

No. 20-828

IN THE
Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,

Petitioners,

v.

YASSIR FAZAGA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF FOR *AMICI CURIAE* JAMES DEMPSEY AND
SHARON BRADFORD FRANKLIN
IN SUPPORT OF THE RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*¹

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¹ This brief is filed with the written consent of all of the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole; no party's counsel authored, in whole or in part, this brief; and no person or entity other than *amicus* and its counsel contributed monetarily to preparing or submitting this brief.

PCLOB's Executive Director. Among other things, in that role she reviewed government surveillance programs and other counterterrorism activities. Franklin graduated from Harvard College and Yale Law School.

SUMMARY OF THE ARGUMENT

Under our system of separation of powers, the federal courts play an essential role in controlling the executive branch's authority in order to protect individual civil liberties from executive overreach. Consistent with this mandate, the judiciary has authority to review national security surveillance actions by the executive, both *ex ante* in the Foreign Intelligence Surveillance Court ("FISC"), and *ex post* in the federal district courts in adversarial proceedings.

Though *ex ante* judicial review of foreign surveillance by the FISC is necessary to protect against executive overreach, it is not sufficient, and *ex post* judicial oversight is essential to protect civil liberties. In particular, the complexity of electronic surveillance conducted in the digital age and the sheer volume and variety of information that may be collected and stored in the course of authorized surveillance makes it impossible for the FISC, acting *ex ante*, to anticipate and address all of the problems that may arise in the course of the government's collection and review of electronic communications. As several recent examples make clear, the executive branch's own internal processes to ensure compliance with FISA are often insufficient to prevent abuse.

Consequently, the federal courts, acting *ex post*, serve as an essential backstop to check the power of

the executive to ensure that individual liberties are not infringed. The courts already play this role in a myriad of circumstances—they routinely review secret national security information *in camera* and *ex parte* in cases involving civil liberties, and have conducted this review competently and securely for years. In the context of criminal proceedings, the federal courts frequently review classified information *in camera* and *ex parte* to decide both motions to suppress and to compel the production of confidential documents. The courts perform a similar function in habeas proceedings brought by detainees at Guantanamo Bay and in actions brought under the Freedom of Information Act seeking disclosure of agency records. Courts regularly perform this function consistently and without incident. Any concern that disclosure of confidential information *in camera* and *ex parte* to a federal judge would jeopardize national security is simply unfounded.

ARGUMENT

The Constitution’s Framers understood that “the abridgement of freedom of the people” is most likely to occur through the “gradual and silent encroachments by those in power.” James Madison, *Speech in the Virginia Ratifying Convention on Control of the Military* (Jun. 16, 1788) (quoted in Robert Timothy Reagan, *National Security Case Studies: Special Case-Management Challenges*, FEDERAL JUDICIAL CENTER, 607 (6th ed. 2015)). The Framers’ “inherent mistrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent

branches[,] . . . not only to make Government accountable but also to ensure individual liberty.” *Boumediene v. Bush*, 553 U.S. 723, 742–743 (2008).

Courts play a constant and integral role in this system, and the judiciary serves as a check on the power of the executive branch to infringe on the liberty of the people. Consistent with this purpose, the judiciary is empowered to check executive overreach, including in cases that involve issues of national security. The judiciary has authority to review national security electronic surveillance actions by the executive both *ex ante*, through *ex parte* proceedings before the FISC, and *ex post*, through the adversarial process in federal district court.

The Foreign Intelligence Surveillance Act (“FISA”), which established the FISC, “represents a carefully drawn balance between the national security of our country and the privacy and liberty interests of citizens” by providing a role for all three branches of government in the oversight of surveillance authorized by FISA. *United States v. Chimak*, No. 8:05-cr-00293-CJC-1, 2006 WL 8436820, at *3 (C.D. Cal. Nov. 20, 2006) (quoting *United States v. Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982)). As FISA recognizes, oversight by all three branches of government is critical to cabin the exercise of national security surveillance powers, particularly when that surveillance is directed at individuals in the United States.

Congress plays an important oversight role in such matters, particularly through the House Permanent Select Committee on Intelligence (“HPSCI”) and the Senate Select Committee on Intelligence (“SSCI”). Various entities within the

executive branch, including inspectors general and the Privacy and Civil Liberties Oversight Board (“PCLOB”), also conduct critically important oversight reviews of government surveillance programs. But in addition, the courts must review and assess whether government surveillance activities are consistent with legal and constitutional requirements. Because some of the ordinary methods of democratic accountability, such as public hearings before Congress and public reports by inspectors general, are generally unavailable when classified information is involved, judicial review *ex post* is all the more important.

