

Case No. 06-2095

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, *ET AL.*,
Plaintiffs-Appellees,

v.

NATIONAL SECURITY AGENCY, *ET AL.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
Case No. 06-CV-10204

**BRIEF AMICUS CURIAE OF
THE AMERICAN CENTER FOR LAW & JUSTICE
IN SUPPORT OF DEFENDANTS-APPELLANTS &
URGING REVERSAL**

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, *Amicus Curiae* American Center for Law and Justice makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

NO

Robert W. Ash

Date

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INTEREST OF *AMICUS*¹

Amicus curiae American Center for Law and Justice (ACLJ) is a not-for-profit organization committed to upholding the integrity of our constitutional system of government based on separation of powers. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before federal and state courts throughout the United States. *See, e.g., Scheidler v. NOW*, 126 S. Ct. 1264 (2006); *McConnell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987).

The ACLJ is very concerned that the lower court in this case overstepped its bounds and exceeded its constitutional authority by interfering with the well-established wartime authority of the President of the United States to take such action as he deems necessary to protect and defend the people of the United States against foreign and domestic enemies during time of war. The ACLJ urges this

¹ This brief is filed with the consent of the parties in accordance with Fed. R. App. P. 29(a), and copies of letters indicating such consent are filed herewith. No counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Court to reverse the district court's decision and to affirm the legality of the President's program at issue here.

SUMMARY OF ARGUMENT

The United States was savagely attacked on September 11, 2001, and is currently at war. Accordingly, the war powers enumerated in the Constitution are in play. The Founding Fathers limited the war powers of the Nation to the political branches of our Government. Those enumerated powers, and the implied powers necessary to effectuate them, provide the President, serving as Commander-in-Chief, with broad authority to take those measures he deems necessary to secure the United States against enemy infiltration and attack. Among such implied powers is the power to gather intelligence to identify and thwart enemy intentions. Gathering intelligence is an inherent part of making war, and, hence, the Commander-in-Chief need not seek separate sanction from any legislative or adjudicative body before engaging in such activity.

The district court erred as a matter of law when it interfered with the President's constitutional wartime authority to prosecute the ongoing war by questioning and denying his right to engage in intelligence gathering via the National Security Agency (NSA) program at issue here. The decision to gather intelligence via the NSA program was a policy decision of the sort entrusted by the Constitution to the Executive Branch. Congress's subsequent authorization

provided additional authority for the President to engage in intelligence gathering via programs like the NSA program. Moreover, because the NSA program has built-in safeguards to limit its reach, the program strikes the proper balance of enhancing national security while minimizing harm to innocent Americans. Because the lower court overstepped its bounds and unconstitutionally interfered with legitimate actions of a coordinate branch of government, this Court should reverse the lower court decision and uphold the legality of the NSA program.

ARGUMENT

I. BECAUSE OF AL-QAEDA'S ATTACKS OF 9-11, A STATE OF WAR EXISTS BETWEEN THE UNITED STATES AND AL-QAEDA, THEREBY ACTIVATING THE PRESIDENT'S WAR POWERS.

A. It Has Been Well-Settled For Over 140 Years That, When the United States Is Attacked From Without, the United States Is At That Very Moment At War and the President Must Take Immediate Steps to Defend the Nation.

On September 11, 2001, the United States was viciously attacked by *al-Qaeda* terrorists. Using civilian airliners as their weapons of choice, *al-Qaeda* terrorists attacked high value targets in New York City and northern Virginia, and a fourth aircraft crashed in Pennsylvania when passengers sought to regain control of the plane from the hijackers. From the moment of their attacks, the United States was in a state of war with *al-Qaeda*.² See *The Prize Cases*, 67 U.S. (2

² Just as President Roosevelt noted, regarding the attack on Pearl Harbor, that a state of war existed between the United States and the Empire of Japan *prior to* a

Black) 635, 668 (1862) (noting that when the United States is attacked, the President is “bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority”); *see also* Alexander Hamilton, The Examination, No. 1, 17 Dec. 1801, *reprinted in*, 3 *The Founder’s Constitution* 101 (Kurland & Lerner eds. 1987) (noting that when a foreign power “openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory”).

