

Nos. 06-2095, 06-2140

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiff-Appellees/Cross-Appellants**

v.

**NATIONAL SECURITY AGENCY, et al.,
Defendant-Appellants/Cross-Appellees**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

**BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFF-
APPELLEES/CROSS-APPELLANTS URGING PARTIAL
AFFIRMANCE ENJOINING WARRANTLESS SURVEILLANCE**

Lucy A. Dalglish, Esq.

Counsel of Record

Gregg P. Leslie, Esq.

Elizabeth J. Soja, Esq.

1101 Wilson Blvd., Suite 1100

Arlington, VA 22209-2211

(703) 807-2100

Attorneys for Amicus Curiae The Reporters

Committee for Freedom of the Press

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Reporters Committee for Freedom of the Press (“The Reporters Committee”) is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state and federal courts since 1970.

The interest of *amicus* in this case is ensuring both the free flow of information and the safety of journalists and their sources, especially in times of international conflict. If the National Security Agency is permitted to continue its practice of warrantless surveillance of American citizens’ communications, journalists will no longer be able to offer good faith promises of confidentiality to their international sources. In the absence of these promises, sources who could face punishment if their communications are revealed will refuse to speak.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

A free press is an essential element of any democracy, and a journalist's ability to communicate with his or her sources is an essential element of a free press. It is irrelevant whether the journalists who brought this action are actually targets of government surveillance. If any journalist strongly and legitimately suspects that his or her communications with a source are being intercepted by a third party, that journalist simply cannot promise confidentiality in good faith to an international source when that source could face torture or death if the communication is revealed.

The National Security Administration's ("NSA") warrantless surveillance program ("the Program") prevents the journalists who cover foreign and national security issues from investigating important news stories by preventing them from making good faith promises of confidentiality when the journalists legitimately believe that their communications are being overheard by a third party. The Program ignores the United States' long-recognized commitment to the free flow of information and disregards the dangers posed to international sources who communicate with the media about issues of national security.

ARGUMENT

- I. **The warrantless surveillance program prevents journalists from engaging in effective newsgathering by prohibiting them from making good faith promises of confidentiality to their international sources.**
 - A. **By preventing journalists from making any promises of confidentiality to international sources in times of increased secrecy, the government makes newsgathering highly difficult – and often impossible – in the most serious and most important of stories.**

The press continues to be a vital check on the government and on excessive government secrecy. The purpose of a free press is not to protect the journalist, or even the journalist's source; rather, a free press protects the citizens of the United States from the dangers of foreign and domestic secrecy. A journalist's right to gather news and report on important issues is indistinguishable from the public's right to know about and understand those issues. An informed electorate helps to ensure a healthy democracy, and the free flow of important information is vital to any population that must choose its leaders at the polls. Information "about the United States' role in world affairs and the impact of international events on American life needs to be fostered for the public interest." See Lisa Kloppenberg, *Disclosure of Confidential Sources in International Reporting*, 60 S. CAL. L. REV. 1631, 1660 (1987). The press must "meet the informational needs of the public by responding to the global interdependence" and "serve as the global eyes and

ears of the American public overseas. The press has the resources and technology to compile facts and investigate international events in a way which private citizens cannot.” *Id.* at 1661.

As government secrecy increases, the public’s need to obtain information from journalists and their sources grows as well. While the previous presidential administration classified approximately 7 million documents per year, the current administration classifies an average of approximately 12 million per year. *See* OpenTheGovernment.org, *Secrecy Report Card 2006: Indicators of Secrecy in Federal Government*, 2006 at 3 (based on chart, “Classification Activity Remains High”). The United States government “has also extended its use of the mosaic theory of intelligence gathering to a level never before seen” – that is, the theory that “innocuous bits of information can be combined to pose a risk to national security and therefore qualify for classification.” *See* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 135 (2006).

While journalists are not elected, appointed, or certified by the government, they are still subject to two rigorous standards of accountability – the trust of the public and the trust of their sources. When reporters risk misinforming the public or betraying a source, they risk losing their

livelihood. A journalist's power to check the government lies not in adherence to rigid guidelines but in a publicly recognized dedication to the truth and a commitment to keeping to his or her word.

When the United States government prevents a specific group of journalists – those who report on national security issues – from making promises of confidentiality in good faith to their international sources, the government strangles the newsgathering process and tramples on the free flow of important newsworthy information. As discussed *infra*, foreign sources – especially those in the Middle East today – can face prison, torture and even death for speaking to the media. If a journalist legitimately suspects that he or she may be subject to warrantless surveillance, that journalist cannot make a good faith promise that a communication will be kept exclusively between the parties, especially when one party could face terrible consequences for disclosure.

