

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE MOTION FOR RELEASE OF
COURT RECORDS

Docket No.: MISC. 07-01

MOTION FOR RECONSIDERATION OR RECONSIDERATION *EN BANC*

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MOTION FOR RECONSIDERATION OR RECONSIDERATION *EN BANC*

The American Civil Liberties Union (“ACLU”) hereby moves this Court to reconsider or reconsider *en banc* its Memorandum Opinion and Order of Dec. 11, 2007 (“Dec. 11 Ruling”) denying the ACLU’s Aug. 8, 2007 Motion for Release of Court Records (“Aug. 8 Motion”). The Dec. 11 Ruling, signed by Judge John D. Bates, correctly found that this Court has jurisdiction to consider a third-party motion for release of court records but erred in holding that (i) the Court lacks the authority to review the lawfulness of the executive’s classification decisions, and (ii) First Amendment interests are not implicated by this Court’s sealing of judicial opinions concerning the meaning and scope of the Foreign Intelligence Surveillance Act (“FISA”). By abdicating this Court’s critically important – and constitutionally required – oversight function, the Dec. 11 Ruling deprives the public of documents and information that are vitally important to an ongoing national debate about government surveillance.

This Court’s Rules of Procedure Effective February 17, 2006 (“2006 FISC Rules”) do not specifically provide for motions for reconsideration or reconsideration *en banc*. However, Rule 1 provides that “[i]ssues not addressed in these rules may be resolved under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure,” and Rule 59(e) of the Federal Rules of Civil Procedure allows motions to amend the judgment to be filed within 10 days after entry of the judgment. Moreover, this Court has issued at least one *en banc* decision in the past. *See In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (For. Int. Surv. Ct. 2002). The ACLU respectfully submits that the issues presented by its Aug. 8 Motion are extraordinarily important and pressing, that the Dec. 11 Ruling was

erroneous, and that reconsideration or reconsideration *en banc* is appropriate and necessary.

BACKGROUND

The President acknowledged in December 2005 that four years earlier he had authorized the National Security Agency (“NSA”) to inaugurate a program of warrantless electronic surveillance inside the nation’s borders. *See* President’s Radio Address, 41 Weekly Comp. Pres. Doc. 1880 (Dec. 17, 2005). According to the Attorney General, the program (the “NSA Program”) involved the interception of communications between individuals inside the country and individuals outside the country where the executive believed that there was “a reasonable basis to conclude that one party to the communication [was] a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.” Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Dec. 19, 2005.¹ The NSA Program was plainly inconsistent with FISA and it engendered widespread concern and condemnation.² The executive’s defense of the NSA Program engendered concern and condemnation in its own right.³

¹ The transcript is available at <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html>.

² *See, e.g.*, Editorial, *NSA Has Your Phone Records; ‘Trust Us’ Isn’t Good Enough*, USA Today, May 11, 2006; Edward Alden and Holly Yeager, *Bush Faces Republican Revolt Over Spying*, Financial Times, Feb. 9, 2006; Editorial, *Spies, Lies and Wiretaps*, N.Y. Times, Jan. 29, 2006; Eric Lichtblau and James Risen, *Justice Deputy Resisted Parts of Spy Program*, N.Y. Times, Jan. 1, 2006.

³ *See, e.g.*, Dan Eggen and Walter Pincus, *Ex-Justice Lawyer Rips Case for Spying*, Wash. Post, Mar. 9, 2006; Carol D. Leonnig, *Report Rebuts Bush on Spying*, Wash. Post, Jan. 7, 2006; Tom Daschle, Op-Ed., *Power We Didn’t Grant*, Wash. Post, Dec. 23, 2005; Editorial, *The Fog of False Choices*, N.Y. Times, Dec. 20, 2005.

