UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN **SOUTHERN DIVISION**

AMERICAN CIVIL LIBERTIES UNION,	
AMERICAN CIVIL LIBERTIES UNION)
FOUNDATION; AMERICAN CIVIL LIBERTIES) Case No. 2:06-CV-10204
UNION OF MICHIGAN; COUNCIL ON)
AMERICAN-ISLAMIC RELATIONS;) Hon. Anna Diggs Taylor
COUNCIL ON AMERICAN-ISLAMIC)
RELATIONS MICHIGAN; GREENPEACE, INC.;)
NATIONAL ASSOCIATION OF CRIMINAL)
DEFENSE LAWYERS; JAMES BAMFORD;)
LARRY DIAMOND; CHRISTOPHER)
HITCHENS; TARA MCKELVEY; and)
BARNETT R. RUBIN,)
)
Plaintiffs,)
)
V.)
)
NATIONAL SECURITY AGENCY/CENTRAL)
SECURITY SERVICE; AND LIEUTENANT)
GENERAL KEITH B. ALEXANDER, in his)
official capacity as Director of the National)
Security Agency/Central Security Service,)
)
Defendants.)
	_)

DEFENDANTS' MOTION FOR STAY PENDING APPEAL

Pursuant to Rule 62 of the Federal Rules of Civil Procedure, Defendants, through their undersigned counsel, hereby move for a stay pending appeal of the Judgment and Permanent Injunction Order entered in this case on August 17, 2006. The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities.

Respectfully submitted,

PETER D. KEISLER **Assistant Attorney General** CARL J. NICHOLS Deputy Assistant Attorney General

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Attorneys for the Defendants

DATED: September 1, 2006

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2006, I electronically filed the foregoing Defendants' Motion for a Stay Pending Appeal using the Court's ECF system, which will send an electronic notification of such filing to plaintiffs' counsel of record, including Ann Beeson (annb@aclu.org) and Jameel Jaffer (jjaffer@aclu.org) of the American Civil Liberties Union.

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF A STAY PENDING APPEAL

INTRODUCTION

Pursuant to Rule 62 of the Federal Rules of Civil Procedure, defendants respectfully move for a stay pending appeal of the Judgment and Permanent Injunction Order entered in this case on August 17, 2006 ("the Order"). Pursuant to a joint stipulation of the parties, this Court has stayed the Order pending its resolution of the present motion. The parties have in the meantime agreed to an expedited appeal in the Sixth Circuit (on the same day that the Court issued its ruling, the Defendants filed a notice of appeal, and the plaintiffs have since filed a

cross-appeal). For the reasons set forth below, a stay pending that expedited appeal is amply warranted.

This Court's Order permanently enjoins the Terrorist Surveillance Program ("TSP"), a foreign intelligence program that the President established to protect the United States from attack by foreign terrorist organizations related to the al Qaeda terrorist network. That network has already successfully attacked the American homeland and has made clear its intention to undertake further atrocities. The President has determined that the TSP is critical for ensuring the security of the American people. A stay pending appeal should be entered so that this vital intelligence-gathering program is not interrupted while the Sixth Circuit has an opportunity to consider the important legal issues raised by this case.

If not stayed, the Court's Order threatens the gravest of harms to the Government and to the American public. In the view of the President, the TSP is essential to the Nation's security, and absent the TSP, the country will be more vulnerable to terrorist attack. Indeed, as the President and high-level Executive Branch officers have explained, the TSP was implemented precisely because no other available tool would protect the Nation as effectively. Additional details concerning the harm that would follow from the suspension of the TSP are set forth in the *In Camera, Ex Parte* Declaration of Lt. Gen. Keith Alexander, Director of the National Security Agency, that is submitted herewith and that establishes in further detail how critical the TSP is to the Government's efforts to detect and prevent additional terrorist attacks on the United States. *See* Notice of Lodging of *In Camera, Ex Parte* Material (lodging classified declaration with court security officers).

We respectfully submit that this Court should not override the national security judgment of the President and the Nation's senior intelligence officers regarding the harm that would result

from the suspension of the TSP. At the very least, it cannot be seriously disputed that a refusal to stay the Court's Order might cause grave harm to the United States and the American public. In addition, as we show below, the Government's appeal indisputably raises serious legal issues. Those serious issues, coupled with the enormous risk of harm to national security absent a stay, more than justify a stay pending appeal; this Court need not find that it erred in order to grant the stay, but simply that sufficiently serious issues are presented. That standard is plainly met here.

