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

IN RE PROCEEDINGS REQUIRED BY § 702(i) OF THE FISA AMENDMENTS ACT OF 2008	Docket No.:

MOTION FOR LEAVE TO PARTICIPATE IN PROCEEDINGS REQUIRED BY § 702(i) OF THE FISA AMENDMENTS ACT OF 2008

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MOTION FOR LEAVE TO PARTICIPATE IN PROCEEDINGS REQUIRED BY § 702(i) OF THE FISA AMENDMENTS ACT OF 2008

RELIEF REQUESTED

Pursuant to this Court's Rules of Procedure Effective February 17, 2006 ("2006 FISC Rules"), the American Civil Liberties Union ("ACLU") hereby moves this Court for leave to participate in future proceedings required by section 702(i) of H.R. 6304, the FISA Amendments Act of 2008 ("FISA Amendments Act," "FAA," or "Act"), which the President signed into law on July 10, 2008. Specifically, the ACLU requests:

(i) that it be notified of the caption and briefing schedule for any proceedings under section 702(i) in which this Court will consider legal questions relating to the scope, meaning, and constitutionality of the FISA Amendments Act;

(ii) that, in connection with such proceedings, the Court require the government to file public versions of its legal briefs, with only those redactions necessary to protect information that is properly classified;

(iii) that, in connection with such proceedings, the ACLU be granted leave to file a legal brief addressing the constitutionality of the Act and to participate in oral argument before the Court;

(iv) that any legal opinions issued by this Court at the conclusion of such proceedings be made available to the public, with only those redactions necessary to protect information that is properly classified.

The motion should be granted for the reasons that follow.

THE FISA AMENDMENTS ACT

The President signed the FISA Amendments Act into law on July 10, 2008. The Act permits the mass acquisition of U.S. citizens' and residents' international communications. Although the Act prohibits the government from intentionally "targeting" people inside the United States, it places virtually no restrictions on the government's targeting of people outside the United States, even if those targets are communicating with U.S. citizens and residents. The law's effect – and, indeed, the

law's main purpose – is to give the government nearly unfettered access to Americans' international communications.

Under section 702(a) of the Act, the Attorney General and the Director of National Intelligence ("DNI") can "authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." An acquisition under section 702(a) may not "intentionally target any person known at the time of the acquisition to be located in the United States"; "intentionally target a person reasonably believed to be outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States"; "intentionally target a United States person reasonably believed to be located outside the United States"; or "intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." FAA § 702(b).

However, an acquisition authorized under section 702(a) may encompass the international communications of U.S. citizens and residents. Indeed, the Attorney General and the DNI may authorize a mass acquisition under section 702(a) even if all of the communications to be acquired originate or terminate inside the United States. Moreover, the Attorney General and the DNI may acquire purely domestic communications as long as there is uncertainly about the location of one party to the communications.

Before authorizing surveillance under section 702(a), the Attorney General and the DNI must either obtain an order from this Court (a "mass acquisition order") or make

an "exigent circumstances" determination that "intelligence important to the national security of the United States may be lost or not timely acquired and time does not permit the issuance of an order . . . prior to the implementation of such authorization." FAA § 702(a) & (c)(2). If the Attorney General and the DNI authorize surveillance under section 702(a) without first obtaining a mass acquisition order from this Court, they must seek such an order from this Court "as soon as practicable but in no event later than 7 days after such determination [of exigent circumstances] is made." FAA § 702(g)(1)(B).

To obtain a mass acquisition order from this Court, the Attorney General and the DNI must provide "a written certification and supporting affidavit" attesting that this Court has approved, or that the government has submitted to this Court for approval, procedures ("targeting procedures") reasonably designed to (i) ensure that the acquisition is "limited to targeting persons reasonably believed to be located outside the United States" and (ii) "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." FAA § 702(g)(2)(A)(i). The certification and supporting affidavit must also attest that this Court has approved, or that the government has submitted to this Court for approval, procedures ("minimization procedures") that meet the definition of "minimization procedures" under 50 U.S.C. §§ 1801(h) or 1821(4). The certification and supporting affidavit must also attest that the Attorney General has adopted "guidelines" to ensure compliance with the limitations set out in section 702(b); that the targeting procedures, minimization procedures, and guidelines are consistent with the Fourth Amendment; that "a significant purpose of the acquisition is to obtain foreign intelligence information"; that "the acquisition involves obtaining foreign intelligence information

from or with the assistance of an electronic communication service provider"; and that "the acquisition complies with the limitations in subsection [702(b)]." FAA § 702(g)(2)(A)(iii)-(vii).