The President reauthorized the NSA Program repeatedly between 2001 and 2007. In January 2007, however, just days before the United States Court of Appeals for the Sixth Circuit was to hear the government's appeal from a ruling that had found the NSA Program violative of FISA and the Constitution, *see ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006),⁴ the Attorney General stated in a letter to the Chairman and Ranking Minority Member of the Senate Judiciary Committee that "any surveillance that was occurring as part of the [NSA Program would] now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." Letter from Attorney General Alberto R. Gonzales to Hon. Patrick Leahy & Hon. Arlen Specter (Jan. 17, 2007).⁵ In the same letter, the Attorney General explained that the change was made possible because of orders issued on January 10th by "a Judge of the Foreign Intelligence Surveillance Court." *Id.* The Attorney General characterized the January 10th orders as "complex" and "innovative," *id.*, and in subsequent testimony to Congress he stated that this Court issued them after the executive "pushed the envelope." *Hearing before the S. Judiciary Comm. on Dep't of Justice Oversight*, 110th Cong. (Jan. 18, 2007) (testimony of Attorney General Gonzales).⁶

⁴ The ruling was vacated on appeal after two judges of a three-judge panel concluded that the plaintiffs did not have standing to bring suit. *See ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007). The dissenting judge found that plaintiffs had standing, that the NSA Program violated FISA, and that the President lacked authority to conduct electronic surveillance without compliance with that statute. *Id.* at 720 (Gilman, J. dissenting).

⁵ The letter is available at <http://www.fas.org/irp/agency/doj/fisa/ag011707.pdf>.

⁶ Despite the Attorney General's January 17th statement that the President was discontinuing the NSA Program, administration officials have continued to assert that the President has authority under the Constitution to conduct surveillance in violation of FISA. *See e.g., id.; Hearing before the S. Intelligence Comm. on the Foreign Intelligence Surveillance Modernization Act of 2007*, 110th Cong. (May 1, 2007).

Administration officials have spoken publicly about the January 10th orders on multiple occasions, referencing and characterizing them in comments to the media, in press briefings, in publicly filed legal papers, and in Congressional testimony. *See, e.g., id.*; Background Briefing by Senior Justice Department Officials on FISA Authority of Electronic Surveillance (Jan. 17, 2007);⁷ Press Briefing by White House Press Secretary Tony Snow (Jan. 17, 2007);⁸ Government's Supplemental Submission, *ACLU v. NSA*, Nos. 06-2095/2140 (6th Cir. filed Jan. 24, 2007) (discussing the Implications of the Intervening FISA Court Orders of January 10, 2007); Greg Miller, *Strict Anti-Terror Wiretap Rules Urged*, L.A. Times, Jan. 24, 2007; Seth Stern, *Justice Officials Leave Lawmakers Confused About New Surveillance Program*, CQ, Jan. 18, 2007. In a press briefing held on January 17th, administration officials acknowledged the extraordinary public interest in the NSA Program and the government's surveillance activities more generally, stating:

[W]e're making [information about the January 10th orders] public obviously because, we wouldn't ordinarily do that. We don't ordinarily [audio gap] FISA orders, and we don't ordinarily talk about intelligence programs like this, but obviously, this is an issue that's been the subject of much public debate and debate on the Hill as the result of press reports, et cetera. So the President has determined that it's appropriate to make this announcement publicly.

Transcript of Background Briefing by Senior Justice Department Officials, Jan. 17, 2007.

Although administration officials repeatedly referenced and characterized the January 10th orders, the orders themselves were kept secret. Consequently, the public has had to rely on the administration's incomplete statements about why the orders were

⁷ The transcript is available at <http://www.fas.org/irp/news/2007/01/doj011707.html>.

⁸ The transcript is available at <http://www.whitehouse.gov/news/releases/2007/01/20070117-5.html>.

