UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

Docket Number: MISC. 07-01

IN RE MOTION FOR RELEASE OF COURT RECORDS

OPPOSITION TO THE AMERICAN CIVIL LIBERTIES UNION'S MOTION FOR RELEASE OF COURT RECORDS

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The American Civil Liberties Union's ("ACLU") unprecedented motion for release of classified court records challenges the secrecy of orders this Court issued, or may have issued, and of the Government's legal briefs submitted to this Court. *See* ACLU Motion ("Mot.") at 2-3. More specifically, the ACLU requests that this Court review the propriety of the Government's classification of information in this Court's January 10, 2007, orders; in any subsequent orders, if such exist, that extended, modified, or vacated these orders; and in any legal briefs submitted by the Government in connection with the initial orders or in connection with any subsequent orders. Further, the ACLU requests that after such review this Court unseal and make public all such documents with only those redactions "essential to protect information that the Court determines" to be properly classified. *Id.* at 2-3.

There is, as the ACLU notes, significant and legitimate public interest in the ongoing debate over Government surveillance of foreign terrorist and intelligence targets. Part of this debate has focused on this Court's January 10, 2007, orders, which authorized the Government to target for collection international communications where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. It is in the interest of informing the public debate that the Attorney General confirmed the existence of the orders on January 17, 2007. In addition, the Government has shared these orders, as well as its legal briefs, with the relevant congressional committees and provided numerous briefings regarding the details of these orders for members of Congress.[1]

Nevertheless, the Court must deny the ACLU's request. First, there is simply no legal basis under the Foreign Intelligence Surveillance Act for the relief the ACLU seeks. Congress, in its limited grant of authority to the Court, has not empowered the Court to consider free-

[1] The Government has considered the balance anew but for reasons expressed *infra* has concluded that the substantial risk of harm that disclosure would pose to the Nation's security currently outweighs any public benefit.

standing motions filed by non-parties, such as the ACLU. Second, as explained below, the materials the ACLU seeks are properly classified in their entirety. The public disclosure of the documents the ACLU requests would seriously compromise sensitive sources and methods relating to the collection of intelligence necessary for the Government to conduct counterterrorism activities. Finally, the First Amendment does not compel release of this properly classified information.

I. There is No Legal Basis for the ACLU's Motion.

The ACLU, which does not purport to have any connection to any case or controversy before this Court, has no legal basis for the relief it seeks. First, Congress did not provide for such relief from this Court in the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801-11, 1821-29, 1841-46, & 1861-62. "It is a 'well-established principle that federal courts . . . are courts of limited jurisdiction marked out by Congress.'" *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1326 (Fed. Cir. 2006) (quoting *Aldinger v. Howard*, 427 U.S. 1, 15 (1976)). Because Congress has not authorized this Court to consider free-standing motions filed by non-parties like the request at issue here, the ACLU's motion should be dismissed. Second, the ACLU, by filing this motion, is attempting an end run around the carefully designed mechanism Congress created for seeking the release of this classified information—the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

A. The FISA Does Not Provide This Court With Jurisdiction to Provide the Relief the ACLU Seeks.

Congress has specified that this Court "shall have jurisdiction to hear applications for and grant orders approving [both] electronic surveillance" (50 U.S.C. § 1803(a)) and certain physical searches (§ 1822(c)), as well as jurisdiction to hear applications for and issue orders concerning the installation of pen registers or trap and trace devices (§ 1842(b)(1)) and the production of

tangible items by private entities (§ 1861(b)(1)(A)). In light of this limited authority, Congress created a procedure under which the Government invokes this Court's jurisdiction by submitting an *ex parte* application (§§ 1804, 1823, 1842(a)-(c), 1861(a)-(b)), and, if relevant requirements are met, the Court "shall enter an *ex parte* order" approving the activity at issue in the application. *See* 50 U.S.C. §§ 1805(a), 1824(a), 1842(d)(1), 1861(c)(1) (emphasis added). It is thus well-established that the "government is the *only* party to FISA proceedings" before this Court. *In re Sealed Case*, 310 F.3d 717, 719 (FISA Ct. Rev. 2002) (emphasis added). Non-parties asserting only a generalized public interest, such as the ACLU, simply are not entitled to participate on their own accord in proceedings before this Court.

