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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CAROLYN JEWEL, TASH HEPTING, GREGORY HICKS, ERIK KNUTZEN and JOICE WALTON, on behalf of themselves and all others similarly situated, Plaintiffs, v. NATIONAL SECURITY AGENCY, *et al.*, Defendants.	CASE NO. 08-CV-4373-JSW **MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE PEOPLE FOR THE AMERCIAN WAY FOUNDATION IN SUPPORT OF PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT** Summary Judgment Hearing Date: December 14, 2012 Time: 9:00 a.m. Courtroom 11, 19th Floor The Honorable Jeffrey S. White

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT prospective amicus curiae People For the American Way Foundation ("PFAWF") respectfully requests the Court's leave to file the attached **BRIEF OF AMICUS CURIAE PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.** PFAWF requests leave to file the attached brief on behalf of its members to highlight for the Court the historical context and legislative history of the Foreign Intelligence Surveillance Act of 1978 ("FISA") as they relate to the issues raised in this case.

I. STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

People For the American Way Foundation is a non-partisan, non-profit citizen organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide, including more than 374,000 in the Ninth Circuit, with more than 242,000 in the State of California alone. One of PFAWF's primary missions is to educate the public on the vital importance of our nation's tradition of liberty and freedom, and to defend that tradition through research, advocacy, outreach, and litigation. This case is of particular concern to PFAWF and its members because of their longstanding concern for and defense of civil liberties and concern over the breadth of the electronic surveillance that has been alleged. Because of its extensive experience with these matters, including specific policy initiatives addressing legal and policy issues arising from the government's domestic surveillance programs, PFAWF is in a position to aid this Court with background on issues related to this case.

II. STANDARD FOR MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

"District courts frequently welcome *amicus* briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties

are able to provide.'" *Sonoma Falls Developers v. Nevada Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003) (quoting *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)). "Whether to allow Amici to file a brief is solely within the Court's discretion, and generally courts have 'exercised great liberality…'" *Woodfin Suite Hotels v. City of Emeryville*, No. C 06-1254 SBA, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007) (quoting *In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal. 1991)). "There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful or otherwise desirable to the court." *Id.* (quotations omitted).

III. THE COURT SHOULD GRANT PFAWF'S MOTION FOR LEAVE TO FILE AS AMICUS CURIAE

PFAWF requests leave to file this brief on behalf of its members to highlight for the Court FISA's historical context and Congress's intent as expressed at the time of the legislation's drafting and passage. Independent of this case, PFAWF has conducted extensive research on FISA and undertaken a public education initiative addressing legal and policy issues raised by the government's recently disclosed surveillance programs. In light of the important interests at stake and PFAWF's experience with the topics at issue in the case, PFAWF seeks to aid the Court in its construction of FISA by providing vital historical and legislative background and analysis relevant to FISA's scope and applicability.

The Court's decision on the proper construction of FISA—and particularly on the interpretation of 50 U.S.C. § 1806(f) and the applicability of the state secrets doctrine—will have "drastic ramifications beyond the parties directly involved in this litigation." *See Sonoma Falls Developers*, 272 F. Supp. 2d at 925. The Court's construction of FISA will determine whether Defendants can use the state secrets privilege to avoid both *ex ante* and *ex post* judicial review of the domestic surveillance conduct at issue in this case, which is allegedly ongoing and implicates the rights of millions of Americans. The prospective effects of the Court's decision are similarly broad—simply put, the Court's construction of FISA has the potential to determine the scale,

nature, and boundaries of the Executive's domestic surveillance programs for years to come, and to fundamentally alter the balance of power between the branches of government.

PFAWF believes that an understanding of FISA's historical and legislative background will provide the Court with useful context as it determines the statute's proper construction. FISA was the result of years of deliberation and negotiations between Congress and two presidential administrations regarding the proper balance between civil liberties and the need for secrecy in intelligence-gathering. The law reflects the considered judgment of the political branches regarding issues of significant importance both to the national security and to the statutory and constitutional rights of Americans. PFAWF's brief provides this background for the Court.

The attached amicus brief conforms to the length and formatting requirements for briefs filed before this Court and the length requirements for amicus briefs under the Federal Rules of Appellate Procedure ("FRAP"). Civil L.R. 7-4(e); Fed. R. App. P. 29(d) & 31 (a)(1)(7) (setting a 7,000 word limit). PFAWF notified Defendants of the scope and subject matter of the amicus brief on October 3, 2012, sixteen days before Defendants' filing deadline on October 19, 2012. Provided the Court grants PFAWF's motion for leave to file, Defendants will have 7 days from the filing of the amicus brief to address the issues therein in their Reply. This 7-day period is both reasonable and consistent with the amount of time an appellant would be accorded to submit a Reply after the filing of an amicus brief in support of an appellee under the FRAP. *See* Fed. R. App. P. 29 & 31.[1]

PFAWF has also followed FRAP Rule 29's guidance by requesting consent to file this brief from both parties. *See* Fed. R. App. P. 29(a). Plaintiffs have consented to this filing. Defendants have stated that they "do not take a position" on whether leave should be granted;

[1] The Federal Rules of Appellate Procedure permit an amicus brief supporting an appellee to be filed up to 7 days after the appellee's initial brief, Fed. R. App. P. 29, and require the appellant to file its reply brief 7 days later, or 14 days after the appellee's brief, Fed. R. App. P. 31. The 7-day window and opportunity to respond in a Reply provided to Defendants by this filing is therefore reasonable and consistent with the Federal Rules of Appellate Procedure.

nevertheless, their overall position remains unclear.[2]

CONCLUSION

This Court should grant PFAWF's motion for leave to file a brief as amicus curiae.