issued, how they were justified legally, and what kinds of surveillance they authorized. The Attorney General has not explained in what way the January 10th orders were “complex” and “innovative.” Nor has he explained his statement that the orders were issued after the executive “pushed the envelope.” President Bush and some members of Congress indicated that the January 10th orders granted “programmatic” authority, but they have not explained on what statutory basis this authority was granted or how this authority was delineated by the Court. *See, e.g.*, President Bush Interview with Sabrina Fang, Tribune Broadcasting, Jan. 18, 2007 (in which President Bush explained that “nothing ha[d] changed in the program [as the result of the January 10th orders] except the court has said we’ve analyzed it and it’s a legitimate way to protect the country”); Background Briefing by Senior Justice Department Officials, Jan. 17, 2007 (in which Justice Department officials stated that “the general contours under these orders allow us to do the same thing and to target the same types of communications” and that “the capabilities of the intelligence agencies to operate such a program have not changed as a result of these orders”); Seth Stern, *Justice Officials Leave Lawmakers Confused About New Surveillance Program*, CQ, Jan. 18, 2007 (reporting that “Heather A. Wilson, R-N.M., a member of the House Permanent Select Committee on Intelligence, said the information relayed to her via staff suggested it is a programmatic authorization, meaning that it does not require the administration to get warrants on a case-by-case basis. ‘That’s the way it’s been described to me,’ Wilson said Thursday.”); Greg Miller, *Strict Anti-Terror Wiretap Rules Urged*, L.A. Times, Jan. 24, 2007 (reporting that government officials confirmed that “the new arrangement allows the government to obtain single warrants that cover ‘bundles’ of wiretaps on multiple suspects”). Thus, the information

that is publicly available about the January 10th orders is sufficient to raise serious questions but not to answer them.

The publicly available information about this Court's subsequent orders is even more sparse. In May 2007, National Intelligence Director Michael McConnell testified before the Senate Judiciary Committee that intelligence agencies were "missing a significant portion of what [they] should be getting" and he urged that FISA be amended. *See Hearing before the S. Intelligence Comm. on the Foreign Intelligence Surveillance Modernization Act of 2007*, 110th Cong. (May 1, 2007). Director McConnell did not explain, however, what categories of information the intelligence agencies were unable to access and why they were unable to access them. His testimony was particularly puzzling because the administration had publicly announced only four months earlier that it had reached an accommodation with this Court. Although the administration's initial effort to expand the executive's surveillance authority failed,⁹ in the days before Congress' summer recess the administration began to push once again for new legislation, contending that such legislation was necessary to close "critical gaps" in the executive's ability to collect communications intelligence. *See Ellen Nakashima, A Push*

⁹ The administration's initial attempt to expand the executive's warrantless surveillance powers stalled in the face of revelations that at one point the President had reauthorized the NSA Program over the opinion of some Justice Department officials that the program, or some aspect of it, was illegal. In testimony before Congress, former Deputy Attorney General James Comey stated that attorneys from the Justice Department's Office of Legal Counsel concluded in March of 2004 that the NSA Program, which had by that time been operating for more than two years, was unlawful. *See Hearing on the U.S. Attorney Firings before the S. Judiciary Comm.*, May 15, 2007 (testimony of former Attorney General James Comey), *available at* http://gulcfac.typepad.com/georgetown_university_law/files/comey.transcript.pdf. Comey's testimony spurred Congress to subpoena documents related to the NSA Program. *See James Risen, Senate Issues Subpoenas in Eavesdropping Investigation*, N.Y. Times, July 27, 2007. Thus far the administration has not produced the subpoenaed documents.

to Rewrite Wiretap Law, Wash. Post, Aug. 1, 2007; Letter from Director of National Intelligence McConnell to Congressional Leaders, July 27, 2007.¹⁰ The administration did not explain, however, what the “gap” was or why the gap existed. It was not until the beginning of August, when House Minority Leader John Boehner referenced an order that this Court had apparently issued “four or five months” earlier, that the public learned that the Court may have withdrawn the authority it extended to the administration in January.¹¹ Even now, the public does not know what authority was withdrawn or why.

On August 5, the President signed into law the Protect America Act of 2007, Pub. L. No. 110-55 (2007). Congressional debate about the proposed legislation was minimal. See, e.g., Editorial, *Stampeding Congress, Again*, N.Y. Times, Aug. 3, 2007; Editorial, *Don't Rush to Modify FISA*, L.A. Times, Aug. 3, 2007; Editorial, *Stop the Stampede*, Wash. Post, Aug. 2, 2007. Although the public debate was vociferous, it was necessarily abstract and hypothetical because the public did not have access to relevant information. Yet the law's implications for Americans are dramatic. It allows the executive to intercept their international telephone calls and e-mails without individualized warrants and without individualized suspicion as long as the surveillance is “directed at” or

¹⁰ The letter is available at http://action.eff.org/site/DocServer/dni_20070727.pdf.