Non-governmental entities may appear before and seek relief from this Court in only two circumstances, both of which involve collateral proceedings concerning the *enforcement* of orders that have already issued as part of the Court's *ex parte* proceedings with the Government. First, the Court presumably has inherent authority to enforce its orders with contempt as an incident to its jurisdiction to issue such orders. *See Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 831 (1994). For this reason, a person who fails to comply with an order of this Court directing that person to take specific action may appear under this Court's rules to defend against the Government's request for contempt sanctions. *See* FISC R. Pro. 15. Second, a private person who has been ordered to produce tangible things (following an *ex parte* proceeding under 50 U.S.C. § 1861) may challenge the legality of that order or an associated non-disclosure order by filing a petition with a pool of judges of this Court. *See* 50 U.S.C.

§§ 1803(e)(1), 1861(f).[2] The ACLU's motion does not fall within either of these limited circumstances.

Further, FISA's provisions regarding the discovery of orders and applications do not implicate the jurisdiction of this Court or provide the ACLU with any basis to seek such documents in any forum. The statute envisions that the federal district courts, and not this Court, have the authority to entertain motions to "discover" or "obtain" FISA "applications or orders or other materials relating to electronic surveillance," physical searches, or the use of pen register or trap and trace devices. *See* 50 U.S.C. §§ 1806(f), 1825(g), 1845(f)(1). But even such motions may be brought, if at all, only by "aggrieved persons,"[3] which the ACLU does not claim to be.[4]

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[2] The ACLU relies on two provisions of this Court's rules to attempt to establish a legal basis for its motion: Rule 7(b)(ii) (providing for records to be unsealed on motion) and Rule 6 (allowing the appearance of non-government attorneys). Mot. at 2 n.2. The ACLU's reliance is misplaced. First, no rule could change the limited purpose Congress gave this Court nor undermine the delicate balance Congress struck in FOIA between the need of the public to know and the need of the Government to keep classified and sensitive information in confidence. Second, the cited FISC rules have purposes other than the *sub silentio* authorization of non-party motions. FISC Rule 7(b)(ii) provides for motions by the Government (or perhaps proper litigants under the two circumstances noted above), not the general public, for the release of records. *See* FISC R. Pro. 7(b)(ii). And Rule 6 allows the appearance of non-government attorneys in the context of the two limited collateral proceedings involving enforcement of orders described in the text and does not authorize motions such as the ACLU's. *See* FISC R. Pro. 6.

[3] An "aggrieved person" means "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." *See* 50 U.S.C. § 1801(k).

[4] Unless the Government intends to use information obtained or derived from electronic surveillance against an aggrieved person in a trial, hearing, or other proceeding in or before a court or other federal or state authority, even the aggrieved person is not notified of the electronic surveillance. *See* 50 U.S.C. § 1806(c). And no court has ever granted an aggrieved person access to any part of orders authorizing surveillance. It would be strange indeed if the ACLU, asserting a generalized desire to know, could obtain the relief it seeks while an aggrieved person could not.

The ACLU thus incorrectly asks this Court to expand its jurisdiction by entertaining this request.[5]

B. The FOIA is the Only Appropriate Avenue for the ACLU's Request.

Congress, in enacting the FISA, did not allow for the relief the ACLU seeks from this Court. Instead, Congress chose to allow individuals to request the release of information from the *Executive Branch* under FOIA, and specifically exempted classified information from the disclosure obligations imposed by FOIA. *See* 5 U.S.C. § 552(b)(1). Under FOIA, the ACLU cannot ask this Court for its orders because FOIA applies only to Executive Branch agency records. *See* 5 U.S.C. §§ 552(a), (f)(1). The ACLU can use FOIA, however, to seek access to FISC orders and Government briefs in the Executive Branch's possession. The FOIA process, which combines an initial review and decision by the Executive Branch on the release and withholding of information with Judicial Branch review in an adversary and public proceeding, is the proper means for the ACLU to seek records of this Court's proceedings from the Executive Branch. Moreover, FOIA's judicial remedies must be sought only in district court, not in this Court. Instead of following the FOIA process that Congress carefully laid out, the ACLU has improperly attempted an end run around FOIA by filing this motion.

Not only does the existence of FOIA's procedural mechanism support the conclusion that the ACLU's motion should be denied, its substantive provisions support the Government's position that the highly classified materials that the ACLU seeks cannot be publicly released.

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[5] Further, the ACLU has unsuccessfully sought much of the same information in litigation in which it was a party in the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit summarily refused the ACLU's motions to unseal classified documents submitted by the National Security Agency. *See Am. Civil Liberties Union, et al. v. Nat'l Sec. Agency, et al.*, Order, Nos. 06-2095, 06-2140 (6th Cir. July 6, 2007). Since the ACLU's requests have been denied in the context of litigation challenging the NSA's activities to which the ACLU was a party, it is even more clear that the ACLU's free-standing non-party motion should be denied here.