In particular, in its ruling, this Court recognized that the Government properly invoked the state secrets privilege in this litigation, and that disclosure of information encompassed by that privilege would threaten grave harm to national security. The Court nevertheless proceeded to address the merits of plaintiffs' claims, a step that we believe was improper. For present purposes, however, it is apparent that at least a serious question exists as to whether the information protected as privileged by the Court is necessary to resolve plaintiffs' claims properly and, therefore, whether the Government's invocation of the state secrets privilege required dismissal of this case.

The Court's analysis of the merits of plaintiffs' claims is also at least open to serious debate. For example, the Court's suggestion that the Fourth Amendment requires that all reasonable searches must be supported by a warrant is difficult to square with settled law. We also believe that there was no basis for the Court to have held that the First Amendment has been violated. Again, a stay does not require any indication from this Court that the Government will prevail on appeal; rather, the Court need only recognize that serious legal issues will be presented to the court of appeals.

In sum, we respectfully submit that both the harm and the likelihood-of-success prongs of the applicable stay standard are amply met here. The Court should therefore stay its Order while the court of appeals considers the issues raised in this case on an expedited basis.

BACKGROUND

1. On September 11, 2001, the al Qaeda terrorist network launched a set of coordinated attacks along the East Coast of the United States. Four commercial jetliners, each carefully selected to be fully loaded with fuel for a transcontinental flight, were hijacked by al Qaeda operatives. Those operatives targeted the Nation's financial center in New York with two of the jetliners, which they deliberately flew into the Twin Towers of the World Trade Center. Al Qaeda targeted the headquarters of the Nation's Armed Forces, the Pentagon, with the third jetliner. Al Qaeda operatives were apparently headed toward Washington, D.C. with the fourth jetliner when passengers struggled with the hijackers and the plane crashed in Shanksville, Pennsylvania. The intended target of this fourth jetliner was most evidently the White House or the Capitol. The attacks of September 11 resulted in approximately 3,000 deaths—the highest single-day death toll from hostile foreign attacks in the Nation's history.

The President immediately declared a national emergency "by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001). The United States also launched a massive military response, both at home and abroad, and quickly began plans for a military response directed at al Qaeda's training grounds and haven in Afghanistan. On September 14, 2001, both Houses of Congress passed a Joint Resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or

aided the terrorist attacks" of September 11. Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001).

With the attacks of September 11, Al Qaeda demonstrated its ability to introduce agents into the United States undetected and to perpetrate devastating attacks. There is no question that "[t]he terrorists want to strike America again, and they hope to inflict even more damage than they did on September the 11th." Press Conference of President Bush (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html. ("President's Press Release"). Thus, the President has directed that finding al Qaeda agents in the United States remains one of the paramount national security concerns to this day. See ibid.

Against this backdrop, the President has explained that, following the events of September 11, he authorized the National Security Agency ("NSA") to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. *See* President's Press Release, *supra*. The Attorney General has further explained that, in order to intercept such a communication, there must be "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html. This surveillance activity directed by the President is known as the "Terrorist Surveillance Program."

2. Plaintiffs, a group of individuals and organizations, filed this suit alleging that they regularly conduct international telephone calls for reasons including journalism, the practice of law, and scholarship. They asserted that some of their communications are and have been with

persons in the Middle East. They argued that the Terrorist Surveillance Program was unlawful on constitutional and statutory grounds, and they sought declaratory and injunctive relief against its use.

In response, the United States formally asserted the military and state secrets privilege, and related statutory privileges, through the Director of National Intelligence, John D.

Negroponte, and the NSA's Signals Intelligence Director, Major General Richard J. Quirk. In asserting the state secrets and related privileges, Director Negroponte and General Quirk explained in public declarations that, "[i]n an effort to counter the al Qaeda threat, the President of the United States authorized the NSA to utilize its signals intelligence (SIGINT) capabilities to collect certain 'one-end foreign' communications where one party is associated with the al Qaeda terrorist organization for the purpose of detecting and preventing another terrorist attack on the United States." Negroponte Decl. ¶ 11 (5/26/06); see Quirk Decl. ¶ 7 (5/26/06) (describing the Terrorist Surveillance Program). The Government provided this Court with ex parte, in camera, classified declarations of both Director Negroponte and General Quirk elaborating further on the Government's assertion of privilege.

