UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE PROCEEDINGS REQUIRED BY § 702(i) OF THE FISA AMENDMENTS ACT OF 2008

Docket Number: MISC 08-01

OPPOSITION TO THE AMERICAN CIVIL LIBERTIES UNION'S MOTION FOR LEAVE TO PARTICIPATE IN PROCEEDINGS REQUIRED BY § 702(i) OF THE FISA AMENDMENTS ACT OF 2008

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Contrary to law and the longstanding and uniform practice of this Court, the American Civil Liberties Union (ACLU) asks this Court to grant it the right to participate in future *ex parte* proceedings under section 702(i) of the Foreign Intelligence Surveillance Amendments Act of 2008 ("FISA Amendments Act" or the "Act"). The purpose of section 702(i) proceedings is to review classified certifications and procedures for the targeting of non-United States persons located outside the United States to acquire foreign intelligence information. This Court has never allowed any party other than the Government to participate in its review of such matters, and it is precluded from doing so here by statute, court rule, and mandated security measures. Indeed, after extensive consideration and a careful balancing of important national security and judicial oversight concerns, Congress intentionally excluded outside third parties from such proceedings, providing instead for very specific and limited *ex parte* review by this Court of the Government's classified certifications and procedures. Because the ACLU could not have access to those certifications and procedures, it could not, in any event, present any meaningful argument on the questions posed under section 702(i).

Notably, the ACLU does not claim any legal right to the requested relief or invoke a single provision of law that would support such relief. Rather, it simply relies on the notion that section 702(i) proceedings should be adversarial and as transparent as possible. But as this Court recently and correctly recognized, in the unique context of FISA proceedings, the benefits of open proceedings are greatly outweighed by the potential harm that public access would cause to the national security and the integrity of the FISC process. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 494-96 (FISA Ct. 2007). Importantly, Congress has made the same judgment, enacting numerous statutory measures to prevent those very harms, including most recently through the FISA Amendments Act. The Court should not risk such harms or run

afoul of those important measures by inviting the ACLU—and thus potentially any other party—into the Court's *ex parte* process.

Without any possibility of meaningful participation in proceedings concerning the Government's classified intelligence methods, the ACLU instead improperly seeks to use this Court's carefully delineated role under section 702(i) as a vehicle to launch, without any demonstration of standing or cognizable right, a facial attack on the constitutionality of the Act. Section 702(i), however, clearly does not permit such a challenge. To the extent the ACLU wishes to challenge the constitutionality of the Act, it must seek to do so in the civil action it has already filed in the Southern District of New York by satisfying traditional Article III requirements.

BACKGROUND

The enactment of the FISA Amendments Act was the culmination of a lengthy and vigorous public debate concerning the need to bring FISA "up to date with the changes in communications technology" over the last 30 years and to address "degraded capabilities in the face of a heightened terrorist threat environment," while at the same time preserving the privacy interests of United States persons. S. Rep. No. 110-209, at 5-6 (2007) (quoting the Director of National Intelligence). During the course of this important debate, Congress conducted an extensive review of the need to modernize FISA: it held numerous hearings, both open and closed to the public, received many classified briefings, reviewed classified documents provided by the Executive Branch and classified decisions of this Court, received testimony from private sector entities, invited statements from experts on national security law and civil liberties, and enacted the Protect America Act of 2007 as a temporary measure. *See, e.g., id.* at 2-3. Following this extensive consideration, Congress enacted (by a wide, bipartisan majority) a

carefully crafted statute that made necessary updates to FISA to strengthen this vital national security authority while safeguarding the civil liberties of Americans at home and abroad.

Among other things, the FISA Amendments Act establishes a framework under which the Attorney General and the Director of National Intelligence (DNI) may authorize the targeting of non-United States persons reasonably believed to be located outside the United States to acquire foreign intelligence information. *See* FISA Amendments Act, Pub. L. No. 110-261, sec. 101(a), § 702. The statute imposes a number of limitations on such acquisitions, including that the Government may not intentionally target a person reasonably believed to be located outside the United States if the purpose is to target a particular, known person reasonably believed to be in the United States. *See id.* § 702(b).