The Act does not require the government to demonstrate to this Court that its surveillance targets are foreign agents, engaged in criminal activity, or connected even remotely with terrorism. Indeed, the statute does not require the government to identify its surveillance targets at all. Moreover, the statute expressly provides that the government's certification is not required to identify the facilities, telephone lines, email addresses, places, premises, or property at which its surveillance will be directed. FAA § 702(g)(4). Thus, under the Act, the government may obtain a mass acquisition order without identifying the people (or even the group of people) to be surveilled; without specifying the facilities, places, premises, or property to be monitored; without obtaining individualized warrants based on criminal or foreign intelligence probable cause; and without making even a prior administrative determination that the acquisition relates to a particular foreign agent or foreign power.

This Court is required to issue a mass acquisition order if it finds that the government's certification "contains all the required elements" and that the "targeting and minimization procedures" are consistent with the requirements of the statute and the Fourth Amendment. FAA § 702(i)(3)(A). It bears emphasis that, under the Act, the role of this Court in authorizing and supervising government surveillance is narrowly circumscribed. While the Court reviews the government's certifications, targeting procedures, and minimization procedures, it does not consider individualized and particularized surveillance applications, it does not make individualized probable cause

determinations, and it does not supervise the implementation of the government's targeting or minimization procedures. *Cf.* 50 U.S.C. 1805(e)(3) ("At or before the end of the period of time for which electronic surveillance is approved by an order or an extension, the judge may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.").[1]

The Act does not place meaningful limits on the government's retention, analysis, and dissemination of U.S. communications and information that relates to U.S. citizens and residents. While the Act requires the government to adopt "minimization" procedures that are "reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination of nonpublicly available information concerning unconsenting United States persons," the statute does not prescribe specific minimization procedures, does not give this Court any authority to oversee the implementation of the procedures, and specifically allows the government to retain and disseminate information – including information relating to U.S. persons – if the government concludes that it is "foreign intelligence information." Nothing in the Act forecloses the government from compiling databases of such "foreign intelligence information" and searching those databases for information about specific U.S. persons.

[1] With respect to any acquisition authorized under section 702(a), the Attorney General and DNI may direct any electronic communication service provider immediately to "provide the Government with all information, facilities, and assistance necessary to accomplish the acquisition." FAA § 702(h)(1)(A). The statute permits electronic communication service providers to challenge the lawfulness of directives before this Court, FAA § 702(h)(4), but such challenges are likely to be rare because electronic communications service providers that supply information, facilities, or assistance in response to directives are immunized from liability. FAA § 702(h)(3).

ARGUMENT

As discussed above, section 702(i) of the Act requires this Court to evaluate the constitutionality of the government's targeting and minimization procedures. Because the procedures have meaning only when understood in the context of the broader statutory scheme, it seems likely that the Court's evaluation of the constitutionality of the procedures will require it to consider the scope, meaning, and constitutionality of the FISA Amendments Act more generally, and in particular section 702 of the Act. For the reasons stated below, proceedings relating to the constitutionality of the broader statutory scheme should be adversarial and as informed and transparent as possible.

For the past seven years, the government's authority to engage in highly intrusive electronic surveillance of U.S. citizens and residents in the name of national security has been the subject of extraordinary public concern and debate. This debate began with the enactment of the USA Patriot Act, Pub. L. 107-56 (Oct. 26, 2001), which radically expanded the government's ability to monitor the activities of innocent U.S. residents. Debate intensified after media reports revealed that President Bush had authorized the National Security Agency ("NSA") to conduct warrantless electronic surveillance inside the nation's borders in disregard of the Foreign Intelligence Surveillance Act, *see, e.g.*, James Risen and Eric Lichtblau, *Bush Let U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, and that the NSA was compiling vast databases of purely domestic telephone records as well, *see* Leslie Cauley, *NSA has Massive Database of Americans' Phone Calls*, USA Today, May 11, 2006. There continues to be widespread public

concern about the government's expanded surveillance authorities.[2] Many Americans believe that these authorities are fundamentally inconsistent with democratic and constitutional values.

There is widespread public apprehension about the privacy implications of the FISA Amendments Act specifically. Numerous editorials, for example, have expressed concern about the constitutionality of the Act, the breadth of surveillance authority it provides the government, and the lack of clarity about what, precisely, the new law authorizes with respect to the acquisition, retention, analysis, and dissemination of international and domestic communications. *See, e.g.*, Editorial, *Compromising the Constitution*, N.Y. Times, July 8, 2008; Editorial, *Our View on Security vs. Privacy: Election-Year Spying Deal is Flawed, Overly Broad*, USA Today, June 25, 2008; Marty Lederman, *The Key Questions About the New FISA Bill*, Balkinization, June 22, 2008.

