Case Nos. 06-17132, 06-17137

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TASH HEPTING, *et al.*,
Plaintiffs/Appellees,

v.

AT&T CORP., *et al.*,
Defendant/Appellant.

TASH HEPTING, *et al.*,
Plaintiffs/Appellees,

v.

United States,
Defendant-Intervenor/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF AMICI CURIAE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE BAR ASSOCIATION OF SAN FRANCISCO, THE BEVERLY HILLS BAR ASSOCIATION, THE CHICAGO BAR ASSOCIATION AND THE LOS ANGELES BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

I. STATEMENT OF INTEREST OF AMICI CURIAE.[1]

A. The Association of the Bar of the City of New York

Founded in 1870, the Association of the Bar of the City of New York (the "NYC Bar"), is a professional organization of more than 22,000 attorneys. Through its many standing committees, such as its Committee on Civil Rights, the NYC Bar educates the Bar and the public about legal issues relating to civil rights, including the right of access to the courts, the right to counsel and the right to remain free from unreasonable searches and seizures. The NYC Bar also seeks to promote effective assistance of counsel for everyone, including those suspected or accused of criminal wrongdoing, and is especially concerned with protecting the confidentiality of attorney-client communications as essential to such representation.

Over the past several years, the NYC Bar has attempted to demonstrate by various means—including through the filings of amicus curiae briefs—that individual liberties need not be subverted by governmental power during times of war and that national security can be achieved without prejudice to constitutional rights that are at the heart of our democracy. Of particular relevance here, the NYC Bar co-sponsored the resolution adopted by the House of Delegates

[1] This brief is filed with the consent of the parties, in accordance with Federal Rule of Appellate Procedure 29(a).

of the American Bar Association in February of 2006, urging the President to halt the surveillance program being conducted by the National Security Agency ("NSA") and instead, if necessary, work with Congress to amend the Foreign Intelligence Surveillance Act of 1978 ("FISA").

B. The Los Angeles County Bar Association

The Los Angeles County Bar Association ("LACBA"), with more than 25,000 members, is the largest local voluntary bar association in the country.

LACBA, through its Professional Responsibility and Ethics Committee and other avenues, has consistently supported the sanctity of attorney-client communications, especially against government intrusion. See, e.g, United States v. Legal Services for New York City, 249 F.3d 1077 (D.C. Cir. 2001) (in which LACBA and other bar associations opposed government attempts to subpoena information which could identify legal services clients by name and legal problems).

LACBA has also played an important role in educating the public about the importance of maintaining civil liberties in the fight against terrorism. For example, the Dialogues on Freedom program, held annually since September 11, 2002, facilitates high school students' discussion of American freedoms and constitutional rights and highlights differences from non-democratic governments.

As the practices challenged here threaten the attorney-client relationship and basic civil liberties, LACBA joins its fellow bar associations in supporting the plaintiffs.[2]

C. The Beverly Hills Bar Association

The Beverly Hills Bar Association ("BHBA") has 4,000 members. For more than seventy years, the BHBA has dedicated itself to the advancement of the rule of law, civil rights, equal access to the courts, and judicial independence. This case presents crucial issues regarding the BHBA's historical concerns: Whether any branch of our federal government is unaccountable and above the rule of law? And, whether judicial review of executive actions can be unilaterally curtailed because of an undeclared "war on terrorism"?

D. The Chicago Bar Association

The Chicago Bar Association ("CBA") is a voluntary bar association organized under the laws of the State of Illinois with a membership of approximately 22,000 attorneys. Founded in 1874, the CBA is dedicated to improving the administration of justice, promoting the public good, and establishing and maintaining the professionalism, honor and the dignity of the legal

[2] LACBA receives many requests to participate in cases as an amicus curiae. Each request must first be submitted to LACBA's Amicus Briefs Committee, which consists of more than 20 lawyers with diverse practices. If the Amicus Briefs Committee decides that the matter is important to the profession and that LACBA should participate in the case, the request is then sent to LACBA's

profession. Accomplishing those ends includes ensuring that lawyers, because of their role in the justice system, as well as their ethics and professionalism, are respected and trusted by clients and the public.