To ensure that such acquisitions comply with statutory limitations and to protect the privacy of United States persons, the FISA Amendments Act requires the Attorney General and the DNI to certify, *inter alia*, that (1) there are targeting procedures in place that are reasonably designed to ensure that an acquisition under section 702 is limited to targeting persons reasonably believed to be located outside the United States; (2) there are minimization procedures that satisfy FISA's definition of such procedures; (3) the targeting and minimization procedures, as well as required guidelines adopted to ensure that an acquisition complies with other limitations in section 702(b), are consistent with the Fourth Amendment; and (4) a significant purpose of the acquisition is to obtain foreign intelligence information. *See id.* § 702(g)(2).

The Act also provides for judicial review of the certification, targeting procedures, and minimization procedures. *See id.* § 702(i). In the absence of exigent circumstances, such review must occur before the acquisition begins. *See id.* § 702(c)(2)-(3), (g)(1)(B). The contours of this

review, moreover, are set forth in careful detail. The Court is to review whether the certification "contains all the required elements" and whether the targeting and minimization procedures are "consistent with" the requirements of the Act and the Fourth Amendment. *Id.* § 702(i)(2)-(3).

Section 702(i) does not provide for facial challenges to the constitutionality of the statute, nor does it provide for any third-party participation at all in the Court's review of the Government's classified certifications and procedures. Rather, consistent with existing provisions of FISA and the 30-year history of *ex parte* proceedings in this Court,[1] the Act expressly provides that, in any proceedings under section 702, all petitions "shall be filed under seal," and "the Court shall, upon request of the Government, review ex parte and in camera any Government submission, or portions of a submission, which may include classified information." *Id.* § 702(k)(2). Because any certifications and procedures will be classified, like those submitted under the Protect America Act and the traditional FISA process, any proceedings conducted under section 702(i) will necessarily be *ex parte*.

Notwithstanding these requirements, the ACLU seeks to participate in section 702(i) proceedings and requests essentially two types of relief. First, the ACLU requests that it be "notified of the caption and briefing schedule for any proceedings under section 702(i) in which the Court will consider legal questions relating to the scope, meaning, and constitutionality" of the Act and granted leave "to file a legal brief addressing the constitutionality of the Act and to participate in oral argument before the Court." ACLU Mot. at 2. Second, the ACLU requests that the Court "require the Government to file public versions of its legal briefs" and to make

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[1] *See, e.g.*, 50 U.S.C. §§ 1805(a), 1824(a), 1842(d)(1), 1861(c)(1) (orders approving applications are entered *ex parte*); *id.* § 1803(c) (applications made and orders issued under FISA are to be maintained under security measures established by the Chief Justice); FISC Rule 3 (FISC and its staff must comply with statutorily mandated security measures, as well as executive orders governing classified information); FISC Rule 13(b) (other than in the enforcement context, all hearings are to be conducted *ex parte*).

available any legal opinions issued by the Court at the conclusion of such proceedings, "with only those redactions necessary to protect information that is properly classified." *Id.*

The Court has ordered the United States to respond to the ACLU's motion and, in particular, to address "whether the FISA Amendments Act permits the relief sought by the ACLU, either as a matter of right or at the discretion of the Court." Scheduling Order at 2.

