

No. 02-001

IN THE UNITED STATES FOREIGN INTELLIGENCE  
SURVEILLANCE COURT OF REVIEW

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IN RE APPEAL FROM JULY 19, 2002 OPINION  
OF THE UNITED STATES FOREIGN INTELLIGENCE  
SURVEILLANCE COURT

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF  
IN SUPPORT OF AFFIRMANCE

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The American Civil Liberties Union, the Center for Democracy and Technology, the Center for National Security Studies, the Electronic Frontier Foundation, the Electronic Privacy Information Center, and the Open Society Institute respectfully request leave to file the attached Brief *amici curiae*.<sup>1</sup> This brief, which urges affirmance, is submitted on behalf of various public interest organizations concerned about unnecessary and unconstitutional government encroachment on privacy and First Amendment rights.

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<sup>1</sup> In the absence of any specific rules for the filing of amicus briefs before the Foreign Intelligence Surveillance Court of Review, counsel for *amici* have relied on the formatting requirements of the Federal Rules of Appellate Procedure.

The American Civil Liberties Union (“ACLU”) is a nationwide, non-profit, non-partisan organization with almost 300,000 members dedicated to the constitutional principles of liberty and equality. The ACLU’s activities include assessing the likely impact of federal anti-terrorism legislation on individual rights, including privacy and First Amendment rights. The ACLU has recently been at the forefront of numerous cases involving individual rights and national security.

The Center for Democracy and Technology (“CDT”) is a non-profit public interest organization focused on privacy and other civil liberties issues affecting the Internet and other communications networks. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT’s activities include the review of federal anti-terrorism activities and policies to determine their possible impacts on communications privacy. CDT frequently presents testimony before Congress and administrative bodies, publishes educational materials, and participates in litigation addressing constitutional issues.

The Center for National Security Studies (the “Center”) is a non-profit, non-governmental civil liberties organization founded in 1974 to ensure that civil liberties are not eroded in the name of national security.

The Center has worked to protect the Fourth Amendment rights of Americans to be free of unreasonable searches and seizures, especially when conducted in the name of national security, for more than twenty-five years. The Center, then affiliated with the American Civil Liberties Union, was asked to testify before Congress when the Foreign Intelligence Surveillance Act (“FISA”) was first enacted, and it has testified before Congress on several occasions since then. The Center has represented individuals challenging the lawfulness of electronic surveillance under FISA and filed *amicus* briefs in other cases concerning FISA.

The Electronic Privacy Information Center (“EPIC”) is a non-profit, public interest research organization focusing on privacy and civil liberties in the fields of telecommunications, electronic information and computer networks. EPIC’s activities include the review of federal investigative activities and policies to determine their possible impacts on privacy and constitutional rights. EPIC frequently presents testimony before Congress and administrative bodies, publishes educational materials, and participates in litigation addressing significant and precedent-setting issues.

The Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. With over 6,000 active members, EFF actively encourages and

challenges industry, government and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF is based in San Francisco. EFF has members all over the United States and maintains one of the most-linked-to Web sites (<http://www.eff.org>) in the world.

The Open Society Institute (“OSI”) is a non-profit, private operating and grant-making foundation that has as its general mission the transformation of closed societies into open ones and the protection and expansion of the values of existing open societies. In order to preserve open society values in the United States and to enhance the capacity of the US to credibly and effectively promote open society values in other countries, OSI accords high priority to advocacy against violations of civil liberties in the United States. It has opposed secrecy, arbitrary action and violations of due process by the US government, particularly in instances where national security is claimed as an authority or justification for violations of privacy and due process rights in the United States.

This case raises issues of extraordinary public importance concerning the Government’s power to engage in highly intrusive electronic surveillance. The Foreign Intelligence Surveillance Act (“FISA”) authorizes the Government to conduct surveillance without complying with the

ordinary requirements of the Fourth Amendment. Traditionally, FISA's departures from ordinary Fourth Amendment principles have been defended on the grounds that FISA surveillance is concerned with gathering foreign intelligence information and not with gathering evidence of criminal conduct. The present case, however, arises from the Government's attempt dramatically to expand FISA's ambit by interpreting certain amendments to FISA effected by the USA PATRIOT Act ("Patriot Act") as having authorized the use of FISA even for surveillance whose primary or exclusive purpose is to gather evidence of criminal conduct. The Government's interpretation of the changes effected by the Patriot Act would jeopardize individual privacy interests, chill protected speech, and effectively institutionalize an end-run around the Fourth Amendment.

The issues presented in this case are of unusual public concern. They have been widely reported in the national press. *See, e.g.*, Editorial, *A Court's Troubling Secrecy*, St. Petersburg Times, Sept. 15, 2002; Editorial, *Justice in the Shadows*, New York Times, Sept. 12, 2002; Jesse J. Holland, *Secret court is asked to release wiretap ruling*, Chicago Tribune, Sept. 11, 2002; Philip Shenon, *Secret Court Weighs Wiretaps*, New York Times, Sept. 10, 2002; Vanessa Blum, *Spy Court Steps Onto Foreign Soil*, Legal Times, Sept. 4, 2002; Editorial, *The Limits of Trust*, Washington Post, Aug. 23 &

Aug. 26, 2002. Further, as this Court is aware, the Senate Judiciary Committee held a hearing on these same issues on September 10, 2002. *The USA PATRIOT Act In Practice: Shedding Light on the FISA Process: Hearing Before United States Senate Committee on the Judiciary*, 107<sup>th</sup> Cong. (Sept. 10, 2002). Virtually everyone who participated in that hearing emphasized the significance of the issues presented in this case.

Participation of *amici curiae* is of particular consequence in this case because proceedings in the Foreign Intelligence Surveillance Court (“FISC”) system are conducted ex parte. As is evident from the Government’s brief, this case is not merely an appeal from the effective denial of a surveillance warrant. Rather, it involves significant constitutional questions whose resolution will affect every FISA surveillance application that the Government presents in the future. Accordingly, it is critical that the Court hear not only from the Government but from those who would protect constitutional rights against Government encroachment.

Counsel for the Government has consented to *amici*’s filing of this brief.

For the reasons stated above, counsel request leave of this Court to file the attached brief *amici curiae*.

Respectfully submitted,

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ANN BEESON  
JAMEEL JAFFER  
STEVEN R. SHAPIRO  
American Civil Liberties Union  
125 Broad Street  
New York, NY 10004  
Telephone: (212) 549-2601  
Facsimile: (212) 549-2651

JAMES X. DEMPSEY  
Center for Democracy and Technology  
1634 Eye Street, NW, Suite 1100  
Washington, DC 20006

KATE MARTIN  
Center for National Security Studies  
1120 19th St., N.W., 8th floor  
Washington, DC 20036

DAVID L. SOBEL  
Electronic Privacy Information Center  
1718 Connecticut Ave., N.W., Suite 200  
Washington, DC 20009

LEE TIEN  
Electronic Frontier Foundation  
454 Shotwell St.  
San Francisco, CA 94110

Counsel for *Amici Curiae*

Dated: September 19, 2002