In addition, the Government moved to dismiss or in the alternative for summary judgment. The Government urged that this litigation could not proceed because plaintiffs' allegations of injury were insufficient to establish standing to sue and, in any event, plaintiffs could not establish their standing without the disclosure of state secrets. The Government also argued that the state secrets privilege foreclosed adjudication of the case on the merits, both because the very subject matter of the suit was a state secret, and because the Government would be unable to mount a defense without revealing state secrets.

3. In its August 17, 2006 ruling, this Court denied the Government's motion, granted plaintiffs' partial summary judgment motion, and permanently enjoined any further use of the Terrorist Surveillance Program. *See* Judgment and Permanent Injunction Order (8/17/06).¹ (The Court's decision is published at ____ F. Supp.2d ____, 2006 WL 2371463.)

The Court concluded that the United States had properly invoked the state secrets privilege, and found that, "[a]fter reviewing [the classified] materials, the court is convinced that the privilege applies 'because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods, or capabilities, or disrupt diplomatic relations with foreign governments." Mem. Op. (8/17/06) at 12 (quoting *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004)). The Court nevertheless concluded that the litigation could proceed, reasoning that the Government has publicly admitted the existence of the Terrorist Surveillance Program.

The Court also held that plaintiffs had established standing, and that the TSP violates the Fourth Amendment warrant requirement, as well as plaintiffs' First Amendment rights. *Id.* at 15-33. The Court further concluded that the Program violates the constitutional separation of powers principle because the President's actions were forbidden by the Foreign Intelligence Surveillance Act. *Id.* at 33-37.

ARGUMENT

A stay pending an expedited appeal is warranted before a national security program deemed essential by the President for protecting the people of the United States from further

¹ The Court granted the Government's motion in part; the Court granted the Government's summary judgment motion with respect to plaintiffs' "data mining" claim. *See ibid*.

terrorist attacks is suspended by court order without the benefit of appellate review. In the circumstances of this case, the standards for such a stay are manifestly met.

In determining whether a stay pending appeal should issue, the courts generally consider (1) the likelihood that the party seeking a stay will prevail on the merits of the appeal, (2) the likelihood of irreparable harm to the movant if the stay is denied, (3) the possibility of substantial harm to others resulting from the stay, and (4) the public interest in granting the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). These factors form a continuum on which a court should balance each of the factors. *See ibid.* ("The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [movant] will suffer absent the stay. Simply stated, more of one excuses less of the other.") (citation omitted); *see also Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("A stay may be granted with either a high probability of success and some injury, or vice versa.").

Most importantly here, in seeking a stay of an injunction pending appeal, the moving party need not convince the district court, which has just ruled against it on the very question at issue, that it was wrong to have done so. Rather, it is sufficient for the moving party to show that the appeal presents "serious questions" on the merits and irreparable harm that outweighs any harm to its opponent. *See Michigan Coal.*, 945 F.2d at 153-54; *see also Grutter v. Bollinger*, 247 F.3d 631, 632 (6th Cir. 2001); *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) ("[I]t will ordinarily be enough that the plaintiff has raised serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation and thus for more deliberative investigation.") (quoting *Washington Metropolitan Area Transit*

Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977)); Artukovic v. Rison, 784 F.2d 1354, 1355 (9th Cir. 1986).

I. THE COURT SHOULD GRANT A STAY PENDING APPEAL.

A. In the Absence of a Stay, the Government and the Public Will Suffer Irreparable Harm.

A stay of the district court's order is essential to prevent irreparable harm to the public interest. As explained in the public declarations of Director of National Intelligence Negroponte, and the NSA's Signals Intelligence Director, General Quirk, the Terrorist Surveillance Program is directed at countering further terrorist attacks by the al Qaeda terrorist network. Negroponte Decl. ¶ 11; see Quirk Decl. ¶ 7. The *in camera/ex parte* declarations of DNI Negroponte and General Quirk detail the vital need for and importance of this program. These declarations are supplemented by the *in camera/ex parte* declaration by NSA Director Alexander, lodged today, which provides more details about the essential nature of the Terrorist Surveillance Program and the crucial role it plays in preventing attacks against the homeland.