DATE: October 12, 2012

Respectfully submitted,

s/ Babak Siavoshy
Babak Siavoshy

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Counsel for Amicus Curiae

[2] Counsel for amicus curiae contacted Defendants' counsel by email and voicemail on October 3, 2012, sixteen days before Defendants' filing deadline. The email explained the issues PFAWF intended to cover in its amicus brief and the date PFAWF proposed to file the brief, and requested Defendants' consent. Defendants' counsel did not respond to these messages. Counsel for amicus curiae contacted Defendants' counsel again, by email, on October 10. On October 11, one day before this filing, Defendants' counsel responded as follows:

> Thanks for your email. You should advise the district court as follows: "The Government Defendants do not take a position on whether leave should be granted to file an amicus brief on the Section 1806(f) issue and leave it for the district court to decide whether it wishes to receive amicus briefing on this issue, although the Government believes that filing an amicus brief a week before its reply deadline in this case is not appropriate."

Email of Anthony J. Coppolino, received October 11, 2012. As discussed above, the 7-day window provided to Defendants is consistent with typical timelines for the filing of amicus briefs under the FRAP. Notwithstanding this, PFAFW would support a reasonable request by Defendants for additional time or space to respond to its amicus brief.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CAROLYN JEWEL, TASH HEPTING, GREGORY HICKS, ERIK KNUTZEN and JOICE WALTON, on behalf of themselves and all others similarly situated, Plaintiffs, v. NATIONAL SECURITY AGENCY, *et al*., Defendants.	CASE NO. 08-CV-4373-JSW **[PROPOSED] ORDER**

The Motion of Amici Curiae People For the American Way for leave to file the **BRIEF OF AMICUS CURIAE PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** is hereby GRANTED.

IT IS SO ORDERED.

Dated: October ___, 2012

The Honorable Jeffrey S. White

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CAROLYN JEWEL, TASH HEPTING, GREGORY HICKS, ERIK KNUTZEN and JOICE WALTON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, *et al.*,

Defendants.

CASE NO. 08-CV-4373-JSW

BRIEF OF AMICUS CURIAE PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary Judgment Hearing
Date: December 14, 2012
Time: 9:00 a.m.
Courtroom 11, 19th Floor
The Honorable Jeffrey S. White

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INTEREST OF AMICUS CURIAE

People For the American Way Foundation ("PFAWF") is a non-partisan, non-profit citizen organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members and activists nationwide, including more than 374,000 in the Ninth Circuit and more than 242,000 in the State of California alone. One of PFAWF's primary missions is to educate the public on the vital importance of our nation's tradition of liberty and freedom, and to defend that tradition through research, advocacy, outreach, and litigation.

This case is of particular concern to PFAWF and its members, given the organization's longstanding concern for and defense of civil liberties and the breadth of the electronic surveillance that has been alleged. Independent of this litigation, PFAWF has conducted extensive research on the Foreign Intelligence Surveillance Act of 1978 ("FISA") and undertaken a public education initiative addressing legal and policy issues raised by the government's recently disclosed surveillance programs. PFAWF is filing this brief on behalf of its members to highlight for the Court FISA's historical context and Congress's intent as expressed at the time of the legislation's drafting and passage.

No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae, or its counsel, made a monetary contribution to the preparation or submission of this brief.[1]

[1] This brief was prepared with the help of University of California, Berkeley, School of Law student Jose de Wit, acting under the supervision of Babak Siavoshy (264182) and Jennifer Urban (209845).

SUMMARY OF THE ARGUMENT

The government's invocation of the state secrets privilege, in response to allegations that it unlawfully surveilled the domestic communications of millions of Americans, subverts the balance between civil liberties and the need for secrecy in litigation over government surveillance that Congress carefully crafted in FISA. Accepting the government's state secrets claim would replace the legislative compromise embodied in FISA with a system of unrestrained administrative discretion that would let the Executive single-handedly dictate when and how it may subject the public to surveillance in the name of national security.

Congress passed FISA in response to well-documented civil liberties abuses by administrations throughout the post-World War II era, including domestic surveillance practices that closely resemble the government's alleged conduct in this case. FISA prescribes the "exclusive means" by which the Executive can monitor domestic electronic communications for foreign intelligence purposes, and also the exclusive means by which courts should address government national security concerns in litigation regarding that surveillance.

FISA's legislative history demonstrates that Congress deliberated the precise legal question before this Court—whether the need for secrecy regarding intelligence-gathering should exempt the Executive's domestic electronic surveillance from judicial review—and decided that it should not. In its deliberations, Congress rejected arguments that the Executive's concerns over secrecy trump the need to protect civil liberties altogether, and crafted in section 1806(f) a set of exclusive procedures by which courts should review sensitive evidence. Congress carefully balanced these procedures to safeguard individuals' important constitutional and statutory rights while ensuring that the Executive can protect sensitive national security information.

If, as Plaintiffs claim, Defendants avoided FISA's *ex ante* judicial review requirements, and the government is now allowed to avoid *ex post* review by quashing this litigation via the state secrets privilege, Defendants will have avoided any judicial review whatsoever—directly contravening Congress's intent and our constitutional system of checks and balances. As FISA co-sponsor Senator Charles Mathias, Jr. argued during a 1974 hearing, judicial oversight of electronic

surveillance is a critical part of any free society:

> If the executive branch believes that the Congress and the courts cannot be trusted to act responsibly on all matters of public policy including those loosely called "national security," then for all practical purposes, the constitutional system of government has been rejected and replaced by an executive national security state.
>
> If it is the view of the Justice Department and the executive branch that the Congress and the courts are not equipped or competent to handle the problems of national security then ways must be devised to make them competent and means provided to equip them to handle such matters; the alternative is authoritarian rule.

