NO. _____

In The
Supreme Court of the United States

CHARLES ROBERT VIII,

Petitioner,

v.

**DEPARTMENT OF JUSTICE,
DEPARTMENT OF HEALTH AND HUMAN SERVICES, and
SOCIAL SECURITY ADMINISTRATION,**

Respondents.

**On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit**

PETITION FOR WRIT OF CERTIORARI

Charles Robert
Pro Se Petitioner
441B West Broadway
Long Beach, New York 11561
(516) 889-2251

Echo Appellate Press Inc., 30 W. Park Ave., Long Beach, NY (516) 432-3601
18796

QUESTION PRESENTED

Petitioner, a U.S. citizen, was in the 1980s the target of the National Security Agency (NSA) Terrorist Surveillance Program (TSP). In a prior Freedom of Information Act (FOIA) action Robert VII v DOJ, 2005 U.S. Dist. LEXIS 39616, 193 Fed. Appx. 8 (2d Cir. 2006), cert. den. 549 U.S. 1167 (2007), he unsuccessfully sought the release of FOIA requested Robert Foreign Intelligence Surveillance Court (FISC) documents. In this Robert VIII v DOJ, HHS, and SSA FOIA action, petitioner seeks a reversal of the Second Circuit's September 6, 2011 Summary Order that dismissed the FOIA action seeking the release of documents that would prove whether AG Gonzales had intentionally withheld material facts from the EDNY, the Second Circuit, and the Supreme Court in Robert VII v DOJ concerning the government's wiretapping of petitioner and a pre-9/11 NSA domestic surveillance program.

I. Did the Court below err by not ordering a remand for the District Court to review *in camera* petitioner's FOIA requested documents withheld pursuant to FOIA Exemption 5?

II. Did the Court below violate petitioner's First Amendment right of access to the courts by enjoining plaintiff from filing any new FOIA complaints without the Judge's pre-clearance order, without holding an evidentiary hearing?

III. Should the Court establish a rule that a Judge has a duty to read *in camera* documents the AG is withholding pursuant to the FOIA Exemption 5 when the petitioner alleges that those documents corroborate his assertions that AGs had committed a "fraud upon the court" in a prior FOIA action?

IV. Should the Court establish a FOIA due diligence rule that requires that a supplemental due diligence search include contacting the most logical person to know the location of the FOIA requested documents?

TABLE OF CONTENTS

TABLE OF CONTENTS OF APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Article II Executive Orders, Presidential Signing Statements, Memoranda, Notifications to Congress, Press Releases, Guidelines, and Briefs 31

Other Authorities

Intentionally Left Blank

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Petitioner respectfully prays that a writ of certiorari issue to review the Judgment below.

OPINIONS BELOW

1. December 9, 2005, EDNY Judge Garaufis Memorandum and Order. Appendix A

2. May 9, 2008, Judge Garaufis Partial Summary Judgment Order. Appendix C

3. September 21, 2009, Judge Garaufis Memorandum and Order. Appendix D

4. September 6, 2011, Second Circuit Summary Order. Appendix E

JURISDICTION

On September 6, 2001, the Second Circuit issued its Summary Order. The jurisdiction of this court is pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article I, Section 1
2. Article II, Section 1, cl. 8
3. Article III, Section 1
4. The Freedom of Information Act, 5 U.S.C. § 552 (b)(5)
5. National Security Act, 50 U.S.C. § 413 (a), (b)
6. The Foreign Intelligence Surveillance Act, 18 U.S.C. § 2511(2)(f)
7. Posse Comitatus Act, 18 U.S.C. § 1385
8. Social Security Act, 42 U.S.C. § 1381

STATEMENT OF THE CASE

This is a FOIA action in which petitioner seeks documents to prove that AG Gonzales had withheld material facts from the District Court, the Second Circuit and the Supreme Court in the prior FOIA action Robert VII v. DOJ, 2005 U.S. Dist. LEXIS

39616, 193 Fed. Appx. 8 (2d Cir. 2006), cert. den. 549 U.S. 1167 (2007). In that FOIA, petitioner unsuccessfully sought the release of FOIA requested Robert Foreign Intelligence Surveillance Court (FISC) documents that reveal whether he had been the illegal target of a pre-9/11 National Security Agency (NSA) Terrorist Surveillance Program (TSP) implemented without the knowledge of the FISC or the Article I "Gang of Eight" in violation of federal laws.

This is a timely petition because on July 19, 2010, the public learned of the existence of a NSA domestic surveillance program as explained by investigative reporters Dana Priest and William Arkin in their Washington Post "Top Secret America" series. They published an eye opening and jaw dropping Orwellian Location Map that revealed thousands of U.S. Government (USG) and private work locations hidden from the public in plain sight and manned by tens of thousands of analysts. http://projects.washingtonpost.com/top-secret-america/map/.

A. Robert VIII background information

Robert VIII is the latest of the petitioner's twenty-four 1985-2005 FOIA actions which have sought the release of a mosaic of 1982-2005 documents that corroborate petitioner's almost incredible allegation: Faux "Commanders in Chief" have diverted unaudited off-OMB Budget Supplemental Security Income (SSI) funds that Congress appropriated for the aged, blind, and disabled, to pay for Top Secret Central Intelligence Agency (CIA) and Defense

Intelligence Agency (DIA) domestic "black operations" that included the NSA TSP.

Petitioner asserted that these CIA-DIA domestic "black operations" were conducted pursuant to the "Unitary Executive" theory whereby the President had Article II authority to protect the nation from terrorists that cannot be encroached upon by the Article I Congress or the Article III Judiciary. Petitioner alleged that the "black operations" were conducted without the knowledge of Presidents Reagan, Bush, Clinton, Bush, and Obama, but with the knowledge of the 1984-2011 FBI Directors.

Petitioner asserted that the FBI Directors knew that none of the Presidents had filed with the "Gang of Eight" the required § 413 (a) of the National Security Act report of covert operations. Petitioner filed FOIA requests seeking documents that prove the FBI Directors had "covered up" the CIA-DIA domestic "black operations" because they knew that these domestic "black operations" had not been funded with classified Office of Management and Budget (OMB) funds allocated to funding foreign CIA-DIA covert operations.

Petitioner asserted that one of the CIA-DIA-FBI Top Secret domestic "black operations" was conducted at the Florida HMO International Medical Centers (IMC), and was funded in 1985-1986 with unaudited HHS funds to pay for medical treatment and supplies for the Contras in violation of the Boland Amendment. Petitioner also asserted that FOIA requested documents reveal that the 1984-2011 CIA-DIA NSA domestic surveillance program data banks

have been "immaculately constructed" and maintained with off-OMB Budget unaudited SSI funds.

