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appointment of the Chief Justice, a member of the Executive Committee of the Judicial Conference of the United States, the governing body of the judiciary.

Amicus Walter Mondale, Vice President of the United States from 1977 through 1981 and a United States Senator from Minnesota from 1964 through 1976, was a member of the Church Committee and served as chairman of the subcommittee charged with drafting the Committee's final report on domestic intelligence activities. As Vice President, he was instrumental in facilitating the drafting and passage of the Foreign Intelligence Surveillance Act.

Amicus Frederick A.O. Schwarz, Jr. served as Chief Counsel to the Church Committee. After his work for the Committee, while back at his law firm, he worked as a part-time consultant for Vice President Mondale on issues such as the drafting(f)21e15Jrm,o(e)-62(t)14(h)-14

to challenge the constitutionality of Section 702 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified at 50 U.S.C. § 1881a *et seq.*), ("FAA"). As the Court of Appeals found, Respondents have a reasonable fear that they will be electronically surveilled and have taken expensive steps, many of which are demanded by their ethical and professional responsibilities, to protect the privacy of their communications.

In this brief, *Amici* show that important constitutional questions would escape judicial review if the Court were to find that these Respondents lacked standing. Respondents challenge the FAA because it allows intelligence agencies to conduct surveillance without the judicial safeguards that Congress, based on the findings of the Church Committee, had considered essential to protect Americans from unlawful and unconstitutional executive abuses. Because the government treats as secret the identity of persons surveilled, if the Court determines that these Respondents do not have standing to bring this challenge, it is unlikely that any plaintiff in the future would have standing to bring such a challenge. As a result, the important constitutional questions raised by the FAA would

investigation of American surveillance operations. The Committee found that intelligence agencies, operating without sufficient oversight or monitoring, repeatedly ran roughshod over Americans' First and Fourth Amendment rights. From the 1930s through the 1970s, Democratic and Republican

For almost thirty years, FISA empowered the Foreign Intelligence Surveillance Court ("FISC"), a special court created by the Act, to prevent intelligence agencies from violating the rights of American citizens or using surveillance for political purposes, while permitting those agencies to obtain information needed to protect the United States. However, in the wake of the September 11, 2001 terrorist attacks, FISA's critical safeguards were first disregarded and then, with the passage of the FAA in 2008, effectively abandoned.

While ostensibly leaving FISA's structure intact, the FAA enacted "additional" procedures to authorize surveillance of non-United States persons

unconstitutional and other unlawful executive conduct. Yet the FAA now immunizes surveillance of Americans' communications into and out of the United States from meaningful judicial review.

Respondents' claims in this lawsuit thus raise questions as to whether electronic surveillance conducted without the safeguards enacted in response to the Church Committee's findings

"should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and-25(1B)-25(e)7(i)3(y36Bk)3125(1B12(r))14(b)-1

those operations were conducted within proper limits.

The Committee adopted its findings and recommendations on a bipartisan basis. Despite the Democrats' large Senate majority, the Committee membership was almost evenly divided: six Democrats and five Republicans. Senator John Tower, the senior Republican, was designated the Committee's Vice Chair, and he presided over Committee meetings when the Chairman, Democratic Senator Frank Church, was absent.

There was bipartisan support for the Book II Report on "Intelligence Activities and the Rights of Americans," which focused on non-military intelligence abuses and their impact on American citizens' rights. Three members, however—Senators Tower, Baker and Goldwater—issued separate statements disagreeing with various aspects of the report. But Senators Tower and Baker agreed with the extensive findings of intelligence abuses documented in the report and both agreed with the requirement for an advance judicial warrant for electronic surveillance. Senator Tower specifically emphasized support for "issuance of a judicial warrant as a condition precedent to electronic surveillance," a measure which "enjoys bi-partisan support in Congress." Senator Tower, Church Committee Book II at 371. Similarly, Senator Baker also expressed his "wholehearted[] support" for a bill requiring a warrant, noting "[t]he abuses of electronic surveillance of the past clearly dictate a need for a system of judicial warrant approval" and that the proposed new system "needs consolidated bi-

partisan support because it represents a significant advance from existing practice." *Id.* at 384.