Electronic Surveillance for National Security Purposes: Hearings on S. 2820, S.3440, and S.4062 Before the Subcomms. on Criminal Laws and Procedures and Constitutional Rights of the S. Comm. on the Judiciary, 93rd Cong. 255 (1974) (hereafter "*1974 S. Judiciary Comm. Hearings*").

Congress rejected such an outcome in passing FISA. Defendants' state secrets claim would upend FISA's comprehensive system of regulation and oversight, which the Senate Judiciary Committee called "a fair and just balance between protection of national security and protection of personal liberties." S. Rep. No. 95-604, at 7 (1977).

BACKGROUND

A. Before FISA, The Executive Branch Engaged In Widespread Abuse Of Its Power To Conduct Electronic Surveillance In The Name Of National Security.

In 1978, Congress enacted FISA in response to "revelations that warrantless electronic surveillance in the name of national security ha[d] been seriously abused." S. Rep. No. 95-604, at 7. Those abuses resulted partly from Congress's decision to exempt foreign intelligence and national security surveillance from domestic electronic surveillance legislation that it enacted in 1968.[2] *See*, *e.g.*, S. Rep. No. 94-1161, at 15 (1977) (explaining that exempting "national security wiretaps" from Title III's electronic surveillance regulations had prompted abuses and that "checks upon the exercise of these clandestine methods were clearly necessary").

The misconduct came to light in the mid-1970s, when a Congressional task force known as the Church Committee produced a series of investigative reports that documented a staggering

[2] Those statutes were the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 212-223 (codified as amended at 18 U.S.C. §§ 2510-2520 (2006)) ("Title III"); *see also* 18 U.S.C. § 2511(3) (1968); FISA, Pub. L. No. 95-511, § 201(c), 97 Stat. 1783, 1797); S. Rep. No. 95-604, at 7.

amount of unlawful surveillance carried out in the name of national security. The Church Committee concluded that, in the years before FISA, "surveillance was often conducted by illegal or improper means" and focused on an over-inclusive set of targets, including "a United States Congressman, Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security." S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities ("Church Committee"), *Book II: Intelligence Activities and the Rights of Americans*, S. Rep. No. 94-755, at 12 (1976) (hereafter "*Book II*").[3] Senator Kennedy explained at the time that "[e]ach [of the government's initiatives] was undertaken under the catch-all phrase of 'national security.'" *Warrantless Wiretapping and Electronic Surveillance - 1974: J. Hearings Before the Subcomm. on Administrative Practice and Procedure and the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary and the Subcomm. on Surveillance of the S. Comm. on Foreign Relations*, 93rd Cong. 2 (1974).

The Church Committee devoted substantial attention to "Project SHAMROCK," a surveillance program that closely resembles the activities alleged in this case. For 30 years, SHAMROCK operated a dragnet targeting international telegrams sent by United States citizens. Church Committee, *Book III: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans*, S. Rep. No. 94-755, at 765-66 (1976). As the committee noted at the time, "SHAMROCK was probably the largest governmental interception program affecting Americans ever undertaken. Although the total number of telegrams read during its course is not available, NSA estimates that in the last two or three years of SHAMROCK's existence, about 150,000 telegrams per month were reviewed by NSA analysts." *Id.*

The Church Committee concluded that "the massive record of intelligence abuses over the years" had "undermined the constitutional rights of citizens … primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been

[3] The targets of surveillance also included a sitting Supreme Court Justice, *Book II* at 10, members of the Civil Rights Movement, including Martin Luther King, Jr., *id.* at 286, and various "teachers, writers, and publications." *Id.* at 17.

applied." *Book II* at 291. The Committee accordingly urged "fundamental reform," recommending legislation that would "cover[] the field by … provid[ing] the exclusive legal authority for domestic security activities," including "warrantless electronic surveillance." *Id.* at 299. The legislation would "make clear to the Executive branch that [Congress] will not condone, and does not accept, any theory of inherent or implied authority to violate the Constitution, the proposed new charters, or any other statutes." *Id.* at 298. The political branches enacted FISA directly in response to the Church Committee's findings and recommendations.

B. FISA Was Passed To Create A Comprehensive System Of Regulation And Oversight That Would End Executive Abuse Of Warrantless Surveillance.

FISA was born from the vigorous national debate on the limits of the government's surveillance power following the Church Committee's findings. The bill, negotiated by the Ford and Carter administrations[4] and signed by President Carter, "represent[ed] a recognition by both the Executive branch and Congress that the statutory rule of law must prevail in the area of foreign intelligence surveillance." S. Rep. No. 95-604, at 7.[5] Congress crafted FISA's regulatory

[4] In March 1976, after several meetings between Congressional leaders and President Ford and his administration, the President asked Congress to enact the electronic-surveillance legislation that eventually became FISA. *Communication From the President of the United States Transmitting a Draft of Proposed Legislation To Amend Title 18, United States Code, To Authorize Applications For a Court Order Approving the Use of Electronic Surveillance To Obtain Foreign Intelligence Information*, H.R. Doc. No. 94-422 (1976) ("The enactment of this bill will ensure that the government will be able to collect necessary national intelligence. At the same time, it will provide major assurance to the public that electronic surveillance for foreign intelligence purposes can and will occur only when reasonably justified in circumstances demonstrating an overriding national interest, and that they will be conducted according to standards and procedures that protect against the possibilities of abuse."). Upon signing FISA, President Carter reemphasized the balance the statute struck between national security and civil liberties. *Statement of President Jimmy Carter on Signing S. 1566 Into Law* (Oct. 5, 1978)) ("[O]ne of the most difficult tasks in a free society like our own is the correlation between adequate intelligence to guarantee our Nation's security on the one hand, and the preservation of basic human rights on the other. This is a difficult balance to strike, but the act I am signing today strikes it … It provides enough secrecy to ensure that intelligence relating to national security can be securely acquired, while permitting review by the courts and Congress to safeguard the rights of Americans and others.").