Given these potential consequences, sources simply cannot afford to speak absent a promise of anonymity. This effectively disallows confidential source newsgathering on matters of national security and severely restricts the way in which national security reporters may gather the news. This, in turn, restricts public's right to know about and understand issues of vital importance to the country's security.

The harm faced by journalists and their sources is not merely speculative. *See generally Laird v. Tatum*, 408 U.S. 1 (1972) (holding that plaintiffs' claim that the knowledge collected by government surveillance could one day be used to harm plaintiffs was too speculative and non-ripe). The harm here, rather, is current and concrete. *See, e.g.*, SUF 15E & R.4 Ex. K, McKelvey Decl. para 14-16. (stating that journalist McKelvey's "inability, because of the NSA Program, to assure anonymity or privacy to the individuals I need to interview, many of whom are frightened of the United States government and military, has prevented me from obtaining information from some of these individuals"). This is not a situation, as in *Laird*, of a "speculative apprehensiveness that the [government] may at some future date misuse the information in some way that would cause direct harm" to the journalists. *Laird*, 408 U.S. at 6; *see also* Brief for the Appellees at 18-19. The Program actively harms the journalists by preventing them, across the board, from making any good faith promises of confidentiality to international sources.

Because foreign insult laws, discussed *infra*, mandate prison or worse for journalists and sources who speak against the government, foreign sources will not come forward with important information absent a promise of confidentiality. These foreign laws do not merely punish incorrect or

fabricated information – they also punish the truth. This is not a case, as in *Laird*, of journalists leaving “somewhat unclear the precise connection between the mere existence of [a] challenged system and their own alleged chill.” Rather, the harm to journalists and their sources here is real and identifiable. *See Laird*, 408 U.S. at 6.

B. The United States government has long recognized the need for confidentiality in newsgathering in a manner that is inconsistent with the NSA’s warrantless surveillance program.

Government officials at the highest levels have recognized the fundamental link between democracy and confidential newsgathering. Sen. Richard Lugar (R-Ind.) said in a July 2006 speech that “spreading democracy abroad has become a pillar of United States foreign policy” and that the “example of press freedom that we set in this country is an important beacon to guide other nations as they try to make the transition from autocratic forms of government.” *See* Transcript, *National Press Club Newsmaker Luncheon with Senator Richard Lugar (R-Ind.) and Representative Mike Pence (R-Ind.)*, Federal News Service, Inc., July 25, 2006. Lugar, who co-sponsored the most recent version of a federal shield law for journalists, emphasized that “restricting the manner in which appropriate news is gathered is tantamount to restricting the information that the public has a right to hear.” *Id*; *see also*

Free Flow of Information Act of 2006, S.B. 2831, 109th Cong. (2006) (proposed shield law legislation stating that journalists should have a qualified privilege to refuse to testify in court about the identity of their confidential sources unless certain factors are met); *see also* H.R. 3323, 109th Cong. (2006).

In addition, the United States has many long-standing, specific media protections that demonstrate the country's commitment to a free press and the importance of a journalist's promise of confidentiality. The U.S. Department of Justice ("DOJ") recognizes the importance of source confidentiality by employing specific guidelines that govern all subpoenas to and interactions with the news media. These guidelines protect the public's right to know by protecting a journalist's freedom to report. *See generally* 28 C.F.R. § 50.10 (2003). The guidelines say that "[b]ecause freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." 28 C.F.R. § 50.10(a) (2003). Affirming the principle of public protection through open newsgathering, DOJ employees are required to "strike the proper balance between the public's interest in the

free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.” *Id.*

Although the DOJ officially opposes a federal reporter's shield law that would allow journalists to refuse to testify about their confidential sources in court in some circumstances, DOJ representatives have publicly affirmed that confidential source newsgathering is vital to a healthy press. For example, in testimony before the Senate Judiciary Committee regarding the Free Flow of Information Act of 2006, Deputy Attorney General Paul McNulty said that the United States is “fully capable of both protecting our security and preserving the media's right to engage in robust reporting on controversial issues. Security and free speech are not mutually exclusive.” *See Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement: Hearings Before the Senate Comm. on the Judiciary, 109th Cong. (2006)* [hereinafter *Shield Law Hearings*] (Sept. 20, 2006 testimony of Paul J. McNulty). He also added that the DOJ “continue[s] to regard journalists as a source of last resort.” *Id.* The NSA, by intercepting communications without a warrant, is effectively regarding journalists as a source of first resort.