Because of the significance of the constitutional issues and the widespread public

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[2] *See, e.g.*, James Risen, *Subpoenas Sent to White House on Wiretapping*, N.Y. Times, July 28, 2007 (reporting on continuing revelations about the NSA's warrantless wiretapping program); Seth Stern, *Justice Officials Leave Lawmakers Confused About New Surveillance Program*, Congressional Quarterly, Jan. 18, 2007 (reporting on ruling issued by this Court in January 2007 that prompted the Administration to cease the warrantless wiretapping program); Greg Miller, *Court Puts Limits on Surveillance Abroad*, L.A. Times, Aug. 2, 2007 (reporting on a ruling issued by this Court in May 2007 that modified the earlier rulings); Ellen Nakashima, *A Push to Rewrite Wiretap Law*, Wash. Post, Aug. 1, 2007; Editorial, *Stampeding Congress, Again*, N.Y. Times, Aug. 3, 2007 (reporting on the passage of the Protect America Act); Greg Miller, *Spy Chief Reveals Details of Operations*, L.A. Times, Aug. 23, 2007; Eric Lichtblau, *More Sharp Words Traded Over Lapsed Wiretap Law*, N.Y. Times, Feb. 23, 2008 (reporting on the continuing legislative debate about FISA and the expiration of the Protect America Act); Charlie Savage, *Adviser Says McCain Backs Bush Wiretaps*, N.Y. Times, June 6, 2008; Jose Antonio Vargas, *Obama Defends Compromise on New FISA Bill*, Wash. Post, July 4, 2008 (reporting on presidential candidates' position on warrantless wiretapping); Bradley Olsen, *Domestic Spying Quietly Goes On*, Baltimore Sun, July 7, 2008 (reporting on speculation about other electronic surveillance activities to which the public remains unaware).

interest in the practical implications of the FISA Amendments Act, the proceedings required by section 702(i) – and, in particular, proceedings in which this Court will consider legal questions relating to the scope, meaning, and constitutionality of the FISA Amendments Act – should be adversarial and as informed and transparent as possible. An adversarial process would ensure that that the Court hears arguments not only from the administration (which actively advocated for the Act's passage) but also from those whose mandate is to ensure that activities undertaken by the government in the name of national security are consistent with the Constitution. As the Supreme Court has stated, "truth – as well as fairness – is best discovered by powerful statements on both sides of the question." *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (internal quotation marks omitted). A transparent process will allow the public to better understand the practical significance and constitutional implications of the Act, and will increase public confidence in a judicial process that is likely to result in a decision relating to the constitutionality of a controversial piece of legislation.

The Court plainly has the authority to grant the relief sought here. As to the ACLU's request that it be permitted to participate in proceedings required by section 702(i), Rule 6 expressly contemplates the possibility that non-government attorneys may appear before the Court with permission. *See* 2006 FISC Rules, Rule 6 ("An attorney may appear on a matter with the permission of the Judge before whom the matter is pending. An attorney who appears before the Court must be a licensed attorney and a member, in good standing, of the bar of a federal court, except that an attorney who is employed by and represents the United States or any of its agencies in a matter before the Court may appear before the Court regardless of federal bar membership. All attorneys

appearing before the Court must have the appropriate security clearances."); *see also* 2006 FISC Rules, Rule 7(b)(ii) (contemplating that a motion for the release of records may be filed by a member of the public).[3]

Further, both this Court and the Foreign Intelligence Surveillance Court of Review ("FISCR") have permitted the ACLU and other civil society organizations to participate in proceedings before this Court in the past. In 2002, the FISCR permitted the ACLU, the National Association of Criminal Defense Attorneys, the Center for Democracy and Technology, the Center for National Security Studies, the Electronic Privacy Information Center, and the Electronic Frontier Foundation to file a brief concerning the constitutionality of certain amendments made by the Patriot Act. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002). In 2006, this Court accepted a brief about the legality of the NSA's warrantless surveillance program from the Center for National Security Studies.[4] More recently, this Court permitted the ACLU to file a motion for the public release of certain legal opinions related to this Court's interpretation of FISA, issued a public briefing schedule, ordered the government to respond to the motion, and ruled that the court had jurisdiction to entertain third-party requests for release of court records. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007).

This Court also has the authority to order the government to file public versions of its legal briefs. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)

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[3] Each of the undersigned counsel is a member in good standing of the bar of a federal court. Given the nature of the Motion, undersigned counsel do not believe that security clearance is necessary. To the extent that undersigned counsel require this Court's permission to file the instant motion, undersigned counsel respectfully seek it.

[4] The brief is available at http://www.cnss.org/FISC%20Memorandum%20(signed).PDF.