[5] FISA also responded to the Supreme Court's call for Congress to establish "reasonable standards" for national security surveillance in the *Keith* case, *United States v. U.S. Dist. Court*, 407 U.S. 297, 302, 322 (1972), which unanimously upheld Fourth Amendment requirements (including prior judicial approval) in cases of domestic national security surveillance. *See*, *e.g.*, S. Rep. No. 95-701,

framework over several years, beginning with hearings in April 1974 and concluding with a signed statute in October 1978—an extensive legislative process that generated thousands of pages of transcripts, reports, case law analysis, and other historical materials.

The resulting procedural and substantive provisions reflected Congress's effort to "strike a fair and just balance between protecting national security and safeguarding personal liberties." S. Rep. No. 94-1035, at 9 (1976). Among other things, FISA established an *ex ante* mechanism by which the Executive branch, before engaging in domestic surveillance, must seek authorization from a special court charged with finding probable cause that the target is an agent of a foreign power as defined by the statute. *See* 50 U.S.C. §§ 1804-05. Crucially, FISA also establishes a system of *ex post* court review of Executive conduct by establishing criminal and civil liability for surveillance that willfully violates the statute, *id.* at §§ 1809-10,[6] and secure procedures that courts should follow in such cases to evaluate evidence that could endanger national security if disclosed, *id.* at §1806(f).

Since enacting FISA in 1978, Congress has several times amended the sections of the United States Code where FISA was codified.[7] *See* Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (amending 18 U.S.C. §§ 2510-22); PATRIOT Act, Pub. L. No. 107-56, § 206-08, 115 Stat. 272, 282-283 (2001) (amending 50 U.S.C. §§ 1803-5, 1823); Protect America Act, Pub. L. No. 110-55, 121 Stat. 552 (2007) (amending 50 U.S.C. § 1801); FISA Amendments Act, Pub. L. 110-261, 122 Stat. 2436 (2008). Throughout, the basic framework that Congress created in FISA—procedures for judicial approval of prospective surveillance, subsequent court review of its legality, and criminal and civil liability—survived intact, and remains today. *See* 50 U.S.C. §§ 1804-06, 1809-10.

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at 21 (explaining that, under FISA, foreign intelligence surveillance would comply with Fourth Amendment requirements under *Keith*).

[6] More recently, Congress explicitly authorized civil actions against the United States for willful violations of FISA and other surveillance statutes. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act"), 18 U.S.C § 2712 (2007) .

[7] FISA was codified at 50 U.S.C §§ 1801-11, 18 U.S.C. §§ 2511(2), 2511 (3), 2518(1), 2518(4), 2518(9)-(10), and 2519(3). Pub. L. No. 95-511 (1978).

ARGUMENT

I. FISA'S MANDATORY SYSTEM OF JUDICIAL OVERSIGHT APPLIES NOTWITHSTANDING THE GOVERNMENT'S INVOCATION OF STATE SECRETS.

FISA's language and legislative history demonstrates that Congress deliberated the precise legal question before this Court—whether the need for secrecy regarding intelligence-gathering should exempt the Executive's domestic electronic surveillance from judicial review—and decided that it should not. Instead, Congress crafted in section 1806(f) a set of exclusive procedures governing district court judges' evaluation of sensitive evidence in surveillance cases. *See* 50 U.S.C. § 1806(f). Those procedures, which preserve judicial review of the surveillance conduct but allow the government to trigger *in camera* and *ex parte* procedures to protect sensitive materials, reflect the political branches' careful effort to balance the national security interest in protecting sensitive information with the need to safeguard important constitutional and statutory privacy rights.

The Court should preserve the legislative compromise that Congress and the Executive reached through FISA and reject the government's attempt to use the state secrets privilege to circumvent FISA's secure, mandatory procedures. Judicial review over government surveillance conduct is particularly important here, where Defendants allegedly circumvented FISA's pre-surveillance authorization procedures altogether, Plaintiffs' Complaint ¶ 39, ECF No. 1, and where a court has upheld Plaintiffs' standing to sue the government, *Jewel v. NSA*, 673 F.3d 902, 914 (9th Cir. 2011) (reversing dismissal of Plaintiffs' claims for lack of standing).

A. Congress Specifically Rejected Both Arguments That Courts Lack Competence To Review Electronic Surveillance And Statutory Schemes That Would Have Eliminated Meaningful Judicial Review.

FISA's legislative history demonstrates that Congress intentionally gave the judiciary a central role in preventing Executive branch abuses of electronic surveillance. From the earliest hearings on legislative proposals, Congress assessed the practical and legal viability of judicial review over foreign intelligence-gathering. *See*, *e.g.*, *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632, The Foreign Intelligence*

Surveillance Act of 1977, Before the Subcomm. on Legis. of the H. Permanent Select Comm. on Intelligence, 95th Cong. 3 (1978) (hereafter "*1978 H.R. Intelligence Comm. Hearings*"); *1974 S. Judiciary Comm. Hearings*, at 40; *Foreign Intelligence Surveillance Act of 1977: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong. 26 (1977) (hereafter "*1977 S. Judiciary Comm. Hearings*"). After extensive deliberation and debate, Congress concluded that protecting civil liberties requires checking documented Executive overreaching though comprehensive judicial oversight of national-security electronic surveillance.