This appeal raises novel issues of great importance relating to the fiduciary relationship between lawyers and clients. The CBA has a long history of participating in litigation, either as a party or as an amicus, with respect to a wide range of issues concerning the lawyer-client relationship. See, e.g., In re Decker, 153 Ill.2d 298 (1992); People ex rel. Harrod v. Illinois Courts Comm'n, 69 Ill.2d 445 (1977); Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 34 Ill.2d 116 (1966); People ex rel. Chicago Bar Ass'n v. Bamborough, 255 Ill. 92 (1912).

E. The Bar Association of San Francisco

The Bar Association of San Francisco ("BASF") is a voluntary association of more than 8,000 attorneys. The majority of its members live and work in the City and County of San Francisco, California. Through its board of directors, its committees, and its volunteer programs, BASF has consistently worked for many years to protect against government abuses and to promote public accountability of law enforcement agencies. BASF has also actively worked to promote unfettered communications between lawyers and clients. BASF believes

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Executive Committee and, time permitting, to the Board of Trustees for final decision. In this case, the Board unanimously approved LACBA participation.

that the NSA surveillance program at issue in this case undermines public accountability and poses a substantial threat to lawyer-client relations because it bypasses the systems of restraint and accountability required by FISA and the United States Constitution.

II. INTRODUCTION AND SUMMARY OF ARGUMENT.

Amici Curiae submit this brief in support of Plaintiffs-Appellees and urge affirmance of the District Court's July 20, 2006 Order denying the motion to dismiss the complaint based on the state secrets privilege. Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006)

Amici agree with the District Court that, given the public concessions by the Government and AT&T, there is no justification for dismissal of the case on such grounds at this early stage, particularly in light of the enormously important issues that this case raises. As the District Court properly observed, this case involves allegations of "widespread violations of individual constitutional rights". Id. at 993. Accordingly, "[t]o defer to a blanket assertion of secrecy here would be to abdicate [the court's constitutional] duty, in particular because the very subject matter of this litigation has been so publicly aired . . . . [D]ismissing this case at the outset would sacrifice liberty for no apparent enhancement of security." Id. at 995.

In this brief, Amici emphasize the special importance to the Bar in preserving judicial scrutiny of the matters alleged in the amended complaint against unwarranted invocation of the state secrets privilege: For the challenged activities threaten the privacy and confidentiality essential to lawyer-client communications and the efficacy of the right to counsel.

This case arises in the wake of disclosures, through leaks to the press, of an NSA program to engage in electronic surveillance outside the requirements for court approval established by the Foreign Intelligence Surveillance Act ("FISA") and subsequent disclosures that AT&T aided this program by providing the Government with access to the contents of virtually all wire and electronic communications of its customers and databases containing records of those communications.

The Government has publicly acknowledged that it allowed the NSA to conduct warrantless surveillance of electronic communications to or from the United States with persons suspected of ties to al Qaeda, if one party to the communication was outside the United States. The Government has also admitted that, provided the communications fell within the parameters described above, communications between lawyers and their clients could be intercepted as part of this program. See Department of Justice's Responses to Joint Questions from House Judiciary Committee Minority Members ¶ 45, available at

http://rawprint.com/pdfs/HJCrawstory2.pdf ("Although the Program does not specifically target the communications of attorneys . . . calls involving such persons would not be categorically excluded from interception if they met [the Program's] criteria").

In fact, through an inadvertent disclosure in another pending case, it is plain that the Government is engaging in warrantless wiretapping of communications between lawyers and their clients who are suspected of terrorist ties. In Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215, 1219, at *7 (D. Or. Sept. 7, 2006), the United States Office of Foreign Asset Control inadvertently produced a "top secret" document that alerted the plaintiffs in that case, directors of a Saudi Arabian charity, that telephone conversations they had with their United States counsel "[had] been intercepted in the past".[3]

These acknowledged activities threaten to chill or completely interfere with lawyer communications and, as such, undermine the right and need for effective assistance of counsel that is fundamental to the rule of law. But the alleged activities challenged here go further. They include AT&T's assistance in the program, which gives the NSA access to a wider category of communications, including communications between lawyers and clients, not limited to those with

[3] The District Court in that case ordered the United States to confirm or deny whether it had monitored the communications; an appeal is currently pending in this Court.

clients linked to terrorist organizations and not necessarily involving a party outside the United States. As such, the allegations here involve an even more profound threat to the confidentiality of attorney-client communications and the effective assistance of counsel.