¹¹ *Newsweek* magazine reported on the basis of other sources that a judge of this Court had “concluded that the administration had overstepped its legal authorities in conducting warrantless eavesdropping even under the scaled-back surveillance program that the White House first agreed to permit the FISA Court to review earlier this year,” held that “some aspects of the warrantless eavesdropping program exceeded the NSA’s authority under [FISA],” and refused “to reauthorize the complete program in the way it had been previously approved by at least one earlier FISA judge.” Michael Isikoff and Mark Hosenball, *Terror Watch: Behind the Surveillance Debate*, *Newsweek*, Aug. 1, 2007; see also Greg Miller, *Court Puts Limits on Surveillance Abroad*, L.A. Times, Aug. 2, 2007 (reporting that this Court had “rejected a government application for a ‘basket warrant’” and quoting an anonymous government official: “[o]ne FISA judge approved this, and then a second FISA judge didn’t”).

“concerns” someone reasonably believed to be outside the United States. *See* Pub. L. No. 110-55, § 2. This Court’s role is severely limited. *Id.* § 3. While the new law will sunset in February 2008 unless renewed, the administration is lobbying vigorously to make the law permanent.

On August 8, three days after the Protect America Act was signed into law, the ACLU moved this Court to unseal (i) orders issued by this Court on January 10th, 2007 (“the January orders”); (ii) any subsequent orders that extended, modified, or vacated the January 10th orders; and (iii) any legal briefs submitted by the government in connection with the January 10 orders or in connection with subsequent orders that extended, modified, or vacated the January 10th orders (collectively, the “sealed materials”). Aug. 8 Motion, p.2. The ACLU did not seek the disclosure of intelligence sources, intelligence methods, or sensitive information relating to individual investigations. It did not seek the disclosure of information that was properly classified. However, it requested that the sealed materials be “made public as quickly as possible with only those redactions essential to protect information that the Court determines, *after independent review*, to be properly classified.” Aug. 8 Motion, pp.2-3 (emphasis added).

On August 16, this Court issued a Scheduling Order requiring the government to file a response to the ACLU’s motion and permitting the ACLU to file a reply. While the parties were briefing the issues, government officials continued to speak publicly about the sealed materials. Most notably, just days before the government filed its opposition brief, Director of National Intelligence Mike McConnell made the following statements to a reporter from the El Paso Times:

So, [the NSA Program] was submitted to the FISA court and the first ruling in the FISA court was what we needed to do we could do with an approval process that was at a summary level

The FISA court ruled presented the program to them and they said the program is what you say it is and it's appropriate and it's legitimate, it's not an issue and was had approval. But the FISA process has a renewal. It comes up every so many days and there are 11 FISA judges. So the second judge looked at the same data and said well wait a minute I interpret the law, which is the FISA law, differently. And it came down to, if it's on a wire and it's foreign in a foreign country, you have to have a warrant and so we found ourselves in a position of actually losing ground because it was the first review was less capability, we got a stay and that took us to the 31st of May. After the 31st of May we were in extremis because now we have significantly less capability. . . .

The issue is volume and time. . . . My argument was that the intelligence community should not be restricted when we are conducting foreign surveillance against a foreigner in a foreign country, just by dint of the fact that it happened to touch a wire.

Transcript, *Debate on the Foreign Intelligence Surveillance Act*, El Paso Times, Aug. 22, 2007. While government officials made statements like these to the news media – statements that referenced, characterized, and described the sealed materials – the government continued to maintain to this Court that the sealed materials were properly classified in their entirety.