ARGUMENT

I. THE ACLU DOES NOT HAVE, AND DOES NOT CLAIM, A RIGHT TO THE REQUESTED RELIEF

The FISA Amendments Act does not give the ACLU a right to participate in section 702(i) proceedings, either by being notified and submitting arguments or by receiving redacted, public versions of legal opinions and briefs. Nor does the ACLU claim such a right or point to any provision of law that would support such a right.[2]

Indeed, far from providing the ACLU any right to participate, Congress set forth a specific scheme for judicial review under the Act that intentionally excludes third parties from the review of government certifications and procedures under section 702(i). In addition to the text of section 702(i) itself, which does not provide for any third-party involvement, the Act expressly provides that classified government submissions under section 702—such as those the Government will file here—are, at the request of the Government, to be reviewed *ex parte*. *See* FISA Amendments Act, sec. 101(a), § 702(k)(2). Moreover, the only provision under section

[2] For the reasons expressed in response to the ACLU's prior motion in this Court for the release of FISC records, the Government does not believe that FISA grants this Court jurisdiction to entertain requests by outside third parties to participate meaningfully in section 702(i) proceedings. *See* Opposition to the ACLU's Motion for Release of Court Records, Docket No. MISC. 07-01 (filed Aug. 31, 2007). Although this Court found jurisdiction to consider the ACLU's previous request, *see In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486-87, the Government respectfully disagrees with that decision and believes that the Court should dismiss this motion for lack of jurisdiction.

702 that permits the participation of any party other than the Government is section 702(h), which allows electronic communications service providers to challenge directives issued to them under the Act. Particularly given the detailed nature of the statutory scheme and the extensive consideration it received, it is clear that Congress determined that section 702(h) proceedings—involving companies that are subject to the Act's requirement to provide assistance and that have already been issued classified directives—are the sole context under the Act in which third-party participation is appropriate. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

In excluding third parties from the Court's review of the Government's classified certifications and procedures, the FISA Amendments Act follows preexisting FISA provisions and the longstanding practice in this Court. For example, prior to the enactment of the FISA Amendments Act, only two provisions of FISA authorized a party other than the Government to seek relief from the FISC. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486 n.3. Like section 702(h), both permitted challenges by parties that were issued orders under FISA to produce information or provide assistance to the Government. *See* 50 U.S.C. § 1861(f); *id.* § 1805B(h)(1)(A) (repealed by FISA Amendments Act). Also, the Act's *ex parte* review provision—section 702(k)(2)—is identical to both 50 U.S.C. § 1861(f)(5), which governs the business records provision of FISA, and § 1805B(k), a now-repealed Protect America Act provision, and is consistent with other FISA provisions requiring the Court to enter *ex parte* orders. *See* 50 U.S.C. §§ 1805(a), 1824(a), 1842(d)(1), 1861(c)(1). The Court has never found a right for third parties to participate in proceedings under those provisions, and there is no such

right here. Indeed, because of such provisions—as well as other required security measures and the unique nature of the Court's docket—every proceeding in the Court's history initiated by a government request for surveillance authority has been held *ex parte*. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 488.

Likewise, the ACLU does not (and could not) assert any right, under the Act or otherwise, to require the Government to file public versions of its legal briefs and the Court to issue public versions of its judicial opinions in connection with section 702(i) proceedings. This aspect of the ACLU's motion, in fact, requests the exact same kind of relief that this Court denied the ACLU late last year. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 485-86 (denying ACLU's motion for access to redacted versions of court orders and government pleadings). In rejecting that request, the Court held that there was no common law or First Amendment right of access to FISC records, even to portions that might be considered unclassified, in light of important needs to protect national security and the FISA process. *See id.* at 490-97. The ACLU does not dispute that holding in its motion.

II. THE RELIEF SOUGHT BY THE ACLU MAY NOT, AND SHOULD NOT, BE GRANTED AS A MATTER OF DISCRETION

In the absence of any legal right to the requested relief, the ACLU instead asks the Court to grant the relief as a matter of discretion, submitting simply that section 702(i) proceedings "should be adversarial and as informed and transparent as possible." ACLU Mot. at 9. That sentiment alone, however, cannot trump the statutory and other security requirements put in place, including under the FISA Amendments Act, to protect the classified information that is at the core of FISC proceedings.[3] Such requirements—which necessarily constrain this Court's

[3] Recognizing that it is not possible to have a public discussion of the classified methods submitted for review under section 702(i) without causing substantial harm to the national

discretion—preclude any meaningful participation by the ACLU in section 702(i) proceedings and any meaningful public disclosure of government submissions or FISC opinions that would allow such participation.