The President has been quite clear that he recognizes that the United States is at war. On September 14, 2001, the President declared a national emergency in response to the 9-11 attacks and the threat of additional attacks. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001). In his address to a Joint Session of Congress, the President promised that “[w]e will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network.” President

formal congressional declaration of war, *see* President Franklin D. Roosevelt, Address to Congress Requesting Declaration of War (Dec. 8, 1941), *available at* http://millercenter.virginia.edu/scripps/diglibrary/prezspeeches/roosevelt/fdr_1941_1208.html, so, too, a state of war existed immediately following the 9-11 attacks upon the United States, despite the lack of congressional action. *See also* *The Pedro*, 175 U.S. 354, 363 (1899) (recognizing that war with Spain began prior to an actual declaration by Congress based upon a prior declaration of the Spanish government).

George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001); *see also id.* (“On September the 11th, enemies of freedom committed an act of war against our country.”); Military Order § 1(a), 66 Fed. Reg. 57,833 (Nov. 13, 2001) (noting attacks of 9-11 “created a state of armed conflict”); President’s Remarks at National Day of Prayer and Remembrance, <http://www.whitehouse.gov/news/releases/2001/09/20010914-2.html> (“War has been waged against us”). Moreover, within days of the 9-11 attacks, the President, as Commander in Chief, dispatched the armed forces of the United States to Afghanistan to seek out and destroy those who had planned the 9-11 attacks as well as those who had succored them. Each of these acts is consistent with the existence of a state of war.

B. The Congress, Also Recognizing That the 9-11 Attacks Were Acts of War, Quickly Ratified the President’s Response and Provided Him Additional Authorization to Pursue the Enemy.

Although war commenced the moment *al-Qaeda* attacked our soil, the United States Congress acted quickly to demonstrate to both our enemies and to the world at large that it concurred in the President’s response. Congress did so by enacting legislation authorizing the use of military force to respond to the attacks. In its Authorization for Use of Military Force (AUMF), Congress authorized 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 that occurred on September 11, 2001, or harbored such organizations or persons.” Pub. L. No. 107-40 § 2(a), 115 Stat. 224, 224 (2001) (hereafter “AUMF”) (emphasis added). The AUMF ratified the President’s response and constituted, if otherwise needed, *see, e.g., The Prize Cases*, 67 U.S. at 668 (noting that the President is legally bound to resist an attack *without* legislative authority), a *de jure* authorization for war. *See, e.g., Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (holding that how Congress gives its consent to engage in war is “a discretionary matter for Congress to decide”). The AUMF recognized, *inter alia*, that “the President has authority *under the Constitution* to take action to deter and prevent acts of international terrorism against the United States” and that he has the right “to protect United States citizens both *at home* and abroad.” AUMF pmb1. (emphasis added).

* * * * *

Accordingly, the attacks of 9-11 were universally understood by senior officials in the Administration and the Congress to be acts of war by *al-Qaeda* and its confederates against the United States, and the United States had a right to respond to such attacks by force of arms.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN UNCONSTITUTIONALLY INTERFERING WITH THE INHERENT POWER OF THE PRESIDENT TO GATHER INTELLIGENCE IN WARTIME.

A. From Time Out of Mind, Security Operations Have Always Included, As an Integral Element, Gathering Intelligence About One's Foes.

Part and parcel of engaging in war is gathering intelligence about one's enemies. Circa 500 B.C., Chinese general Sun Tzu wrote a collection of essays on the art of war. See Sun Tzu, *The Art of War* (Thomas Cleary trans., Shambhala Publications, Inc. 2003) (1988). His essays were suffused with discussions on the need to gather intelligence on one's enemies' forces and dispositions and to thwart the gathering of intelligence on one's own forces and dispositions. *E.g., id.* at 41, 44, 48-50, 52, 87, 89, 120-23, 166, 168, 176-80. That principle has not changed in the intervening 2,500 years. It has been recognized in our history as well. James Madison noted the following in Federalist No. 41: "Security against foreign danger is one of the primitive objects of civil society The powers requisite for attaining it must be effectually confided to federal councils." The Federalist No. 41, at 244 (James Madison) (Bantam Classics ed. 1982).