All three branches of government are essential in the review of sensitive national security cases when individual civil liberties are involved. In particular, adversarial proceedings in the district courts fill a gap. Oversight by the political branches, without more, is insufficient; oversight by the executive branch is exclusively *ex parte* and Congressional oversight bodies, when considering classified matters, hear mainly, if not exclusively, from government witnesses. See *Bin Ali-Jaber v. United States*, 861 F.3d 241, 252–53 (D.C. Cir. 2017) (Rogers Brown, J., concurring) (noting that judicial review is necessary to check the “outsized power” of the executive to conduct surveillance).

Amici have personal experience with conducting oversight within the executive branch. In their experience, the oversight structures within the executive branch, while robust and indispensable, are not sufficient to curb executive overreach, particularly in the complex and highly fact-dependent context of electronic surveillance.

In contrast, the judiciary offers the benefits of truth-finding through the adversarial process, while also providing the *in camera* and *ex parte* consideration necessary to protect national security interests. See 50 U.S.C. § 1806(f) (stating if “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”).

For the judiciary to serve as a meaningful check on the executive and ensure protection of civil liberties, it is essential that, in addition to its *ex ante* role through the FISC, it is also able to review *ex post* the government’s use of electronic surveillance when that surveillance is challenged during the course of litigation in the federal district courts. This judicial review is consistent with the judiciary’s role as a co-equal branch of government, and part of the work that the federal district courts do every day. The federal courts have consistently demonstrated their competence to review classified evidence and decide cases that touch on issues related to national security, all while protecting the security of classified information.

This Court should affirm the judgment below.

A. Ex Post Judicial Oversight Is Necessary to Prevent Overreach

FISA gives the executive branch significant authority to conduct surveillance of people living in the United States, and foreign persons located outside the United States. See Patrick Walsh,

Planning for Change: Building a Framework to Predict Future Changes to the Foreign Intelligence Surveillance Act, 4 NAT'L SEC. L.J. 1, 2–3 (2015). Because individuals exchange and store more information online, the march of technology has tremendously expanded the scope and reach of the executive's power to conduct surveillance. See *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring). In light of the executive's expanded ability to surveil residents of the United States on American soil (with access to a level of detailed information that was simply unavailable even a decade ago), it is essential that the federal courts serve as a check to prevent executive overreach and protect civil liberties.

Judicial review through the FISA process is necessary but not sufficient to prevent executive overreach and protect individual liberty. The complexity of electronic surveillance as conducted in our digital age and the sheer volume and variety of information that may be collected and stored in the course of authorized surveillance makes it impossible for the FISC, acting *ex ante*, to anticipate and address all of the problems that may arise in the course of the government's collection and review of electronic communications.

Situations involving *ex post* review of FISA surveillance in an adversarial judicial proceeding are relatively infrequent, but they have unique potential to identify and rectify practices that have gone off the rails. In general, most individuals never learn that they have been subject to surveillance under FISA. The government is legally required to provide such notice only when it plans to introduce FISA

evidence against an individual in court. *See* 50 U.S.C. § 1806(c).

The national experience of the past decade shows that the non-adversarial context of the FISC's *ex ante* approvals and executive branch oversight are not guaranteed to identify and correct problems.

For example, in 2006, the FISC conducted *ex ante* review of the NSA's program for bulk collection of telephone records, and issued an order approving that collection under Section 215 of FISA. Without ever issuing an opinion explaining why this bulk collection program could be legally operated under Section 215, the FISC continued to renew its approval through 2013. Privacy and Civil Liberties Oversight Bd., *Report on the Telephone Records Program Conducted under Section 215 of the USA Patriot Act and on the Operations of the Foreign Intelligence Surveillance Court* 38, 42–46 (2014).² Only after the existence of the program was disclosed through a leak did it receive in depth scrutiny. Upon conducting a thorough oversight review of this program, the PCLOB concluded that it was illegal and “lack[ed] a viable legal foundation under Section 215.” *Id.* at 168.

Moreover, the government admitted to the FISC that its *ex ante* submissions in connection with an

² The FISC did not issue an opinion explaining the rationale for approval of the program until after its existence had been disclosed to the public by Edward Snowden in June 2013. Privacy and Civil Liberties Oversight Bd., *Report on the Telephone Records Program Conducted under Section 215 of the USA Patriot Act and on the Operations of the Foreign Intelligence Surveillance Court*, at 46-56. The program was subsequently ended by Congress through enactment of the USA FREEDOM Act in 2015.

aspect of the telephone metadata collection program had been “inaccurate.” *Id.* at 190–207. Further, the PCLOB’s review suggested that the bulk telephone metadata collection program was, as a whole, not effective in preventing terrorist attacks on the United States, despite prior representations to that effect by the executive branch to the FISC. *Id.* at 144–55.

