

1 LAFAYETTE & KUMAGAI LLP
2 SUSAN T. KUMAGAI #127667
3 100 Spear Street #600
4 San Francisco, CA 94105
5 Telephone: (415) 357-4600
6 Facsimile: (415) 357-4605
7 Email: skumagai@lkclaw.com

8 HOWARD WASSERMAN (*Pro Hac Vice* Application Pending)
9 Florida International University College of Law
10 University Park, RDB 2065
11 Miami, Florida 33199
12 Telephone: (305) 348-7482
13 Facsimile: (786) 417-2433
14 Email: howard.wasserman@fiu.edu

15 Attorneys for Amici Curiae Law Professors Steven G. Calabresi,
16 Don Doernberg, Richard D. Freer, Stephen B. Presser,
17 Robert J. Pushaw, Ronald D. Rotunda, Stephen F. Smith,
18 Michael E. Solimine, William W. Van Alstyne, and
19 Howard M. Wasserman

20 UNITED STATES DISTRICT COURT
21
22 NORTHERN DISTRICT OF CALIFORNIA
23
24 SAN FRANCISCO DIVISION
25

26 In re:

27 NATIONAL SECURITY AGENCY
28 TELECOMMUNICATIONS RECORDS
LITIGATION

MDL Dkt. No. 06-1791-VRW

**MOTION OF AMICI CURIAE LAW
PROFESSORS FOR LEAVE TO FILE
BRIEF IN SUPPORT OF (1) THE
CONSTITUTIONALITY OF § 802 OF
THE FOREIGN INTELLIGENCE
SURVEILLANCE ACT OF 1978
AMENDMENTS ACT OF 2008, AND (2)
THE MOTION OF THE UNITED
STATES TO DISMISS (Dkt. 469);
[PROPOSED] ORDER**

29 This Document Relates To All Cases Except:
30 *Al-Haramain Islamic Foundation, Inc. v. Bush*
31 (07-109); *Center for Constitutional Rights v.*
32 *Bush* (07-01115); *Guzzi v. Bush* (06-6225);
33 *Shubert v. Bush* (07-693); *Clayton v. AT&T*
34 *Commc'ns of the Southwest* (07-1187); *United*
35 *States v. Adams* (07-01323); *United States v.*
36 *Clayton* (07-01242); *United States v.*
37 *Palermino* (07-1326); *United States v. Rabner*
38 (07-01324); *United States v. Volz* (07-01396)

Date: December 1, 2008
Time: 10 am
Courtroom: 6, 17th Floor
Judge: Hon. Vaughn R. Walker

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT Steven G. Calabresi, Don Doernberg, Richard D.

3 Freer, Stephen B. Presser, Robert J. Pushaw, Ronald D. Rotunda, Stephen F. Smith,

4 Michael E. Solimine, William W. Van Alstyne, and Howard M. Wasserman (collectively,

5 “Amici Curiae Law Professors”) respectfully request the Court’s leave to participate as

6 amici curiae in the above-captioned litigation in support of (1) the constitutionality of § 802

7 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 and (2) the

8 Motion of the United States to Dismiss or, In the Alternative, For Summary Judgment (Dkt.

9 469). To ensure ample opportunity for Plaintiffs to respond to the arguments in Amici

10 Curiae Law Professors’ 15-page brief, Amici Curiae Law Professors file this motion on the

11 same day the United States and Carrier Defendants file their briefs in support of the United

12 States’ Motion to Dismiss. While the United States and Carrier Defendants have consented

13 to this motion, Plaintiffs have not. Plaintiffs have not yet determined whether they intend

14 to oppose this motion. Notably, this Court granted amicus curiae Brennan Center for

15 Justice leave to submit a 20-page brief in opposition to the Government’s motion to dismiss

16 (Dkt. 502), despite the Brennan Center’s lack of consent from the United States and Carrier

17 Defendants.

18 **I. Standard For Motion for Leave to File Brief of Amici Curiae**

19 The Court has broad discretion to permit third parties to participate in an action as

20 amici curiae. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987).

21 Participation of amici curiae may be appropriate where legal issues in a case have potential

22 ramifications beyond the parties directly involved or where amici can offer a unique

23 perspective to aid the Court. *Sonoma Falls Dev., LLC v. Nev. Gold & Casinos, Inc.*, 272 F.