In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court noted that the constitutional grant of war power "includes all that is necessary and proper for carrying these powers into execution." *Id.* at 788. That principle translates, *inter alia*, into Presidential authority to use covert means to gather the intelligence

necessary for conducting foreign affairs and engaging in war. *See, e.g., Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (“[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials.”); *Totten v. United States*, 92 U.S. 105, 106 (1876) (noting that the President “was undoubtedly authorized during the war, as commander-in-chief . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy”). This is especially so in war. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)) (noting as “obvious and unarguable” that there is no governmental interest more compelling than security of the Nation).

Gathering intelligence about one’s foes is so integral a part of making war that it is almost trite to have to mention it, but the district court’s decision in this matter has made it necessary. The district court, completely missing the point about the nature and need of intelligence gathering in wartime, disregarded the President’s inherent power under the Constitution, as Commander-in-Chief, to take the actions he deems appropriate, including intelligence gathering, to protect and

defend the United States. *See, e.g., ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 780 (E.D. Mich. 2006) (characterizing the Government's claim to inherent intelligence gathering power as justifying the right to violate the Constitution and federal statutes); *see also id.* at 782 (characterizing the need for "speed and agility" in gathering intelligence in the ongoing war on terror as "weightless").

B. Because the War Powers of the United States Inhere Solely in the Executive and Legislative Branches of the Government, the District Court Erred as a Matter of Law in Substituting Its Judgment For the President's.

Once war exists, the enumerated war powers in the Constitution, and such other implied powers as are necessary to effectuate them, become operative. Enumerated war powers reside solely in Articles I and II of the Constitution. *See, e.g.,* U.S. Const. art. I, § 8, cls. 11-16 (granting Congress the power to declare war and to provide for, organize, maintain, and govern the military); U.S. Const. art. II, § 1, cl. 1 (conferring on the President the "executive power"); U.S. Const. art. II, § 2, cl. 1 (providing that the President shall be the Commander-in-Chief of the armed forces). Hence, the war powers are contained in the portions of the Constitution which deal with the political branches of our Government, not the Judiciary. As a result, in *Hirabayashi v. United States*, 320 U.S. 81 (1943), the Supreme Court sounded the following warning about the role of courts in assessing the wisdom and reach of discretionary decisions made concerning how to prosecute a war:

The war power of the national government is “the power to wage war successfully.” . . . *It extends to every matter and activity so related to war as substantially to affect its conduct and progress. . . . It embraces every phase of the national defense* Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of means for resisting it. . . . *Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.*

Id. at 93 (citations omitted) (emphasis added).

In this case, the lower court disregarded the Supreme Court’s clear warning and improperly substituted its judgment for that of the President, serving in his role as Commander-in-Chief, the one official in the United States Government with overall responsibility for prosecuting the ongoing war. The lower court’s action not only violates the Supreme Court’s warning in *Hirabayashi*, it also fails to recognize both the President’s inherent constitutional power as Commander-in-Chief to gather intelligence in order to secure the Nation from further enemy attacks *and* the fact that Congress, via its AUMF, provided additional, broad authorization for the President to take whatever steps “he determines” necessary to identify the perpetrators of the 9-11 attacks and their confederates. This latter point is discussed further, *infra*.

By failing to honor the President’s inherent powers under the Constitution to gather intelligence, the district court improperly entered a realm reserved by the Founding Fathers to the Executive Branch. The lower court violated the fundamental separation of powers, and this Court should reverse the lower court on that basis. *See, e.g., Aktepe v. United States*, 105 F.3d 1400, 1402 (11th Cir. 1997) (citing *Tiffany v. United States*, 931 F.2d 271, 276 (4th Cir. 1991)) (“Separation of powers is a doctrine to which courts must adhere even in the absence of an explicit statutory command.”).

III. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY FAILING TO RECOGNIZE THAT THE AUMF AUTHORIZED INTELLIGENCE GATHERING AND IS CONSISTENT WITH FISA, §1809 (a)(1).

A. The District Court Erred As a Matter of Law by Failing to Recognize that Intelligence Gathering Is a “Fundamental and Accepted Incident” of Waging War.

In addition to his inherent powers, the President has also received broad authorization to wage war from Congress. The district court argued that the AUMF did not sanction intelligence gathering because the court could find no words explicitly authorizing such activity. *See Nat’l Sec. Agency*, 438 F. Supp. 2d at 779 (“court must note that the AUMF says nothing whatsoever of intelligence or surveillance”). Such a finding is specious, *see, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (noting that “Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take”),

and demonstrates why the Supreme Court has cautioned courts to forego reviewing decisions of the political branches having to do with wartime policy decisions, *see, e.g., Hirabayashi*, 320 U.S. at 93. Yet, even here, the Supreme Court has noted that the words of a statute must be given their plain meaning; hence, broad language must be interpreted broadly. *BedRoc Ltd. v. United States*, 541 U.S. 176, 184 (2004); *see also Burns v. Alcala*, 420 U.S. 575, 580 (1975).

Recently, five Justices of the Supreme Court agreed in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the “necessary and appropriate force” language of the AUMF was to be interpreted broadly. A plurality of the Court in *Hamdi* noted that, despite the absence of any words in the AUMF concerning what to do with individuals captured during the hostilities, “detention of individuals . . . for the duration of the particular conflict in which they are captured is *so fundamental and accepted an incident of war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.*” *Hamdi*, 542 U.S. at 518 (plurality opinion) (emphasis added); *see also id.* at 587 (Thomas, J., dissenting) (agreeing with the plurality that the AUMF authorized the President to “detain those arrayed against our troops”); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2092 (2005) (“The clear inference is that the AUMF authorizes what the laws of war permit.”). Thus, the AUMF did not have to expressly denominate

the power to detain captured belligerents because detaining captives is “part and parcel” of waging war. So, too, is gathering intelligence on the Nation’s foes, something the district court apparently did not understand.

Moreover, if the district court’s reasoning were taken to its logical conclusion, then Congress authorized *nothing* because the AUMF does not specifically list any of the appropriate and necessary means of waging war. Five Justices in *Hamdi* explicitly rejected such reasoning. Similarly, the lower court’s reasoning is fatally flawed regarding intelligence gathering because intelligence gathering is a necessary and fundamental incident of war and has been for thousands of years. *See, e.g., Tzu, supra* at 41, 44, 48-50, 52, 87, 89, 120-23, 166, 168, 176-80. The AUMF gave the President additional authority to carry out his responsibilities as Commander-in-Chief, *see* AUMF pmb., § 2(a), and the district court erred as a matter of law in failing to recognize that fact. This Court should reverse the lower court’s ruling.

B. The AUMF Satisfies the Terms of FISA Because the AUMF is the § 1809 Statute Authorizing the NSA Program at Issue Here.

The Foreign Intelligence Surveillance Act (FISA), *see* 50 U.S.C. §§ 1801 *et seq.*, governs surveillance of foreign and domestic communications for purposes of intelligence gathering and, in certain cases, criminal prosecution. FISA is the relevant statute from which to begin discussion, but since it acknowledges the existence of foreign surveillance outside of its domain, *see* 50 U.S.C. §1809 (a)(1),

analysis does not end there. FISA is violated if the respective electronic surveillance is not “authorized by statute,” but FISA never identifies any specific statute to which it is referring. *Id.* That omission was intentional—the history of FISA is quite enlightening. In conference, the Senate preferred to limit the President’s authority to the terms “as provided in this bill,” whereas the House of Representatives insisted on the broader language which was ultimately adopted. *See* H.R. Rep. No. 95-1720, at 33 (1978), *as reprinted in* H.R. Conf. Rep. No. 1720, 95th Cong., 2nd Sess. 1978, 1978 U.S.C.C.A.N. 4048, 4062. When considering FISA, one must determine whether another statute exists which concerns surveillance. The AUMF qualifies as such a statute.

