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12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN FRANCISCO DIVISION**

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16  
17 IN RE NATIONAL SECURITY AGENCY )  
TELECOMMUNICATIONS RECORDS )  
18 LITIGATION )

**No. M:06-cv-01791-VRW**  
**EXHIBIT 1 TO SUPPLEMENTAL**  
**MEMORANDUM IN SUPPORT OF**  
**DEFENDANTS' MOTION TO**  
**DISMISS**

19 \_\_\_\_\_ )  
20 This Document Relates Solely To: )

**COMPLAINT**

21 *Guzzi v. Obama et al.* )  
(Case No. 06-cv-06225-VRW) )  
22 \_\_\_\_\_ )

Chief Judge Vaughn R. Walker

**ORIGINAL**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA**

FILED IN CLERK'S OFFICE  
JAN 20 2006

MARK E. GUZZI,

Plaintiff

v.

PRESIDENT GEORGE W. BUSH,  
LTG KEITH B. ALEXANDER,  
NATIONAL SECURITY AGENCY

Defendants

Civil Action No.

**1 06 - CV - 0136**

**JEC**

JAN 20 2006  
by: [Signature]  
Deputy Clerk

**COMPLAINT**

**I. INTRODUCTION**

This action concerns a matter of significant national interest. Specifically, how certain actions taken by President George W. Bush in the pursuit of the global war on terror threaten the constitutional principles that make this great nation worthy of defense. In his rightful zeal to prevent another terrorist attack on our nation President Bush has, unfortunately, exceeded the executive powers granted to the Office of the President by Article II of the Constitution of the United States. In so exceeding those executive powers, President Bush has encroached upon the legislative powers that are constitutionally bestowed upon the Congress of the United States and abandoned his constitutional duty to ensure that the laws of that co-equal branch of government are faithfully executed. President Bush is thus fundamentally altering the democratic foundations upon which this great nation stands and is intruding upon the most basic of civil liberties that are afforded to all American citizens.

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Deputy Clerk

This action does not concern nor does it question the ends sought to be achieved by President Bush in his pursuit of the global war on terror. For the ends are unquestionably valid and fall well within the purview of the Office of the President. Our national security is clearly and continually threatened by an unconventional, brutal, and relentless enemy. However, the means chosen to achieve the ends, if allowed to stand, will forever diminish what our founding fathers so gallantly fought to establish and what all Americans so readily cherish.

It is with the foregoing mindset that this action is proceeding.

## **II. PARTIES**

1. Plaintiff is Mark E. Guzzi, a citizen of the United States of America who resides at 271 Providence Oaks Circle, Alpharetta, Georgia.

2. Defendant George W. Bush (“Defendant Bush”) is President of the United States of America whose principle residence and office is located at 1600 Pennsylvania Avenue, Washington, D.C.

3. Defendant LTG Keith B. Alexander (“Defendant Alexander”) is Director of the National Security Agency whose principle office is located at 9800 Savage Road, Fort Mead, Maryland.

4. Defendant National Security Agency (“Defendant NSA”) is an agency of the United States whose headquarters is located at 9800 Savage Road, Fort Mead Maryland.

## **III. JURISDICTION AND VENUE**

5 This Court has original jurisdiction over this matter pursuant to 28 U.S.C. §1331 in that this action involves questions arising under Articles I and II of the

Constitution of the United States, the First and Fourth Amendments to the Constitution of the United States, the Foreign Intelligence Surveillance Act, 50 U.S.C. §1801, *et seq.*, (hereinafter referred to as “FISA”), 42 U.S.C. §1983, and the Declaratory Judgment Act 28 U.S.C. §§2201 and 2202.

6. Venue is proper in this District pursuant to 28 U.S.C. §1391(e) because Plaintiff resides in this District and Defendant Bush and Defendant Alexander are officers or employees of the United States or an agency thereof and are acting in their official capacities or under cover of legal authority and Defendant NSA is an agency of the United States.

#### **IV. RELEVANT CONSTITUTIONAL, STATUTORY AND CONGRESSIONAL RESOLUTION PROVISIONS**

7. Article I, Sec. 1 of the Constitution of the United States vests “[a]ll legislative Powers . . . in [the] Congress of the United States.”