Petitioner asserted that these CIA-DIA "black operations" were serial violations of § 413 (a) of the National Security Act, 50 U.S.C. § 413, the "exclusivity provision" of the Foreign Intelligence Act (FISA) of 1978, 18 U.S.C. § 2511(2)(f), the domestic limitations on military law enforcement of the Posse Comitatus Act of 1878 (PCA), 18 U.S.C. § 1385, and the Social Security Act, 42 U.S.C. §1381. He asserted that these were 1985-2011 impeachable violations of federal laws that the AGs knew had to be conducted without the knowledge of the Article I "Gang of Eight," the Article II Presidents, and the Article III FISC and Supreme Court Justices.

Petitioner also asserted that FOIA requested documents reveal that the 1985-2011 AGs have known that CIA Director Casey had established "stovepipes" that he honeycombed within the Office of the White House Counsel, DOJ, FBI, DOD, OMB, NARA, HHS, and SSA that led to a *faux* "Commander in Chief" who was not President Reagan. The AGs knew that these "stovepipes" were necessary to provide President Reagan with a "plausible deniability" defense to the serial impeachable violations of the Boland Amendment, § 413 (a) of the National Security Act, the FISA, the PCA, and the Social Security Act. Petitioner asserted that the FOIA requested documents reveal the 1985 "stovepipes" continue to exist with the knowledge of 2011 Associate DAG James Baker because he knows the content of petitioner's FOIA requested Robert VII v DOJ "FISC Robert" documents.

On December 16, 2005, the public first learned about the Top Secret post-9/11 NSA TSP from NY Times reporters James Risen and Eric Lichtblau. "Bush Lets U.S. Spy on Callers Without Courts," NY Times, 12-16-05. Upon information and belief, the Gang of Eight" also first learned about the post-9/11 NSA TSP from this Risen and Lichtblau news report.

On December 22, 2005, AG Gonzales' AAG of the Office of Legislative Affairs William E. Moschella provided the "Gang of Eight" with retroactive § 413 (a) of the National Security Act Notification of the 2001-2005 post-9/11 NSA TSP. However, he did not provide Notification of the existence and data mining of the 1984-2001 pre-9/11 NSA TSP data banks:

> As explained above, the President determined that it was necessary following September 11, to create an early warning detection system. FISA could not have provided the speed and agility required for the early warning detection system. In addition, any legislative change, other than the AUMF, that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities. Nevertheless, I want to stress that the United States makes full use of FISA to ad-

> dress the terrorist threat, and FISA has proven to be a very important tool, especially in longer-term investigations. In addition, the United States is constantly assessing all available legal options, taking full advantage of any developments in the law. Moschella 5. Emphasis Added.
> http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf

On May 18, 2006, Baltimore Sun reporter Siobhan Gorman reported leaks that NSA whistleblower Thomas Drake had provided her re the pre-9/11 use of the Thin Thread algorithm. "In what intelligence experts describe as rigorous testing of Thin Thread in 1998, the project succeeded at each task with high marks." "NSA Killed System That Sifted Phone Data Legally," Baltimore Sun, 5-18-06. http://www.commondreams.org/headlines06/0518-07.htm

On May 16, 2011, The New Yorker prereleased Jane Mayer's May 23, 2011 article "The Secret Sharer," The New Yorker, May 23, 2011. She reported NSA whistleblower Thomas Drake's allegation that NSA Director General Hayden had authorized the pre-9/11 use of the Thin Thread algorithm to data mine NSA domestic surveillance program data banks. This NSA data mining was made without the knowledge of the "Gang of Eight" or the FISC. "The phone calls were the tip of the iceberg. The really sensitive stuff was the data mining." He says, "I

was faced with a crisis of conscience. What do I do—remain silent, and complicit, or go to the press?" See Drake's assertions in the May 22, 2011 60 Minutes segment "U.S. v Whistleblower Thomas Drake." http://www.cbsnews.com/video/watch/?id=7366912n&tag=related;photovideo

On June 10, 2011, the public and 535 Members of Congress learned that AG Holder had determined that NSA whistleblower Drake had told the truth in his leak re NSA Director Hayden's knowledge of the pre-9/11 NSA data mining of the NSA domestic surveillance program data banks. AG Holder abandoned the Espionage Act indictment of Drake and accepted a plea agreement without any jail time. "According to the government's motion, pre-trial rulings by the court under the Classified Information Procedures Act (CIPA) would have required that highly classified information appear, without substitution, in exhibits made publicly available at trial. The NSA concluded that such disclosure would harm national security." DOJ Press Release 6-10-11 http://www.justice.gov/opa/pr/2011/June/11-crm-760.html

AG Holder's approval of the Drake plea agreement solidified the facts in the mosaic of hundreds of connect-the-dots documents that the USG had released to petitioner in his 1985-2011 FOIA litigation saga. These documents provided an answer to the 2011 publicly unanswered question as to the funding source for the 1984-2011 NSA domestic surveillance program data banks that had not been funded with classified OMB Budget funds. There remains no 2011 public answer to this question in part because

President Obama, like Presidents Reagan, Bush, Clinton, and Bush, has not filed a "corrective action" plan pursuant to § 413 (b) of the National Security Act to cure the illegal intelligence activities of the ongoing data mining of the 1984-2011 pre-9/11 NSA data banks that are now in the custody of DOD Cyber Commander-NSA Director General Keith Alexander:

> **(b) Reports concerning illegal intelligence activities**
>
> The President shall ensure that any illegal intelligence activity is reported promptly to the congressional intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity. National Security Act, 50 U.S.C. § 413 (b). Emphasis Added.

On December 9, 2005, the District Court enjoined the petitioner from filing a FOIA complaint without a pre clearance Order because the court determined that all of the prior FOIA actions had been frivolous. A-1. However, each one of the 24 dismissed FOIA actions was productive. FOIA Officers released hundreds of FOIA requested connect-the-dots documents and DOJ attorneys had filed FRCP 11 signed pleadings. These documents established a time line of the *mens rea* of over a score of USG attorneys who had filed 1986-2011 signed pleadings with EDNY

District Judges, the Second Circuit, and the Supreme Court.

The USG pleadings that petitioner obtained during the 1985-2011 FOIA litigation are now 2011 Article II road maps that lead to the identity of the 1984-2011 daisy-chain of attorneys who have made litigation decisions to data mine pre-9/11 NSA TSP data banks that were not reported to the "Gang of Eight" as required by § 413 (a) of the National Security Act. These attorneys made their decisions on behalf of their clients who were the *faux* Commanders-in-Chief and not Presidents Reagan, Bush, Clinton, Bush, and Obama.