For these reasons, the refusal of the District Court to dismiss this case at the very outset based on the invocation of the state secrets privilege was correct. Especially given the basic liberties at stake, including the right to effective assistance of counsel, that decision should be affirmed and every effort should be made to permit the litigation to proceed, with such safeguards as are proven to be necessary to accommodate the real—as distinct from hypothetical—needs of national security, in a manner that will not undermine the Court's constitutional duty to adjudicate the serious claims made here.

III. THE DEFENDANTS' ACTIONS IMPERMISSIBLY IMPEDE ATTORNEY-CLIENT COMMUNICATIONS.

The NSA's publicly-disclosed program of warrantless wiretapping threatens to undermine a fundamental principle of a just legal system: That justice requires that persons accused by the government of wrongdoing have access to legal advice and that such legal advice can only be effective if lawyer-client communications are conducted in confidence uninhibited by fears that government agents are listening in. For lawyers that advise overseas clients, particularly those suspected of terrorism, the program chills speech protected by the First

Amendment. Additionally, the program raises even more fundamental constitutional concerns. By impeding the ability of lawyers to provide adequate assistance to clients targeted by the government, it subverts a vital element of the rule of law and due process.

Moreover, the assistance given by AT&T to this unlawful program, as alleged in the present case, expands these concerns. In light of allegations that AT&T gives the NSA access to the contents and records of virtually all Americans' telephone and Internet communications, all lawyers—like the public generally—now lack confidence in the privacy of their communications that is so essential to the effective assistance of counsel.

A. Preserving the Confidentiality of Lawyer-Client Communications is Essential to the Effective Assistance of Counsel.

The principle that lawyer-client communications are entitled to confidentiality is deeply rooted in our legal system. The courts of this country long have recognized that disclosures made by clients to their attorneys to facilitate the rendering of legal advice are protected with a "seal of secrecy". See. e.g., Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of

disclosure."). Thus, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law". Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citations omitted).

The purpose of such confidentiality "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice". id. at 389; see also Fisher v. United States, 425 U.S. 391, 403 (1976) ("[I]f the client knows that damaging information could . . . be obtained from the attorney following disclosure . . . the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."). As the Supreme Court has noted, the attorney-client privilege shields communications between lawyers and clients relating to legal advice in recognition of the basic principle "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client". Upjohn, 449 U.S. at 389.

FISA itself recognizes, in several ways, the importance of preserving the confidentiality of lawyer-client communications. First, FISA provides that "[n]o otherwise privileged communication[s] obtained in accordance with, or in violation of, the provisions of this subchapter shall lose [their] privileged character". 50 U.S.C. § 1806(a). Thus, to the extent that privileged communications between attorneys and clients (whether or not indicted) are

wiretapped, they retain their privileged status and neither the privileged communications nor their fruit may be used in court.[4] This strict prohibition by itself deters the wiretapping of communications between attorneys and clients, since future prosecutions based on evidence obtained from illegal wiretaps could be compromised.

Second, prior to issuing a surveillance "order" (FISA's equivalent of a warrant),[5] a FISA court judge must find that the Government has adopted "minimization procedures", see 50 U.S.C. § 1805(a)(4), that are "reasonably designed . . . to minimize the acquisition and retention . . . of nonpublicly available information concerning unconsenting United States persons". Id. § 1801(h)(1). The NSA's current Legal Compliance and Minimization Procedures manual, which was last modified in 1993, specifically deals with the wiretapping of attorney-client communications and provides that:

> As soon as it becomes apparent that a communication is between a person who is known to be under criminal indictment and an attorney

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[4] Individuals must be given notice under FISA if the Government intends to use the fruits of any such surveillance against a person in a criminal proceeding, and the criminal defendant then may move to suppress the evidence. See 18 U.S.C. § 2518(9)-(10); 50 U.S.C. § 1806(c) & (e); see generally United States v. Belfield, 692 F.2d 141, 144-46 (D.C. Cir. 1982).

[5] As "a recognition by both the Executive Branch and the [Legislative Branch] that the statutory rule of law must prevail in the area of foreign intelligence surveillance", S. Rep. No. 95-604, at 7 (1978), as reprinted in 1978 U.S.C.C.A.N. 3904, 3908 (hereinafter, "Legislative History"), FISA requires a judicial "order" for all electronic surveillance for foreign intelligence in the United States that may intercept communications of United States persons. 50 U.S.C. § 1805.