Through the AUMF, Congress authorized the President to “use all necessary and appropriate force against those . . . [that the President] determines planned, authorized, committed, or aided” in the 9-11 attacks. AUMF § 2(a). Given the decision in *Hamdi* that the AUMF’s “necessary and appropriate force” language was to be interpreted broadly to include authorizing “fundamental and accepted . . . incident[s] of war,” *see* 542 U.S. at 518, the AUMF’s language suffices to authorize the President’s intelligence gathering activities, since gathering intelligence on a Nation’s enemies is a fundamental and accepted incident of war and has been for over 2,500 years. As such, the district court erred as a matter of law in restricting the President’s statutory authority to FISA alone. *See Nat’l Sec.*

Agency, 438 F. Supp. 2d at 778 (concluding that FISA governs and that the President “has acted, undisputedly, as FISA forbids”).

Then, having misconstrued the breadth of authority that the AUMF granted the President, the district court misapplied the principles set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). The district court determined, based on its incorrect understanding of the broad authority granted the President by the AUMF regarding fundamental and accepted incidents of war, *see, e.g., Hamdi*, 542 U.S. at 518, that the President’s intelligence gathering program ran counter to FISA, *see Nat’l Sec. Agency*, 438 F. Supp. 2d at 778 (concluding that the President has acted “as FISA forbids” and that Presidential power is “at its lowest ebb”). Yet, just the opposite is true. By granting the President the authority “to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks,” AUMF § 2(a) (emphasis added), Congress granted broad authority to the President, authority that the Court in *Hamdi* noted included “fundamental and accepted . . . incident[s] of war.” 542 U.S. at 518.

Intelligence gathering is one such fundamental and accepted incident of war. The only logical way that the President could identify those who “planned, authorized, committed, or aided” in the 9-11 attacks—aside from their unlikely

self-identification—was to engage in intensive intelligence gathering operations. In the AUMF, Congress left to the President the selection of the means to carry out its granted authority. *See* AUMF § 2(a) (leaving to the President the decision concerning how to implement the authority conferred). The NSA program is a natural policy outgrowth of the need to identify the enemy and, hence, falls outside the ken and reach of the Judiciary. In this matter, despite the trial court’s contrary determination, *see Nat’l Sec. Agency*, 438 F. Supp. 2d at 778, the President’s will and the Congress’s will are in agreement. In accordance with Justice Jackson’s *Youngstown* criteria, the President’s authority is, therefore, at its highest.

Hence, the district court erred as a matter of law, and this Court should reverse the lower court’s decision.

IV. THE PRESIDENT’S DECISION TO PERMIT THE MONITORING OF POSSIBLE AL-QAEDA COMMUNICATIONS IN TIME OF WAR VIA THE NSA PROGRAM IS A NONJUSTICIABLE POLITICAL QUESTION.

“It is well established that the federal courts will not adjudicate political questions.” *Powell v. McCormack*, 395 U.S. 486, 518 (1969). The “nonjusticiability of a political question is primarily a function of the separation of powers.” *Baker v. Carr*, 369 U.S. 186, 210 (1962). “Restrictions derived from the separation of powers doctrine prevent the judicial branch from deciding ‘political questions,’ controversies that revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and

executive branches.” *Aktepe*, 105 F.3d at 1402 (citing *Japan Whaling Ass’n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986)). Further, “[s]eparation of powers is a doctrine to which the courts must adhere even in the absence of an explicit statutory command.” *Id.* (citing *Tiffany*, 931 F.2d at 276).

Foreign policy and military affairs figure prominently among the areas where the political question doctrine has been implicated. *See, e.g., Haig*, 453 U.S. at 292 (“matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention”); *Aktepe*, 105 F.3d at 1403 (finding that political branches are accorded high degree of deference in area of military affairs). The Constitution commits the conduct of foreign affairs and national security to the legislative and executive branches of government. *See, e.g., Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918); *Johnson*, 339 U.S. at 786.