B. Litigation history of Robert VIII

Robert VIII v. DOJ, HHS, and SSA is a consolidation of Robert IV v. DOJ, cv 02-1101, Robert V v. DOJ, cv 03-4324, Robert VI v. DOJ, cv 04-0269, and Robert VIII v. DOJ, HHS, and SSA, cv 05-2543 (Garaufis, J). The docket number for Robert VIII v. DOJ, HHS, and SSA became the docket number for the four 2002-2005 consolidated FOIA complaints that are now at issue in this petition.

On March 1, 2004, Office of Intelligence Policy and Review (OIPR) Counsel James Baker rendered a FOIA decision and affirmed the CIA's use of FOIA Exemption 1 and the "Glomar Response" to withhold the FOIA requested "FISC Robert" documents. On March 10, 2004, the hospital confrontation occurred between WH Counsel Gonzales and AG Ashcroft, DAG James Comey, and FBI Director Robert Mueller re certification of the NSA TSP that was not known

to the public until May, 2009. "Doubts about Mr. Gonzales's version of events in March 2004 grew after James B. Comey, the former Deputy Attorney General, testified in May that he and other Justice Department officials were prepared to resign over legal objections to an intelligence program that appeared to be the N.S.A. program." Johnston and Shane, "F.B.I. Chief Gives Account at Odds With Gonzales's," NY Times, 7-27-09.

On May 6, 2004, AAG of the OLC Goldsmith sent a Top Secret OLC FISA Memo to AG Ashcroft, Memorandum for the Attorney General: Review of the Legality of the (redacted b1,b3) Program. On March 18, 2011, AG Holder would declassify and release this OLC Memo with reclassified pages redacted. https://webspace.utexas.edu/rmc2289/OLC%2054.FINAL.PDF.

On May 12, 2004, petitioner filed the Robert VII v. DOJ, cv 04-1961, complaint. On an unknown date after May 12, 2004, AG Ashcroft filed a Motion seeking to dismiss the Robert VII v DOJ complaint. Attached to that Motion was the "uncorrected" Declaration of OIPR Counsel James Baker that explained his March 1, 2004 FOIA decision. Upon information and belief, that *ex parte* Declaration was a 5 U.S.C. § 552 "c (3) exclusion" Declaration that explained the "Glomar Response" defense and was based on AG Meese's December, 1987 Attorney General's Memorandum on the 1986 Amendments to the Freedom of InformationAct.
http://www.usdoj.gov/04foia/86agmemo.htm. On October 1, 2004, OIPR Counsel Baker filed his replacement "corrected" Robert VII v DOJ Declaration. See

the Declaration posted at http://www.snowflake5391.net/baker.pdf.

On March 1, 2005, the District Court dismissed Robert VII v. DOJ. On April 1, 2005, petitioner filed his Robert VII v. DOJ Notice of Appeal.

On May 25, 2005, petitioner filed the Robert VIII v. DOJ, HHS, and SSA complaint. As a result, Robert VII moved up the appellate ladder prior to Robert IV, Robert V and Robert VI.

On September 8, 2005, the District Court held a Robert VIII hearing of approximately five minutes. This was the only time in the 2002-2009 Robert IV, Robert V, Robert VI, Robert VII, and Robert VIII litigation that Judge Garaufis had ever met the petitioner or asked him a question. This would become the "hearing" upon which the District Court based its Robert VIII v. DOJ, HHS, and SSA Order that requires petitioner to secure a pre-clearance order from the District Court prior to his filing any new FOIA complaint.

On December 9, 2005, the District Court issued its Robert VIII v. DOJ, HHS, and SSA Memorandum and Order. On December 14, 2005, the Judgment was filed that required petitioner to secure Judge Garaufis' pre-clearance Order prior to filing any new FOIA request. A-36.

On December 16, 2005, Risen and Lichtblau published their NSA TSP scoop. On January 6, 2006, based on that report, petitioner filed a Robert VII Motion seeking a pre-clearance Order to file a putative

FOIA complaint seeking a discrete set of FOIA requested documents that he believed would prove to the court that AG Gonzales had withheld material facts re the NSA TSP in Robert IV, Robert V, Robert VI, Robert VII, and Robert VIII.

On January 19, 2006, AG Gonzales made public a letter he sent to the Senate Majority Leader along with a Memorandum: Legal Authorities Supporting the Activities of the National Security Agency Described by the President. http://www.usdoj.gov/olc/2006/nsa-white-paper.pdf AG Gonzales explained the basis for the post-9/11 NSA TSP, but not the pre-9/11 NSA TSP.

On January 20, 2006, petitioner filed a Robert VIII v. DOJ, HHS, and SSA Interlocutory Notice of Appeal of the December 9, 2005 Memorandum and Order and the December 14, 2005 Judgment. This became a Robert VIII appeal docketed as 06-0391-cv.

On January 30, 2006, the Second Circuit heard the Robert VII v. DOJ oral argument. The Court asked questions concerning issues raised in the Briefs of appellant and AG Gonzales.

On March 9, 2006, the Second Circuit ordered the parties to file letter-Briefs re the following issues that had not been addressed in the parties' Briefs:

> 1. Does 50 U.S.C. § 1806 (f) apply to Robert's FOIA request to the Office of Intelligence Policy and Review FOIA Coordinator for "all FISA (Foreign Intelli-

> gence Surveillance Act) Affidavits that were relied upon the FISA court to authorize wiretaps of the telephones of Charles Robert, Esq., a/k/a Snowflake 5391?
>
> 2. If *ex parte*, *in camera* review is required, what additional procedures, if any, are necessary to preserve the confidentiality of the information submitted to the District Court, including, but not limited to, the existence of an application of surveillance pursuant to the FISA?

On March 21, 2006, petitioner filed a Robert VIII Motion for a Certificate of Appealability of Judge Garaufis' Robert VIII December 12, 2005 injunction. Petitioner cited to the Second Circuit's Robert VII v. DOJ March 9, 2006 Order and argued his First Amendment right of access to the courts was directly affected by the injunction Order.

On April 3, 2006, the parties submitted their Robert VII letter-Briefs. AG Gonzales' Brief did not discuss the facts contained in the "FISC Robert" documents that OIPR Counsel Baker had read on March 1, 2004. AG Gonzales also did not inform the Second Circuit of the FISA "secret law" contained in the May 6, 2004 OLC FISA Memo. See AG Gonzales' letter-Brief posted at http://www.snowflake 5391.net/RobertvDOJbrief.pdf.

On April 11, 2006, the Second Circuit issued its Robert VII v. DOJ Summary Order dismissing the action. The court did not discuss the teed up FISA issues that it had framed in its March 9, 2006 Order.

On April 15, 2006, petitioner filed the April 11, 2006 Robert VII v. DOJ decision in the Robert VIII v. DOJ, HHS, and SSA interlocutory appeal Record. He informed the court of his intent to file within 45 days a Robert VII v DOJ petition for an *en banc* rehearing.