Judge Bates denied the ACLU's Aug. 8 Motion on December 11, 2007. He found that the Court had jurisdiction to consider a third-party motion for the release of court records. Dec. 11 Ruling, p.5. He ruled, however, that any common law right of access to the sealed materials had been overridden by FISA and by security procedures adopted in 1979. *Id.* at 10 (citing *Security Procedures Established Pursuant to Pub. L. No. 95-511, 92 Stat. 1783, by the Chief Justice of the United States for the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review* (May 18,

1979) (“*Security Procedures*”). He found that the Court was required to treat the executive’s classification decisions as conclusive. Dec. 11 Ruling, p.11.

Judge Bates also held that First Amendment interests were not implicated by the sealing of judicial opinions concerning the meaning and scope of FISA. Applying the “logic and experience” test from *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise I*”), Judge Bates first considered whether there was a tradition of access to FISC opinions. He concluded that there was not. Dec. 11 Ruling, p.14. Judge Bates acknowledged the ACLU’s argument that “the orders at issue here are distinguishable [from routine surveillance orders] because they are ‘of broader significance and include legal analysis and legal rulings concerning the meaning of FISA,’” *id.* at 14-15 (quoting ACLU Reply at 13)), but he wrote that “[e]ven assuming that it is proper to apply the ‘experience’ test to a narrow subset of FISC decisions of broad legal significance . . . the FISC has in fact issued other legally significant decisions that remain classified and have not been released to the public.” *Id.* at 15. Turning to the “logic” prong of the *Press-Enterprise II* test, Judge Bates acknowledged that disclosure of the sealed materials could serve the public interest. *Id.* at 16. He found, however, that “the detrimental consequences of broad public access to FISC proceedings or records would greatly outweigh any such benefits,” and, most relevant to the ACLU’s motion, that these detrimental consequences would outweigh the benefits even if access were limited to information that should not have been classified. *Id.* at 17.

Judge Bates declined to reach the question whether the Court possessed any “residual authority” that would permit it to conduct an independent review of the executive’s classification decisions. He wrote: “Assuming, arguendo, that this Court

retains such residual discretion, it declines to undertake the searching review of the Executive Branch's classification decisions requested by the ACLU, because of the serious negative consequences that might ensue" *Id.* at 22.

REASONS WHY RECONSIDERATION IS WARRANTED

The Dec. 11 Ruling was incorrect in several respects. As an initial matter, the Court erred in holding that it must treat the executive's classification decisions as conclusive. In fact, this Court – and Article III courts generally – have an important role to play in ensuring that the executive's classification decisions are consistent with the Constitution as well as with the Executive Order that governs the classification of national security information. Where the executive's classification decisions effectively deprive the public of information about the judicial process and about the law itself, the courts' oversight role is especially critical.

In denying the ACLU's request that the Court conduct an independent review to determine whether the sealed materials are properly classified in their entirety, Judge Bates wrote that "[u]nder FISA and the applicable Security Procedures, *there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions.*" Dec. 11 Ruling, p.11-12 (emphasis added). In fact, however, this Court plainly *does* have the authority to determine whether materials on its docket are appropriately classified. Article III courts routinely review the lawfulness of classification decisions. *See, e.g., Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (recognizing appropriateness of judicial review of pre-publication classification determinations); *Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (requiring de novo judicial review of pre-publication

classification determinations to ensure that information was properly classified and to ensure that agency “explanations justif[ied] censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification”); *Hayden v. NSA*, 608 F.2d 1381, 1384 (D.C. Cir. 1979) (the “court must make a de novo review of the agency’s classification decision [in a FOIA case], with the burden on the agency to justify nondisclosure”). It would be very odd, to say the least, if other Article III courts possessed the authority to review classification decisions but this Court – a court with special expertise on matters relating to intelligence gathering and national security – did not.