While Congress enacted FOIA with the view that the public interest is normally served by disclosure of government records, it also recognized that the disclosure of certain categories of information would harm the greater public good. It thus exempted several types of records from mandatory disclosure (*see* 5 U.S.C. § 552(b)) in order "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger v. Catholic Action*, 454 U.S. 139, 144 (1981). Most relevant here, FOIA Exemption 1 applies to matters that are properly classified under an Executive order authorizing such matters to be kept secret in the interest of national security. *See* 5 U.S.C. § 552(b)(1).

As explained below, the materials sought are properly classified in their entirety. The Electronic Frontier Foundation recently requested many of the same materials from the Executive Branch as the ACLU currently seeks, and the United States District Court for the District of Columbia determined that such materials were properly withheld from public release pursuant to, *inter alia*, the Executive's authority to withhold classified materials for reasons of national security. *See Elec. Frontier Found. v. Dep't of Justice*, Civ. No. 07-403, slip op. (D.D.C. Aug. 14, 2007) (dkt. no. 17) (granting Government's motion for summary judgment).[6] While the Government would oppose release of the information the ACLU now seeks if it were to submit a FOIA request to the Executive Branch, that is not a reason to allow the ACLU to circumvent the FOIA process Congress has created.

Further, the ACLU's motion, if granted, would result in this Court's having to create a parallel type of proceeding, not authorized by any statute, in which any member of the public could file a motion with this Court seeking FISA orders and records, and in which the Government would be forced to develop and justify its position regarding the disclosure of such

[6] On August 3, 2007, EFF filed a motion for reconsideration of the district court's decision. *See Elec. Frontier Found.*, Civ. No. 07-403 (dkt. no. 16).

materials without the benefit of the orderly, sequential decision-making process Congress established in the FOIA. The resulting adversarial proceeding would be wholly inconsistent with the limited jurisdiction Congress has given this Court and the *ex parte* nature of the proceedings before it. In addition, any decision reached by this Court in such a proceeding might well be unreviewable, unlike in the FOIA context. *See* 50 U.S.C. § 1803(b) (the Foreign Intelligence Surveillance Review Court has appellate jurisdiction over appeals from denials of FISA applications).

For these reasons, the ACLU's motion has no legal basis. FISA, the statute authorizing this Court, provides for no such motion. And Congress has established the FOIA process for addressing just such a request. The ACLU's request should be denied.

II. The Executive Branch Properly Classified the Requested Materials.

Not only is there no legal basis for the ACLU's motion, but its assertion that the Executive Branch's classification decisions are improper fails on its merits. The ACLU recognizes that "this Court's docket consists mainly of material that is properly classified" and concedes that "the administration has taken the position that the sealed materials are classified." Mot. at 14, 19. It nonetheless requests that this Court second-guess the Executive Branch's classification decision. It is well-established that the Judiciary gives the utmost deference to the Executive Branch's classification decisions, including the Executive's assessment of the national security risk of disclosing classified information. And the ACLU offers no persuasive reason to question the current classification of the FISC orders and government briefs. Further, as noted above, the U.S. District Court for the District of Columbia recently held that the Government, pursuant to the Executive's authority to withhold classified materials for national security

reasons, had properly withheld many of the same materials the ACLU now seeks. *See Elec. Frontier Found.*, Civ. No. 07-0403, slip op. at 24.

A. The Executive Branch Has Sole Authority to Classify Information and Courts Give the Utmost Deference to These Decisions.

The Executive Branch has sole authority to classify and control access to "information bearing on national security . . . flows primarily from th[e] constitutional investment of power in the President" as the Commander in Chief. *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988). The Supreme Court, accordingly, has made clear that the "protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *Id.* at 529; *see also id.* at 529-30 ("'courts have traditionally shown the utmost deference to Presidential responsibilities'" in "'these areas of Art. II duties'"); *see also, e.g., Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) ("emphasiz[ing] the primacy of the Executive" in this context); *Guillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992) (President possesses "exclusive constitutional authority over access to national security information").