8. Article I, Sec. 3, Cl. 2 of the Constitution of the United States recognizes the power of the President to veto bills that have been presented to the President after the bill has passed the House of Representatives and the Senate.

9. Article I, Sec. 8, Cl. 18 of the Constitution of the United States authorizes Congress “to make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

10. Article II, Sec. I, Cl. 1 of the Constitution of the United States vests the executive power “in [the] President of the United States of America.”

11. Article II, Sec. 3 of the Constitution of the United States authorizes the President to recommend to Congress “such Measures as he shall judge necessary and expedient.”

12. Article II, Sec. 3 of the Constitution of the United States stating that the President “shall take Care that the Laws be faithfully executed.”

13. The First Amendment to the Constitution of the United States provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble.”

14. The Fourth Amendment to the Constitution of the United States provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

15. In 1978 and pursuant to its Article I, Sec. 8, Cl. 18 powers, Congress enacted FISA. FISA is “the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted.” 18 U.S.C. §2511(2)(f). FISA further provides that no one may engage in electronic surveillance “except as authorized by statute.” 18 U.S.C. §1809(a)(1).

16. In October of 2002, Congress issued a Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq in which Congress authorized the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against

the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council Resolutions regarding Iraq.”

#### **V. RELEVANT ACTIVITIES OF DEFENDANTS**

17. Defendant Bush issued an Executive Order (hereinafter referred to as the “Executive Order”) shortly after the terrorist attacks of September 11, 2001, authorizing Defendant Alexander and Defendant NSA to engage in the warrantless wiretapping of international telephone, cell phone, email, and internet based conversations of American citizens.

18. Defendant Bush and/or members of his administration have admitted that Defendant Bush issued the aforementioned Executive Order, that Defendants Alexander and NSA have conducted warrantless wiretapping of American citizens pursuant to said Executive Order, and that they have every intention of continuing such warrantless wiretapping under authority of the Executive Order.

19. Defendant Bush and/or members of his administration have admitted that the warrantless wiretapping that is authorized and ongoing pursuant to the Executive Order does not comply with the procedural requirements set forth in FISA as that statute relates to the warrantless wiretapping of an American citizen’s international telephone, cell phone, email, and internet based communications.

20. Defendant Bush and/or members of his administration have stated that FISA does not provide Defendant Bush and his administration with the ability to move swiftly or secretly enough to detect and prevent possible terrorist attacks as a justification for circumventing FISA’s procedural requirements for wiretapping the international telephone, cell phone, email, and internet based communications of American citizens.

21. Defendant Bush and/or members of his administration have stated that such warrantless wiretaps are limited to telephone, cell phone, email, and internet based conversations where at least one party to the conversation is outside of the territorial limits of the United States for purposes of, including but not limited to, discovering potential terrorist plots, conspiracies and targets.

22. Defendant Bush and/or members of his administration have further stated that the warrantless wiretapping program that has been initiated by the Executive Order is limited to conversations where the administration “reasonably believes” that at least one party to the conversation is a member of al Qaeda, affiliated with al Qaeda, is member of an organization affiliated with al Qaeda, or is working in support of al Qaeda.

23. Defendant Bush and/or members of his administration have refused and continue to refuse to discuss any further details of the warrantless wiretapping program authorized by the Executive Order on the basis that the program is “highly classified” thereby rendering their unsubstantiated assertions concerning the limited scope of the program wholly unverifiable by any independent and objective person or entity outside of the executive branch of the federal government as is required by FISA.

24. Defendant Bush’s power, if any, to issue the Executive Order must stem from one of two sources; from the Constitution itself or from an act of Congress.

25. Defendant Bush and/or members of his administration have not and cannot point to any constitutional provision that expressly authorizes the President of the United States to order the warrantless wiretapping of international telephone, cell phone, email, and internet based communications of American citizens.

26. Defendant Bush and/or members of his administration have asserted that Defendant Bush has the “inherent authority” as commander in chief under the Constitution to engage in the warrantless wiretapping of international telephone, cell phone, email, and internet based communications of American citizens.