Indeed, the President has specifically determined that the NSA's activities are "critical" to the national security of the United States, and "ha[ve] been effective in disrupting the enemy." Press Conference of President Bush (12/19/05), available at http://www.whitehouse.gov/news/ releases/2005/12/20051219-2.html. Similarly, as the Attorney General reaffirmed earlier this year, "the terrorist surveillance program is an essential element of our military campaign against al Qaeda[. It] allows us to locate al Qaeda operatives, especially those already in the United States and poised to attack. We cannot defend the Nation without such information, as we painfully learned on September 11th." Testimony of Attorney General Alberto Gonzales before the U.S. Senate Committee on the Judiciary, February 6, 2006. The Attorney General added that

the Terrorist Surveillance Program provides "an 'early warning system' with only one purpose: to detect and prevent the next attack on the United States from foreign agents hiding in our midst. It is imperative for national security that we can detect reliably, immediately, and without delay whenever communications associated with al Qaeda enter or leave the United States. That may be the only way to alert us to the presence of an al Qaeda agent in our country and to the existence of an unfolding plot." *Ibid*.

There is no basis for supposing that national security could be protected as effectively in the absence of the TSP. As General Michael Hayden, Director of the Central Intelligence Agency, reiterated in recent Congressional testimony, "[t]he FISA regime from 1978 onward focused on specific court orders, against individual targets, individually justified and individually documented. This was well suited to stable, foreign entities on which we wanted to focus for extended periods of time for foreign intelligence purposes. It is less well suited to provide the agility to detect and prevent attacks against the homeland." Testimony of General Michael V. Hayden before the U.S. Senate Committee on the Judiciary, July 26, 2006. Again, this assessment is confirmed for the reasons stated in the In Camera, Ex Parte Alexander Declaration lodged with this motion.

In short, monitoring al Qaeda operatives and their confederates remains one of the preeminent concerns of the war on terrorism. By targeting the international communications into and out of the United States of persons reasonably believed to be linked to al Qaeda, the Terrorist Surveillance Program provides the United States with an early warning system to help avert the next attack. The challenged activities constitute a critical aspect of America's national security, and it should be self-evident that suspending those activities—even in the limited

period during which the court of appeals reviews the matter—would threaten the gravest of harms to the United States and its people.

At the same time, plaintiffs can present no comparable harm. Even if plaintiffs have established their standing to sue (a conclusion with which the Government respectfully disagrees), any possible harm to plaintiffs from the issuance of a stay is plainly outweighed by the drastic harm to the country that could follow from suspending the TSP during the expedited appeal.

В. **Appellants Have the Requisite Probability of Success on the**

A stay pending appeal is also warranted because there is a sufficient probability that the Defendants will prevail on the merits. As noted, this standard is satisfied where serious and substantial questions of law exist, as is plainly the case here.

Defendants respectfully submit that they have a substantial likelihood of prevailing on a number of issues. As an initial matter, Defendants will argue that this Court's injunction is substantially overbroad. The Order enjoins the Terrorist Surveillance Program not only with respect to the plaintiffs—which should be all the relief needed to redress plaintiffs' alleged injuries—but also with respect to any and all persons the program may target. No basis for such sweeping relief exists, and the scope of the injunction is thus itself a ground for a stay. See Sharpe v. Cureton, 319 F.3d 259, 273 (6th Cir.), cert. denied, 540 U.S. 876 (2003).

Beyond the scope of the injunction, Defendants will argue on appeal that this Court's opinion wrongly decided the merits of plaintiffs' claims because the factual details needed to evaluate and resolve these claims are protected by the state secrets and statutory privileges. Cf. Mem. Op. (8/17/06) at 12. We will therefore argue that the Court's conclusion that privileged

facts were unnecessary to adjudicate the merits, *ibid.*, was based on an erroneous view of the legal doctrines underlying the plaintiffs' claims.