The most prominent indicator of government protection of confidential source reporting is the number of current and proposed shield laws in the United States. Thirty-two states and the District of Columbia have shield law

statutes that specifically protect a journalist from having to disclose his or her confidential sources. *See New York Times Co. v. Gonzales*, 382 F.Supp.2d 457, 502 (S.D.N.Y. 2005) (listing all U.S. state shield laws, except for the new shield law in Connecticut, Pub. Act No. 06-140 (2006)); *see also* The Reporters Committee for Freedom of the Press, *Reporter's Privilege Compendium*, www.rcfp.org/privilege/index.html (2002). The courts in 16 of the 18 remaining states have recognized some kind of protection for journalists. *See Gonzales*, 382 F.Supp.2d at 503 (listing case law in those states that confers this protection). While there is currently no federal shield law, attempts to pass such a law have spanned three decades and bipartisan support for the guiding principle has been unwaveringly strong. *See, e.g., Time for a Federal Shield Law*, N.Y. TIMES, Jul. 21, 2005 at A28 (addressing “Republican and Democratic lawmakers testify[ing] together ... about the need for the federal government to follow the lead of 49 states and guarantee that journalists are allowed the right to protect the names of confidential sources”).

During 2006 Senate Judiciary Committee hearings regarding the latest proposed shield law, The Free Flow of Information Act of 2006, bipartisan proponents spoke forcefully about the need to uphold the free press by protecting source confidentiality. *See generally* S.B. 2831, 109th Cong.; H.R.

3323, 109th Cong. (2006). Despite the current administration's opposition to the law, George W. Bush's former Solicitor General Theodore Olson testified in support of the law. He said that journalists who are "working to uncover stories that would otherwise go untold" simply "cannot function effectively without offering some measure of confidentiality to their sources." *Shield Law Hearings* (Sept. 20, 2006 testimony of Theodore B. Olson).

In a written statement prepared for the same occasion, Sen. Patrick Leahy (D-Vt.) said that "investigative journalism based on confidential sources has been critical in exposing to scrutiny" many important news stories, including missteps by the Bush administration. *Shield Law Hearings* (Sept. 20, 2006 written testimony of Sen. Patrick Leahy (D-Vt.)). "What investigative journalism tells us," he continued, "is often not welcome news – think of the pictures at Abu Ghraib. But it is precisely the news that the people of a democracy need to make informed choices." *Id.*

The United States' recognition of the importance of source protection to press freedom is not unique among free nations. In 1996, the European Court of Human Rights declared:

Protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be

undermined and the ability of the press to provide accurate and reliable information may be adversely affected.

Goodwin v. United Kingdom, 22 E.H.R.R. 123, 143 (1996).

II. International sources who could face serious repercussions, including torture and death, in their countries for communicating with the U.S. press will not come forward if they fear they will be identified.

Although the NSA may not intend to directly imperil confidential sources, journalists and their sources have no way of knowing with which foreign governments U.S. intelligence agencies have agreed to share information. *See, e.g.*, Dana Priest, *CIA Holds Secret Terror Suspects in Secret Prisons*, WASH. POST., Nov. 2, 2005 at A1 (reporting that fighting the war on terror “depends on the cooperation of foreign intelligence services.” Those cooperating foreign countries remained unnamed in Priest’s Pulitzer Prize-winning article).

American journalists and many of their foreign sources who would talk to them are often in grave danger due to the lack of legal protections in other countries. Unlike dissenters and whistleblowers in the United States, those in other countries who wish to expose the illegal or irresponsible policies, corruption or wrongdoing within their government or elsewhere have few options if they choose to take action.

In his testimony before the Senate Judiciary Committee, Assistant Attorney General McNulty referenced the fact that in the United States, some sources have recourse under the law to “blow the whistle” on unsatisfactory government activity before talking to the news media in some circumstances. *See Shield Law Hearings* (Sept. 20, 2006 testimony of Paul J. McNulty). He referred to the Intelligence Community Whistleblower Protection Act of 1998, which allows some sources to voice dissatisfaction or “blow the whistle” on the government as an alternative to going directly to the news media. *Id.*; *see also* Intelligence Community Whistleblower Protection Act, Pub. L. 105-272, Title. VII, 112 Stat. 2413 (1998). Would-be whistleblowers in many foreign countries – particularly in the Middle East – do not have this type of protection as a first resort, so the journalist’s role is even more important.