27. The Executive Order cannot be sustained as an exercise of the President’s military power as Commander in Chief of the Armed Forces for two reasons. First, the Executive Order is not directed to the Armed Forces of the United States. By his own admission the Executive Order is directed to Defendant NSA which is not part of the Armed Forces of the United States. Second, it cannot be said, with faithfulness to our constitutional system of government, that the Commander in Chief of the Armed Forces has the ultimate power to unilaterally disregard a duly enacted statute of the Congress. This is especially evident considering that Defendant Bush has a constitutional duty to see that the laws are faithfully executed.

28. Nor can the Executive Order be sustained because of the several constitutional provisions that grant executive power to the President. The aforementioned duty of the President to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits a President’s functions in the lawmaking process to recommending laws he thinks prudent and vetoing laws he thinks bad. *See* U.S. Const. Art. II, Sec. 3, and U.S. Const. Art. I, Sec. 7, Cl. 3. respectively.

29. In issuing the Executive Order Defendant Bush abandoned his constitutional duty under Article II, Sec. 3 to “take Care that the Laws be faithfully executed” and has unlawfully encroached upon the legislative powers of Congress.



## VI. RELEVANT CONGRESSIONAL ACTIVITIES

30. In 1978 Congress enacted FISA in response to a United States Supreme Court decision that held the warrantless wiretapping in intelligence investigations of domestic security threats was a violation of the Fourth Amendment, *see United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972), and a report of the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities that concluded that the executive branch of government had engaged in warrantless wiretapping of numerous citizens of the United States who were not suspected of any criminal activity. *See* S.Rep. No. 94-755, 94<sup>th</sup> Cong. 2d Sess. (1976) (“Select Committee Report”)

31. The Senate Judiciary states that “[t]he basis for this legislation is the understanding – concurred in by the Attorney General – that even if the President has an ‘inherent’ Constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance. S.Rep. 95-604(I), reprinted at 1978 U.S.C.C.A.N. at 3927.

32. In setting forth FISA’s procedural requirements for obtaining a warrant for purposes of engaging in electronic surveillance for national security purposes Congress was attempting to balance the executive’s need for information regarding threats to our national security with the constitutional rights of American citizens to engage in free speech and association and be free from unreasonable searches and seizures.

33. In striking that balance Congress, through FISA, established the Foreign Intelligence Surveillance Court (“FISA Court”) that is now composed of eleven federal

district court judges that are empowered to grant or deny government applications for electronic surveillance warrants in foreign intelligence investigations. 50 U.S.C. §1803(a).

34. The FISA Court is authorized to issue warrants for electronic surveillance if the government demonstrates, among other things, probable cause to believe that “the target of the electronic surveillance is a foreign power or an agent of a foreign power” and that “each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used by a foreign power or an agent of a foreign power.” 50 U.S.C. §1805(a)(3).

35. However, FISA also recognizes that there may be times where the government will not have sufficient advance notice of activities that may threaten national security to apply for a warrant in the FISA Court in order to perform the necessary electronic surveillance. Thus, FISA permits, in emergency situations, the Attorney General to authorize warrantless surveillance “if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such surveillance that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this subchapter is made to that judge as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance. 50 U.S.C. §1805(f).

36. FISA goes even further by authorizing the Attorney General to authorize warrantless electronic surveillance for up to one year if the Attorney General certifies under oath and in writing that the surveillance is directed solely at the property or means of communication used exclusively by a foreign power, that “there is no substantial

likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party,” and that there a minimization procedures in place. 50 U.S.C. §1802.

37. Defendants have not and cannot point to any statutory enactment that expressly or impliedly authorizes Defendants to absolve themselves of complying with the requirements of FISA.

38. In October of 2002, Congress also passed a Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq.

39. Pursuant to this Joint Resolution Congress authorized the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council Resolutions regarding Iraq.

40. There is nothing in the Joint Resolution nor its legislative history that either expressly or impliedly empowers the President of the United States to authorize an agency of the United States to engage in the surreptitious electronic surveillance of the international communications of American citizens.

## **VII. RELEVANT ACTIVITIES OF PLAINTIFF**

41. As a lifelong citizen of the United States of America Plaintiff has exercised his First Amendment rights freely and without fear of unconstitutional government intrusion or interference for a vast majority of his lifetime.

42. In exercising said rights Plaintiff has forged relationships with persons of foreign origin both within and beyond the confines of the territorial limits of the United States.