Contrary to Judge Bates’ conclusion, nothing in FISA or the *Security Procedures* prohibits this Court from determining whether materials on its docket are properly classified and, relatedly, whether its own judicial opinions are properly withheld from the public. Indeed, a statute that foreclosed an Article III court from unsealing materials on its own docket would raise serious separation-of-powers concerns. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (“[i]t has long been understood that ‘[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others,’” (internal quotation marks omitted)); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) (“every court has supervisory power over its own records and files”); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 560-64 (3d Cir. 1985) (en banc).¹²

¹² If either FISA or the *Security Procedures* foreclosed the Court from publishing its own opinions, this Court would not have been able to publish its 1994 opinion

Judge Bates also erred in holding that First Amendment interests are not implicated by the sealing of judicial opinions concerning the scope and meaning of FISA. As to the “experience” test from *Press-Enterprise II*, he asked the wrong question. The appropriate question is not whether there is a tradition of public access to “decisions of broad legal significance” issued by the FISC. Dec. 11 Ruling, p.15. The appropriate question is whether there is a tradition of public access to decisions of Article III courts.¹³ Plainly, there is. See, e.g., *Hicklin Eng’g, L.C. v. R.J. Bartell & R.J. Bartell Assocs., L.L.C.*, 439 F.3d 346, 348-49 (7th Cir. 2006); *United States v. Turner*, 206 Fed. Appx. 572, 574 n.1 (7th Cir. 2006); *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying motion to file opinion under seal “because the decisions of the court are a matter of public record”); *BBA Nonwovens Simpsonville, Inc. v. Superior Nonwovens, L.L.C.*, 303 F.3d 1332, 1335 n.1 (Fed. Cir. 2002) (same). While it may be true that there is no tradition of public access to decisions of broad legal significance issued by the FISC, this is surely because the FISC has no tradition of issuing decisions of broad legal significance at all. The FISC’s mandate is to “hear applications and grant orders,” and the Court’s docket reflects that mandate, see Letter from Presiding Judge Colleen Kollar-Kotelly to Hon. Patrick J. Leahy, Hon. Arlen Specter, and Hon. Charles E. Grassley,

concerning physical searches or its 2002 opinion concerning minimization procedures and the Patriot Act.

¹³ Judge Bates cited the Supreme Court’s decision in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 n.13 (1982), but this case clearly *supports* plaintiffs’ argument. In *Globe Newspaper*, the Court stated that the relevant question was not whether there was a tradition of openness with respect to particular “type[s]” of criminal trials but whether there was “a right of access to criminal trials” generally. Here, similarly, the proper question is not whether there is a tradition of openness with respect to the FISC’s opinions (a more specific category) but whether there is a tradition of openness with respect to the legal opinions of Article III courts (a more general category).

Aug. 20, 2002 (“In general, the docket reflects all filings with the Court and is comprised almost exclusively of applications for electronic surveillance and/or searches, the orders authorizing the surveillance and the search warrants, and the returns on the warrants.”).¹⁴ Notably, in at least two of the cases in which the FISC has issued broader decisions, it has made those decisions public. *See* n.12, *supra*.

As to the “logic” prong of the *Press-Enterprise II* test, Judge Bates properly acknowledged the value of public disclosure. Dec. 11 Ruling, p.16 (recognizing that disclosure sought by ACLU might increase public “understanding of the FISC’s decisionmaking,” “provide an additional safeguard against mistakes, overreaching or abuse,” and allow the public to “participate in a better-informed manner in debates over legislative proposals relating to FISA”). However, he substantially overstated the risks that would flow from independent judicial review. *Id.* at 19. It bears emphasis that the ACLU is seeking the release of judicial opinions concerning the scope and meaning of FISA, *and only to the extent that the judicial opinions concern the scope and meaning of FISA*. The ACLU is not seeking the disclosure of intelligence methods, the names of surveillance targets, or any other information relating to individual investigations. The ACLU simply wants to know how this Court has interpreted an important federal statute, and it has asked only that this Court conduct an independent review of the sealed materials to determine whether they are properly classified in their entirety. The ACLU knows of no other context in which judicial decisions about the meaning of a federal statute have been kept secret from the public. It certainly knows of no other context in

¹⁴ The letter is available at <http://www.fas.org/irp/agency/doj/fisa/fisc082002.htm>.

which such decisions have been kept secret from the public simply because the executive has demanded that they be kept secret.

It follows that First Amendment interests are indeed implicated by the sealing of Article III judicial opinions concerning the scope and meaning of FISA. Consequently, this Court has not just the authority but the *obligation* to determine whether the materials are properly classified in their entirety. *See, e.g., United States v. Alcantara*, 396 F.3d 189, 201 (2d Cir. 2005) (finding *sua sponte* that closed plea and sentencing proceedings violated the First Amendment though neither party objected to closure).