Additionally, when a country’s own news media is being intimidated into partiality (and often into disappearance), United States-based journalists can become a whistleblower’s only recourse. For example, Iraqi news outlets are plagued by constant “acts of censorship, criminal prosecutions of journalists, intimidation, and physical threats against the media by Iraqi officials” – not to mention acts of violence. *See* Ann Cooper, *Letter to His Excellency Nouri Kamal al-Maliki, Prime Minister of Iraq, regarding press freedom recommendations*, June 6, 2006, www.cpj.org/protests/06ltrs

/mideast/iraq06june06pl.html (accessed Nov. 16, 2006). The American military presence in Iraq has not remedied the situation; newspaper offices and television stations that offer “alternatives to the American message” have reportedly been destroyed and shut down by Westerners. *See, e.g.,* Brenner A. Allen, *A Cause of Action Against Private Contractors and the U.S. Government for Freedom of Speech Violations in Iraq*, 31 N.C. J. INT'L L. & COM. REG. 535, 548-549.

In some cases, foreign governments do more than simply fail to give dissenting insiders a way to air their grievances; they punish those who would speak against the government. *See, e.g.,* Iraqi Penal Code, 3rd ed., Ch. 3 § 1:225-226 (1969, 2006) (stating that anyone who “publicly insults” a government official can be sent to prison for up to seven years). According to the non-profit research group Reporters Without Borders, Iraq, Iran, Pakistan and Saudi Arabia all rank in the bottom 10 percent in the nonprofit’s annual ranking of press-friendly countries; Afghanistan, Israel, the Palestinian Authority, Egypt and Syria all ranked in the bottom 25 percent. *See* Reporters Without Borders, *Worldwide Press Freedom Index*, www.rsf.org/article.php3?id_article=19385 (2006). In their 2006 annual report, Reporters Without Borders cautioned that “[i]n Iran, prison often means torture as well. In Algeria, just a cartoon can land its author in jail.” *See* Reporters Without

Borders, *2006 Annual Report* at 135 (2006). The group also reported that governments in “Libya, Iran, Syria, Tunisia and Saudi Arabia have total control over news within their borders and are among the world’s most repressive regimes.” *Id.*

Laws outlawing government insult are not written to apply specifically to journalists, so they pose dangers to journalists and their sources alike. Iraq’s current criminal code – the same code that was used under Saddam Hussein – mandates that anyone “who publicly insults” a government official, government program or the armed forces can be sent to jail for seven years. *See* Iraqi Penal Code, 3rd ed., Ch. 3 § 1:225-226 (1969, 2006). Speaking against any foreign government or even a corporation that has an office in Iraq can result in a two-year jail sentence. *Id.* at 227.

According to the British Broadcasting Corp. (“BBC”), Algeria and Egypt also have laws that mandate a prison sentence for defaming government officials and criticism of government officials is banned in, *inter alia*, Saudi Arabia, Syria, and Bahrain. *See* BBC Country Profiles, http://news.bbc.co.uk/2/hi/country_profiles/default.stm (Aug. 2006). Kuwaiti journalists can be imprisoned for referencing God and the prophet Mohammed in publications. *Id.*

In the recent British case *Jameel v. Wall Street Journal Europe*, a Middle East-based reporter's story was the subject of a libel lawsuit against the *Wall Street Journal Europe*. See *Jameel v. Wall Street Journal Europe* 2006 U.K.H.L. 44; see also James M. Dorsey, *Saudi Officials Monitor Certain Bank Accounts: Focus Is on Those With Potential Terrorist Ties*, WALL ST. J. EUROPE, Feb. 6, 2002 at 1. The reporter, James Dorsey, testified in court about the dangers of reporting on and from the Middle East. He recounted that in January 2002, he attended a dinner in Saudi Arabia and later wrote a story about a Muslim religious minority.

[O]ne of the people I spoke to was arrested and, to the best of my knowledge, sentenced to prison for seven years... Other people were present at that dinner. The person who was arrested and imprisoned was actually willing to speak to me on the record and, therefore, was quoted in the story. There were other people at that dinner who were not reflected in my story in any form or fashion, and my understanding is that they too were at least detained for periods of time.