On June 8, 2006, the Second Circuit denied the Robert VIII v. DOJ, HHS, and SSA Motion of a Certificate of Appealability and dismissed the Robert VIII interlocutory appeal. On June 23, 2006, the Second Circuit granted the Robert VII v. DOJ Motion to file an oversized petition in support of the petition for an *en banc* hearing. On July 13, 2006, petitioner filed his petition and argued there should be an *en banc* hearing of the April 11, 2006 Summary Order because of subsequent Supreme Court Article II decisions including Hamdan v. Rumsfeld, 548 U.S. 557 (2006), which held that there was to be Article III review of Article II Executive Branch national security decisions even in a time of war.

On August 25, 2006, the Second Circuit denied the Robert VII v. DOJ petition for a rehearing. This decision was rendered without the Second Circuit's knowing the FISA "secret law" contained in the Top Secret May 6, 2004 OLC FISA Memo.

In December, 2006, AG Gonzales instructed SG Clement not to file a Robert VII v DOJ Brief in oppo-

sition to the petition for a writ of certiorari. In December, 2006, CIA Director Hayden awarded Counsel for the National Security Division of Intelligence Policy James Baker the George H.W. Bush Award for Excellence in Counterterrorism, the highest CIA award.

On January 16, 2007, this Court denied the Robert VII v. DOJ petition for a writ of certiorari. On January 19, 2007, AG Gonzales awarded Counsel for the National Security Division of Intelligence Policy Baker the Edmund J. Randolph Award, the highest DOJ award.

On May 9, 2008, the District Court granted in part AG Mukasey's Robert VIII v. DOJ, HHS, and SSA Motion for a Summary Judgment. A-38. However, the court ordered AG Mukasey to conduct a supplemental due diligence search for the FOIA requested "Barrett nonacquiescence policy," "Christensen nonacquiescence policy," and "IMC Investigation Final Report" documents.

On March 19, 2009, AG Holder issued FOIA Guidelines that established the presumption of disclosure applied to FOIA requests. http://www. justice.gov/ag/foia-memo-march2009.pdf. AG Holder rescinded AG Ashcroft's October 12, 2001 FOIA Guidelines.

On September 21, 2009, the District Court rendered its Robert VIII v. DOJ, HHS, and SSA Memorandum and Order. A-54. On November 9, 2009, petitioner filed a Notice of Appeal.

On March 10, 2010, the Second Circuit held a Robert VIII pre-argument conference. The parties signed a Local Rule 42.1 Stipulation whereby the petitioner withdrew the appeal without prejudice to reinstate the appeal by September 3, 2010. AG Holder rejected petitioner's quiet settlement offer.

On August 24, 2010, petitioner filed a Robert VIII reinstatement letter. On September 24, 2010, the Second Circuit reinstated the Robert VIII appeal.

On February 23, 2011, petitioner filed his Robert VIII v. DOJ, HHS, and SSA Brief. He sought a remand to provide the District Court with an opportunity to apply AG Holder's March 19, 2009 FOIA Guidelines that had not been applied to the Robert VIII documents, and to read *in camera* the "Robert v Holz" and Robert VII v DOJ "FISC Robert" documents.

On March 18, 2011, AG Holder declassified the May 6, 2004 OLC FISA Memo. However, AG Holder reclassified certain pages. Upon information and belief, these pages discussed the pre-9/11 NSA TSP and Mitchell v. Forsyth, 472 U.S. 511 (1985).

On March 21, 2011, the Second Circuit decided Amnesty v. Clapper, 638 F. 3d 118 (2d Cir. 2011). The Court established a FISA standing standard that would apply to the petitioner if he filed a Bivens action claiming a violation of his First Amendment right of access to the courts.

On April 11, 2011, petitioner filed an OLC Mandatory Declassification Review (MDR) request to

declassify the reclassified pages of the May 6, 2004 OLC FISA Memo pursuant to President Obama's December 29, 2009 E.O. 13526 § 3.3. As of the date of this petition, AG Holder has not docketed petitioner's OLC MDR request.

On May 12, 2011, AG Holder filed his Second Circuit Amnesty v. Clapper petition for a rehearing *en banc*. He filed this petition with the knowledge of the content of the Top Secret May 6, 2004 OLC FISA Memo pages that he had reclassified on March 18, 2011.

On May 26, 2011, AG Holder filed his Robert VIII Brief. He defended all of the government's representations made to the District Court in Robert IV, Robert V, Robert VI, Robert VII, and Robert VIII. He filed this Brief knowing that his Associate DAG Baker knew the contents of the CIA classified March 1, 2004 Robert VII "FISC Robert" documents.

On June 1, 2011, petitioner filed his Robert VIII v DOJ, HHS, and SSA Reply Brief. He explained the significance of the pages of the reclassified May 6, 2004 OLC FISA Memo.

On September 6, 2011, the Second Circuit rendered its decision upholding DOJ's decisions as to the FOIA requested documents. A-61. The petitioner argues that the court erred except for its modification of the December 14, 2005 Judgment.

On September 21, 2011, the Second Circuit denied AG Holder's Amnesty v. Clapper petition for an

en banc hearing. As a result, petitioner now has standing to file a Bivens action.

C. The Robert VIII "Robert v Holz" documents

One set of the documents requested in Robert VIII was the "Robert v Holz" documents withheld pursuant to FOIA Exemption 5. Robert v. Holz, cv 85-4205 (Wexler, J), was the first of his FOIA actions.

These 1985-1988 DOJ documents establish whether he was illegally wiretapped. These documents reveal DOJ attorneys' knowledge of HHS General Counsel del Real's "Fraud Against the Government" investigation of Robert. HHS General Counsel del Real had sent six Special Agents to interrogate petitioner's aged, blind, and disabled clients *ex parte* in their homes to learn the legal advice petitioner was providing and legal fees he was charging in cases challenging HHS "nonacquiescence" policies.

AG Holder explained in his May 25, 2011 Second Circuit Brief that he withheld the "Robert v Holz" documents pursuant to the attorney-client and work product privilege. 5 U.S.C.§552 (b)(5). In his May 31, 2011 Reply Brief, petitioner argued that these documents proved whether USG attorneys had committed a "fraud" in Robert v. Holz by withholding from the District Court the material fact that petitioner had been a target of the NSA TSP.

Petitioner also argued that the Second Circuit should order a remand so that the District Court could read *in camera* the 1985-1988 "Robert v. Holz" documents along with the reclassified pages of the

May 6, 2004 OLC FISA Memo to determine whether Robert's assertions were accurate that he had been the target of the NSA TSP during the "Fraud Upon the Government" investigation of Robert that sought his incarceration and disbarment. A remand would also provide an opportunity for the District Court to review *in camera* the "FISC Robert" documents and determine whether DOJ attorneys had committed a "fraud" in Robert VII v. DOJ by intentionally withholding of material facts re the NSA TSP.

