

## 2009 McBaine Moot Court Competition

### INTRODUCTORY MEMO TO COMPETITORS

Welcome to the 2009 McBaine Honors Moot Court Competition! This memo is to get you thinking about this year's problem.

#### Background

This year's problem is *ACLU v. NSA*. This problem was chosen for its engaging legal issues and political themes. We also had to choose a case which would be guaranteed to not come before any of our final round panelists.

After the September 11, 2001, terrorist attacks, President Bush authorized the National Security Agency ("NSA") to begin the Terrorist Surveillance Program ("TSP"). The specifics of the TSP are classified, but what is known is that it permits warrantless domestic eavesdropping if two conditions are met: first, one party to the intercepted communication must be located overseas, and second, the NSA must have a "reasonable basis" to conclude that one of the parties is connected to Al Qaeda or a related organization. In 2005, the New York Times published an article describing the program and suggesting that the TSP might violate the law.

One month after the publication of the New York Times article, the ACLU filed suit in the U.S. District Court for the Eastern District of Michigan on behalf of a group of attorneys, journalists, and academics who were in legitimate communication with foreigners. These plaintiffs believed that their communications had been subject to the TSP. The plaintiffs alleged that the TSP violated the First and Fourth Amendments, separation of powers doctrine, and three statutes, including the Foreign Intelligence Surveillance Act, 50 U.S.C. §1801 *et seq.*

The District Court for the Eastern District of Michigan granted ACLU's motion for partial summary judgment, holding that the TSP violates the Administrative Procedures Act; the Separation of Powers doctrine; the First and Fourth Amendments of the Constitution; and the statutory law. The District Court also granted defendant NSA's motion for summary judgment with respect to the ACLU's data-mining claim. The District Court found that the plaintiffs had standing to pursue their claims. With respect to each of the alleged violations of law, the District Court granted the Plaintiffs motion for partial summary judgments.

The Sixth Circuit Court of Appeals reversed both the standing determination and the FISA determination on a split decision. Judge Batchelder found that Plaintiffs lacked standing; Judge Gibbons concurred in the judgment only, finding that State Secrets Doctrine made the case nonjusticiable; Judge Gilman dissented, finding both that the Plaintiffs have standing and the District Court's decision on the merits should be affirmed.

## Problem

In reality, this case was denied certiorari by the U.S. Supreme Court, and the factual landscape has changed since the Sixth Circuit opinion issued. **However, for the purposes of this Competition, competitors will brief and argue their side *as if* the case was being heard by the U.S. Supreme Court.**

The questions presented are:

1. Whether the Court of Appeals erred in holding that plaintiffs lack standing to challenge the lawfulness of the Terrorist Surveillance Program.
2. Whether the President possesses authority under Article II of the Constitution to engage in the Terrorist Surveillance Program.

These are the only questions before the Court, so please confine your arguments to these questions.

## The Record

The Case Record you have should consist of the following documents, arranged in chronological order:

- A. Complaint (1/17/06)
- B. ACLU statement of Undisputed Facts (3/9/06) and accompanying documents:
  1. Exhibits (3/9/06)
  2. Declaration of Larry Diamond (3/9/06)
  3. Declaration of Nancy Hollander (3/9/06)
  4. Declaration of Tara McKelvey (3/9/06)
  5. Declaration of William Swor (3/9/06)
- C. Declaration of John D. Negroponte, Dir. of National Intelligence (5/27/06)
- D. Declaration of Major General Richard J. Quirk, NSA Signals Intelligence Director (5/27/06)
- E. Declaration of Leonard M. Niehoff (6/5/06)
- F. Declaration of Barnett R. Rubin (6/5/06)
- G. Declaration of Nazih Hassan (6/5/06)
- H. Declaration of Joshua L. Dratel (6/5/06)
- I. Declaration of Mohammed Abdrabboh (6/5/06)
- J. Declaration of Nabid Ayad (6/5/06)
- K. Opinion from the United States District Court, Eastern District of Michigan (8/7/06)
- L. Opinion from the United States Circuit Court of Appeals for the Sixth Circuit (7/6/07)

The Record will be the foundation of your argument and a jumping-off point for additional research. Generally, you are not limited to a closed, specified universe of legal authority, as in some other moot court competitions and in first year written and oral

advocacy. You may cite any relevant legal authority, subject to the requirements of the Honor Code above (i.e. you may not consult or cite to any briefs on the case or any cases raising related issues). You may not read or consult with stories in the popular media about the case if they are dated after the filing of the Court of Appeals' decision (e.g., a New York Times or Washington Post article). You may not read or consult other secondary literature about the case if dated after the filing of the Court of Appeals' decision (e.g., a law review article, case comment, or blog post). Please refer to the Official Rules or ask us if you have any questions.

Please read the certiorari questions carefully. Remember, your briefs are due on Friday, February 27<sup>th</sup>, 2009. Good luck!