No National Security Information Has Ever Leaked from Federal Courts in More Than 50 years of FISA and States Secrets Cases; Congress Can Trust Them Fully in the Pending Cases

Federal courts have for more than half a century heard extremely sensitive, classified national security evidence behind secured doors ("*ex parte, in camera*") in scores of cases. *Neither AT&T nor any other proponent of blanket amnesty has presented evidence of a single leak attributable to the courts in all that time.* Nonetheless, proponents of blanket retroactive amnesty for telephone companies who compromised the privacy of tens of millions of Americans insinuate that courts simply cannot be trusted to hear the cases brought by such plaintiffs without risking the nation's security. For the multiple reasons detailed here, that claim is simply false:

- **No Discovery of Sensitive Intelligence Sources or Methods Is Relevant to the Key Questions Before the Court in the Pending Cases…... *None*.**

  The central question in the pending litigation is whether the carriers provided customer communications and records to the government without the proper legal authority. What the government did with the information afterwards, is simply not relevant to the legal claims. Suggestions that permitting the litigation to go forward threatens the national security are simply unsupported by the facts of the case and its evidentiary requirements which, of course, will be regulated by a judge empowered to prevent disclosure of any and all sensitive material – even to the plaintiffs – and to review sensitive evidence in a secure facility.

- **The Government Already Has Formally Admitted that Key Evidence is Not a State Secret.**

  The government has admitted that the key evidence against AT&T, for example, is not a state secret. That evidence – AT&T documents brought forward by whistleblower Mark Klein showing that AT&T had installed technology in its San Francisco and other offices that provided the government wholesale with full-content copies of millions of its customers' domestic phone calls and e-mails – was reviewed early in the litigation by the Department of Justice and determined not to be, *or to have ever been*, classified material. Subsequently, in an unsuccessful bid to shield them as alleged trade secrets, AT&T verified to the court that Mr. Klein's documents are genuine.

- **Courts Are Adept at Securely Employing FISA's National Security Evidence Procedures.**

  With only basic research, EFF has located 21 cases decided in the past twenty five years in which U.S. District Courts and Courts of Appeal used the national security evidence procedures prescribed in FISA at 50 U.S.C. §1806(f) to review sensitive evidence, all without a leak. These cases include many in which, pursuant to FISA, regular federal courts throughout the nation[1] reviewed evidence and affidavits submitted to the FISA Court prior to the issuance of a FISA warrant.

- **The States Secrets Privilege Has Been Unfailingly Honored by Courts for a Half Century.**

  Similarly, and with equally basic research, EFF has identified 48 cases in which the states secrets privilege was invoked and evidence was handled by federal judges … once again without a single leak. Commencing with the earliest days of the state secrets privilege's first judicial recognition in 1956[2], these actions include cases in which the court reviewed the details of classified intelligence operations, including the names of agents and methods of intelligence gathering.[3] They also include several cases in which warrantless surveillance was alleged.[4]

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Notes

1 Without regard to geography or political ideology, and without exception, federal courts across the country have unfailingly safeguarded sensitive evidence in FISA cases. *See, e.g.:*

District Court Cases

California: *U.S. v. Ott*, 637 F.Supp. 62 (E.D.Cal. 1986)

Florida: *U.S. v. Hassoun*, 2007 WL 1068127 (S.D.Fla. 2007)

Illinois: *Global Relief Foundation, Inc. v. O'Neill*, 207 F.Supp.2d 779 (N.D. Ill. 2002)

New York: *U.S. v. Sattar*, 2003 WL 22137012 (S.D.N.Y. 2003)

Pennsylvania: *U.S. v. Spanjol*, 720 F.Supp. 55 (E.D.Pa. 1989)

Texas: *U.S. v. Holy Land Fndtn. for Relief and Development*, 2007 WL 2011319 (N.D. Tex. 2007)

Virginia: *U.S. v. Hawamda*, 1989 WL 235836 (E.D.Va. 1989)

Circuit Courts of Appeal Cases

U.S. v. Damrah, 412 F.3d 618 (6th Cir. 2005)

In re Grand Jury Proceedings of Special April 2002 Grand Jury, 347 F.3d 197 (7th Cir. 2003)

U.S. v. Squillacote, 221 F.3d 542 (4th Cir. 2000)

U.S. v. Berberian, 851 F.2d 236 (9th Cir. 1988)

U.S. v. Badia, 827 F.2d 1458 (11th Cir. 1987)

2 *Petrowicz v. Holland*, 142 F.Supp. 369 (E.D. Pa. 1956)

3 Sources and Methods Cases

ACLU v. Brown, 609 F.2d 277 (7th Cir. 1979) (identities of intelligence agents, details of worldwide counterintelligence research file system, and documents specifying standards for domestic intelligence gathering)

United States v. Koreh, 144 F.R.D. 218 (D.N.J. 1992) (details and identities of U.S. intelligence sources)

4 Warrantless Surveillance Evidence Cases

Spock v. United States, 464 F.Supp. 510 (S.D.N.Y. 1978);