In its September 6, 2011 decision, the Second Circuit affirmed the District Court's decision to apply FOIA Exemption 5. However, neither the District Court or the Second Circuit read the DOJ "Robert v. Holz" documents which petitioner asserted proved that a "fraud" had been committed in Robert VII. "We agree with the District Court that the withheld pages constituted work product and were properly withheld under FOIA Exemption 5." A-65, n.1.

The Second Circuit did not address the reclassified May 6, 2004 OLC FISA pages which petitioner asserts discusses the pre-9/11 NSA TSP and Mitchell v. Forsyth. The Second Circuit deferred to AG Holder's May 26, 2011 Brief's representations. As a result, AG Holder knew that the Second Circuit did not know the Top Secret reclassified FISA "secret law" and 1980s "Robert v Holz" wiretap facts.

D. The Robert VIII "Ruppert" documents

One set of documents at issue in Robert VIII was the "Ruppert case file notes" documents. These documents reveal why DOJ attorneys ratified the Ruppert v. Bowen, 871 F.2d 1172 (2d Cir. 1989) "non-acquiescence" policy decision as applied to the millions of Ford v. Shalala, 87 F. Supp 2d 163 (E.D.N.Y. 1999), nationwide class members. This remains a timely issue because AG Holder continues in 2011 to defend the "Ruppert nonacquiescence policy" which he knows results in the reduction by one-third of the monthly federal SSI benefits of the millions of SSI recipients not residing in the Seventh Circuit states, and the possible diversion of those SSI funds for purposes not intended by Congress.

The "Ruppert case file notes" reveal the AGs' Ruppert litigation strategy tracking back to 1982. On January 7, 1982, Judge Pratt decided Glasgold v. Califano, 558 F. Supp. 129 (E.D. N.Y. 1982), aff'd sub nom. Rothman v. Schweiker, 706 F. 2d 407 (2nd Cir. 1983), cert. den. sub nom. Guigno v. Schweiker, 464 U.S. 984 (1983). The District Court rejected petitioner's argument that the Government apply the Indiana Jackson v. Schweiker regulation to SSI recipients residing in the States not in the Seventh Circuit. However, he issued a Ruppert I remand order. "Plaintiffs' assertion that a distinction should be made between oral and written information, such that one is statutorily required while the other is not, should be adequately briefed before a decision is made." Glasgold, 551 F. Supp. 129, 151.

On October 9, 1987, Judge Wexler rendered his Ruppert v. Bowen, 671 F. Supp. 151 (EDNY 1987), decision on the merits. He held that Jackson v. Schweiker 683 F. 2d 1076 (7th Cir. 1982), and the "Jackson" SSI income regulation, 20 C.F.R. 416.1130(b), did not apply to SSI recipients residing in the Second Circuit. Petitioner appealed that decision.

On March 29, 1989, the Second Circuit decided Ruppert v. Bowen, 871 F. 2d 1172 (2d Cir. 1989), upholding and reversing in part the District Court's decision. The court ordered a Ruppert II remand for the court to provide the HHS Secretary with an opportunity to apply the "Jackson" regulation, 20 C.F.R. § 416.1130(b), with its "actual economic benefit" standard, and establish an SSI standard that would apply in the Second Circuit.

On July 16, 1990, HHS General Counsel Michael Astrue (the 2007-2011 SSA Commissioner) approved a Ruppert "Acquiescence Ruling", AR 90-02. This established the "Ruppert nonacquiescence policy" and explained why the "Jackson" income regulation would not be expanded to states not in the Seventh Circuit. Rather, the Acquiescence Ruling explained why the Circuit Courts had incorrectly decided Ruppert and Jackson because they were contrary to HHS policy. http://www.ssa.gov/OP_Home/rulings/ar/02/AR90-02-ar-02.html.

In its September 6, 2011 decision, the Second Circuit affirmed Judge Garaufis' decision to apply FOIA Exemption 5. A-65, n.1. Neither court ever read *in camera* the "Ruppert" documents.

E. The Robert VIII "Barrett nonacquiescence policy" document

One of documents at issue in Robert VIII was the "Barrett nonacquiescence policy" document. This document explains why DOJ did not acquiesce to the Second Circuit's Barrett v. United States, 798 F. 2d 565 (2d Cir. 1986), decision that government attorneys could not withhold facts from the court in order to protect classified facts. "Finally, acceptance of the view urged by the federal appellants would result in a blanket grant of absolute immunity to government lawyers acting to prevent exposure of the government in liability." Id. at 573.

In its May 9, 2008 decision, the District Court ordered AG Mukasey to conduct a supplemental due diligence search for this document that the FOIA Officer could not locate within the DOJ. Petitioner placed the DOJ on Notice that a reasonable search to locate the OLC opinion would be to contact (Acting) AAG of the OLC Steven Bradbury (2005-2008).

In 2002, the Congress addressed the issue of the AG's defense of nonacquiescence policies by enacting Report on Enforcement of Laws: Policies Regarding the Constitutionality of Provisions and Non-acquiescence. Pursuant to 28 U.S.C. § 530D (a)(1)(A)(ii), Congress required that the AG "shall" report to Congress cases that the AG determined were "nonacquiescence" cases. However, President Bush's November 2, 2002 § 530D Signing Statement established an exception for classified nonacquiescence decisions which were not to be reported to

Congress. http://www.presidency.ucsb.edu/ws/index.php?pid=73177.

AG Mukasey's FOIA Officer conducted the supplemental due diligence search by again reviewing the Executive Office of U.S. Attorneys (EOUSA) Indexes. The FOIA Officer filed a supplemental Declaration without explaining why there was no contact with the OLC Office. Petitioner asserts this was because it was a classified OLC decision not reported to Congress.

In its September 21, 2009 decision, the District Court held that the AG's FOIA Officer had conducted a reasonable second due diligence search for the document by reviewing the EOUSA Indexes and not the OLC Indexes. The Second Circuit affirmed that decision. "we again agree with the District Court that the DOJ demonstrated through its supplemental declarations that it had conducted searches that were reasonably calculated to locate the requested documents (assuming any exist) and that Robert offered only conclusionary allegations that were insufficient to rebut the DOJ's showing." A-65.

F. The Robert VIII "Christensen nonacquiescence policy" document

One of the sets of documents at issue in Robert VIII was the "Christensen nonacquiescence policy" document. As with the "Barrett nonacquiescence policy" document, the Second Circuit affirmed the District Court's decision that the DOJ's supplemental declarations established that DOJ FOIA Officers had conducted two reasonable searches for this document

by reviewing the EOUSA Indexes. A-65. The AGs FOIA Officers did not make inquiries of Acting AAG of the OLC Bradbury who had the 28 U.S.C. § 530D duty to report "nonacquiescence" cases to Congress except for the classified "nonacquiescence" cases. They did not locate the document.