A bipartisan spirit also characterized FISA's enactment. In the final debate over FISA in the Senate, for example, Senator Jake Garn, the Republican manager of the bill and Vice Chair of the Intelligence Committee, explained:

> [FISA's] sponsorship represents a unique bipartisan collaboration in the interests of national security. . . . This is not a liberal bill. It is not a conservative bill. It is neither a Democratic nor 1ti Tw [(n8(t)-11( )-62(bc)5(u)-

activities of various United States agencies, including the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, the Department of Defense, and the National Security Council, from 1936 through 1976. Church Committee Book II at v-vii, 21. Looking back as far as the administration of Franklin Roosevelt, the Committee found that "intelligence excesses, at home and abroad have been found in every administration." *Id.* at viii. Many presidential administrations collaborated with intelligence agencies to break the law and overextend intelligence operations. *See id.* at v, viii.

The Committee found a pattern of intelligence investigations with vague or imprecisely defined mandates, providing intelligence officials enormous discretion with which to choose their surveillance targets. This broad discretion enabled surveillance of individuals and organizations that presented little or no threat to national security. Often, the targets of wiretapping were chosen based solely on domestic political considerations.

In one of the most notorious examples, the FBI targeted Dr. Martin Luther King, Jr., in an effort to "neutralize" him as a civil rights leader. *Id.* at 11 (internal quotation marks omitted). The FBI used "nearly every intelligence technique at [its] disposal," including electronic surveillance, to obtain information about the "private activities of Dr. King and his advisors" in order to "completely discredit" them. *Id.* (internal quotation marks and citation omitted). For example, the FBI mailed to Dr. King a recording from microphones hidden in his hotel

Information on Americans that was collected in these programs was often wholly irrelevant to the stated purpose of the surveillance order, but it was nonetheless recorded and then disseminated to senior administration officials. This had disturbing implications for separation of powers principles. *See* Church Committee Book II at 161-3. For example, as part of an investigation into "possibly unlawful attempts of representatives of a foreign country to influence congressional sugar quota legislation," a bug was planted in the hotel room of the chairman of the House Agriculture Committee. *Id.* at 200. The Church Committee found that while the "investigation was apparently initiated because of the Government's concern about future relations with the foreign country involved and the possibility of bribery, it [was] clear that the Kennedy Administration was politically interested in the outcome of the sugar quota legislation as well" and obtained "a great deal of potentially useful political information" from this and other surveillance. *Id.* at 200-01.

Church Committee Book II at 104-05.

Of particular relevance here, the Committee determined that in some instances electronic surveillance of foreigners actually had the "primary purpose of intercepting the communications of a particular American citizen with that target" as a way of circumventing "the generally more stringent requirements for surveillances of Americans." Church Committee Book III at 312-13. In at least one instance, the FBI "instituted an electronic surveillance of a foreign target for the *express* purpose of intercepting telephone conversations of an American citizen." Church Committee Book II at 120 (emphasis added).

NSA surveillance programs purportedly designed to target foreigners also swept up "countless" pieces of correspondence "between Americans in the United States and American or foreign parties abroad." *Id*. at 169. Indeed, the NSA defined foreign communications as any

NSA access to all of their incoming and outgoing international telegrams, "including millions of the private communications of Americans." Church Committee Book II at 104. The CIA initiated similar programs to intercept cables and mail entering the United States. *Id.* at 58. In addition, because the CIA could use wiretaps and bugs to listen to *all* communications of their targets, American citizens with whom the foreign targets spoke were also overheard by intelligence agents. Church Committee Book III at 312.

Americans' fundamental rights were further compromised when the CIA and NSA shared information on American citizens that they had collected in their investigations of "foreign" targets with the FBI. *See* Church Committee Book II at 59. For example, in the 1950s, the CIA began supplying the FBI with information it had collected about American citizens, particularly letters "professing 'pro-Communist sympathies'" and information about U.S. peace groups going to Russia. *Id.* at 59. Government officials outside the intelligence community also made requests—which the NSA honored—for specific people, including American citizens, to be targeted for surveillance. *Id.* at 161-62. In one instance, in response to "the specific request of the Bureau of Narcotics and Dangerous Drugs," the NSA monitored thousands of telephone conversations on a telecommunications pipeline between New York City and South America. *Id.* at 162.

