FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE CERTAIN ORDERS ISSUED BY THIS COURT ON JANUARY 10TH, 2007, AND SUBSEQUENTLY EXTENDED, MODIFIED AND/OR VACATED.	**MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR RELEASE OF COURT RECORDS**

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PRELIMINARY STATEMENT

Pursuant to Rule 7(b)(ii) of this Court's Rules of Procedure Effective February 17, 2006 ("2006 FISC Rules"), the American Civil Liberties Union ("ACLU") respectfully moves for the unsealing of (i) orders issued by this Court on January 10th, 2007 (the "January 10th orders"); (ii) any subsequent orders that extended, modified, or vacated the January 10th orders;[1] and (iii) any legal briefs submitted by the government in connection with the January 10th orders or in connection with subsequent orders that extended, modified, or vacated the January 10th orders.[2] The ACLU respectfully requests that all such documents (collectively, the "sealed materials") be made public as

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[1] The ACLU means to include in this category the order that House Minority Leader John Boehner referenced in an August 1st television interview. *See* Greg Miller, *Court Puts Limits on Surveillance Abroad: The ruling raises concerns that U.S. anti-terrorism efforts might be impaired at a time of heightened risk*, L.A. Times, Aug. 2, 2007 (quoting Rep. Boehner: "[t]here's been a ruling, over the last four or five months, that prohibits the ability of our intelligence services and our counterintelligence people from listening in to two terrorists in other parts of the world where the communication could come through the United States").

[2] Rule 7(b)(ii) appears to contemplate 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"). Further, 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."). To the extent that the undersigned attorneys require permission to file this Motion, they hereby respectfully seek it. 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.

quickly as possible with only those redactions essential to protect information that the Court determines, after independent review, to be properly classified.

The sealed materials are vitally important to the ongoing national debate about government surveillance and the disclosure of the sealed materials would serve the public interest. The Attorney General referenced and characterized certain of the sealed materials in explaining why the President discontinued a warrantless surveillance program that he had inaugurated in late 2001. The House Minority Leader referenced and characterized certain of the sealed materials in advocating that the Foreign Intelligence Surveillance Act ("FISA") be amended for the ninth time since the September 2001 terrorist attacks. Members of Congress referenced and characterized certain of the sealed materials in explaining their support for the amendments. Over the next six months, Congress and the public will consider whether these amendments should be made permanent. Publication of the sealed materials will permit members of the public to participate meaningfully in this debate, evaluate the decisions of their elected leaders, and determine for themselves whether the proposed permanent expansion of the executive's surveillance powers is appropriate.

FACTUAL 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.[3] The NSA Program was plainly inconsistent with FISA and it engendered widespread concern and condemnation.[4] The executive's defense of the NSA Program – that Congress implicitly authorized the NSA Program when it passed the September 2001 Authorization for Use of Military Force and that, in any event, the President possesses authority under the Constitution to engage in warrantless surveillance in violation of FISA – engendered concern and condemnation in its own right.[5]

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),[6] the Attorney General stated in a letter to the Chairman and Ranking

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

[4] *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.

[5] *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.

[6] 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*, --- F.3d ----, 2007 WL 1952370 (6th Cir., July 6, 2007). The dissenting judge found that

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.[7] 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). He also stated that it had taken "some time for a judge to get comfortable" with the government's proposal. *Id.* [8]

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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 *38.

[7] The letter is available at http://www.fas.org/irp/agency/doj/fisa/ag011707.pdf.

[8] 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., Hearing before the S. Intelligence Comm. on the Foreign Intelligence Surveillance Modernization Act of 2007,* 110th Cong. (May 1, 2007) (during which Director of National Intelligence Mike McConnell denied that there were any current plans for conducting electronic surveillance without compliance with this Court's orders but stated that "Article II is Article II. So in a different circumstance, I can't speak for the president what he might decide"); *Hearing before the S. Judiciary Comm. on Dep't of Justice Oversight*, 110th Cong. (Jan. 18, 2007) (during which Attorney General Gonzales explained that the President authorized surveillance in violation of FISA "because there was a firm belief, *and that belief continues today* that he does have the authority under the Constitution to engage in electronic surveillance of the enemy on a limited basis during a time of war") (emphasis added).