In the course of drafting FISA, several House and Senate committees heard testimony that courts cannot effectively review foreign-intelligence surveillance because judges purportedly lack experience in the field and might leak sensitive information. *See, e.g.,* H.R. Rep. No. 95-1283(I), at 25 (1978); *1974 S. Judiciary Comm. Hearings*, at 255. Relatedly, some legislators suggested a statutory system functionally equivalent to the pre-FISA regime of unchecked Executive authority—and to the regime the government proposes now. *See, e.g., 1978 H.R. Intelligence Comm. Hearings*, at 3 (statement of Rep. McClory, introducing a competing bill which "retains with the Executive—where it should be—the authority to approve national security foreign intelligence surveillance").

In enacting FISA, a strong majority in Congress, along with the top executive officials who negotiated the bill, rejected that position.[8] The law provides for court review of government electronic surveillance both before surveillance takes place, *see* 50 U.S.C. § 1804-05, and to determine its legality afterward, *see id.* §§ 1806(f), 1809-10; *see also*, 18 U.S.C. § 2712. The Act's legislative history makes clear that these judicial review provisions were intended to impose meaningful limits on the Executive's ability to conduct unchecked electronic surveillance in the

[8] The House voted 226-176 to approve FISA and the Senate approved it by a voice vote. 124 *Cong. Rec.* 36,414, 36,417 (1978). The Senate had passed the pre-Conference bill 95-1. 124 *Cong. Rec.* 34,845 (1978). Legislators and executive officials alike explicitly rejected concerns about the courts' competence to handle national security evidence. S. Rep. No. 94-1035, at 79 ("We believe that these same issues—secrecy and emergency, judicial competence and purpose—do not call for any different result in the case of foreign intelligence collection through electronic surveillance."); *1977 S. Judiciary Comm. Hearings*, at 26 (Attorney General Bell asserting that "[t]he most leakproof branch of the Government is the judiciary . . . I have seen intelligence matters in the courts. . . I have great confidence in the courts," and Senator Orrin Hatch replying, "I do also.").

name of national security. *See* S. Rep. No. 94-1035, at 11 ("[T]he past record establishes clearly that the executive branch cannot be the sole or final arbiter of when such proper circumstances exist."), 20 (noting that FISA "is based on the premise (supported by history), that executive self-restraint, in the area of national security electronic surveillance, is neither feasible nor wise").

Although Congress has revised FISA several times since enacting it in 1978, it has always left intact FISA's basic framework—judicial approval of prospective surveillance, subsequent judicial review of its legality, and criminal and civil liability for surveillance outside the statute. *See* 50 U.S.C. §§ 1804-06, 1809-10. Accordingly, FISA reflects Congress's judgment that courts must play a central role in assessing the legality of government electronic surveillance.

B. Congress Adopted FISA As The Exclusive Means Of Conducting Electronic Surveillance.

In enacting FISA, Congress intended for FISA's judicial oversight mechanisms to provide the legitimate—and exclusive—framework by which the Executive branch may conduct electronic surveillance for foreign intelligence purposes. S. Rep. No. 95-604, at 15 (FISA crafted to "provide the secure framework by which the Executive branch may conduct legitimate electronic surveillance for foreign intelligence purposes").

Indeed, the Joint House and Senate Conference Committee rejected narrow language that would have made FISA merely the "exclusive *statutory* means by which [foreign intelligence] electronic surveillance" could be conducted (emphasis added), instead accepting the Senate's broader requirement that FISA established the "exclusive means" for such surveillance. H.R. Conf. Rep. No. 95-1720, at 35 (1978) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) ("[w]hen a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb")).

Congress's most recent revision to FISA, the FISA Amendments Act of 2008, puts to rest the question of whether FISA's framework of judicial authorization and review applies to all Executive efforts to intercept domestic electronic communications under the pretense of intelligence gathering. The Act makes clear that the statute's procedures "shall be the exclusive means by which electronic surveillance and the interception of domestic wire, oral, or electronic

communications may be conducted." 50 U.S.C. § 1812(a)).[9]

C. Section 1806(f) Establishes The Exclusive Framework For Ensuring The Security Of Sensitive Information In Cases Implicating Electronic Surveillance.

FISA precludes the government's argument that it can avoid all judicial review of its domestic surveillance activities by invoking the state secrets privilege to protect the national security interests at stake. Congress already included procedures in FISA to protect national security, and established those procedures as the exclusive framework for reviewing sensitive materials in litigation pertaining to government surveillance. *See* 50 U.S.C. § 1806(f).[10]

FISA section 1806(f)—which applies "notwithstanding any other law"—is the "exclusive" procedure for protecting sensitive surveillance materials in suits against the government under FISA and other surveillance statutes. *Id.*; 18 U.S.C. § 2712(b)(4) (designating 1806(f) as "the exclusive means by which materials [designated as sensitive by the government] shall be reviewed" in suits against the United States under FISA, the Wiretap Act and the Electronic Privacy Protection Act).[11] Section 1806(f) allows the government to trigger[12] secure review

[9] FISA leaves open only one other avenue by which the Executive may intercept domestic electronic communications – where Congress has provided "express statutory authorization" to do so. *Id.* at § 1812(b) . The government has made no arguments under this provision.

[10] Section 1806(f) requires that

> the United States district court … shall, notwithstanding any other law, [and provided] the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

50 U.S.C. § 1806(f) . The first half of the provision is discussed separately in Part D.(1), below.

[11] 18 U.S.C. § 2712 is discussed in greater detail in Part D(2), below.