> who represents that individual in the matter under indictment (or someone acting on behalf of the attorney), monitoring of that communication will cease and the communication shall be identified as an attorney-client communication in a log maintained for that purpose. The relevant portion of the tape containing that conversation will be placed under seal and the Department of Justice, Office of Intelligence Policy and Review, shall be notified so that appropriate procedures may be established to protect such communications from review or use in any criminal prosecution, while preserving foreign intelligence contained therein.

Legal Compliance and Minimization Procedures, USSID 18 annex A, app. 1 § 4(b) (Jul. 27, 1993), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/07-01.htm (emphases added).

These minimization procedures reflect a recognition of the vital importance of confidentiality of lawyer client communications to the provision of effective assistance of counsel. The provisions, moreover, have been a part of FISA since its original enactment in 1978, and they remained unaltered after the tragedies of September 11, 2001, despite the fact that Congress enacted substantial amendments to FISA designed to enable the Government to fight terrorism more effectively.[6]

[6] In the months after September 11, 2001, Congress amended FISA in an act titled "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" (i.e., the USA PATRIOT Act of 2001). See Pub.L. No. 107-56, 115 Stat. 272. Among other things, the USA PATRIOT Act of 2001 increased the number of judges serving on the FISA court from seven to eleven. Pub. L. No. 107-56, § 208, 115 Stat. 272, 283. Within a few months of the USA PATRIOT Act of 2001, Congress amended FISA further,

B. The Monitoring and Wiretapping of Communications Between Lawyers and Their Clients Chills Communications Protected by the First Amendment.

The NSA's and AT&T's alleged wiretapping of communications between lawyers and their clients—without full compliance with FISA—has impermissibly chilled and will further chill constitutionally protected speech, in violation of the First Amendment.[7] Before FISA was enacted, in United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972) (the "Keith" case), the Supreme Court noted—in the context of addressing warrantless wiretapping for domestic intelligence purposes but in words equally

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enlarging the window available to the Government retroactively to seek a warrant from 24 to 72 hours. Pub. L. No. 107-108, § 314(a)(2)(B), 115 Stat. 1394, 1402. Finally, FISA was last amended in 2004, as part of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, an act considered by the President to be "the most dramatic reform of our Nation's intelligence capabilities since President Harry S. Truman signed the National Security Act of 1947". See Press Release, White House, President Signs Intelligence Reform and Terrorism Prevention Act (Dec. 17, 2004), available at http://www.whitehouse.gov/news/releases/2004/12/print/20041217-1.html. This last series of amendments added a new section to FISA, which imposes certain semi-annual reporting requirements on the Attorney General with respect to, among others, "electronic surveillance under section 1805". 50 U.S.C. § 1871.

[7] This chill remains unmitigated even after the President's recent announcement that he would not reauthorize the program when its current 45-day authorization expires, and instead that the program would continue pursuant to some undisclosed and general order from the Foreign Intelligence Surveillance Court ("FISC"). This recent development did nothing to remove the threat of future illegal surveillance by the Executive Branch. Although a judge on the FISC apparently has approved some form of spying program, the Government has refused to release any details concerning the judge's order or its scope. Moreover, the Executive Branch has steadfastly maintained that the President retains the inherent authority to resume the Program outside the prescripts of the FISC order at any time. See Press Release, White House (Jan. 17, 2007) available at http://www.whitehouse.gov/news/releases/2007/01/print/20070117-5.html. Moreover, because the surveillance activities are secret, it cannot be known

applicable to the NSA surveillance program—the degree to which warrantless surveillance is inconsistent with the guarantees of the First Amendment:

> History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. . . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security". Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.

Id. at 314:

Keith also underscored the inherent danger of permitting the acts of the Executive to go unchecked by judicial oversight:

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. . . . [T]he Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.

Id. at 317.[8]

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whether the Government has resumed surveillance without a FISA court's involvement.