Administration officials have spoken publicly about the January 10th orders on multiple occasions. They have referenced and characterized the January 10th orders 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, Jan. 17, 2007;[9] Press Briefing by White House Press Secretary Tony Snow, January 17, 2007;[10] Government's Supplemental Submission Discussing the Implications of the Intervening FISA Court Orders of January 10, 2007, *ACLU v. NSA*, Nos. 06-2095/2140 (6th Cir., filed Jan. 24, 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.

While administration officials have repeatedly referenced and characterized the January 10th orders, however, the orders themselves have remained secret. Consequently, the public has had to rely on the administration's incomplete statements about why the orders were issued, how they were justified legally, and what kinds of

[9] The transcript is available at at http://www.fas.org/irp/news/2007/01/doj011707.html.

[10] The transcript is available at http://www.whitehouse.gov/news/releases/2007/01/20070117-5.html.

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 have 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,[11] 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*

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[11] 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. 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.[12] The administration did not explain, however, what the "gap" was or why the gap existed. It was not until a week ago, when House Minority Leader John Boehner referenced an order that this Court apparently issued "in the last four or five months," that the public learned that the Court may have withdrawn the authority it extended to the administration in January.[13] Even now, the public does not know what authority was withdrawn or why.

Three days ago, the President signed into law the Protect America Act of 2007, Pub. L. No. 110-55 (2007). Fueled by the administration's repeated but unverifiable claims that this Court had limited its ability to engage in critically necessary surveillance, Congressional debate about the proposed legislation was minimal, lasting a total of only four days. Indeed, congressional consideration of the law was limited almost entirely to closed-door negotiations between the leadership and the administration. *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. Because the public did not have access to relevant information, public

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

[13] *Newsweek* magazine reported on the basis of other sources that "in an order several months ago," a judge of this Court "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").

debate was also minimal. Yet the law's implications are dramatic. It allows the executive to intercept Americans' international calls and emails without individualized warrants and without individualized suspicion as long as the surveillance is "directed at" or "concerns" someone reasonably believed to be outside the United States. *See* Pub. L. No. 110-55, § 2. This Court's role is limited to approving the reasonableness of the procedures used by the executive to determine whether individuals are outside the United States, and even this review is for "clear erro[r]." *Id.* at § 3. While the new law will sunset in six months unless renewed, the administration has already said that the law should be made permanent. *See* Jim Rutenberg, *Bush Still Wields the Threat of Terrorism*, N.Y. Times, Aug. 7, 2007.

ARGUMENT

I. THE PUBLIC INTEREST WOULD BE SERVED BY THE PUBLICATION OF THE SEALED MATERIALS.

Over the next six months, Congress and the public will debate the wisdom and necessity of permanently expanding the executive's authority to conduct intrusive forms of surveillance without meaningful judicial oversight. Unless this Court releases the sealed materials, this debate will take place in a vacuum. 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 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.

In addition to informing public debate about recent and proposed legislation, the disclosure of the sealed materials would aid the public in understanding the scope of the government's surveillance activities. The courts have long recognized that "those charged with [the] investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *U.S. v. U.S. Dist. Court for Eastern Dist. of Mich.*, 407 U.S. 297, 317 (1972). As the Church and Pike Committees observed more than thirty years ago, unchecked government surveillance yields all too readily to excess, carrying with it "the possibility of abuses of power which are not always quickly apprehended or understood." *Intelligence Activities and the Rights of Americans*, Book II, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, S. Rep. No. 94-755, at 3 (1976); *see also id.* ("We have seen a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to what witnesses characterized as 'vacuum cleaners,' sweeping in information about lawful activities of American citizens."). Given the dangers of unchecked government surveillance, the public has an interest in knowing the general nature of the government's surveillance activities, ensuring that those activities are commensurate with the threats they are intended to answer, and ascertaining whether adequate safeguards are in place to ensure that those activities remain subject to democratic control.