Similarly, in 2019, the Department of Justice Inspector General’s Office found that applications submitted to the FISA court in 2016 to surveil Carter Page, a policy advisor to former President Donald Trump “contained a number of factual representations that were inaccurate, incomplete or unsupported by appropriate documentation.” Dep’t of Justice Off. of the Inspector General, Oversight and Review Div., *Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation*, at viii–ix (2019). The Inspector General’s investigation into surveillance of Carter Page was triggered by public controversy around the Department of Justice’s investigation of ties between members of then-President Trump’s campaign and the Russian government. But for the extraordinary circumstances involved with investigating a presidential campaign, the misconduct would probably never have come to light. The Inspector General’s report demonstrated that the executive’s internal processes to review FISA applications and check its own work are clearly insufficient. The report highlights the need for *ex post* review of the FISA process in an adversarial judicial proceeding in order to check executive overreach.

The PCLOB’s report relating to the NSA’s bulk collection of telephone metadata and the Inspector

General's investigation of FISA practices in the aftermath of the Carter Page incident make clear that *ex ante* review through the FISA process is insufficient on its own. Internal executive branch review procedures are also unlikely to serve as a full check on executive power in the absence of significant attention to the issue. Even in those circumstances, executive review alone is not sufficient to protect individual liberties, nor is congressional oversight through the intelligence committees. Effective oversight of national security surveillance requires all three branches of government to work in tandem. *Ex post* judicial oversight by the federal courts is a necessary element to check the power of the executive to conduct electronic surveillance.

B. The Federal Courts Are Competent to Review Classified Documents and Decide Questions Relating to National Security.

In its opening brief, the government noted that the decision below “substantially weakens” its ability to “safeguard national security information,” and implied that allowing the federal courts to review classified documents (rather than affidavits from various agency heads) and decide cases related to national security can, in and of itself, pose a risk to national security. *See* Gov. Br. at 21. This is simply incorrect. The federal courts routinely review classified documents *in camera* and *ex parte*, without any incident or leak, and without this review posing any concern to national security, all while providing for the efficient resolution of the cases before them.

Reagan, *National Security Case Studies: Special Case-Management Challenges*, at 79 (describing various tools used by courts to protect sensitive information, including placing classified exhibits in a safe or sensitive compartmented information facility). In fact, fellow amicus, Laura Donohue, has found that there are “now more than 180 FISA-related cases in regular Article III courts” and that “specialized Article III courts (FISC/FISCR) and the non-specialized, geographic Article III courts (i.e., District Courts and Courts of Appeal) are increasingly in dialogue as the caselaw evolves” in resolving FISA-related cases. Laura K. Donohue, *The Evolution and Jurisprudence of The Foreign Intelligence Surveillance Court and Foreign Intelligence Surveillance Court of Review*, 12 Harv. Nat’l Security J. 198, 8 (2021).

1. Courts Regularly Consider Classified and Secret Information in Criminal Cases.

First, and perhaps most importantly, the federal courts have demonstrated their ability to play an essential role in balancing national security considerations with individual liberties during the conduct of adversarial proceedings in criminal prosecutions of terrorism and other national security-related offenses. In these cases, the federal courts routinely review classified documents *in camera* and *ex parte* and make determinations about their admissibility. Most frequently, this kind of review arises in the context of motions to suppress classified materials. However, Article III courts are also empowered to review classified documents

under the procedures established by the Classified Information Procedures Act (“CIPA”), all without incident or leak.

a. District Courts Regularly Consider Classified and Secret Information in the Context of Motions to Suppress.

The federal courts are most frequently called upon to review classified information *in camera* and *ex parte* in the context of motions to suppress documents that the government seeks to introduce against individuals who have been charged with terrorism-related offenses.

For example, in a 2014 case involving charges against a defendant for plotting to use weapons of mass destruction in the United States, Magistrate Judge O’Sullivan in the Southern District of Florida conducted “a thorough *in camera, ex parte* review of the classified . . . [FISA] materials” in connection with a motion to suppress certain FISA-related materials and to compel production of certain other materials. *See United States v. Qazi*, No. 0:12-cr-60298-BB, 2014 U.S. Dist. LEXIS 188796, at *6 (S.D. Fla. Sep. 5, 2014), report and recommendation adopted, No. 0:12-cr-60298-BB, 2014 U.S. Dist. LEXIS 188797 (S.D. Fla. Oct. 28, 2014).