[12] The provision is triggered, initially, when the Attorney General files an affidavit notifying the court that certain information in a legal dispute is "related to" government electronic surveillance and that "disclosure or an adversary hearing" regarding that information could "harm the national security of the United States." 50 U.S.C. § 1806(f).

procedures anytime it believes litigation would reveal sensitive surveillance materials and harm national security. *Id.* Once triggered, section 1806(f)'s secure procedures protect the national security interest by mandating *ex parte* and *in camera* review, by a federal district court, of the sensitive surveillance materials. They further protect national security by giving the government the opportunity during that review to persuade the court to withhold the materials from the aggrieved party. *Id.*

Invoking section 1806(f) does not permit the government to avoid all review of the legality of its surveillance conduct, however. The provision requires the court to review any "application, order, and such other materials relating to the surveillance" *in camera* and *ex parte* "to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." *Id*. If necessary to make an accurate determination of the legality of the surveillance, the court "may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance." *Id.* These provisions reflect Congress's attempt to "strike a reasonable balance between an entirely *in camera* proceeding . . . and mandatory disclosure [to the aggrieved party], which might occasionally result in the wholesale revelation of sensitive foreign intelligence information." S. Rep. No. 95-604, at 58.

Section 1806(f) therefore represents the political branches' balanced legislative solution to the national security problems raised by litigation over unlawful government surveillance. This solution leaves no room for the government's blanket invocation of a common law doctrine to shield its conduct from review. Indeed, the Senate Judiciary Committee explained that litigants should not be allowed to evade section 1806(f)'s procedures by invoking other laws or jurisprudential doctrines:

> The Committee wishes to make clear that the procedures set out in [the subsection ultimately codified at section 1806(f)] apply whatever the underlying rule or statute referred to in [a party's] motion. This is necessary to prevent the carefully drawn procedures in [the same subsection] from being bypassed by the inventive litigant using a new statute, rule or judicial construction.

S. Rep. No. 95-604, at 57; *accord* S. Rep. No. 95-701, at 63 ("When the procedure is so triggered, however, the Government *must* make available to the court a copy of the court order and

accompanying application upon which the surveillance was based." (emphasis added)); *accord* H.R. Rep. No. 95-1283(I), at 91 (when the legality of surveillance is at issue, "it is this procedure 'notwithstanding any other law' that must be used to resolve the question").

The government nevertheless argues that it may invoke state secrets to avoid any court review—even *in camera*, *ex parte* review—of an otherwise justiciable claim regarding its surveillance conduct. The government's argument contradicts the plain language and legislative history of section 1806(f). In giving the Executive the extraordinary power to compel a court to review evidence relevant to litigants' claims *in camera* and *ex parte*, Congress precluded the Executive from using national security as a ground to avoid altogether any judicial review of a claim against it.

D. Section 1806(f)'s Mandatory Procedures Apply Both In Criminal Proceedings And In Civil Suits Against The Government.

The government argues that section 1806(f)'s procedures apply only in the context of motions to suppress evidence used in criminal proceedings, and therefore do not apply to the civil suit against the government in this case. *See generally* Defs.' Mot. to Dismiss and for Summ. J. 33-47, ECF No. 102 ("Defs.' Brf."). To the contrary, section 1806(f)'s plain language, statutory context, legislative history, and historical background demonstrate that the provision's mandatory procedures and review requirements apply equally in civil suits against the government.

1. Section 1806(f)'s Plain Language Extends Its Procedures To Civil Suits Against the Government.

A straightforward reading of section 1806(f)'s plain language extends its mandatory procedures to civil proceedings. Section 1806(f) applies in three different circumstances, the third of which (emphasized below) is relevant here:

- "Whenever a court or other authority is notified pursuant to subsection (c) or (d) of Section 1806," which govern the federal or a state government's use of surveillance evidence in a judicial or administrative proceeding.

- Whenever "a motion is made pursuant to subsection (e) of Section 1806," which is triggered when a person against whom the government intends to use surveillance evidence moves to suppress that evidence; or

- ***"Whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any state," to --***
  - ***"discover or obtain applications or orders or other materials relating to electronic surveillance***, or
  - To discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under [FISA]..."

50 U.S.C. § 1806(f) (emphasis added).

The italicized language extends section 1806(f)'s procedures to "any motion or request" made by an aggrieved person "pursuant to any other statute or rule of the United States or any State" to "discover or obtain applications or orders or other materials relating to electronic surveillance." *Id*. The plain meaning of this provision applies section 1806(f)'s requirements—i.e., that the court review (*ex parte* and *in camera*) the sensitive materials and determine the legality of the government's surveillance conduct—to motions or requests filed in an otherwise justiciable civil suit against the government, including, for example, a "discovery" motion that might implicate sensitive surveillance information. *See* 50 U.S.C. § 1806(f). As with the rest of section 1806(f), these requirements apply notwithstanding "any other law," *id.*, including the government's invocation of the state secrets privilege.

2. Congress Specifically Incorporated Section 1806(f)'s Procedures In Civil Liability Provisions Regarding Unlawful Government Surveillance.

The straightforward reading of 1806(f)'s plain language is consistent with the fact that Congress specifically designated section 1806(f) as the "exclusive means" by which courts should review sensitive evidence in electronic surveillance-related civil actions against the United States. *See* 18 U.S.C. § 2712 (creating civil liability against the United States and incorporating section 1806(f) as the "the exclusive means by which materials [governed by that section] shall be reviewed").