43. Several of the aforementioned relationships have been forged with persons living outside of the territorial United States who are of middle-eastern decent or who live in the Middle East.

44. In the course of said relationships Plaintiff has engaged in numerous international telephone, cell phone, email, and internet based conversations that both predate and postdate the terrorist attacks that occurred within the United States on September 11, 2001.

45. During the course of said conversations Plaintiff and his associates have freely engaged in dialogue concerning terrorist attacks, known terrorist figures, and our beliefs and opinions concerning the validity and/or effectiveness of terroristic methods, philosophies, strategies, recruitment, targets and other related subjects.

46. During the course of said conversations Plaintiff and his associates have also freely engaged in dialogue concerning Defendant's Bush's response to the terrorist attacks of September 11, 2001, the introduction of American military forces into Afghanistan, and the wisdom or lack thereof in Defendant Bush invading Iraq without the approval and support of the international community via a United Nations resolution, and other related topics.

47. During the course of said conversations Plaintiff and/or his associates have voiced criticism of Defendant Bush in his handling of the global war on terror, the

introduction of American military forces in Iraq and the continuing military campaign in that country.

48. Plaintiff learned of Defendant Bush's Executive Order and the program it authorized through an article in the December 16, 2005 edition of the New York Times.

49. Since learning of the Executive Order and the carrying out of that order by Defendant Alexander and Defendant NSA Plaintiff has been forced to choose to either continue engaging in his First Amendment rights to freedom of speech and association and risk an unconstitutional infringement of his Fourth Amendment right to privacy or of foregoing his First Amendment rights to freedom of speech and association in order to avoid a violation of his Fourth Amendment right to privacy by the surreptitious wiretapping and recording of his conversations by members of the executive branch of government.

50. Since learning of the Executive Order Plaintiff fears that if he continues to engage in the aforementioned unfettered dialogue concerning terrorists, terrorist philosophies, terrorist methodologies, terrorist targets and the American responses thereto he has already become or will become a target of the program authorized by the Executive Order in violation of his Fourth Amendment rights.

51. Plaintiff has therefore been forced to refrain from communicating freely and candidly in his international communications about topics that are likely to trigger electronic monitoring in violation of his First Amendment rights.

52. Plaintiff is therefore being forced to suffer immediate, ongoing, and irreparable injury.

## **VIII. CAUSES OF ACTION**

53. The Executive Order and the program it authorizes violate Plaintiff's First Amendment rights to free speech and association.

54. The Executive Order and the program it authorizes violate Plaintiff's Fourth Amendment right to be free from unreasonable searches and seizures.

55. The Executive Order and the program it authorizes violate the constitutional principle of separation of powers in that Defendant Bush exceeded his Article II powers and in doing so has encroached upon Congress's Article I legislative powers.

56. The Executive Order and the program it authorizes are conclusive evidence that Defendant Bush has abrogated his constitutional duty to ensure that the laws are faithfully executed.

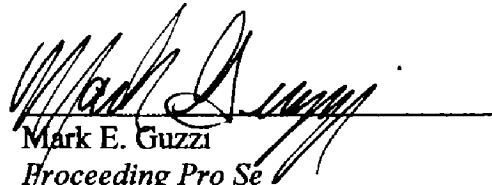
## **XI. PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare that the Executive Order violates Plaintiff's First and Fourth Amendment rights;
2. Declare that Defendant Bush exceeded his executive powers under Article II of the Constitution of the United States in issuing the Executive Order;
3. Declare that in exceeding his executive powers under Article II of the Constitution of the United States Defendant Bush has unconstitutionally encroached upon the legislative powers that have been reserved to Congress pursuant to Article I of the Constitution of the United States;

4. Declare that Defendant Bush violated FISA in issuing the Executive Order;
5. Declare that Defendant Bush abandoned his constitutional duty under Article II, Sec. 3 of the Constitution of the United States to take care that the laws be faithfully executed;
6. Permanently enjoin all defendants from implementing the Executive Order;
7. Award Plaintiff fees and costs pursuant to 28 U.S.C. §2412; and
8. Grant such other relief as the Court deems just and proper.

Respectfully submitted,



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Dated: January 20, 2006