That same year, in a case involving charges of attempting to use a weapon of mass destruction, Judge Coleman of the Northern District of Illinois reviewed FISA application materials *in camera* in connection with a suppression motion. *See United States v. Daoud*, No. 1:12-cr-00723-JZL-1, 2014 WL

321384, at *2–3 (N.D. Ill. Aug. 9, 2013). Judge Coleman issued an order which would have permitted the defendant’s attorney to review certain documents subject to a protective order because counsel had active security clearances. *See id.*

The government appealed and the Seventh Circuit reversed Judge Coleman’s order, making clear that a district judge had to conduct an *ex parte in camera* hearing before allowing for the disclosure of confidential information to an adverse party. *United States v. Daoud*, 755 F.3d 479, 481–82 (7th Cir. 2014). Importantly, the Seventh Circuit did not challenge Judge Coleman’s decision to review classified materials *in camera*. Rather, the Seventh Circuit made clear that in evaluating the merits of the case, the district court was authorized to conduct its own *in camera* review of classified materials in order to assess the government’s claim that they should be withheld for reasons of national security. *Id.* at 481–82, 485.

This kind of *ex parte in camera* review of classified documents is not unusual. Across the country, district judges presiding over national security-related criminal prosecutions review FISA applications and other classified documents to ensure that surveillance was lawful and to decide what role, if any, those documents will play in criminal cases. *See, e.g., United States v. Hasbajrami*, 945 F.3d 641, 673 (2d Cir. 2019) (requiring the district court to “conduct an inquiry into whether any querying of databases of Section 702-acquired information . . . was lawful under the Fourth Amendment”); *United States v. Mohamud*, No. 3:10-cr-00475-KI-1, 2014 WL 2866749, at *27 (D. Or. June 24, 2018) (noting that the court “made a

careful *de novo*, *ex parte* review of the § 702 applications” and concluded that the “§ 702 surveillance at issue here was lawfully conducted”).

b. District Courts Regularly Review Classified Information in the CIPA Context.

Review of classified information by Article III courts also occurs when they are considering motions seeking the production of classified materials to criminal defendants under *Brady v. Maryland*, 373 U.S. 83 (1963). CIPA expressly establishes procedures to govern the handling of classified information during the course of discovery in criminal cases.

To further its twin goals of both protecting classified information and a defendant’s right to a fair trial, CIPA allows a district court to review *in camera* documents before requiring those documents to be produced under *Brady*, 373 U.S. 83. *United States v. O’Hara*, 301 F.3d 563, 567–68 (7th Cir. 2002). CIPA also authorizes the court, “upon sufficient showing,” to allow the government to delete specified items of classified information or substitute a summary of the information in the classified documents for the document itself while still complying with its obligations under *Brady*. *Id.* at 568 (quoting 18 U.S.C. § 4); *see also United States v. Aref*, 533 F.3d 72, 78–79 (2d Cir. 2008); *United States v. Abu-Jihaad*, 603 F.3d 102, 140–141 (2d Cir. 2010).

Indeed, CIPA not only expressly contemplates that the federal courts will review *in camera*

classified materials, it also requires the district court to ensure a defendant's right to a fair trial in light of defense counsel's limited ability to participate in CIPA proceedings. *Abu-Jihaad*, 603 F.3d at 142.

2. District Courts Routinely Review National Security Materials in the Guantanamo Bay Habeas Cases.

Federal district and appellate courts in Washington, DC have also routinely (and effectively) examined classified national security information in cases for habeas relief filed by detainees in Guantanamo Bay. Several former federal judges concluded that the “courts have gradually forged an effective jurisprudence that seeks to address the government’s interest in national security while protecting the right of prisoners to fairly challenge their detention.” Hum. Rights First & The Constitution Project, *A Report from Former Federal Judges, Habeas Works: Federal Courts’ Proven Capacity to Handle Guantanamo Cases* 1 (2010), retrieved from <https://archive.constitutionproject.org/wp-content/uploads/2012/10/414.pdf>.