Congress in 2001 supplemented FISA by creating a cause of action against the United States for willful violations of the Electronic Communications Privacy Act ("ECPA"), the Wiretap Act, and various subsections of FISA. *See* 18 U.S.C. § 2712 (enacted as part of the PATRIOT

Act). Section 2712 created an avenue for "any person" aggrieved by the willful, unlawful collection, use or dissemination of information obtained in violation of these three statutes to seek money damages against the United States. *Id.* Congress understood that section 2712's expanded liability provisions would create new opportunities for litigants to unearth sensitive surveillance information. Accordingly, Congress explicitly provided in section 2712 that "notwithstanding any other provision of law," section 1806(f)'s secure procedures "shall be the exclusive means" by which courts should evaluate sensitive evidence in surveillance-related civil suits against the United States government arising under FISA section 1806, ECPA and the Wiretap Act. *See* 18 U.S.C. § 2712(b)(4).

The government's argument that section 1806(f) applies only to criminal cases belies that statutory language. Had Congress intended for section 1806(f)'s procedures to apply only to criminal evidence-suppression motions, it would not have explicitly designated those procedures as the "exclusive means" by which courts should handle sensitive evidence when plaintiffs seek to vindicate the privacy rights that Congress incorporated in section 2712.

3. FISA's Legislative History Confirms That Section 1806(f) Applies In Civil Proceedings Against The Government.

FISA's legislative history similarly shows that Congress intended for section 1806(f) to apply in civil proceedings.

The House Judiciary Committee expressly envisioned that section 1806(f) would apply in civil suits. In discussing the provision that became section 1806(f), the House Committee stated that

> [a] decision of illegality [of government surveillance] may not always arise in the context of suppression; rather **it may, for example, arise incident to a discovery motion in a civil trial**.

H.R. Rep. No. 95-1283(I), at 91 (emphasis added). To account for the procedural differences between criminal proceedings (where the government can avoid disclosure simply by not using surveillance materials to prosecute) and civil trials (where discovery rules could force the government to disclose surveillance materials), the House Committee devised different procedures to apply in each context. *Id.* at 90-93. The first set of procedures, which the House Committee codified as subsection (f), would have applied in "those rare situations in which the Government

states it will use evidence obtained or derived from electronic surveillance," *id.* at 90., such as a suppression motion in criminal proceedings.

The House Committee's second set of procedures—which it codified as subsection (g)—would apply whenever the Attorney General certified that *"no information obtained or derived from an electronic surveillance has been or is to be used by the Government*" in the litigation—i.e., situations where a criminal suppression motion would be unnecessary. *Id.* at 91 (emphasis added). This, the House explained, included situations where a party filed a "motion or request" to "discover or obtain" surveillance materials before "any court or other authority of the United States or a state" under "any law," and those materials would implicate sensitive national security information. *Id*. at 10, 90-91.[13] The House's version of subsection (g) therefore envisioned that *in camera* and *ex parte* review could "arise incident to a discovery motion in a civil trial." *Id.* at 91.

The Senate Committees, on the other hand, did not adopt a two-procedure model, but instead proposed a single-procedure model with language similar to the House's bill. As the government points out, the Senate committees focused much of their discussion on safeguarding defendants' rights through criminal suppression proceedings. Defs.' Brf. at 38-42; S. Rep. No. 95-701, at 58; S. Rep. No. 95-604, at 57-59.

In drafting the final language of section 1806(f), however, the Joint House and Senate Conference Committee reconciled the two houses' approaches to FISA's judicial review procedures.[14] The Committee's compromise between those two approaches adopted the Senate's

[13] Under subsection (g), civil disputes implicating electronic surveillance materials would have been considered *in camera* and *ex parte* by a "Special Court of Appeals." The court would have disclosed, at its discretion, "materials relating to the surveillance" to the aggrieved party only if necessary to afford due process to that party. H.R. Rep. No. 95-1283(I), at 90-93.

[14] The Conference Committee described the difference between the House and Senate bills:

> The Senate bill provided a single procedure for determining the legality of electronic surveillance in a subsequent in camera and ex parte proceeding … [by contrast] the House amendments provided two separate procedures of determining the legality of electronic surveillance … In criminal cases, there would be an in camera proceeding … In civil suits, there would be an in camera and ex parte proceeding before a court of appeals; and the court would disclose… to the aggrieved person or his attorney materials relating to the surveillance only if necessary to afford due process to the aggrieved person.

single-procedure model while, crucially, retaining key language from the House bill's subsection (g) that extended *ex post* court review procedures to civil actions.[15]

Declaring that *"[t]he conferees agree that an in camera and ex parte proceeding is appropriate for determining the lawfulness of electronic surveillance* in both criminal and civil cases," the Conference Committee adopted section 1806(f), as the single, exclusive framework for handling sensitive evidence in *all* cases involving electronic foreign intelligence-gathering. H.R. Conf. Rep. No. 95-1720, at 32 (emphasis added). Shortly after the Committee reconciled FISA's judicial review provisions, President Carter signed the statute into law. 124 *Cong. Rec.* 38,086 (1978).

The legislative history therefore demonstrates that Congress expressly considered whether FISA's judicial review procedures should apply to civil suits. Congress determined that they should, and established section 1806(f)'s procedures as the exclusive means courts should follow for "determinin[g] the lawfulness of electronic surveillance in both criminal and civil cases." H.R. Conf. Rep. No. 95-1720, at 31.

4. FISA's Historical Background Confirms That Section 1806(f) Applies In Civil Proceedings Against The Government.

Finally, the historical circumstances that led to FISA's enactment further support that Congress meant section 1806(f)'s mandatory procedures to apply to civil suits against the

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H.R. Conf. Rep. No. 95-1720, at 31-32.