For instance, we will contend that the Court wrongly concluded that the Terrorist Surveillance Program violates the Constitution because the Fourth Amendment "requires prior warrants for any reasonable search." Mem. Op. (8/17/06) at 30-31. We will argue on appeal that the "ultimate touchstone of the Fourth Amendment is 'reasonableness,'" Brigham City v. Stuart, 126 S. Ct. 1943 (2006), and that the general rule requiring judicial warrants based on probable cause is subject to numerous exceptions even when a search is made for ordinary lawenforcement purposes. Nat'l Treasury Employees Union v. Van Rabb, 489 U.S. 656, 665 (1989) ("NTEU"). The Supreme Court has thus repeatedly articulated "the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Ibid.*; see also, e.g., Brigham City, supra; Bd. of Educ. v. Earls, 536 U.S. 822, 828 (2002) (explaining that probable cause standard is "peculiarly related to criminal investigations," and may be inappropriate where "the Government seeks to prevent the development of hazardous conditions").

It is also well-established that, where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." See NTEU, 489 U.S. at 665-66; see also MacWade v. Kelly, F.3d . 2006 WL 2328723 at *6-*13 (2d Cir. 2006) (applying "special needs" doctrine to uphold warrantless and suspicionless searches of containers in New York subway, where searches are performed to prevent terrorist attack). Thus, in evaluating the constitutionality of a search under the "special

needs" doctrine, reasonableness is evaluated by balancing multiple factors, including the nature of the governmental interest, the privacy interest at stake, and the efficacy of the search in advancing the governmental interest. See MacWade, supra, at *7 (following Earls, 536 U.S. at 830-34).

We will thus argue on appeal that the Court incorrectly concluded that the TSP is unconstitutional because it authorizes searches without judicial warrant, and that, because the warrant question is just the first step in the Fourth Amendment inquiry, it was error for this Court to resolve the Fourth Amendment claim on this basis without undertaking further analysis. That inquiry, we will argue, necessarily entails a detailed evaluation of numerous factual matters concerning the TSP's operations, its efficacy, and the highly classified intelligence data associated with these subjects. But that is precisely the type of classified information that the Court itself recognized was protected by the state secrets privilege because its disclosure would pose a serious danger to national security. See Mem. Op. (8/17/06) at 12. For this reason (among others) the plaintiffs' Fourth Amendment claim should have been dismissed under the state secrets doctrine.

Defendants will also contend on appeal that this Court's Fourth Amendment analysis errs in failing to evaluate properly the President's inherent Constitutional authority to conduct warrantless surveillance of communications involving *foreign* powers such as al Qaeda and its agents. Cf. id. at 30-31, 40-41. The Supreme Court in Keith specifically reserved the question of the "scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country," see United States v. U.S. District Court, 407 U.S. 297, 308, 321-22 & n.20 (1972) (hereinafter Keith), and, since Keith, every court of appeals that has decided the issue has held that the President possesses "inherent authority" under the Constitution "to

conduct warrantless searches to obtain foreign intelligence information." See In re Sealed Case, 310 F.3d 717, 742 & n.26 (FISA Ct. of Rev. 2002) (emphasis added).² Indeed, the *Falvey* decision, cited by this Court, makes clear that the President's Article II power to collect foreign intelligence information "is not constitutionally hamstrung by the need to obtain prior judicial approval before engaging in wiretapping." See United States v. Falvey, 540 F. Supp. 1306, 1311 (E.D.N.Y. 1982) (citing uniform appellate authority). Thus, unlike ordinary law-enforcement contexts, the Terrorist Surveillance Program—whose purpose is to thwart future terrorist attacks against the United States by Al Qaeda and its agents—involves the exercise of powers uniquely vested in the Executive by the Constitution in a manner fully consistent with the Fourth Amendment.³ We will also argue that, in the context of the TSP, the Court erred in failing to

² See United States v. Buck, 548 F.2d 871, 875 (9th Cir.), cert. denied, 434 U.S. 890 (1977); United States v. Butenko, 494 F.2d 593, 605 (3d Cir.) (en banc), cert. denied sub nom., Ivanov v. United States, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974). Indeed, the Keith Court, while reserving the question itself, listed ample authority for the "view that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved." See Keith, 407 U.S. at 322 n.20.