Moreover, courts give the utmost deference to the Executive Branch's "predictive judgment" in evaluating both the risk that disclosure might pose to national security and the "acceptable margin of error in assessing" that risk because of the Executive's superior position to make such determinations. *Egan*, 484 U.S. at 529; *see also CIA v. Sims*, 471 U.S. 159, 176-77, 180 (1985) (deferring to Executive Branch decision to protect intelligence sources and methods from disclosure, and concluding that assessments of harm "often require complex political, historical, and psychological judgments" and judges have "little or no background in the delicate business of intelligence gathering"); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 707 (6th Cir. 2003) (citing *Sims* and deferring to judgment of Executive Branch officials concerning risk of

disclosing national security information); *People's Mojahedin Org. of Iran v. Department of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (noting that courts are often ill-suited to determine the sensitivity of classified information).

This Court's rules reflect this established deference to the Executive Branch's classification decisions. The Court's rules state that "[i]n all matters," the Court "shall comply with [both statutory] security measures . . . as well as Executive Order 12958," as amended. FISC R. Pro. 3. Executive Order 12,958, in turn, makes clear that only certain Executive Branch officials may make original classification determinations. *See* Exec. Order No. 12,958 § 1.3, available as amended at 68 Fed. Reg. 15,315 (2003); *cf. id.* § 2.1 (governing derivative classification). As a result, when this Court directs that one of its opinions be published, the rules of the Court specify that "the Opinion must be reviewed by the Executive Branch and redacted, as necessary, to ensure that properly classified information is appropriately protected." FISC R. Pro. 5(c). These rules similarly recognize that while court materials are always "provided to the government when issued," "no Court records or other materials may be released without prior motion to and Order by the Court;" and, even where the Court orders records to be released, those "records shall be released in conformance with the security measures" mandated by Rule 3. FISC R. Pro. 7(b)(ii). Accordingly, materials classified by the Executive Branch under Executive Order 12,958 may not be publicly released by this Court.

Additionally, in a letter to Senators Patrick Leahy and Arlen Specter concerning the January 10, 2007, FISC orders the ACLU is currently requesting, the Presiding Judge of this Court confirmed that the Court follows this deferential approach to the Executive Branch regarding classified information. *See* January 17, 2007, Letter from Presiding Judge Kollar-Kotelly to Senators Leahy and Specter. The Presiding Judge stated that while she had "no

objection to this material being made available to the Committee," "the Court's practice is to refer any requests for classified information to the Department of Justice." *Id.* The Presiding Judge further stated that if "the Executive and Legislative Branches reach agreement for access to this material, the Court will, of course, cooperate with the agreement." *Id.*

B. The Documents the ACLU Seeks Are Properly Classified.

Under these principles, the ACLU's request that the Court review the Government's classification of the materials and order the release of any improperly classified portions is baseless. The materials withheld here include orders signed by the FISC authorizing the collection of foreign intelligence, and any Government briefs concerning these orders. Such orders authorize the United States to conduct foreign surveillance, and specifically, to target for collection international communications where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization.[7] These documents, accordingly, directly implicate the collection of foreign intelligence critical to the ongoing Global War Against Terror.

The documents are currently and properly classified because they fall squarely into one of the categories of information identified by Executive Order as subject to classification in the interests of national security. *See* Exec. Order No. 12,958, as amended. Specifically, Section 1.4(c) of Executive Order 12,958, as amended, identifies "intelligence activities (including special activities), intelligence sources or methods, or cryptology," as among the subjects properly subject to classification. The authority to protect intelligence sources and methods from disclosure is rooted in the "practical necessities of modern intelligence gathering," *Fitzgibbon v.*

[7] An unclassified summary such as the ACLU seeks would say nothing more than this sentence and any other information provided in the Attorney General's discussion of this Court's orders in his January 17, 2007, letter. *See* Letter from Attorney General Alberto R. Gonzales to Hon. Patrick Leahy and Hon. Arlen Specter, January 17, 2007.

CIA, 911 F.2d 755, 761 (D.C. Cir. 1990), and has been described by the Supreme Court as both "sweeping," *Sims*, 471 U.S. at 169, and "wide-ranging." *Snepp v. United States*, 444 U.S. 507, 509 (1980). Sources and methods constitute "the heart of all intelligence operations," *Sims*, 471 U.S. at 167, and "[i]t is the responsibility of the [intelligence community], not that of the judiciary to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process." *Id.* at 180.

The unauthorized disclosure of information relating to intelligence collection activities would cause serious damage to the national security of the United States: to disclose the methods, means, sources, or targets of intelligence collection, or the procedures relating to the acquisition, retention, or dissemination of intelligence information, is to provide terrorists with a roadmap for how to avoid surveillance or to manipulate it. The resulting loss of accurate intelligence would have devastating consequences for the national security of the United States. This is because hostile intelligence services and international terrorist groups taking aim at the United States are sensitive to information that points to certain categories of targets or certain types of methods or means of surveillance, and use any such information to conduct their counterintelligence or international terrorist activities against us more securely.