On May 1, 2000, in Christensen v. Harris County, 529 U.S. 566 (2000), this Court had clarified the Chevron deference standard. Christensen involved a Labor Department attorney's interpretation of a regulation. The Court rejected the AGs' administrative law argument that the Court should defer to Executive Branch counsel's interpretation of the regulation when Congress has spoken. "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." Id. at 588.

Petitioner asserts that a classified "Christensen nonacquiescence policy" document exists as applied to the Ford v. Shalala, 87 F. Supp 2d 163 (E.D.N.Y. 1999), nationwide class of SSI recipients whose Notices had been facially defective. The Ford decision required remedy Notices which included citations to the regulations upon which the SSI recipients benefits were denied or reduced. Christensen resolved the Notice issue presented in the 1982 Ruppert I and 1989 Ruppert II remands. However, SSA Commissioner Astrue continues in 2011 not to send Ford remedy Notices to the Ford class members that cite to the SSI "Jackson" income regulation, 20 C.F.R. 416.1130 (b), without which their benefits continue to be reduced.

If a classified Christensen nonacquiescence policy document exists and was not reported to Congress, then this would be a "clandestine" policy that would trigger the equitable tolling remedy of Bowen v. City of New York, 476 U.S. 467 (1986) as applied to 1994-2011 Ford class members. "The claimants were denied the fair and neutral procedure required by the statute and regulations, and they are now entitled to pursue that procedure." Id. at 487.

G. The Robert VIII "IMC Investigation Final Report" document

One document at issue in Robert VIII was the 1987 joint FBI-DOJ-HHS task force's "IMC Investigation Final Report" that the DOJ FOIA Officer could not locate. This document reveals whether FBI Director Webster knew that a CIA-DIA "black operation" had been conducted at the Florida HMO International Medical Center, Inc (IMC), in violation of the Boland Amendment that prohibited the use of funds to assist the Contras which were not Department of State Nicaraguan Humanitarian Assistance Office (NHAO) funds.

The FOIA-requested "IMC Investigation Final Report" was issued by a 1985-1987 joint FBI-DOJ-HHS task force that investigated alleged "Fraud against the Government" committed at IMC. The joint task force had provided preliminary findings to a 1987 House Committee on Government Operations that was conducting its own "Fraud Against the Government" investigation of IMC. On April 14, 1988, the House Committee issued its Report: Medicare Health Maintenance Organizations: The International Medi-

cal Centers Experience. See also Miami Mystery: Paid to Treat Elderly, IMC Moves in Worlds of Spying and Politics: Medicare Money Flowed in: Only Mr. Recarey Knows Where It Flowed Next: Congress, "bugs" and Mob." Wall Street Journal, 8-9-88.

Petitioner informed the AG that a copy of this document had been in the custody of AAG of the Civil Division DAAG of the Commercial Division Michael Hertz, a 33 year DOJ veteran. He had been in charge of the IMC *qui tam* suit in which DOJ succeeded the ex realtor Leon Weinstein who was a former-HHS IG Special Agent who had participated in the HHS "Fraud Against the Government" investigation of IMC. After his forced retirement, he had filed a IMC "whistleblower" *qui tam* action that was taken over by the Commercial Division.

The DOJ limited its due diligence searches for this IMC document to an AUSA from the Southern District of Florida who searched the Indexes of the Southern District of Florida for this document. The DOJ FOIA Officer did not contact DAAG Hertz.

As with the "Barrett nonacquiescence policy" and "Christensen nonacquiescence policy" documents, the Second Circuit affirmed the District Court's decision that the DOJ's supplemental Declaration carried the DOJ's burden to prove that the DOJ FOIA Officers had acted with due diligence conducting a reasonable unsuccessful supplemental search. A-65. Petitioner asserts this was not a reasonable search because AG Holder knows that this is a classified IMC document which DAAG Hertz can locate. Upon information and belief, AG Holder knows whether

this document corroborates petitioner's allegation that HHS General Counsel del Real had been CIA Director Casey's covered agent who in December, 1985 became IMC President Miguel Recarey's Chief of Staff who administered the HHS funds paid to the Contras.

H. Pages of the May 6, 2004 OLC FISA "secret law" Memo reclassified on March 18, 2011

The May 6, 2004 OLC FISA Memo is a connect-the-dots document to the FOIA requested documents at issue in this petition. Petitioner suggests that to better understand FOIA requested 1982-2011 documents, the Justices consider applying former-Secretary Rumsfeld's historical analysis of "known-known", "known-unknown", and "unknown-unknown" facts:

> Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns -- the ones we don't know we don't know.
> http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2636

Petitioner argues that the Second Circuit erred because the pages of the May 6, 2004 OLC "secret law" Memo reclassified on March 18, 2011, were "known-unknown" facts to the Second Circuit. The Second Circuit's knowledge of the OLC FISA Memo's reclassified pages should have triggered a remand decision so that the District Court would have an opportunity to learn the "known-known" facts that AG Holder knew had been "unknown-unknown" facts to the District Court in Robert VII v. DOJ and in Robert VIII v. DOJ, HHS, and SSA.

Upon information and belief, the reclassified May 6, 2004 OLC FISA Memo pages explain AG Meese's decision not to follow Mitchell v. Forsyth, 472 U.S. 511 (1985), because it was determined that this Court did not have the authority to encroach upon the President's Article II authority to protect the nation from terrorists by conducting warrantless wiretaps:

> We conclude that the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions.
>
> As the Nation's chief law enforcement officer, the Attorney General provides vital assistance to the President in his performance of the latter's constitu-

> tional duty to "preserve, protect, and defend the Constitution of the United States." U.S. Const. Art. II, 1, cl. 8. Mitchell's argument, in essence, is that the national security functions of the Attorney General are so sensitive, so vital to the protection of our Nation's well-being, that we cannot tolerate any risk that in performing those functions he will be chilled by the possibility of personal liability for acts that may be found to impinge on the constitutional rights of citizens. Such arguments, 'when urged on behalf of the President and the national security in its domestic implications, merit the most careful consideration.' Keith, 407 U.S., at 219. Nonetheless, we do not believe that the considerations that have led us to recognize absolute immunities for other officials dictate the same result in this case. Id. at 520. Emphasis Added.

AG Meese explained his "Co-ordinate Branches of Government" theory that the President and the AG have equal authority with the Supreme Court to interpret Article II of the Constitution, in his 1986 "Tulane" speech, Law of the Constitution, 61 Tulane L. Rev. 979:

> The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government crated and empowered by the Constitution- the executive and legislative no less than the judicial—has a duty to interpret the Constitution." Id. at 985-986. Emphasis Added.