Needless to say, the ACLU does not ask the Court to disclose information about specific investigations or information about intelligence sources or methods. However, this Court's legal interpretations of an important federal statute designed to protect civil liberties while permitting the government to gather foreign intelligence should be made public to the maximum extent possible. The public should know, at least in general terms, how this Court has interpreted FISA. And the public should know how the administration has asked the Court to interpret that statute. Publication of the sealed materials, with redactions necessary to protect properly classified information, would provide the public with answers to these questions.

While the administration has referenced and characterized the sealed materials repeatedly, it is imperative that the public be permitted to examine the sealed materials for itself. In a debate about the expansion of executive surveillance powers, the executive is not a disinterested party and its disclosures may be selective, incomplete, and self-serving. After the *New York Times* revealed the existence of the NSA Program, the administration conducted an aggressive public relations campaign to convince the public of the program's legality, necessity, and efficacy; the campaign included the disclosure of and official acknowledgement of information that was previously secret.[14] After congressional leaders accused Attorney General Gonzales of misleading the Senate

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[14] *See, e.g., The Worldwide Terror Threat: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. (2006), *available at* 2006 WL 246499 (testimony of Director of National Intelligence John Negroponte and Principal Deputy Director of National Intelligence Gen. Michael Hayden); *Oversight on the Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. (2006), *available at* 2006 WL 896707 (testimony of Attorney General Alberto Gonzales); President's Radio Address, 41 Weekly Comp. Pres. Doc. 1880, 1881 (Dec. 17, 2005); Remarks Following a Visit to the National Security Agency at Fort Meade, Maryland, 42 Weekly Comp. Pres. Doc. 121, 122-23 (Jan. 25, 2006); President's Radio Address, 42 Weekly Comp. Pres. Doc. 926 (May 13, 2006).

Judiciary Committee by indicating that there was never any disagreement within the administration about the lawfulness of the NSA Program, the administration defended the Attorney General by disclosing the existence of previously unacknowledged intelligence activities and stating that any disagreement related to *those* activities. And after the administration encountered public and congressional resistance to proposals to amend FISA, government officials leaked information about an order of this Court that had purportedly limited the executive's surveillance powers. Disclosures about this Court's decisions have been selective and politically motivated. The public should not have to rely on the grace of the executive branch to obtain information that is crucial to determining whether the executive's surveillance authorities should be further expanded.

The debate about amendments to FISA is a debate about one of the most important matters of our time: the circumstances in which the government should be permitted to use its profoundly intrusive surveillance powers to intercept the communications of U.S. citizens and residents. This Court should not permit this debate to take place in a vacuum. It is imperative that the public be permitted to participate meaningfully in this debate and that it be given the means of assessing for itself whether recent amendments to FISA were appropriate and should be made permanent. None of this will be possible unless the sealed materials are published.

II. THIS COURT HAS THE AUTHORITY TO PUBLISH THE SEALED MATERIALS.

This Court's rules contemplate that the Court may publish its records upon motion, *see* 2006 FISC Rules, Rule 7(b)(ii) (indicating that court records may be released upon "prior motion to and Order by the Court"), or *sua sponte, see* 2006 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 published"). This Court would have the authority to grant this Motion even in the absence of these rules, because it is "fundamental that 'every court has supervisory power over its own records and files.'" *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)).