To disclose that certain targets have been identified for surveillance or not, or that certain surveillance methods or procedures are authorized for use or not, would allow terrorists and other adversaries intent on causing harm to the United States to identify where U.S. intelligence efforts were focused and to identify "safe harbors" where communications about their terrorist plans could be conducted in relative safety. *See Am. Civil Liberties Union v. Dep't of Justice*, 265 F. Supp. 2d 20, 31 (D.D.C. 2003) ("records that indicate how [an agency] has apportioned its

counterespionage resources, that reveal the relative frequency with which particular surveillance tools have been deployed, and that show how often U.S. persons have been targeted may undoubtedly prove useful to those who are the actual or potential target of such surveillance, and may thereby undermine the efficiency and effectiveness of such surveillance").

Indeed, even apart from the danger of disclosure of the information on its own merits, courts have long recognized that sensitive information of this nature, if disclosed, when coupled with other available or unconfirmed information, could provide even more dangerous insight into the United States' intelligence strategies. *See Sims*, 471 U.S. at 178 ("[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context"); *Ctr. for Nat'l Security Studies v. Dep't of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) ("things that did not make sense to the District Judge would make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence gathering capabilities from what these documents revealed about sources and methods") (quoting *United States v. Yunis*, 867 F.2d 617, 625 (D.C. Cir. 1989)); *Fitzgibbon*, 911 F.2d at 763 ("each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance itself") (quoting *Gardels v. CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982)).

Congress, which recognized the necessity for strict secrecy in matters handled by the FISC, specifically provided that the FISC operates under special security measures, and that FISA orders and applications are not to be disclosed absent specific judicial findings. *See* 50 U.S.C. § 1803(c) ("application made and orders granted[] shall be maintained under security measures"); *id.* § 1806(f) (FISA orders, applications and related materials may be disclosed by a

reviewing court in a criminal case "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance"); FISC R. Pro. 3 (FISC must comply with § 1803(c), § 1822(e), and Executive Order 12,958 governing classification of national security information). As a result, FISC orders are routinely classified and it is the ordinary practice of the Government to refuse to confirm or deny the existence of records pertaining to FISA activities because it is impossible to do either without revealing classified information.

Similarly, courts also have long recognized the "exceptional nature" of FISA material and have uniformly endorsed the conclusion that disclosure of FISA material "might compromise the ability of the United States to gather foreign intelligence effectively." *United States v. Rosen*, 447 F. Supp. 2d 538, 546 (E.D. Va. 2006). As a result, courts routinely decline to order the disclosure of classified FISA orders and applications, even where such disclosure is sought by criminal defendants in federal criminal proceedings.[8]

Additionally, the specific FISC orders and Government briefs sought by the ACLU contain no information that can be released without harming national security, compromising intelligence sources and methods, and interfering with current and prospective law enforcement

[8] *See, e.g.*, *United States v. Dumeisi*, 424 F.3d 566, 578-79 (7th Cir. 2005), *cert. denied*, 547 U.S. 1023 (2006) (declining to compel disclosure of FISA orders and/or applications to criminal defendants or their counsel on the ground that such disclosures would harm the national security of the United States); *United States v. Damrah*, 412 F.3d 618, 624-25 (6th Cir. 2005) (same); *United States v. Squillacote*, 221 F.3d 542, 544 (4th Cir. 2000) (same); *United States v. Isa*, 923 F.2d 1300, 1306 (8th Cir. 1991) (same); *United States v. Hamide*, 914 F.2d 1147, 1150 (9th Cir. 1990) (same); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987) (same); *United States v. Ott*, 827 F.2d 473, 476-77 (9th Cir. 1987) (same); *United States v. Duggan*, 743 F.2d 59, 79 (2d Cir. 1984) (same); *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982) (same).

investigations. Any legal discussion that may be contained in these materials would be inextricably intertwined with the operational details of the authorized surveillance.[9]