³ We will also point out that this Court's discussion of FISA's amendments to Title III, see Mem. Op. (8/17/06) at 31, is not relevant to this Fourth Amendment conclusion. Congressional enactments cannot supersede constitutional provisions, and nothing in FISA or Title III changes the Fourth Amendment's requirements. Nor can the Court's FISA analysis provide an independent statutory basis for invalidating the Terrorist Surveillance Program, because the Court itself expressly declined to reach the question whether the application of FISA to this context would be constitutional if it is read (as plaintiffs do) to severely restrict the President's authority to collect foreign intelligence information. See Mem. Op. (8/17/06) at 41 (concluding that FISA's constitutionality here is "irrelevant" because the TSP violates the Constitution). The Court's separation of powers analysis (id. at 33-37) is similarly inapposite. The constitutional separation of powers doctrine and the *Youngstown* analysis cited by the Court come into play only where Congress has acted constitutionally to limit the President's foreign surveillance powers by enacting FISA. Because the Court declined to reach the question whether FISA would constitutionally apply in the context of the TSP, its decision cannot properly rest on the separation of powers.

recognize that the information protected by the state secrets privilege is essential to addressing issues relating to the President's exercise of his core Article II powers.

Finally, while the precise basis for the Court's First Amendment analysis, see Mem. Op. (8/17/06) at 31-33, is unclear, we will explain on appeal that, in our view, this Court erred in its ultimate conclusion that the Terrorist Surveillance Program violates the First Amendment simply because the program "violate[s] the Fourth [Amendment] in failing to procure judicial orders as required by FISA." Id. at 33. The Court's decision erroneously treats the First and Fourth Amendments as coterminous, and does not separately address how the Terrorist Surveillance Program independently violates the First Amendment. The Program clearly does not "regulate speech," does not threaten criminal prosecution for protected expression (as in *Dombrowski v*. Pfister, 380 U.S. 479, 481 & n.1, 486 (1965)), and does not indirectly achieve ends otherwise prohibited by the First Amendment (as in Zweibon v. Mitchell, 516 F.2d 594, 635 (D.C. Cir. 1975)). And, as with plaintiffs' Fourth Amendment claim, we will submit that the facts needed to properly address this claim are subject to the state secrets privilege.

In short, we will urge on appeal that this Court's judgment rests on an incorrect application of the state secrets doctrine, and the Fourth and First Amendments. At the very least, these arguments present serious questions to be resolved by the Court of Appeals. The Court should stay its Order pending appeal so that the Court of Appeals can decide these important matters without risking harm to public safety as a result of the suspension of the Terrorist Surveillance Program.

CONCLUSION

For the foregoing reasons, the court should issue a stay pending appeal of the Judgment and Permanent Injunction Order entered in this case on August 17, 2006.

Respectfully submitted,

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Attorneys for the Defendants

DATED: September 1, 2006

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2006, I electronically filed the foregoing Defendants' Memorandum of Points and Authorities in Support of a Stay Pending Appeal using the Court's ECF system, which will send an electronic notification of such filing to plaintiffs' counsel of record, including Ann Beeson (annb@aclu.org) and Jameel Jaffer (jjaffer@aclu.org) of the American Civil Liberties Union.

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

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DEFENDANTS' NOTICE OF LODGING OF *IN CAMERA, EX PARTE* MATERIAL IN SUPPORT OF DEFENDANTS' MOTION FOR A STAY PENDING APPEAL

Defendants, through their undersigned counsel, hereby provide notice that they are lodging for submission in support of Defendants' Motion for a Stay Pending Appeal the *In Camera, Ex Parte* Classified Declaration of Lt. General Keith Alexander, Director, National Security Agency.

This submission has been lodged for secure storage and for secure transmission to the Court (upon request) with the United States Department of Justice, Litigation Security Group, 20 Massachusetts Avenue, N.W., 5th Floor, Washington, D.C. (202) 514-9016. The Court may

contact the undersigned counsel to assist in securing delivery of these submissions for review at the Court's convenience.

Respectfully submitted,

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DATED: September 1, 2006

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2006, I electronically filed the foregoing Defendants' Notice of Lodging of in Camera, ex Parte Material in Support of Defendants' Motion for a Stay Pending Appeal using the Court's ECF system, which will send an electronic notification of such filing to plaintiffs' counsel of record, including Ann Beeson (annb@aclu.org) and Jameel Jaffer (jjaffer@aclu.org) of the American Civil Liberties Union.

s/ Anthony J. Coppolino

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