As discussed, section 702(k)(2) requires all petitions under section 702 to be filed under seal and provides for *ex parte* review, upon the request of the Government, of any government submission or portion of a submission "which may include classified information." Because the Government's certification, targeting procedures, and minimization procedures will provide the details of the Government's sources and methods for collecting foreign intelligence information under the Act, they will be classified (as they were under the Protect America Act). Thus, the Government will necessarily invoke the *ex parte* review provision provided by Congress for section 702(i) proceedings, thereby *requiring* the exclusion of any other party. Indeed, similar proceedings for the judicial review of certifications and procedures issued under the Protect America Act—which contained a provision identical to section 702(k)(2)—were conducted *ex parte* by this Court. *See* 50 U.S.C. §§ 1805B(k), 1805C (repealed).

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security, the FISA Amendments Act substitutes rigorous judicial and congressional oversight of the Government's use of the authorities under the Act for the public scrutiny that is the norm for judicial proceedings. *See, e.g.,* Act, sec.101(a), § 707 (requiring the Attorney General to submit to relevant oversight committees in Congress semiannual reports that include any certifications submitted under § 702(g), a description of any judicial review under § 702(i), and copies of court orders or pleadings that contain significant legal interpretations of section 702); *id.* § 702(l)(1) (requiring the Attorney General and Director of National Intelligence to conduct semiannual assessments of compliance with the targeting and minimization procedures and to submit such assessments to this Court and the relevant oversight committees in Congress); *id.* § 702(l)(2) (providing for similar reviews by Inspectors General of intelligence community elements and the Department of Justice, and requiring the submission of such reviews to the relevant oversight committees in Congress); *id.* § 702(l)(3) (requiring annual intelligence community reviews to evaluate the adequacy and application of minimization procedures and to submit such reviews to this Court and the relevant oversight committees in Congress).

Even absent an explicit *ex parte* review provision, the Court would not have the discretion to reveal classified information to an outside third party or to involve such party in a classified proceeding. The authority to classify, control access to, and protect information bearing on national security is vested by the Constitution in the Executive Branch. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988). Pursuant to statute and the FISC's own rules, moreover, the Court "in all matters" must comply with security measures established by the Chief Justice (in consultation with the Attorney General and Director of National Intelligence), as well as Executive Order 12958, as amended. *See* 50 U.S.C. § 1803(c); FISC Rule 3. Among other things, these measures preclude the disclosure of classified information to any person that has not been granted clearance by the Executive Branch. *See* Exec. Order 13292, part 4 (March 25, 2003) (amending Exec. Order 12958).[4] As the Court itself held in rejecting a similar ACLU request, "[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." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 491. Thus, the Court does not have the discretion to disclose any classified certifications, targeting procedures, or minimization procedures to the ACLU.[5]

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[4] *See also* 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, *reprinted in* H.R. Rep. No. 96-558, at 7-10 (1979), at ¶ 7 (requiring "all court records" to be maintained in accordance with Executive Branch security standards and directing that such records "shall not be removed from [the court's] premises except in accordance with the Foreign Intelligence Surveillance Act").

[5] The Court also could not notify the ACLU of any classified captions of section 702(i) proceedings or disclose facts about the number or timing of such proceedings that would reveal information about classified intelligence sources and methods. Nor, pursuant to its Rules, could the Court grant the ACLU's request to participate in an oral argument held under section 702(i). *See* FISC Rule 13(b). Moreover, contrary to the ACLU's suggestion, the mere general implication of FISC Rule 6 that "that non-government attorneys may appear before the Court