As reasons counterbalancing a public right of access to the Dec. 11 Ruling, Judge Bates suggested that a “partial release of declassified portions of the requested materials” could “confuse or obscure, rather than illuminate, the decisions in question.” Dec. 11 Ruling, p.19. He also worried that, if the FISC were to conduct an independent review, there was a danger that the Court “might err by releasing information that in fact should remain classified.” *Id.* These risks, however, are equally present in the context of FOIA litigation, and even in that context – where no constitutional rights are at stake – courts both review *de novo* the lawfulness of executive classification decisions and require partial disclosure where releasable information can be segregated from information that is properly classified. *Hayden v. NSA*, 608 F.2d 1381, 1384 (D.C. Cir. 1979); *Halpern v. FBI*, 181 F.3d 279, 291-92 (2d Cir. 1999); *Baez v. Dept. of Justice*, 647 F.2d 1328, 1335 (D.C. Cir. 1980). Where constitutional rights are at stake, the courts review classification decisions under a more stringent test. *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983); *United States v. Rosen*, 487 F. Supp. 2d 703, 716-17 (E.D. Va. 2007) (“While it is true, as an abstract proposition, that the government’s interest in protecting classified

information can be a qualifying compelling and overriding interest, it is also true that the government must make a specific showing of harm to national security in order to carry its burden [under the *Press-Enterprise* standard]. . . . [A] generalized assertion . . . of the information's classified status is not alone sufficient to overcome the presumption in favor of open trials"). More fundamentally, it is not appropriate for this Court (or any other) to keep information secret on the grounds that its disclosure could confuse the public. If information has been classified improperly, the public has a right to see the information and to make its own assessment of the information's import. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

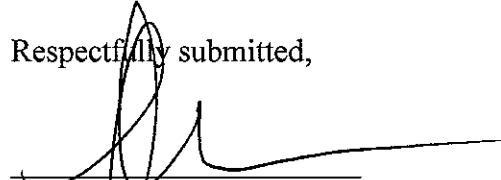
Judge Bates provided one additional rationale for refusing to conduct an independent review of the sealed material – that, if the executive's classification decisions were subjected to searching judicial review, "government officials might choose to conduct a search or surveillance without FISC approval where the need to for such approval is unclear[,] creating . . . an incentive for government officials to avoid judicial review." Dec. 11 Ruling, p.20. But that reasoning proves far too much, for it would lead to the conclusion that judicial approval of search warrants should be abandoned altogether, for the possibility that a warrant will be denied creates an incentive for government officials to avoid submitting applications for warrants. Accepting the possibility of unconstitutional behavior as a basis of judicial decisionmaking would be a capitulation to lawlessness.

Finally, Judge Bates erred in refusing to exercise any residual discretion to review the sealing of the requested materials. The ACLU respectfully requests that the Court reconsider this decision. Even if the Court does not have the *obligation* to review the sealed materials, it should do so in the unusual circumstances presented here. At this writing, Congress and the public are debating the wisdom and necessity of permanently expanding the executive's authority to conduct intrusive forms of surveillance without meaningful judicial oversight. The sealed materials, though still withheld from the public, are at the center of this debate. Publication of the sealed materials would assist the public in evaluating the significance of recent amendments to FISA and determining for itself whether those amendments should be made permanent. Without the sealed materials, it will be impossible for the public to assess the administration's claim that the amendments are necessary to fill a "gap" in the executive's authority to conduct necessary surveillance. Moreover, it will be impossible for the public to assess whether any gap is a significant problem, and, if it is, whether recent amendments to FISA, and proposed further amendments to the law, are limited to addressing this problem or in fact go much further. Disclosure of the sealed materials will ensure a more informed debate about what is plainly a matter of pressing national concern.

CONCLUSION

For the reasons stated above, the ACLU respectfully requests that this Court reconsider or reconsider *en banc* its Dec. 11 Ruling.

Respectfully submitted,



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