Upon information and belief, AG Meese made a Mitchell v Forsyth "nonacquiescence" decision. This is evidenced by the fact that AG Meese did not instruct DOD Secretary Casper Weinberger to dismantle the NSA TSP data banks that were being data mined by NSA Director General William Odom (1985-1988) in violation of the "exclusivity provision" of the FISA.

On March 28, 1986, Civil Division AAG Richard Willard, who was on the Mitchell v. Forsyth USG Brief that had made the AG's absolute immunity argument, sent a memo to USG attorneys explaining the law as to Bivens personal liability of DOJ attorneys. Personal Liability of Federal Officials The Bivens Problem. National Archives Files of Richard Willard 1985-1988 Accession 060-90-220, Box 12 Folder: Correspondence to Other Division and DOJ Components. He provided this advice to DOJ attorneys who knew that after Mitchell v Forsyth, they could be sued if they knew of the warrantless wiretaps that continued to be conducted without FISC orders. He advised that because there would be no right of indemnification from the DOJ, the attorneys

should purchase a personal professional liability policy. "A decision on professional liability insurance is personal and I am attaching a copy of a brochure and application should you wish to explore the matter further." Willard, at 2. http://www.archives.gov/news/samuel-alito/accession-060-90-220/Acc060-90-220-box12-Correspondence.pdf.

On May 6, 2004, AAG of the OLC Goldsmith sent the Top Secret FISA Memo to AG Ashcroft and explained that the main legal authority for the post-9/11 NSA PSP was the Congressionally enacted September 18, 2001 Authorization for Use of Military Force (AUMF). This trumped the "exclusivity provision" of the FISA. However, this May 6, 2004 OLC opinion also discussed the President's inherent unlimited Article II authority as the Commander-in-Chief to authorize the NSA to take actions at all times, and not just during wartime such as after 9/11:

> The President's authority in this field is sufficiently comprehensive that the entire structure of federal restrictions for protection national security information has been created solely by presidential order, not by statute. See generally Department of the Navy v Egan, 484 U.S. 5187, 527, 530 (1988); See also New York Times Co. v United States, 403 U.S. 713, 729-730 (1971)(Stewart, J., concurring)("(I)t is the constitutional

> duty of the Executive-as a matter of sovereign prerogative and not as a matter of laws the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the field of international relations and national defense."). Similarly, the NSA is entirely a creature of the Executive-it has no organic statute defining or limiting its functions. (redacted b1, b3). Id. at 45. Emphasis added.
> https://webspace.utexas.edu/rmc2289/OLC%2054.FINAL.PDF.

This May 6, 2004 Memo explained the "Unitary Executive" theory whereby the Article I Congress did not have the constitutional authority to enact legislation that encroached upon the President's Article II Commander in Chief's duties that made it "impossible for the President to perform his constitutionally prescribed" duties:

> Even if we did not conclude that (redacted b1,b3) was within the core of the Commander-in-Chief power with which Congress cannot interfere, we would conclude that the restrictions in the FISA would frustrate the President's ability to carry out his constitu-

> tionally assigned functions as Commander in Chief and are impermissible on that basis. As noted above, even in prior opinions suggesting that Congress has the power to restrict the Executive's actions in foreign intelligence collection this Office has always preserved the caveat that such restrictions would be permissible only where they do not "go so far as to render it impossible for the President to perform his constitutionally prescribed functions." Redacted b5. Id. at 70. Emphasis Added.

AG Holder's March 18, 2011 reclassification decision was an admission that there was a DOJ "known-known" pre-9/11 FISA "secret law" that his 2011 Associate DAG James Baker knew had been an "unknown-unknown" FISA "secret law" throughout Robert VII v. DOJ. On May 26, 2011 when AG Holder filed his Robert VIII Brief, he knew that the FISA "secret law" continued to be "unknown-unknown" law to the District Court and the Second Circuit.

REASONS FOR GRANTNG THE PETITION

I. The Court below erred by not ordering a remand for the District Court to review *in camera* petitioner's FOIA requested documents withheld pursuant to FOIA Exemption 5

In its September 6, 2011 Summary Order, the Second Circuit rejected petitioner's argument that there should be a remand in order to apply AG Holder's March 19, 2009 FOIA Guideline with its presumption of disclosure:

> With respect to Robert's arguments that the case should be remanded to allow the District Court to reconsider its ruling in light of purportedly new standards for handling FOIA requests, Robert has not explained how these standards would undermine, or even apply to, the District Court's decisions. A-64.

On March 19, 2009, AG Holder issued a Memorandum that established new FOIA Guidelines. Memorandum for Heads of Executive Departments and Agencies. This Memorandum rescinded 2001 Guidelines and established a new presumption of disclosure standard that would also apply to pending FOIA cases:

> Instead, the Department of Justice will defend a denial of a FOIA request only if (1) the

> agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the Judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information. Id. at 2. Emphasis Added.
> http://www.justice.gov/ag/foia-memo-march2009.pdf

Petitioner argues that the new FOIA Guidelines should be applied in this case. There is a substantial likelihood that the release of documents withheld pursuant to FOIA Exemption 5 would result in a material disclosure of additional information concerning the pre-9/11 NSA TSP and petitioner's assertion he had been the 1980s target of illegal wiretapping.

In his May 31, 2011 Reply Brief, petitioner had argued that AG Holder's March 18, 2011 decision to reclassify pages of the May 6, 2004 OLC FISA Memorandum sent to AG Ashcroft provided a reason for a

remand. He argued that a remand would provide the District Court with an opportunity to read *in camera* the "Robert v. Holz" and "Ruppert" documents that were withheld pursuant to FOIA Exemption 5 to determine whether these documents corroborated petitioner's assertion that he had been the target of an illegal NSA TSP that was funded with unaudited SSI funds because classified OMB Budget funds could not be used due to the NSA Directors' violations of the "exclusivity provision" of the FISA.

Petitioner also argued that by application of AG Holder's presumption of disclosure, the court could determine whether these documents contained evidence that petitioner needed to prosecute a Bivens v. Six Unkown Federal Narcotic Agents, 403 U.S. 388 (1971), complaint. Petitioner asserts that these documents would prove the elements of a Christopher v. Harbury, 536 U.S. 403 (2001), violation of his First Amendment right of access to the courts because the decision to enjoin him from filing new FOIA complaints without a pre-clearance Order was made without a hearing at which AG Gonzales' representation of the facts could be challenged. He also argued that these documents were needed for the petitioner to survive an AG's Ashcroft v. Iqbal, 566 U.S. 662 (2009), Motion to dismiss because of the implausibility of his claims.

Petitioner argues that lurking in this case is the Marbury v. Madison principle of the Article III Courts authority to review Article I and Article II decisions:

> It is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. 5 U.S. 137, 177 (1803). Emphasis Added.