[15] Indeed, the relevant portions of section 1806(f) closely mirror the House bill's subsection (g), which expressly applied to civil proceedings:

> **Relevant language in section 1806(f):** [*in camera* and *ex parte* judicial review triggered] "…whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance…"
>
> **House Report's subsection (g):** [*in camera* and *ex parte* judicial review triggered] "…whenever any motion or request is made pursuant to any statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to surveillance…"

H.R. Rep. No. 85-1283(I), at 10; 50 U.S.C. § 1806(f).

government. Few of the surveillance-related violations detailed in the Church Committee's report that led to FISA's enactment involved the use of surveillance evidence in criminal proceedings. *See Book II* at 10 (surveillance of Justice Douglas), 286 (surveillance of Civil Rights Movement members), 12 (surveillance of journalists, politicians, and "numerous individuals and groups who engaged in no criminal activity"); *also c.f.* H.R. Rep. No. 95-1283(I), at 24 n. 20 ("[I]n the area of foreign intelligence surveillances … prosecution is rarely the result."). Had Congress limited section 1806(f) to criminal suppression motions, as the government argues, it would have created in FISA a drastically inadequate response to the types of surveillance abuses that motivated Congress to enact the statute.

Indeed, the Church Committee anticipated both that civil liability would be used to enforce FISA, and that secure procedures would be required to resolve disputes involving sensitive surveillance materials. The Committee recommended that

> courts [should] be able to fashion discovery procedures, including inspection of materials in chambers, and to issue orders as the interests of justice require, to allow plaintiffs with substantial claims to uncover enough factual materials to argue their case, while protecting the secrecy of governmental information in which there is a legitimate security interest.

Book II at 337. Given that Congress adopted FISA in direct response to the Church Committee's report, it is unsurprising that these procedures closely resemble those Congress adopted in section 1806(f).

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The government's contention that it can avoid judicial review of its surveillance conduct through a blanket (and unreviewable) invocation of state secrets is contrary to FISA's plain meaning and its legislative history—both of which make clear that FISA's system of mandatory, secure, *in camera* and *ex parte* judicial review, codified in section 1806(f), provides the exclusive means for resolving civil disputes involving sensitive national security materials. The Court should give effect to FISA's procedural and substantive requirements, which together reflect Congress's effort to "strike a fair and just balance between protecting national security and safeguarding personal liberties." S. Rep. No. 94-1035, at 9.

II. ALLOWING THE GOVERNMENT TO AVOID JUDICIAL REVIEW WOULD UPEND THE POLITICAL BRANCHES' CAREFUL BALANCING OF NATIONAL SECURITY AND CIVIL LIBERTIES INTERESTS IN FISA.

FISA's requirement that courts employ secure procedures to review all national security-related electronic surveillance, both before and after it takes place, represents the policy judgment that the Executive and both houses of Congress reached together after four years of debate. In arguing that the state secrets doctrine immunizes the Executive from *any* judicial oversight whatsoever, the government effectively asks this Court to rebalance the political branches' carefully considered—and legislatively enacted—policy decision.

As the House Permanent Select Committee on Intelligence remarked just before Congress passed FISA,

> the decision as to the standards governing when and how foreign intelligence electronic surveillance should be conducted is and should be a political decision, in the best sense of the term, because it involves the weighing of important public policy concerns—civil liberties and the national security. Such a political decision is one properly made by the political branches of Government together, not adopted by one branch on its own and with no regard for the other. Under our Constitution legislation is the embodiment of such political decisions.

H.R. Rep. No. 95-1283(I), at 21-22 (emphasis added).

Our constitutional system of checks and balances exists precisely to prevent the Executive from unilaterally disregarding the types of inherently political, historically significant, legislative balancing that FISA embodies. *See Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring) ("[W]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter … Courts can sustain exclusive Presidential control in such a case only by disabling Congress from acting upon the subject").

These checks and balances continue to apply in a time of war, and even with respect to the government's war powers, which are "powers granted jointly to the President and Congress," *Hamdan v. Rumsfeld*, 548 U.S. 577, 591 (2006); *id.* at 593 n. 23. ("Whether or not the President has independent power … he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers"); *see also Little v. Barreme*, 6 U.S. 170, 178-79

(1804) (the President did not have the power to authorize searches and seizures by naval vessels during wartime beyond specific statutory limitations imposed by Congress).

Thus, where the political branches have made a considered policy choice and prescribed not just the availability of a cause of action but also the precise procedures by which litigation should transpire, as they did in FISA, a common law rule cannot be used to circumvent that legislative judgment. *United States v. Texas*, 507 U.S. 529, 534 (1993) ("Statutes which invade the common law … are to be read with a presumption favoring the retention of long-established and familiar principles, *except* when a statutory purpose to the contrary is evident.") (emphasis added); *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution."); *Kasza*, 133 F.3d 1159, 1165 (9th Cir. 1998) (describing the state secrets doctrine as a common law evidentiary privilege).

In enacting FISA, the political branches collaborated through the legislative process to carefully weigh two important, competing policy interests, and created procedures to protect both. Our Constitution demands that any readjustment to FISA's framework—whether to better preserve government secrets or to better protect civil liberties—must likewise begin with the political branches, through the legislative process. It is neither for the Executive alone, nor for this Court, to engage in policy-making that belongs in the democratic process.

CONCLUSION

Accordingly, People For the American Way Foundation respectfully urges this Court to grant Plaintiffs' Motion for Partial Summary Judgment.

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Respectfully submitted,

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