In *Baker v. Carr*, the Supreme Court identified six separate hallmarks of political questions, any one of which is sufficient to carry a controversy beyond justiciable bounds. 396 U.S. at 217. In this matter, four hallmarks apply:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; [and] a lack of judicially discoverable and manageable standards for resolving it; [and] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [and] . . . an unusual need for unquestioning adherence to a political decision already made

Id. As shown *infra*, each of these four hallmarks is independently met and, thereby, precludes this, or any other, court from granting the relief sought by the Plaintiffs below.

A. The Constitution Clearly Commits the Issues of Foreign Policy and National Security to the Legislative and Executive Branches.

The Constitution commits the issues raised in this matter to the political branches of government. *See, e.g.*, U.S. Const. art. I, § 8, cls. 11-16; art. II, § 1, cl. 1; art. II, § 2, cl. 1; *Oetjen*, 246 U.S. at 302 (the Constitution commits the conduct of foreign affairs to the executive and legislative branches); *The Prize Cases*, 67 U.S. at 670 (when the President is acting as Commander-in-Chief, courts must recognize that it is the President who “determine[s] what degree of force the crisis demands” as well as whether those who threaten the Nation have “the character of belligerents”); *Haig*, 453 U.S. at 307 (concluding that foreign policy and national security overlap and “cannot neatly be compartmentalized”). No such power is found in Article III.

“The Supreme Court has repeatedly recognized that the President is the nation’s ‘guiding organ in the conduct of our foreign affairs,’ in whom the Constitution vests ‘vast powers in relation to the outside world.’” *Made in the USA Found. v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001) (quoting *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948), and citing *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (“recognizing ‘the generally accepted view that foreign policy is

the province and responsibility of the Executive’”) (citation omitted)); *see also Curtiss-Wright*, 299 U.S. at 319 (“In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . ‘The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.’”) (quoting 6 Annals of Congress 613 (1816)).

The Supreme Court has also noted that the President has broad authority as Commander-in-Chief. *See Hirabayashi*, 320 U.S. at 93 (rejecting a judicial role when the political branches are exercising their judgment as to means to be used to meet their wartime responsibilities). Such is the case here.

The underlying events in this matter stem from the United States’ response to the 9-11 terrorist attacks perpetrated on our soil. The United States response involves both foreign policy and national security components. Militarily, the President, with the explicit approval of the Congress, *see* AUMF § 2(a) (“President is authorized to use all necessary and appropriate force . . .”), ordered the armed forces of the United States into action to seek out and destroy the terrorists and those who succor them. This led to active hostilities in Afghanistan aimed at destroying the *al-Qaeda* terrorist organization and the Taliban regime which gave the terrorists safe haven.

Since hostilities began, United States agencies and armed forces have been seeking to identify, capture, or kill members of the *al-Qaeda* terrorist organization and their supporters. How to do so involves political decisions which implicate both the national security and foreign policies of the United States, execution of which rightly resides in the political branches. The Judiciary is ill-equipped to determine the possible impact of such decisions on the wartime foreign and national security policies of the Nation and should be wary of entering the realm of discretionary decision-making reserved to the President. The district court in this case failed to respect the enumerated and inherent powers of a coordinate branch of government and thereby unconstitutionally violated separation of powers. This Court must reverse the lower court.

B. This Matter Lacks Judicially Discoverable and Manageable Standards.

No judicially discoverable and manageable standards exist for resolving the complicated questions raised by how to gather intelligence on enemy terrorists both within and without the country in wartime. Decisions about prosecuting a war and gathering intelligence data must often be made on an *ad hoc* basis, depending on unique, often unpredictable, circumstances. *Al-Qaeda* sleeper cells exist in the United States for the purpose of engaging in terrorist acts on United States soil. The day-to-day prosecution of war and making decisions related directly thereto, such as identifying the enemy and thwarting enemy plans, rightly

reside with the President in his capacity as Commander-in-Chief. *See, e.g., Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919) (concluding that war power includes power “to remedy the evils which have arisen from [a conflict’s] rise and progress”) (quoting *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870)); *In re Yamashita*, 327 U.S. 1, 12 (1946) (“The war power . . . is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy . . . evils which the military operations have produced.”) (citing *Stewart*, 78 U.S. at 507). Given the unique events of 9-11 and the unique nature of the war on terrorism, the President deserves the latitude and benefit of the doubt as he seeks to grapple with a heretofore unknown situation and develop effective policies to restore peace.