See Testimony of Dorsey, Day 7 Trial Transcript at 1141, *Jameel v. Wall Street Journal*, 2006 U.K.H.L. 44. Dorsey added that the experience “reinforced my conviction, and it was blatantly clear that I needed to be as protective as I could for my sources, particularly if that was a request that had been put to me.” *Id.*

In September 2006, *The New York Times* highlighted – in both form and content – the difficulties foreign journalists and sources face under a set

of restrictive speech laws. *See* Paul von Zielbauer, Sahar Nageeb and an Iraqi employee of the N.Y. Times, *Iraqi Journalists Add Laws to Their List of War's Dangers*, N.Y. TIMES, Sept. 29, 2006 at A12. The article, as published, was attributed to an anonymous "Iraqi employee of *The New York Times*." *Id.* According to a source in the article who also "spoke on condition of anonymity," journalists and those with whom they work "are taking fire from every direction. They've got the defamation law hanging over their heads. They've got their political opponents gunning for them." *Id.* The article also noted that news organizations have been asked to sign a pledge to produce news that promotes the government's vision of unity. An Iraqi media official was quoted as saying that the government has the right, "as it combats terrorism, to silence any voice that tries to harm the national unity." *Id.*

The consequences of both whistleblowing and reporting can go even beyond prison and torture. The American public will not soon forget the violent murder of *Wall Street Journal* reporter Daniel Pearl, who was kidnapped in Pakistan on his way to meet a source who had ties to al Qaeda. *See, e.g.,* Free Press News Service, *Abducted Writer Dead; U.S., Pakistan Say Videotape May Show His Execution*, DETROIT FREE PRESS, Feb. 22, 2002 at A1. Pearl's death highlighted for the American public the dangers that journalists and their sources are currently facing abroad. Pearl is not alone; at

least 138 journalists have been killed in the Middle East since 1992. *See* Committee to Protect Journalists, *Journalists killed: Jan. 1, 1992—Aug. 15, 2006*, www.cpj.org/killed/killed_archives/stats.html (accessed Nov. 16, 2006). More journalists have been killed in Iraq in the past 15 years than in any other country. *Id.* As of November 2006, the Committee to Protect Journalists (“CPJ”) reported that 86 journalists of various nationalities have been killed in just Iraq since March 2003. *See* Committee to Protect Journalists, *Iraq: Journalists in Danger – A statistical profile of journalists killed on duty since March 2003*, www.cpj.org/Briefings/Iraq/Iraq_danger.html (accessed Nov. 16, 2006). More than half of these deaths were murders. *Id.*

CPJ does not keep statistics on those who act as the journalists’ sources in foreign countries, but the animosity and violence towards journalists unquestionably extends to their sources as well. When an American journalist cannot offer his or her source a good faith promise of confidentiality in an overseas communication, that source must, in some cases, decide whether or not to gamble his or her life. If a source cannot take that gamble, the journalist must then make a difficult choice – travel overseas and, like Pearl, meet with sources in person, or remain silent and let the story go unwritten.

CONCLUSION

The NSA's warrantless surveillance program is contrary to the United States' democratic commitment to freedom of the press. Given the prohibitive speech laws in foreign countries – most notably the Middle East – and the real dangers that threaten journalists and their sources, American journalists must be able to make good faith promises of confidentiality to their international sources. The NSA's warrantless surveillance program prohibits journalists from making these promises to individuals who could face grave punishment for speaking with members of the news media.

For these and the foregoing reasons, *amicus curiae* urges this court to affirm the district court's judgment insofar as it enjoined the NSA's warrantless wiretapping program.

Respectfully submitted,

Lucy A. Dalglish, Esq.

Counsel of Record

Gregg P. Leslie, Esq.

Elizabeth J. Soja, Esq.

1101 Wilson Blvd., Suite 1100

Arlington, VA 22209-2211

(703) 807-2100

Attorneys for Amicus Curiae

*The Reporters Committee for Freedom
of the Press*

Date: November 17, 2006

CERTIFICATE OF COMPLIANCE WITH
Fed.R.App.P. 32(a)(7)(B)

I hereby certify that pursuant to Fed.R.App.P. 32(a)(7)(B), the following brief is proportionally spaced, has a typeface of 14-point Times New Roman, and contains 3,973 words according to the word count of the word processing system (Microsoft Office Word 2003) used to prepare this brief.

Lucy A. Dalglish

CERTIFICATE OF SERVICE

I certify that on November 17, 2006, an original and six (6) copies of the brief for *Amicus Curiae* The Reporters Committee for Freedom of the Press were sent, via Federal Express, to the Clerk of the United States Court of Appeals for the Sixth Circuit, 540 Potter Stewart U.S. Courthouse, 100 E. Fifth Street, Cincinnati, Ohio 45202-3988, and two (2) copies were sent via United States mail, postage prepaid, to:

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950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

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Douglas Letter
U.S. Department of Justice
douglas.letter@usdoj.gov

Lucy A. Dalglish
Counsel for *Amicus Curiae*