[8] See also Scott, 436 U.S. at 137 ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular

The legislative history of FISA demonstrates that Congress shared the Keith Court's view that warrantless searches by an unchecked Executive raised the specter of abuse[9]—especially given the documented history of abuse in this area[10]—and chilled protected speech:

> Also formidable—although incalculable—is the "chilling effect" which warrantless electronic surveillance may have on the Constitutional rights of those who were not targets of the surveillance, but who perceived themselves, whether reasonably or unreasonably, as potential targets. Our Bill of Rights is concerned not only with direct infringements on Constitutional rights, but also with government activities which effectively

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search or seizure in light of the particular circumstances.") (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

[9] Indeed, the recent disclosures of the FBI's misuse of National Security Letters provide another dramatic example that executive officers cannot be trusted to safeguard privacy and protected speech in the exercise of their law enforcement duties. National Security Letters allow the FBI to demand customer records from credit bureaus, banks, phone companies, internet service providers, and other organizations without judicial oversight simply upon a finding by the FBI that the information sought is "relevant to an authorized investigation" of international terrorism or foreign intelligence. Not surprisingly—and just as the Court in Keith anticipated—the Letters have been grossly misused. See U.S. Dep't Justice Office of the Inspector General, A Review of the Federal Bureau of Investigation's Use of National Security Letters, March 2007, available at http://www.usdoj.gov/oig/special/s0703b/final.pdf.

[10] Following its investigation of past practices of the Executive Branch, Congress was informed that the "vague and elastic standards for wiretapping and bugging" the Executive Branch had been applying resulted in "electronic surveillances which, by any objective measure, were improper and seriously infringed the Fourth Amendment rights of both the targets and those with whom the targets communicated". Legislative History at 8. For instance, Congress was informed that past subjects of surveillance "ha[d] included a United States Congressman, congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisers and an anti-Vietnam war protest group". Id. Furthermore, claims of national security had sometimes been used to justify warrantless wiretapping of members of the Democratic Party, ostensibly because the Executive Branch had boundlessly defined the term "dissident group". United States v. Falvey, 540 F. Supp. 1306, 1309 (E.D.N.Y. 1982).

> inhibit the exercise of these rights. The exercise of political freedom depends in large measure on citizens' understanding that they will be able to be publicly active and dissent from official policy, within lawful limits, without having to sacrifice the expectation of privacy that they rightfully hold. Arbitrary or uncontrolled use of warrantless electronic surveillance can violate that understanding and impair that public confidence so necessary to an uninhibited political life.

Legislative History at 8.

As one pre-FISA Court of Appeals described the chilling effect of warrantless foreign intelligence gathering: "To allow the Executive Branch to make its own determinations as to such matters invites abuse, and public knowledge that such abuse is possible can exert a deathly pall over vigorous First Amendment debate on issues of foreign policy". Zweibon v. Mitchell, 516 F.2d 594, 635-36 (D.C. Cir. 1975).

The chilling effects of the NSA's surveillance program and the broad access to customer communications allegedly provided by AT&T to the Government are most troubling in the context of the relationship between an attorney and his client. The right of meaningful access to the courts is one aspect of the First Amendment right to petition the government, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972),[11] and the right to assistance of counsel—which includes the right to confidential attorney-client

[11] "The right of access to the courts is indeed but one aspect of the right of petition." California Motor, 404 U.S. at 510.

communication—is an integral part of that right. See, e.g., Goodwin v. Oswald, 462 F.2d 1237, 1241 (2d Cir. 1972) (prison inmates, who have fewer First Amendment rights than non-incarcerated persons, possess the rights to access the courts, to have assistance of counsel, and to have "the opportunity for confidential communication between attorney and client"). The threat of NSA surveillance makes in-person communication virtually the only means by which attorneys and clients reasonably can be assured that their dialogue will remain confidential. As a practical reality, however, such in-person meetings between an attorney and a client abroad may become so burdensome, costly and ineffective that the Program might very well chill all effective communications between these attorneys and their clients, thus undermining the First Amendment right completely.

The Supreme Court has also held that, for groups that are forced to resort to the courts to redress disparate treatment at the hands of the government, the right to pursue litigation is protected by the First Amendment. NAACP v. Button, 371 U.S. 415, 428-30 (1963). The attorneys who represent these groups and thereby challenge what they believe to be unlawful government policies similarly engage in a form of protected political expression. Id.; see also In re Primus, 436 U.S. 412, 431-32 (1978) ("The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' including 'advising another that his legal rights have been infringed....")

(internal citations omitted); Westchester Legal Servs., Inc. v. County of Westchester, 607 F. Supp. 1379, 1382 (S.D.N.Y. 1985) ("The First Amendment 'protects the right of associations to engage in advocacy on behalf of their members.'" (quoting Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464 (1979))).