Despite the unique nature of the war on terrorism, the district court refused to defer to the President’s judgment in this matter and substituted its own opinion about how best to identify those who seek to engage in terrorist acts on behalf of an enemy power. Many of these terrorists, as American citizens or legally admitted aliens, are especially dangerous (since they can “hide” in plain view in American society), but such persons, when apprehended, may be treasure troves of vital intelligence information needed by the President to thwart other terrorist attacks. Identifying and capturing such persons before they can commit their terrorist acts better serves the security interests of the United States than trying

them after-the-fact for violations of the United States criminal code. Such policy decisions rightly reside with the President as Commander-in-Chief, not with the courts. Further,

[t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. *But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.* Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. *They are delicate, complex, and involve large elements of prophecy.* They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. *They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of the political power not subject to judicial intrusion or inquiry.*

Chicago & S. Air Lines, 333 U.S. at 111 (citing *Coleman v. Miller*, 307 U.S. 433, 454 (1939), *Curtiss-Wright*, 299 U.S. at 319-21, and *Oetjen*, 246 U.S. at 302) (emphasis added).

Additionally, unlike in previous conflicts, our enemies in this conflict appear to possess a zeal for suicidal attacks on Americans. This mindset makes the situation especially dangerous, and special measures and caution are called for. Such policy decisions are for the President and Congress to make, not the courts.

Given the unique nature of this war and the willingness of the terrorists to readily forfeit their lives in attacking Americans, serious policy decisions concerning how to identify such persons is required, and such efforts involve the formulation and subsequent implementation of national policy to deal with such persons, clearly political matters reserved to the political branches, not the courts. The district court intruded where it should not have and should be reversed.

C. It Is Impossible to Decide This Matter Without an Initial Policy Determination of a Kind Clearly For Nonjudicial Discretion.

The President, as Commander-in-Chief, is charged with responsibility for prosecuting the ongoing war on terrorism, and the Supreme Court has noted as “obvious and unarguable” that there is no governmental interest more compelling than security of the Nation. *Haig*, 453 U.S. at 307 (citing *Aptheker*, 378 U.S. at 509); accord *Cole v. Young*, 351 U.S. 536, 546 (1956). Part and parcel of any resort to war is gathering intelligence on the enemy and its operatives. How to do so is a political question which implicates matters like balancing the needs of waging war with protecting the civil rights of our citizens. See, e.g., William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 222 (1998) (“In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts in favor of order—in favor of the government’s ability to deal with conditions that threaten the national well-being.”). It also often requires gathering

intelligence on citizens and/or subjects of foreign countries, many of which are friendly to the United States. Gathering such intelligence requires extreme care, delicate diplomacy, and use of culturally sensitive operatives. Courts are especially ill-suited to evaluate and judge such operations in wartime.

Moreover, because of the unique nature of the war on terror, the President is faced with a heretofore unknown and extremely grave situation, and it is his responsibility—and his alone—to formulate and implement policies to protect and defend the United States. *It falls to the President to orchestrate national policy and balance benefits and risks.* He both needs and deserves the latitude to develop such policies without undue interference by the Judiciary which, in any case, lacks the competence to deal with such situations. In wartime, it is useful to remember Justice Goldberg’s oft-quoted phrase, that the Constitution “is not a suicide pact.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-60 (1963).

The prosecution of a war involves both foreign policy and national security issues which generally fall outside the realm of judicial competence.