The need for secrecy of these materials was most recently demonstrated in the decision of the U.S. District Court for the District of Columbia noted above. *See Elec. Frontier Found.*, Civ. No. 07-403, slip op. (granting Government's motion for summary judgment). The plaintiff in that case filed a FOIA request for this Court's January 10, 2007, orders and any FISC rules and guidelines associated with such orders. The plaintiff argued, similarly to the ACLU, that "the withheld material strongly suggest that segregable portions of the disputed FISC material can, in fact, be disclosed without harm to national security or other cognizable interests." *Id.* at 1 (quotation marks omitted). The district court rejected this argument and denied the plaintiff's cross-motion for *in camera* review. The court found that, based on the Justice Department's two declarations in support of its motion for summary judgment, the Department had "created as full a public record as possible concerning the nature of the responsive documents and the justification for their withholding without exposing classified national security information." *Id.* at 24. The court agreed with the Justice Department that "there appears to be no reasonably segregable portions of the documents that may be released to the public." *Id.*

The ACLU's challenge to the classification of the materials it seeks is based only on public statements made by Government officials concerning the January 10, 2007, FISA Court

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[9] The highly classified nature of the material sought by the ACLU prevents further explanation in an unclassified setting of their content or volume, or of the serious or exceptionally grave risk of damage to national security if the responsive documents are ordered to be disclosed. In light of the ACLU's having no legal basis for its motion and the Government's having properly classified the requested materials, the Government has specifically chosen not to provide a classified annex or declaration with the instant brief. If the Court deems it necessary, however, to further address the issue of the classification of the requested documents, the Government requests the opportunity to address this issue more fully at that point.

orders, but those statements provide no basis for questioning the current classification of those materials. The Attorney General was authorized to disclose the existence of the January 10, 2007, orders based on a balancing of the public interest in making that limited public disclosure and the need to maintain the secrecy of the orders' highly classified details in order to protect national security. *Cf.* Exec. Order No. 12,958 § 3.1(b) (concerning declassification by Presidential subordinates who head executive agencies). While some might speculate based on publicly available statements or media reports (much of which offer varying or inconsistent accounts of the January 10, 2007, orders) as to the specific contents of the January 10, 2007, orders and Government briefs related to such orders and whether subsequent related orders and Government briefs exist, that would be just that – speculation.

Moreover, such limited disclosures do not change the fact that the orders themselves, and their incorporated procedures, remain highly classified, as clearly contemplated by Congress when it enacted FISA, and as required by Executive Order 12,958, as amended. While "[t]he national interest sometimes makes it advisable, or even imperative, to disclose information . . . it is the responsibility of the [Executive Branch], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process." *Sims*, 471 U.S. at 180.

The Government's willingness to discuss the limited information that can be revealed on the public record regarding a highly classified activity cannot be used to undermine the Government's determination, grounded in its "unique insights into what adverse affects [sic] might occur as a result of public disclosures," *Krikorian v. Dep't of State*, 984 F.2d 461, 464 (D.C. Cir. 1993), that certain other information concerning the activity must remain classified in

the interests of national security. *See Afshar v. Dep't of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983) (rejecting plaintiffs' claims that prior disclosures required rejection of the Government's withholding determinations in part because courts should "avoid discouraging the agency from disclosing such information about its intelligence function as it feels it can without endangering its performance of that function") (quoting *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982)); *accord Public Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993) (holding that the court of appeals is "unwilling to fashion a rule that would require an agency to release all related materials any time it elected to give the public information about a classified matter. To do so would give the Government a strong disincentive ever to provide its citizenry with briefings of any kind on sensitive topics").

In sum, the FISC orders and the Government's briefs requested by the ACLU are highly classified and no part of any of the documents can be released without harming national security. Public disclosure of the documents the ACLU requests would seriously compromise the collection of intelligence necessary to the conduct of the Nation's counter-terrorist activities, a conclusion repeatedly endorsed with respect to similar materials by all three branches of the federal government.[10] Accordingly, as this Court knows from its own familiarity with the documents, the classified materials that the ACLU seeks cannot be publicly disclosed.

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[10] Additionally, the ACLU argues that since the Court has publicly released a redacted version of one decision, out of the many thousands of orders the Court has issued, and the Foreign Intelligence Surveillance Review Court has released an opinion, it would be consistent with the Court's past practice for the Court to second-guess the Executive's classification and release the instant documents. The district court in *Electronic Frontier Foundation* rejected a similar argument. The court was "not persuaded that release of a Foreign Intelligence Surveillance Review Court opinion confirms there likely are segregable materials at issue here." *Elec. Frontier Found.*, Civ. No. 07-0403, slip. op. at 19. The release to the public of a single Foreign Intelligence Surveillance Review Court opinion "is no different than the sporadic issuance of public opinions relating to sealed grand jury matters. The mere fact that such a decision is issued for public viewing, whether redacted or not, does not by default mean that all