The collective effect of these restrictions is to make any meaningful participation by the ACLU in section 702(i) proceedings impossible. As Congress carefully set forth in the FISA Amendments Act, judicial review under section 702(i) is limited to determining whether the Government's certification contains all of the required elements and whether the targeting and minimization procedures are consistent with the requirements of the Act and the Fourth Amendment. *See* Act, sec. 101(a), § 702(i)(2)-(3). Because the certifications and procedures will all be classified (and therefore not amenable to public disclosure), there is nothing that the ACLU could contribute to the Court's resolution of whether those particular documents in a particular proceeding satisfy the relevant legal requirements. Therefore, even if the Court had the discretion to allow the ACLU to brief purely unclassified legal issues in section 702(i) proceedings, such participation would be meaningless.[6]

The ACLU relies on two occasions in which third parties have submitted briefs to this Court on purely unclassified issues. *See* ACLU Mot. at 10. Neither matter, however, involved a proceeding designed by Congress solely for this Court's review of classified government submissions regarding the acquisition foreign intelligence information. One of the briefs, which contained general unclassified views on the Terrorist Surveillance Program, was provided by the

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with permission," ACLU Mot. at 9, obviously does not override these restrictions or provide authority for third parties to participate in specific *ex parte* proceedings under section 702(i). Rather, Rule 6 is designed for the limited circumstances, not applicable here, in which private parties that receive orders or directives under FISA to provide information or assistance may appear before the Court to challenge those directives or defend against their enforcement.

[6] At best, the ACLU's motion is premature because the Government has not yet initiated such proceedings and the Court does not yet know what any certifications and procedures will contain. Based on the nature of the activity at issue and the history of implementing similar authorities, however, there is no likelihood that the submissions will be unclassified. Thus, at no time will the ACLU be entitled to the relief it seeks because it will always involve the release of classified information if it is to be meaningful.

Center for National Security Studies for no particular proceeding and without any request or formal acceptance by the Court. The other proceeding involved the ACLU's request for access to this Court's records—a proceeding initiated by the ACLU, not a government request for surveillance authority. The ACLU also cites its submission of an amicus brief in *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002), but in that case a specific unclassified legal issue was raised *by the Government* in a request it made of this Court. *See* August 20, 2002 Letter from Presiding Judge Kollar-Kotelly to Senators Leahy, Specter, and Grassley at 2 (attached as Exhibit 1). Moreover, after *ex parte* proceedings in this Court, the unclassified issue was raised on appeal *by the Government* in a form that made meaningful amicus briefing possible.

For the same reasons that the submission of legal arguments by the ACLU on section 702(i) review would be meaningless, the Government could not meaningfully address in public filings the legal questions concerning whether it has met the required standards in a section 702(i) proceeding. Nor would there be any benefit to releasing redacted versions of the Government's classified submissions or court opinions under section 702(i). Given the nature of the submissions subject to the Court's review, such documents are likely to contain little, if any, segregable unclassified information (and certainly not enough unclassified information for the ACLU to evaluate the constitutionality of the Government's classified procedures). Obtaining highly (if not completely) redacted versions of those filings would, at best, be a "Pyrrhic victory" for the ACLU and, at worst, simply "confuse or obscure, rather than illuminate, the decisions in question." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 495 & n.30.[7]

[7] At the very least, the Court could not issue opinions publicly without the Executive Branch's review to ensure appropriate redactions for classified information. *See* FISC Rule 5(c); *see also* FISC Rule 7(b)(ii) ("Court records shall be released in conformance with the security measures" mandated by statute and executive order.). Again, any request for such review would be premature at best. And to the extent that the ACLU seeks an independent review by this

Because the ACLU cannot itself present, or receive from the Government or Court, any meaningful information on the questions presented under section 702(i), its motion is tantamount to a request to use this Court as a forum to launch a facial challenge to the FISA Amendments Act. *See, e.g.*, ACLU Mot. at 7 (requesting participation in "proceedings relating to the constitutionality of the broader statutory scheme"). Even if permitted in the FISC, such a challenge could not succeed because the Government could, of course, implement the statute in a constitutional manner. *See, e.g., Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (holding that to prevail on a facial challenge, a litigant generally must show that a statute "is unconstitutional in all of its applications," or, at the very least, has no "plainly legitimate sweep").[8] In any event, the ACLU has not demonstrated its standing to raise such a challenge, and—most importantly—it is not permitted to do so in this Court. As the Act makes quite clear, this Court's review under section 702(i) is limited to as-applied questions concerning the classified certifications and procedures. Third-party challenges to the constitutionality of the Act (other than challenges that may be brought by electronic communications service providers pursuant to section 702(h)), must be brought through the