The ACLU recognizes that this Court's docket consists mainly of material that is properly classified. In an August 20th, 2002 letter to leaders of the Senate Judiciary Committee, the Presiding Judge of this Court explained that "[i]n 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. All of these docket entries are classified at the secret and top secret level." *See* Letter from Presiding Judge Colleen Kollar-Kotelly to Hon. Patrick J. Leahy, Hon. Arlen Specter, and Hon. Charles E. Grassley, Aug. 20, 2002.[15] Some matters that arise in the FISC, however, raise novel and complex legal issues or are of broader significance. On at least two occasions in the past, this Court has recognized the public interest in the Court's resolution of such issues and has accordingly published its rulings. In the early 1980s, Presiding Judge George Hart published an opinion concerning the Court's authority to issue warrants for physical searches. *Id.*; *see also* James Bamford, *The Puzzle Palace: A Report on America's Most Secret Agency* (Penguin Books, 1983). In 2002, the Court published an en banc decision addressing the government's motion to vacate certain procedures that the Court had previously enforced as "minimization procedures" under 50 U.S.C. § 1801(h). *See* Letter

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

from Presiding Judge Colleen Kollar-Kotelly to Hon. Patrick J. Leahy, Hon. Arlen Specter, and Hon. Charles E. Grassley, Aug. 20th, 2002.[16]

The sealed materials plainly address legal issues of similarly broad significance. Administration officials have stated that the January 10th orders were "innovative" and "complex," that they construed FISA more expansively than it had been construed before, and that they were issued only after lengthy negotiations between the executive branch and a judge of this Court. The House Minority Leader has said that a subsequent order issued by this Court "prohibit[ed] the ability of our intelligence services and our counterintelligence people from listening in to two terrorists in other parts of the worlds where the communication could come through the United States." Thus, it is clear that the sealed materials are not simply routine orders that granted run-of-the-mill surveillance applications. Moreover, the sealed materials have had far-reaching effects. As discussed above, certain of the sealed materials were cited as the basis for the President's decision in early 2007 to discontinue the NSA Program. Certain of the sealed materials were cited by the administration as necessitating amendments to FISA. Thus, the sealed materials have affected far more than the executive's authority to conduct surveillance in individual foreign intelligence or terrorism investigations. Disclosure of the sealed materials, with redactions to protect information that is properly classified, would be consistent with the Court's past practice and procedural rules.

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[16] This Court's decision was later appealed by the government, requiring the FISA Court of Review ("FISCR") to convene for the first time since the passage of FISA in 1978. The FISCR published its subsequent order and opinion. *See In re Sealed Case*, 310 F.3d 717, 742 (For. Int. Surv. Ct. Rev. 2002). The briefs submitted by the government were also made public. *See* Br. for the United States, *In re Sealed Case*, No. 02-001 (Aug. 21, 2002); Supp. Br. for the United States, *In re Sealed Case*, No. 02-001 (Sep. 25, 2002). The briefs are available at http://fas.org/irp/agency/doj/fisa/.

III. COMPELLING FIRST AMENDMENT INTERESTS SUPPORT RELEASE OF THE SEALED MATERIALS.

That the judicial process should be as open to the public as possible is a principle enshrined in both the Constitution and the common law. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980); *Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978). Public access to the workings of the judiciary serves multiple ends. It promotes confidence in the judicial system. *See Press-Enter. Co. v. Superior Court of Cal. for Riverside County*, 464 U.S. 501, 508 (1984); *Huminski v. Corsones*, 396 F.3d 53, 81 (2d Cir. 2005) ("[I]n these cases . . . the law itself is on trial, quite as much as the cause which is to be decided. Holding court in public thus assumes a unique significance in a society that commits itself to the rule of law"); *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) ("This preference for public access is rooted in the public's first amendment right to know about the administration of justice. It helps safeguard the integrity, quality and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies." (internal quotation marks and citations omitted)); *Matter of Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) ("What happens in the halls of government is presumptively open to public scrutiny . . . . Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification."); *Application of Nat'l Broad. Co., Inc.*, 828 F.2d 340, 345 (6th Cir. 1987). Public access also serves as a check against abuse. *Richmond Newspapers, Inc.*, 448 U.S. at 569 (discussing the value of an open justice system and noting that "[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account" (quoting Jeremy Bentham, Rationale of Judicial Evidence 524 (1827))). Ultimately, the law's recognition

of the importance of judicial transparency serves "the citizen's desire to keep a watchful eye on the workings of public agencies . . . [and] the operation of government." *Nixon,* 435 U.S. at 598.