Many of those whom the NSA's warrantless surveillance has likely targeted have been accused by the United States of somehow having ties to terrorism, and are vigorously litigating their innocence against the Government. But "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants". Primus, 436 U.S. at 431. The NSA's surveillance seriously inhibits the ability of these accused persons effectively to litigate their position because it necessarily chills communications with their attorneys, as well as communications between their attorneys and witnesses and others who reside outside the United States. Moreover, the inability of the attorneys effectively to litigate against what they believe to be unlawful government conduct effectively chills the speech and expression of those attorneys as well. See Button, 371 U.S. at 428-30 (White, J., concurring in part and dissenting in part) (finding constitutionally protected the activities of NAACP staff lawyers in, among other things, "advising Negroes of their constitutional rights"); see also Primus, 436 U.S. at 431-32.

The allegations in this case that AT&T has given the NSA access to virtually all customer communications widens the potential for abuse and may have a chilling effect on all lawyer-client communications, not just those with clients actually or potentially viewed as affiliated with or providing support to suspected terrorists.

C. Wiretapping Communications Between Lawyers and Their Clients Inhibits the Effective Assistance of Counsel Guaranteed by the Sixth Amendment.

The privacy of lawyer-client communication is also recognized as critical to the effective assistance of counsel guaranteed by the Sixth Amendment.[12] See United States v. Chavez, 902 F.2d 259, 266 (4th Cir. 1990) ("[A] critical component of the Sixth Amendment's guarantee of effective assistance is the ability of counsel to maintain uninhibited communication with his client and to build a 'relationship characterized by trust and confidence'." (quoting Morris v. Slappy, 461 U.S. 1, 21 (1983)) (emphasis added)); Bittaker v. Woodford, 331 F.3d 715, 723 n.7 (9th Cir. 2003) ("[T]he essence of the Sixth Amendment right is, indeed, privacy of communication with counsel." (citations and internal quotations omitted)).

[12] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Thus, when the Government intrudes into that privacy, the intrusion often renders counsel's assistance ineffective and thereby violates the Sixth Amendment rights of the criminal defendant. See, e.g., Weatherford v. Bursey, 429 U.S. 545, 558 (1977) (government intrusion into attorney-client relationship violates the Sixth Amendment if the defendant is prejudiced by the intrusion); U.S. v. Danielson, 325 F.3d 1054, 1067-69 (9th Cir. 2003) (holding that a Sixth Amendment violation occurred where the government deliberately obtained privileged information about a defendant's trial strategy); United States v. Irwin, 612 F.2d 1182, 1185 (9th Cir. 1980) ("It is clear that government interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his Sixth Amendment right to counsel".); Mastrian v. McManus, 554 F.2d 813, 820-21 (8th Cir. 1977) ("It is clear 'that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him.'" (quoting Coplon v. United States, 191 F.2d 749, 757 (D.C. Cir. 1951))); United States v. Gartner, 518 F.2d 633, 637 (2d Cir. 1975) ("When conduct of a Government agent touches upon the relationship between a criminal defendant and his attorney, such conduct exposes the Government to the risk of fatal intrusion and must accordingly be carefully scrutinized."); Caldwell v. United States, 205 F.2d 879, 881 (D.C. Cir. 1953) ("[I]nterception of supposedly private telephone consultations between accused and counsel, before and during

trial, denies the accused his constitutional right to effective assistance of counsel, under the Fifth and Sixth Amendments."); 24 C.A. Wright & K.W. Graham, Jr., Federal Practice and Procedure § 5489 (1986) ("[C]onfidential communications between a criminal defendant and his attorney are thought to be a right guaranteed by the Sixth Amendment . . . .").

It is clear that, based simply on public disclosures, the NSA's surveillance program is fundamentally at odds with the Sixth Amendment's deep respect for attorney-client confidentiality. The Department of Justice has admitted that the program would allow monitoring of attorney-client communications if the persons under surveillance otherwise meet the standards for surveillance under the Program. DOJ Responses ¶ 45. By threatening the sanctity of the attorney-client relationship,[13] the NSA's admitted surveillance activities chill all communications between those who "perceive themselves, whether reasonably or unreasonably, as potential targets"[14] of surveillance and their attorneys. A client who worries that his communications with counsel could be subject to surveillance will understandably be "reluctant to confide in his lawyer", Fisher, 425 U.S. at 403,

[13] "The sanctity of the constitutional right of an accused privately to consult with counsel is generally recognized and zealously enforced by state as well as federal courts." Coplon, 191 F.2d at 758. In stark contrast to the NSA surveillance program, FISA shows considerable respect for the attorney-client relationship. See supra, Part III. A, for a discussion of FISA's minimization procedures.