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Court of the Government's classification decisions, the Court has already rejected that invitation. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 491 ("[I]f the FISC were to assume the role of independently making declassification and release decisions in the probing manner requested by the ACLU, there would be a real risk of harm to national security interests and ultimately to the FISA process itself."); *see also* January 17, 2007 Letter from Presiding Judge Kollar-Kotelly to Senators Leahy and Specter (stating that "the Court's practice is to refer any requests for classified information to the Department of Justice") (attached as Exhibit 2).

[8] For example, the Government could decide to utilize the Act to acquire only communications between non-U.S. persons located outside the United States, acquisitions which even the ACLU does not appear to challenge. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (holding that only those persons who "have come within the territory of the United States and developed substantial connections" to the country have Fourth Amendment rights). That is not to suggest that other types of acquisitions permitted under the Act raise constitutional questions; rather, it simply demonstrates that the Act cannot be successfully challenged on its face.

normal civil action process and must meet, among other things, the traditional requirements of Article III, including standing and ripeness.

In fact, the ACLU has already pursued such an alternative avenue of relief by filing—on the same day that it filed this motion—a civil action in the United States District Court for the Southern District of New York challenging the constitutionality of the Act. *See Amnesty International USA, et al. v. McConnell*, No. 08-6259 (S.D.N.Y.) (complaint filed July 10, 2008). The ACLU, however, cannot avoid the substantial standing and other hurdles that it faces in that action by injecting itself into limited, highly classified, and *ex parte* proceedings in this Court. *See, e.g., ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007) (holding that the ACLU lacked standing to bring a constitutional challenge to the Terrorist Surveillance Program), *cert. denied*, 128 S. Ct. 1334 (2008). Nor should this Court duplicate the judicial review that the ACLU is simultaneously seeking in district court. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 496 n.32 (holding that there "would be no point" in duplicating the judicial review that the ACLU could obtain through the Freedom of Information Act); *cf. Columbia Plaza Corp. v. Security Nat'l Bank*, 525 F.2d 620, 626 (D.C. Cir. 1975) (noting, in the FRCP 13 context, that "the wasteful expenditure of energy and money incidental to separate litigation of identical issues should be avoided," and the particular "value of eliminating the risk of inconsistent adjudications and races to obtain judgment").

Indeed, allowing third parties to use this Court as a general forum to present facial challenges to the Government's surveillance activities could cause a flood of litigation that would distract this Court from its important national security functions. The Court should reject the ACLU's attempt to turn this Court into a vehicle for such challenges and, for all the reasons stated, conduct its review as set forth in the FISA Amendments Act.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny the ACLU's motion for leave to participate in proceedings under section 702(i) of the FISA Amendments Act.

Dated: July 29, 2008

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

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IN RE PROCEEDINGS REQUIRED BY § 702(i) OF THE FISA AMENDMENTS ACT OF 2008

Docket Number: MISC 08-01

CERTIFICATE OF SERVICE

I, Andrew H. Tannenbaum, hereby certify that, on July 29, 2008, a copy of the accompanying Opposition to the American Civil Liberties Union's Motion for Leave to Participate in Proceedings Required by § 702(i) of the FISA Amendments Act of 2008 was served by overnight courier on the following individuals:

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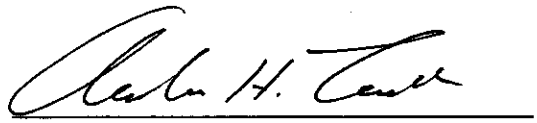

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