The Church Committee concluded that this unethical and illegal conduct had occurred—and continued for decades—because intelligence agencies lacked "appropriate restraints, controls, and prohibitions on intelligence collection." Church Committee Book II at 171. As a result, "distinctions between legitimate targets of investigations and innocent citizens were forgotten" and "the Government's actions were never examined for their effects on the constitutional rights of Americans." *Id.*

The Committee identified three characteristics of United States intelligence that, unchecked, had led to violations of the rights of American citizens: (1) excessive concentration of power in the executive, which "contained the seeds of abuse"; (2) excessive secrecy that shielded "constitutional, legal and moral problems from the scrutiny of all three branches of government [and] from the American people themselves"; and (3) a general sense of lawlessness that pervaded the intelligence field, causing government officials to use national-security rationalizations as a pretext to evade statutory and constitutional limits on non-security related surveillance. *Id.* at 292.

reconcile the interests of personal privacy and national security in a way that is fully consistent with the fundamental principles of the fourth amendment and due process of law." 124 Cong. Rec. 10889-90; *see also Foreign Intelligence Surveillance Act: Hearing on H.R. 7308 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 28, 29 (1976) (explanation of former Deputy Solicitor General Philip Lacovara that FISA's requirement of judicial involvement was necessary both because "the courts, from the earliest time, have been regarded as the bulwarks of liberty against executive excesses," and because executive branch officials would exercise greater self-restraint when forced "to think through the decision that they're making and to put it down on paper and to have to justify it to someone else").

One of the most significant components of FISA's scheme was the creation of the FISC, a special court that served as a check on executive surveillance activities. The government had to apply to the FISC for permission to conduct foreign intelligence surveillance in the United States, including surveillance of communications with American citizens into and out of the United States. 50 U.S.C. §§ 1803, 1804.

Under FISA's procedures, a federal officer seeking authorization to conduct electronic surveillance was required to make a detailed application in writing under oath to a judge of the FISC seeking permission to surveil a specific target. The target of the surveillance must have been either a foreign power or an agent of a foreign power, and

the application was required to identify the specific facilities or places used or about to be used by the foreign power or agent to which surveillance would be directed. *Id.* § 1804(a)(3).

Each application was required to include, *inter alia*, a detailed statement of the facts and circumstances providing: (1) the identity or a description of the specific target of the surveillance and the facilities to be surveilled; (2) the justification for the belief that the target was a foreign power or a foreign power's agent and that the power or agent was using or about to use the targeted facilities or

foreign intelligence surveillance targeting non-United States persons located outside the United States.

These procedures enable the government to circumvent FISA's judicial safeguards, despite the Church Committee's finding that the claim that surveillance was intended to target foreigners was frequently a pretext for unlawful invasions of the privacy of American citizens. *See* pp. 14-16, *supra*.

The FAA abandons FISA's requirement that an individualized order issue after meaningful judicial review of the basis for the government's request. And it circumvents the FISC's power to engage in continued oversight of ongoing surveillance. Instead, the FAA permits the executive branch to initiate a generalized, mass surveillance program for up to one year, encompassing any communications entering or leaving the United States in which one or more unspecified targets are believed to be non-United States persons located outside the United States. In place of the detailed judicial review of the claimed justifications of individual surveillance activities, the FAA limits the FISC to a review that is perfunctory. The FISC does little more than ensure that the government's application recites the required statutory certifications and is designed to meet statutory and constitutional requirements for targeting and minimization procedures. Monitoring of the actual implementation of the minimization procedures is left to the executive branch. 50 U.S.C. § 1881a(a).

Thus, by authorizing mass surveillance and eliminating FISA's judicial safeguards, the FAA

Intelligence to apply for an order authorizing them to conduct surveillance "targeting" unspecified foreign persons located outside the United States for a period of up to one year.