[14] Legislative History at 8.

and will thus be unable to obtain fully informed advice. Thus, the NSA's warrantless surveillance threatens to deny effective assistance of counsel, not only to clients who are criminal defendants, but to all those clients detained or accused as alleged members of organizations allegedly "affiliated" with or providing "support" to al Qaeda. Indeed, given the NSA's unfettered and unreviewable discretion in applying those vague terms, the Program is likely to chill the communications of lawyers with many other clients who may reasonably perceive themselves to be the targets of such wiretapping.

By allegedly giving the NSA access to the content of virtually all telephone and electronic communications, as well as records of those communications, AT&T exposes all lawyer communications with criminal defendants to government intrusion and subversion of the right to counsel guaranteed by the Sixth Amendment.

D. Warrantless Surveillance Creates a Serious Ethical Dilemma for Lawyers.

The NSA's surveillance program, as allegedly facilitated by AT&T, creates a serious ethical dilemma for lawyers—especially for those representing clients who are accused of links to al Qaeda or affiliated organizations, or for those with clients outside the United States who have reason to perceive themselves within the potentially broad scope of the program.

The Model Rules of Professional Conduct ("Model Rules") promulgated by the American Bar Association require an attorney to provide competent representation to clients, including the "thoroughness and preparation reasonably necessary for the representation". ABA Model Rule 1.1. Under Model Rule 1.4, an attorney also owes her client a duty of communication, pursuant to which she must "reasonably consult with the client about the means by which the client's objectives are to be accomplished". The Comment to Model Rule 1.4 emphasizes the importance of this communication to the lawyer-client relationship, explaining that "[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation".

The same standards of professional responsibility also require an attorney to maintain as confidential information that relates to the representation of a client. See id. 1.6. This ethical obligation is expansive and is substantially broader than the attorney-client privilege. See id. cmt. ¶ 3 ("The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."). The lawyer's fundamental duty of confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship" and encourages clients "to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter". Id. ¶ 2. The duty is therefore

central to the functioning of the attorney-client relationship and to effective representation.

Given the allegations that AT&T has given the NSA access to virtually all communications, all lawyers—but especially those clients whose clients fall within the group of those admittedly targeted by the NSA's surveillance program—now confront a difficult and troubling ethical dilemma: either discontinue their telephonic and electronic communications with these clients and risk violating their obligations of competence and candor, or continue communicating with these clients at the risk of violating their professional obligation to take all reasonable steps to protect client confidences. Of course, an attorney may be able to avoid this conflict through in-person communications with clients and witnesses. Such an approach, however, may not always be possible, especially where clients and witnesses are located abroad. And, even when possible, it will burden the representation with inefficiencies, substantially increased costs, and significant logistical difficulties. In short, the NSA program being carried out with AT&T's assistance may cause attorneys to cease all electronic and telephonic communications relating to the representation that they have reason to believe will be intercepted, and resort to alternative means for gathering information that, at best, may work clumsily and inefficiently and, at worst, may not work at all.

Conclusion

In sum, the allegations of the amended complaint raise serious concerns about the privacy and confidentiality of the communications of all Americans that are critical to a free society. As bar associations, Amici are especially concerned about the impact of the conduct alleged on the ability of lawyers and clients to communicate free from government intrusion—communication that is essential to effective assistance of counsel and the rule of law. The District Court, therefore, correctly refused to dismiss this case at the outset based on the invocation of the state secrets privilege and, in doing so, shield from judicial scrutiny the momentous issues it raises. Amici recognize that there may be state secrets the disclosure of which would be harmful to our Nation's security. But every effort should be made to proceed with the litigation, while protecting any such secrets without resorting to the drastic remedy of dismissal. Any other course would undermine the role of the Judiciary, our constitutional system and the rule of law.

For the foregoing reasons, Amici Curiae respectfully request that this Court affirm the district court's July 20, 2006 Order denying defendants motions to dismiss.

May 2, 2007

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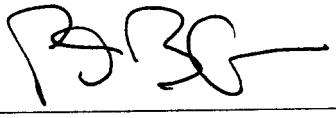
by 

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 4,956 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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