[I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, “decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”

People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (quoting *Chicago & S. Air Lines*, 333 U.S. at 111). The same is true for

military decisions. *See, e.g., Hirabayashi*, 320 U.S. at 93 (noting the wide discretion given the political branches in dealing with war issues and recognizing that courts should not substitute their judgment for that of the political branches).

Al-Qaeda attacked the United States on 9-11, using operatives who had earlier entered the United States to plan their attacks. Since then, terrorist sleeper cells aligned with *al-Qaeda* have been discovered within the United States. Undiscovered cells undoubtedly continue to exist whose members are planning future attacks. United States allies have also been attacked by sleeper cells within their territory. The threat is real, and the President is charged by the Constitution with the responsibility to defend and secure the United States. *Al-Qaeda* has already murdered close to 3,000 persons on United States soil, and its constant rantings indicate that it wishes to kill thousands more. The President must, therefore, be given the freedom to act boldly in the Nation's defense. The NSA program, with its built-in limitations and protections, strikes the proper wartime balance between security and freedom. The lower court in this matter improperly interfered with the President's authority as Commander-in-Chief in wartime, and this Court should reverse the district court and affirm the legality of the NSA program at issue here.

D. There is an Unusual Need For Unquestioning Adherence to the Political Decision Already Made by the President.

The situation faced by the United States today is without historical precedent. The United States has suffered well-planned, coordinated attacks on the political and economic centers of this Nation. The President, with the explicit concurrence of Congress, *see* AUMF, has taken decisive steps to meet the threat and protect the Nation. Such steps should not be subjected to second-guessing by the Judiciary. *See Haig*, 453 U.S. at 307 (concluding it to be “obvious and unarguable” that there is no governmental interest more compelling than security of the Nation) (citing *Aptheker*, 378 U.S. at 509); *accord Cole*, 351 U.S. at 546; *Hirabayashi*, 320 U.S. at 93 (nation’s war power is “the power to wage war successfully”).

We are facing an enemy which willingly commits the most horrendous, suicidal acts against innocent civilians and which will do so again if it can. *Because this situation is without historical precedent, no one can know for sure how much success emerging policies will have. As such, it would be inappropriate for the courts of the United States to enter the political fray and attempt to second-guess the policies adopted by the President to meet this threat. See Hirabayashi*, 320 U.S. at 93.

Any appearance of official opposition to decisions within the discretion of the President will surely bring aid, comfort, and encouragement to the enemy while

potentially demoralizing the men and women in the U.S. armed forces who are daily putting their lives at risk to track down and destroy the confederates of those who planned the 9-11 attacks and wish to repeat them. In this case, the President is acting pursuant to his authority as Chief Executive, *see The Prize Cases*, 67 U.S. at 668 (“The Constitution confers on the President the whole Executive power.”), as Commander-in-Chief, U.S. Const. art. II, § 2, cl. 1, and with statutory authority granted by the Congress, AUMF. Moreover,

[w]hen the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. *In such a case the executive action “would be supported by the strongest of presumptions and the widest latitude of judicial interpretation”*

Dames & Moore, 453 U.S. at 668 (quoting *Youngstown Sheet & Tube*, 343 U.S. at 637 (Jackson, J., concurring)) (emphasis added). Given this agreement between the President and the Congress, the district court should have upheld the President’s action.

CONCLUSION

WHEREFORE, in light of the foregoing, the American Center for Law and Justice respectfully urges this Court to reverse the lower court’s decisions against the United States Government defendants and to affirm the legality of the NSA program at issue here.

Respectfully submitted,

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Plaintiffs-Appellees

v.

NATIONAL SECURITY AGENCY, et al.,

Defendants-Appellants.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the exempted portions in Fed. R. App. P. 32 (a)(7)(B)(iii), the foregoing brief contains 6,532 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2003 for Windows XP.

Robert W. Ash

October __, 2006

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____ day of October, 2006, true and exact copies of the foregoing Brief Amicus Curiae of The American Center for Law and Justice in Support of Defendants-Appellants & Urging Reversal have been forwarded to the persons listed below:

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