("[e]very court has supervisory power over its own records and files"). In August 2007, this Court ordered the government to respond to the ACLU's motion for the release of certain legal rulings and to file a public version of its responsive legal brief. *In re Motion for Release of Court Records*, Docket No. Misc. 07-01 (FISA Ct., Aug. 16, 2007) (scheduling order). The government filed a public version of its legal brief in opposition to the ACLU's motion; it also filed a public brief in opposition to the ACLU's motion for reconsideration. The government has filed public versions of legal briefs in other FISC-related proceedings as well. *See, e.g.*, Br. for the United States, *In re Sealed Case*, No. 02-001 (FISA Ct. Rev., Aug. 21, 2002), *available at* http://www.fas.org/irp/agency/doj/fisa/082102appeal.html; Supp. Br. for the United States, *In re Sealed Case*, No. 02-001 (FISA Ct. Rev., Sep. 25, 2002), *available at* http://www.fas.org/irp/agency/doj/fisa/092502sup.html.[5]

Plainly, the Court also has authority to issue public versions of its own legal opinions. Again, Rule 7(b)(ii) contemplates that a motion for the release of records may be filed by a member of the public. *See* 2006 FISC Rules, Rule 7(b)(ii) (distinguishing between situations in which orders and opinions are "provided to the government when issued" and situations in which materials may be released upon "prior motion to and Order by the Court"). The rules also contemplate that the Court may release Court records *sua sponte*. *See* FISC Rules, Rule 5(c) ("[o]n request by a Judge, the Presiding Judge, after consulting with other Judges of the court, may direct that an Opinion be

[5] The ACLU assumes that the government will, in fact, file legal briefs in the proceedings required by Section 702(i) because Rule 10(a)(ii) of the 2006 FISC Rules states that: "If an application or other request for action raises an issue of law not previously considered by the Court, the government must submit a memorandum of law in support of its position on each new issue."

published."). Indeed, Judge Bates recently ruled that this Court has jurisdiction to entertain requests for the release of court records by non-government parties because this Court, like "every court, has supervisory power over its own records and files." *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007).

This Court and the FISCR have released public versions of important legal rulings on five occasions. In the early 1980s, Presiding Judge George Hart published an opinion concerning the Court's authority to issue warrants for physical searches. Letter from Presiding Judge Colleen Kollar-Kotelly to Hon. Patrick J. Leahy, Hon. Arlen Specter, and Hon. Charles E. Grassley, Aug. 20, 2002.[6] In 2002, the Court published an *en banc* decision pertaining to the government's revised minimization procedures. *See In re All Matters Submitted to the Foreign Intelligence Surveillance Court* (FISA Ct., May 17, 2002). The FISCR subsequently published its order and opinion in the appeal of that matter. *See In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002). In December 2007 Judge Bates issued a public opinion pertaining to the ACLU's motion for the release of court records, *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, and in February 2008 Judge Bates issued another public opinion denying the ACLU's motion for reconsideration, *In re Motion for Release of Court Records*, Docket No. Misc. 07-01 (FISA Ct., Feb. 8, 2008).

The arguments in favor of transparency are especially weighty here. In the proceedings required under Section 702(i), this Court will be opining on vitally important constitutional questions. It will be called upon to issue judicial opinions that contain interpretation and analysis about the scope and meaning of a major federal law that

[6] The letter is available at http://www.fas.org/irp/agency/doj/fisa/fisc082002.htm.

impacts the privacy rights of all U.S. residents – a law that makes radical changes to surveillance authorities that have been in place for many years. The value of public access to these judicial rulings cannot be overstated. Without access to this Court's rulings, the public may never know whether this Court has found that the government's targeting and minimization procedures violate the Constitution, whether this Court is interpreting the FISA Amendments Act narrowly or broadly, or even whether the Court has declared the statute unconstitutional. Without public access, Americans will simply not know what their privacy rights are.

The public should have access to this Court's rulings relating to the scope, meaning, and constitutionality of the new law. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983) ("The English common law, the American constitutional system, and the concept of the 'consent of the governed' stress the 'public' nature of legal principles and decisions."). Public access to legal opinions, particularly those that contain constitutional interpretation, is a cornerstone of democracy, *see, e.g.*, *Hicklin Engineering, L.C. v. R.J. Bartell*, 439 F.3d 346, 348-49 (7th Cir. 2006), and does not dissipate in the national security context, *see, e.g.*, *United States v. Ressam*, 221 F. Supp. 2d 1252 (W.D. Wash. 2002); *see also United States v. Rosen*, 487 F. Supp. 2d 703, 715-16 (E.D. Va. 2007); *United States v. Moussaoui*, 65 F. App'x 881, 887 (4th Cir. 2003). Judge Bates recently acknowledged that "certain benefits could be expected from public access" to FISC legal rulings pertaining to the scope and legality of the government's surveillance powers, *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 16, noting that there "might be greater understanding of the FISC's decisionmaking," that "[e]nhanced public scrutiny could provide an additional safeguard

against mistakes, overreaching or abuse," and that "the public could participate in a better-informed manner" in legislative debate relating to FISA, *id.* The public should know how this Court interprets the FISA Amendments Act and whether it finds the government's procedures or the Act itself to be unconstitutional.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests that this Court grant the relief requested above.

Respectfully submitted,

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