III. The First Amendment Does Not Compel Release of This Classified Information.

The First Amendment does not compel release of the classified orders of this Court and the legal briefs submitted to it. The First Amendment generally does not "mandate[] a right of access to government information or sources of information within the government's control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978); *id.* at 16 (the First Amendment "do[es] not guarantee the public a right of access to information generated or controlled by government") (Stewart, J., concurring). The Supreme Court has recognized a limited public right of access to criminal judicial proceedings, *see, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), but that right has no application in the context of the foreign intelligence surveillance proceedings before this Court. *See Ctr. for Nat'l Security Studies*, 331 F.3d at 934.

A. The First Amendment Public Right of Access is Limited to Criminal Proceedings.

In *Center for National Security Studies*, the D.C. Circuit rejected plaintiffs' request for information concerning individuals detained in the wake of the September 11, 2001, terrorist attacks. Plaintiffs argued that the *Richmond Newspapers* decision and its progeny recognized plaintiffs' First Amendment right to detainee information. The D.C. Circuit disagreed:

> We will not convert the First Amendment right of access to criminal judicial proceedings into a requirement that the government disclose information compiled during the exercise of a quintessential executive power – the investigation and prevention of terrorism. The dangers [to national security] which we have catalogued above of making such a release in this case provide ample evidence of the need to follow this course. . . . We will not expand the First Amendment right of public access to require disclosure of information compiled during the government's investigation of terrorist acts.

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other such decisions must also contain information subject to public disclosure." *Id.* Like the requesting party in *Electronic Frontier Foundation*, the ACLU in the instant case cites no legal authority to support such a contention.

331 F.3d at 935-36. Neither the D.C. Circuit nor the Supreme Court has ever applied *Richmond Newspapers* outside the context of criminal proceedings. *Flynt v. Rumsfeld*, 355 F.3d 697, 704 (D.C. Cir. 2004).

This Court should follow the well-reasoned decisions of the D.C. Circuit limiting the reach of the *Richmond Newspapers* holding and not extend a First Amendment public right of access to records of the foreign intelligence surveillance proceedings of this Court. Those proceedings are *ex parte* and "shall be maintained under [mandatory] security measures." *See, e.g.*, 50 U.S.C. §§ 1803(c), 1805(a). The orders and legal briefs sought by the ACLU in this matter were prepared in connection with the Government's efforts to combat international terrorism. *See* Letter from Attorney General Gonzales to Senators Leahy and Specter, January 17, 2007. This Court, therefore, should not expand the limited First Amendment public right of access to include access to the records of foreign intelligence proceedings. *See Ctr. for Nat'l Security Studies*, 331 F.3d at 935-36.

B. Both Experience and Logic Show That the First Amendment Does Not Compel Access to This Information.

The ACLU's request for the orders and legal briefs fails under the very authority upon which it bases its First Amendment claim. Even assuming that *Richmond Newspapers* and its progeny applied, these cases require a plaintiff to demonstrate both "a tradition of accessibility" and that "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co.*, 478 U.S. at 8. This test is known as the two-part "experience and logic" test. If a plaintiff makes this threshold showing, government restrictions must be narrowly tailored to meet a compelling governmental interest. *Detroit Free Press*, 303 F.3d at 705. Both experience and logic demonstrate that the ACLU cannot make this threshold showing.

A "'historical tradition of at least some duration is obviously necessary'" before a court may recognize a right "of public entree to particular proceedings or information," *Detroit Free Press*, 303 F.3d at 701, yet the ACLU can identify no historical tradition of granting public access to the orders of this Court or the briefs submitted to it. As the Court's scheduling order noted, the ACLU's motion is unprecedented. No one before has ever thought that requesting disclosure of classified information through the FISC was a proper way to circumvent FOIA or that a non-party asserting nothing more than a generalized public interest could properly file a motion in the FISC. The ACLU cites one case—*United States v. Ressam*, 221 F. Supp.2d 1252 (W.D. Wash. 2002)—in support of its general claim that courts "routinely" allow public access to court orders in the national security context. Mot. at 17-18. This one case in no way establishes a historical tradition of public access to the FISC's orders and briefs. *Ressam* concerned proceedings in a federal district court, rather than the FISC. Moreover, *Ressam* was a criminal proceeding, unlike the foreign intelligence surveillance matters that come before the FISC, and, therefore, implicated the First Amendment issues addressed in the *Richmond Newspapers* cases.[11] Thus, this case is simply inapposite.