If the petition were granted, then AG Holder would have to decide whether he would reveal to the Supreme Court *in camera,* the pre-9/11 FISA "secret law" explained in the pages of the May 6, 2004 OLC Memo reclassified on March 18, 2011. This becomes a Marbury v. Madison issue if AG Holder refuses to reveal the pre-9/11 FISA "secret law" explained in the May 6, 2004 OLC Memo, or if the "secret law" of the OLC Memo reveals AG Meese's opinion that this Court had "incorrectly" decided Mitchell v. Forsyth because the AG needs absolute immunity to wiretap U.S. citizens to protect the nation from terrorists.

II. The Court below violated petitioner's First Amendment right of access to the courts by enjoining plaintiff from filing any new FOIA complaints without the Judge's pre-clearance order, without holding an evidentiary hearing

Petition argues that Judge Garaufis should have provided him with an evidentiary hearing that included the right to cross examine witnesses prior to enjoining him from filing any new FOIA complaints

without a pre-clearance Order. Although the Second Circuit modified the December 14, 2005 Judgment to limit the injunction to require a pre-clearance Order prior to filing a FOIA complaint, it affirmed the decision that petitioner did not have a right to a hearing to cross examine witnesses to challenge the accuracy of AG Gonzales' representation of the facts. "There is no support for Robert's argument that he was entitled to an evidentiary hearing and an opportunity to cross examine witnesses." A-67.

If AG Holder files an Amnesty v. Clapper, 638 F. 3d 118 (2d Cir. 2011), petition for a writ of certiorari which this Court grants, then Robert VIII presents a timely issue concerning the right to a hearing before an injunction is issued. Petitioner argues that an evidentiary hearing was needed so that he could prove that he was a FISA "aggrieved person" pursuant to the 50 U.S.C. § 1806 (f) standing provision. In Robert VII v. DOJ, 2005 U.S. Dist. LEXIS 39616, 193 Fed. Appx. 8 (2d Cir. 2006), cert. den. 549 U.S. 1167 (2007), the Second Circuit had ordered letter-Briefs on that issue which foreshadowed the Second Circuit's March 21, 2011 Amnesty decision.

If the District Court had scheduled a pre-injunction hearing, then petitioner would have had an opportunity to ask USG witnesses why he had been a target of a pre-9/11 NSA domestic surveillance program. He would have explained that he became a serial FOIA filer because he knew that the AGs were conducting an NSA TSP without the knowledge of the Article I "Gang of Eight" or the Article III FISC. This hearing would have been held after the December 16, 2005 publication in the New York Times of "Bush

Lets U.S. Spy on Callers Without Courts" scoop which revealed the post-9/11 NSA TSP.

III. The Court should establish a rule that a Judge has a duty to read *in camera* documents the AG is withholding pursuant to the FOIA Exemption 5 when the petitioner alleges that those documents corroborate his assertions that AGs had committed a "fraud upon the court" in a prior FOIA action

This case provides the Court with an opportunity to address the issue of whether when the AG asserts the FOIA Exemption 5 attorney-client privilege or work product defense, the Judge has a duty to read *in camera* documents that the plaintiff asserts corroborate an allegation that the AG had committed a "fraud upon the court" in a prior FOIA action. 5 U.S.C. § 552 (b)(5). This is a timely issue if AG Holder files an Amnesty v. Clapper petition for a writ of certiorari given AG Holder's knowledge of the 1985-1988 DOJ "Robert v. Holz" documents which reveal whether petitioner had been a FISA "aggrieved person" pursuant to 50 U.S.C. § 1806 (f).

Petitioner had requested that the District Court and the Second Circuit read *in camera* the "Robert v Holz" and "Ruppert" documents to learn whether these documents contain evidence that corroborated petitioner's assertion that AGs Ashcroft and Gonzales had committed a Chambers v. Nasco, 501 U.S. 32 (1991), "fraud upon the court" in Robert VII. "It is a wrong against the institutions set up to protect and safeguard the public." Id. at 44.

The Second Circuit also rejected petitioner's argument that the Clark v. United States, 389 U.S. 1 (1933), "fraud" exception applies. "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." Id. at 15 (1933). However, the Courts never read *in camera* the "Robert v. Holz" and "Ruppert" documents that the FOIA Officers had read when they determined FOIA Exemption 5 should be applied.

IV. The Court should establish a FOIA due diligence rule that requires that a supplemental due diligence search include contacting the most logical person to know the location of the FOIA requested documents

The Second Circuit held that the AGs' supplemental searches for the "Barrett nonacquiescence policy", "Christensen nonacquiescence policy", and "IMC Investigation Final Report" documents had been reasonable due diligence searches. Those supplemental searches were *de novo* searches of the original searches which had not located the documents.

Petitioner argues that it was not reasonable for the DOJ FOIA Officer to conduct a supplemental due diligence search for "nonacquiescence" policy documents and not contact 2005-2008 (Acting) AAG of the OLC Bradbury. He was the most logical DOJ employee to locate the "Barrett nonacquiescence policy" and "Christensen nonacquiescence policy" documents. Pursuant to 28 U.S.C. § 530 D, Report on Enforcement of Laws: Policies Regarding the Constitutionality of Provisions and Non-acquiescence, he was

tasked with informing Congress the names of the "nonacquiescence" cases and knowing whether these were classified "nonacquiescence" cases by application of the November 2, 2002 Presidential Signing Statement.

Likewise, Petitioner argues that it was not reasonable for the DOJ FOIA Officer to conduct a supplemental due diligence search for the "IMC Investigation Final Report" document and not contact DAAG of the Civil Division Commercial Division Hertz. He had been in charge of DOJ's *qui tam* suit against IMC that was based in part on the "IMC Investigation Final Report" of the joint FBI-DOJ-HHS task force that had provided facts to the House Oversight Committee that had conducted its own "Fraud Against the Government" investigation of IMC.

This case provides the Court with an opportunity to establish a FOIA rule: If the DOJ cannot locate a FOIA requested document, then the Judge has a duty to order a supplemental due diligence search that includes contacting the most logical person to know the location of the FOIA requested document. Without such a FOIA due diligence rule, an AG can make Article III Judges the "handmaiden" of the Executive.

CONCLUSION

This petition should be granted because it presents the Court with an opportunity to establish Article III standards for the data mining of the 1984-2011 Orwellian-Hooveresque NSA TSP data banks that the 1985 Mitchell v. Forsyth Court could never have envisioned. These Article III standards would apply to the FISA "secret law" that was not known to the District and Circuit Courts below.

Dated:
November 30, 2011

Charles Robert
Pro se Plaintiff-Appellant
441 B West Broadway
Long Beach, New York 11561
516-889-2251