The D.C. Circuit has “repeatedly approved *ex parte* filings as an essential procedural mechanism for protecting classified information critical to national security.” *Al Hela v. Trump*, 972 F.3d 120, 137 (D.C. Cir. 2020) (citing *Khan v. Obama*, 655 F.3d 21, 31 (D.C. Cir. 2011) (noting that where the source of classified information is “highly sensitive” it can be shown to the court alone), and *Obaydullah v. Obama*, 688 F.3d 784, 795–96 (D.C. Cir. 2012) (noting that the government “submitted an *ex parte*

filing to the court containing further information about its source” to help the court determine whether confidential information was properly withheld)). In *Al-Hela v. Trump*, for example, the D.C. Circuit expressly approved of the district court’s reliance on *ex parte* filings to corroborate the reliability of various sources to evaluate the petitioner’s claim for habeas relief. *Id.* There, both the district court and the D.C. Circuit reviewed this material *in camera* in order to properly assess whether denial of habeas relief was appropriate. *Id.*

The D.C. Circuit has similarly approved of *in camera* and *ex parte* procedures to allow the district court to review classified documents to assess whether the classification of each prisoner as an enemy combatant was appropriate and whether these documents justified his continued detention. *Al Odah v. United States*, 559 F.3d 539, 542–43 (D.C. Cir. 2009); *see also Bin Attash v. Obama*, 628 F. Supp. 2d 24, 36 (D.D.C. 2009) (ordering the government to produce unredacted intelligence reports for the court’s *in camera* review to determine whether redacted portions were properly withheld).

3. District Courts Routinely Review Sensitive National Security Materials in the FOIA Context.

Finally, Article III courts routinely review highly sensitive documents, especially documents related to the FISA process, *in camera* and *ex parte* to determine whether the material is subject to an exemption to disclosure under the Freedom of Information Act (“FOIA”). Like CIPA, FOIA

expressly contemplates judicial review of sensitive documents *in camera*. 5 U.S.C. § 552(a)(4)(B). And courts routinely conduct this kind of *in camera* review in order to determine the scope of a FOIA applicant's right to receive information. The practices of judges in the Southern District of New York, the Northern District of California, and the District Court for the District of Columbia are illustrative, as many FOIA cases are brought about national security in those districts.

In the Southern District of New York, for example, district court judges regularly hold *in camera* hearings to review classified documents requested by applicants to determine whether they are exempt from disclosure under FOIA and, if so, whether any reasonably segregable portion may be released. *See generally, e.g., New York Times v. Dept. of Justice*, 872 F. Supp. 2d 309 (S.D.N.Y. 2012) (reviewing *in camera* classified reports to Congress from the Attorney General and Director of National Intelligence regarding foreign intelligence collection); *ACLU v. F.B.I.*, 59 F. Supp. 3d 584 (S.D.N.Y. 2014) (reviewing *in camera* classified rulings by the FISC related to the government's use of section 215 of the Patriot Act to require production of any tangible things if certain requirements are met); *ACLU v. Dept. of Justice*, 90 F. Supp. 3d 201 (S.D.N.Y. 2015) (reviewing *in camera* records relating to the Department of Justice's policy on giving notice to criminal defendants against whom it intended to use electronic surveillance).

The Northern District of California follows a similar practice. In 2014, for example, Judge Rogers reviewed *in camera* and *ex parte* several orders from the FISC to determine whether they were subject to

disclosure under FOIA. *Elec. Frontier Found. v. Dept. of Justice*, No. 4:11-cv-05221-YGR, 2014 WL 12770239, at *2–3 (N.D. Cal. June 13, 2014). In this context, Judge Rogers concluded that *in camera* review was particularly necessary because the documents at issue had been declassified and had previously been withheld in their entirety, even though disclosure of a reasonably segregable portion of those documents was requested and was now likely required under the statute. *Id.* After conducting this review, however, Judge Rogers determined that the government had established a proper basis for withholding the documents and declined to order their production. *See Elec. Frontier Found.*, No. 4:11-cv-05221-YGR, 2014 WL 3945646, at *4 (N.D. Cal. Aug. 11, 2014).

Lastly, an example in the District Court for the District of Columbia highlights the common practice of district court judges reviewing classified information *in camera*. In *McClanahan v. Dept. of Justice*, Chief Judge Beryl A. Howell described the burden that an agency must meet in order to satisfy the court that “in camera review is neither necessary nor appropriate” in an agency’s affidavit in response to a request under FOIA. 204 F. Supp. 3d 30, 49 (D.D.C. 2016). Chief Judge Howell determined that, “after reviewing the thorough *ex parte, in camera* declarations submitted” the Court was satisfied that the classified information should not be given to the plaintiffs. *Id.* at 50.

* * *

As these examples demonstrate, the federal courts are competent to review classified and highly

sensitive materials related to national security *in camera* and *ex parte* and make judicial determinations based on that review. And, in these circumstances, judicial review of the documents is necessary to protect the rights of private parties and ensure the orderly resolution of cases. If the federal courts are empowered (and, in the appropriate case, required) to perform this function in the criminal, habeas, and FOIA contexts, there is no reason to prevent the courts from doing so in suits challenging the legality of FISA surveillance.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be affirmed.

Respectfully submitted,

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