24 Supp. 2d 919, 925 (N.D. Cal. 2002). Indeed, as noted above, this Court has already granted

25 amicus curiae Brennan Center for Justice leave to submit a brief in opposition to the

26 Government’s motion to dismiss (Dkt. 502).

27 **II. Statement of Identity and Interest of Amici Curiae**

28 Amici are law professors and scholars in constitutional law, federal courts, and civil

1 procedure, who have taught, written, and spoken, and hold strong views about, the
2 constitutional separation-of-powers issues related to the Supreme Court precedent of *United*
3 *States v. Klein*, 80 U.S. 128 (1871). Amici wish to submit a brief to this court analyzing the
4 history, meaning, and doctrinal effects of *Klein* and to show that this precedent, properly
5 understood and applied, does not render unconstitutional the immunity provisions of § 802
6 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008. Amici
7 believe that, to the extent issues related to *Klein* are implicated in the instant case, it is
8 essential that those issues be thoroughly analyzed and correctly resolved as a matter of law.

9 Amici represent a broad range of divergent political and ideological views as to the
10 policy, wisdom and justice of the congressional decision to grant immunity to the
11 telecommunications company defendants. But signatories agree that there is no
12 constitutional defect in the statute. Regardless of whether Congress should have granted
13 this immunity, signatories believe Congress possesses the constitutional power to do so.

14 Amici are:

- 15 • Steven G. Calabresi, George C. Dix Professor of Law, Northwestern University
16 School of Law
- 17 • Don Doernberg, Professor of Law, Pace Law School
- 18 • Richard D. Freer, Robert Howell Hall Professor of Law, Emory University School
19 of Law
- 20 • Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern
21 University School of Law
- 22 • Robert J. Pushaw, James Wilson Endowed Professor of Law, Pepperdine
23 University School of Law
- 24 • Ronald D. Rotunda, Professor of Law, Chapman University School of Law
- 25 • Stephen F. Smith, John V. Ray Research Professor, University of Virginia School
26 of Law
- 27 • Michael E. Solimine, Donald P. Klekamp Professor of Law, University of
28 Cincinnati College of Law

• William W. Van Alstyne, Lee Professor, William & Mary Marshall-Wythe School
of Law

• Howard M. Wasserman, Associate Professor of Law, Florida International
University College of Law

CONCLUSION

Wherefore, Amici request this court's leave to submit an amicus brief on the scope
and meaning of *United States v. Klein*, arguing that § 802 is constitutionally valid under
that precedent.

Dated: November 5, 2008.

LAFAYETTE & KUMAGAI LLP
SUSAN T. KUMAGAI #127667
100 Spear Street #600
San Francisco, CA 94105

HOWARD WASSERMAN
(*Pro Hac Vice* Application Pending)
Florida International University College of Law
University Park, RDB 2065
Miami, Florida 33199

By /s/ Susan T. Kumagai
Susan T. Kumagai

By /s/ Howard Wasserman
Howard Wasserman

Attorneys for Amici Curiae Law Professors
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Alstyne, and Howard M. Wasserman

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
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[PROPOSED] ORDER

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Good cause appearing, the Motion of Amici Curiae Law Professors Steven G. Calabresi, Don Doernberg, Richard D. Freer, Stephen B. Presser, Robert J. Pushaw, Ronald D. Rotunda, Stephen F. Smith, Michael E. Solimine, William W. Van Alstyne, and Howard M. Wasserman for leave to file a brief in support of (1) the constitutionality of § 802 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act Of 2008, and (2) the Motion of the United States to Dismiss or, in the Alternative, for Summary Judgment (Dkt. 469), is hereby GRANTED.

IT IS SO ORDERED.

Dated: November ___, 2008

Hon. Vaughn R. Walker
United States Chief District Judge

CERTIFICATE OF SERVICE

I certify that a copy of this document was served electronically on November 5, 2008, on counsel of record in compliance with Federal Rule 5, Local Rule 5-6 and General Order 45, by use of the Court's ECF system.

/s/ Susan T. Kumagai
SUSAN T. KUMAGAI