In contrast to FISA, the application need not identify or describe the persons or facilities to be surveilled. *Compare* 50 U.S.C. § 1805(c)(1) *with id.* §§ 1881a(d)(1), (g)(4). Nor is the government required to make the showing required by FISA that the target is a foreign power or agent of a foreign power; instead, it must merely certify that "a significant purpose of the acquisition is to obtain foreign intelligence material" and that information will be obtained "from or with the assistance of an electronic communication service provider." *Id.* §§ 1881a(g)(4), (g)(2)(A)(v); *see also id.* § 1801(e)(2).

An FAA application

certifications, however, do not prohibit surveillance of communications between the foreign targets and United States persons located in the United States.

The application also must state that the surveillance shall be conducted in a manner consistent with the Fourth Amendment of the United States. *Id.* §§ 1881a(b), (g)(2).

None of the FAA's requirements, however, adequately substitutes for the detailed information that was required by FISA and that allowed the FISC to ensure that there was probable cause for government surveillance aimed at individualized, specified targets and facilities.

In *Keith*, this Court wrote that "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." 407 U.S. at 318 (citation omitted). The Church Committee agreed, recognizing that requiring government officials to go before a judge and seek approval was the surest way to guard against abuses. *See* Church Committee Book II at 325. This principle was adopted into law in FISA. *See* 124 Cong. Rec. 10887 ("It is the courts, not the executive, that would ultimately rule on whether the surveillance should occur." (Statement of Sen. Kennedy)). Unlike FISA, the FAA does not require

the government to establish or the FISC to determine that probable cause exists in advance of specific, individualized surveillance of identified targets and facilities. The FAA provides jurisdiction

violation—until that finding is affirmed by the FISA Court of Review.

In his letter transmitting the second volume of the Church Committee's findings, Senator Church stated that the Committee's recommendations were "designed to place intelligence activities within the constitutional scheme for controlling government power." Church Committee Book II at iii. FISA's probable cause review by the FISC, discussed above, provided one such check by the judiciary. Another check is meaningful post

determined to be located in the United States, and a description of procedures developed to assess the extent to which the acquisitions acquire the communications of United States persons. *Id.* § 1881a(l)(3). While these assessments are submitted to the judges of the FISC and to both houses of Congress's intelligence and judiciary committees, it is far from clear what utility they serve.

As the Second Circuit pointed out in its decision below, though the government claims that FISC judges may disapprove of minimization procedures in the future if they are shown to be ineffective, "the government has not asserted, and the statute does not clearly state, that the FISC may rely on these assessments to revoke earlier surveillance authorizations." *Amnesty Int'l*, 638 F.3d at 125. Moreover, there are no provisions in the FAA that permit the FISC to make its own, independent assessment of whether there has been compliance with the minimization procedures. The reports are also insufficient to allow Congress to monitor or guard against overreaching. In a letter sent to the Director of National Intelligence on July 26, 2012, thirteen senators, including members of both the Intelligence and Judiciary committees, wrote that they were "concerned that Congress and the public do not currently have a full understanding of the impact that [the FAA] has had on the privacy of law-abiding Americans," noting that the intelligence community had been unable "to identify the number of people located inside the United States whose communications may have been reviewed" under the FAA. *See* Letter from Ron Wyden, U.S. Senator, et

al., to James R. Clapper, Jr., Dir. of Nat'l Intelligence (July 26, 2012) at 1, *available at* http://www.wyden.senate.gov/download/letter-to-dni.

judicial oversight, intelligence agencies have, since the 9/11 crisis, repeatedly infringed the rights of American citizens.

For example, as part of the Bush Administration's Terrorism Surveillance Program, which purportedly was aimed solely at international communications, the NSA nonetheless engaged in warrantless surveillance of purely domestic communications, as a result of what the agency described as "technical glitches." James Risen & Eric Lichtblau, *Spying Program Snared U.S. Calls*, N.Y. Times, Dec. 20, 2005, at A1.

In 2009, after the passage of the FAA, the press reported that the NSA carried out "significant and systematic" overcollection of domestic communications, due in part to difficulties in distinguishing between intra-American communications and those taking place at least partly overseas. Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*,

by the other branches.

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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