Logic also compels the conclusion that the First Amendment does not confer a public right of access to this classified information. If such a right existed, classified national security information filed in court proceedings could routinely be disclosed to the world. Not only is that not the case, but classified information normally is not disclosed even under seal to private

[11] Moreover, the *Ressam* court's actions undermine the ACLU's argument since the court acted to protect classified information from public dissemination. The court refused to disclose most of the documents and only allowed the production of sealed protective orders that contained little more than a handful of segregable, redacted classified words. 221 F. Supp. 2d at 1262, 1264-65. In the instant case, the Government has determined that it is not possible to segregate classified from unclassified information in the requested materials.

litigants engaged in civil litigation with the Government. *See, e.g., Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 159 (D.C. Cir. 2004) (Roberts, J.); *Jifry v. FAA*, 370 F.3d 1174, 1184 (D.C. Cir. 2004); *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984). Public access would play no "significant positive role in the functioning of the particular process in question"—the applications to and decisions by this Court. *Press-Enterprise Co.*, 478 U.S. at 8. To the contrary, public access would undermine the important foreign intelligence surveillance authorized by this Court.[12]

C. The Government Has a Compelling Interest in Protecting This Classified Information.

Even if the First Amendment applied in the way the ACLU suggests in this specific context, which it does not, the Government has a compelling need to protect classified information and to bar public access to such information. It is both "'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," and that "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve th[is] interest[]." *Haig v. Agee*, 453 U.S. 280, 307 (1981). *See also Sims*, 471 U.S. at 175 ("'The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the

[12] The ACLU's "logic" argument fails because it focuses on whether public disclosure would have a positive effect, Mot. at 16-19, but neglects to consider the extent to which such disclosure impairs the public good. *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002) (holding that closure of special interest deportation hearings involving INS detainees with connections to terrorism does not violate First Amendment). Were the logic prong only to determine whether openness serves some good, "it is difficult to conceive of a government proceeding to which the public would not have a First Amendment right of access." *Id.* For example, a plaintiff could argue that public access to any government affair, "even internal CIA deliberations, would 'promote informed discussion' among the citizenry." *Id.* As the *North Jersey Media Group* court found, it is doubtful that the Supreme Court in *Richmond Newspapers* intended such a result. 308 F.3d at 217. In the instant case, the ACLU's argument favoring public disclosure of the orders and briefs is outweighed by the substantial risk that disclosure would pose to the Nation's security.

effective operation of our foreign intelligence service.'") (quoting *Snepp*, 444 U.S. at 509 n.3). One of the key methods for protecting that secrecy is, as explained at greater length *supra*, the Executive Branch's classification of information whose disclosure reasonably could be expected to result in damage to the national security, *see* Exec. Order No. 12,958 §§ 1.1(a)(4), 1.2, 1.4, and the Government's strict control over access to such information. See *id.* §§ 4.1, 4.3; *see also* 5 U.S.C. § 552(b)(1) (FOIA exception for classified materials). As is apparent to the Court from the documents themselves, and as discussed *supra*, the documents requested remain properly classified in their entirety because disclosure of any material part of them would reveal the methods by which the Government conducts surveillance of those whose avowed intent is to attack the United States. Protecting the secrecy of the requested orders and briefs serves the compelling interest of protecting the lives and liberties of Americans. This Court, accordingly, should deny the ACLU's request for access to these classified materials.[13]

[13] The common law provides no authority for the ACLU's motion. FISA grants this Court jurisdiction to hear Government applications and grant orders for electronic surveillance, physical search, pen register and trap and trace surveillance, and the production of certain business records. 50 U.S.C. §§ 1803(a), 1822(c), 1842(b)(1), and 1861(b)(1)(A). It does not grant jurisdiction for this Court to hear common law claims for records or other relief. In addition, Congress has preempted any common law right of access by adopting FOIA, which provides an administrative avenue for requesting the documents at issue. *Ctr. for Nat'l Security Studies*, 331 F.3d at 936-37; *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997) (holding that there is no common law right of access to withdrawn plea agreement because "the appropriate device" for access to the records "is a Freedom of Information Act request addressed to the relevant agency.") (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 605-06 (1978)).

CONCLUSION

For the foregoing reasons, the ACLU's motion to release classified materials relating to highly sensitive and valuable national security operations should be denied.

August 31, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the United States of America's Opposition to the American Civil Liberties Union's Motion for Release of Court Records was served via Federal Express and email on this 31st day of August, 2007, addressed to:

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