The public interest in disclosure of judicial opinions is particularly strong. As the Seventh Circuit recently noted:

> Redacting portions of opinions is one thing, secret disposition is quite another . . . . What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.

Hicklin Engineering, L.C. v. R.J. Bartell, 439 F.3d 346, 348-49 (7th Cir. 2006); *see also 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, LLC*, 303 F.3d 1332, 1335 n.1 (Fed. Cir. 2002) (same). As one court has noted, "requiring a judge's rulings to be made in public deters partiality and bias . . . . In short, justice must not only be done, it must be seen to be done." *United States v. Rosen*, 487 F. Supp. 2d 703, 715-16 (E.D. Va. 2007).

The courts have routinely recognized and given effect to the public's right of access to judicial orders and opinions even in the national security context. For example in *United States v. Ressam,* 221 F. Supp. 2d 1252 (W.D. Wash. 2002), which involved the prosecution of an al-Qaeda-trained Algerian terrorist who had plotted to detonate explosives at the Los Angeles International Airport, the court rejected an argument for access to government submissions containing classified information but proceeded to find

a First Amendment right of access to sealed protective orders previously issued by the court:

> [T]here is a venerable tradition of public access to court orders, not only because of the inherent value in publicly announcing a particular result, but because dissemination of the court's reasoning behind that result is a necessary limitation imposed on those entrusted with judicial power. A court's order therefore serves a function that extends far beyond a specific case. More than merely informing the parties of the outcome of a motion, an order also enlightens the public about the functioning of the judicial system. One might argue that protective orders, because of their frequent references to sensitive information, generally deserve a higher degree of scrutiny before they are publicly disclosed, yet the Court does not find this legitimate concern sufficient to overcome the long history of general public access to court orders . . . .
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> The Court is similarly unaware of any reason why court orders should not be made public because they do not contribute significantly to the functioning of the judicial process. Rather than an isolated statement that does nothing more than grant or deny a motion, an order that explains its rationale enhances public understanding and faith in the fairness of the judicial process. It not only clarifies the result, but explains the legal precedent and policy considerations upon which it is based. The benefits of access to court orders do not accrue merely in those members of the public that read or hear of them. The court itself, knowing that its determinations will be scrutinized by others, is further encouraged to coherently explain the reasoning behind its decision. In short, the general practice of disclosing court orders to the public not only plays a significant role in the judicial process, but is also a fundamental aspect of our country's open administration of justice.

Id. at 1262-63.

The public interest in disclosure of the sealed materials is plain. The January 10th orders led the President to discontinue the NSA Program in January 2007. A subsequent order of this Court led the administration to urge that Congress adopt "emergency" legislation to address purported "gaps" in the executive's surveillance authority. The administration's claims about the purported gaps created by this order led Congress to expand dramatically the executive's power to conduct electronic surveillance without

meaningful judicial oversight. It is inappropriate, to say the least, that the judicial decisions that led to these major changes in the landscape of U.S. privacy law remain secret. As the Supreme Court has explained, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press-Enter. Co. v. Superior Court of Cal. for Riverside County*, 478 U.S. 1, 9 (1986).

The ACLU is aware that the administration has taken the position that the sealed materials are classified. However, the question whether – and to what extent – judicial records should be made available to the public is ultimately one for the Court to decide, and requires a particularized inquiry into any national security interests offered by the government in support of secrecy. Thus, for example, the Fourth Circuit in *In re Washington Post*, 807 F.2d 383, 391 (4th Cir. 1986), wrote:

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

Id. at 391-92. In *Rosen*, 487 F. Supp. 2d at 716-17, the court wrote:

> 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]. The government's *ipse dixit* that information is damaging to national security is not sufficient . . . . Here, the government has not met its burden; instead, it has done no more than to invoke 'national security' broadly and in a conclusory fashion, as to all the classified information in the case. Of course, classification decisions are

> for the Executive Branch, and the information's classified status must inform an assessment of the government's asserted interests under *Press-Enterprise*. But ultimately, trial judges must make their own judgment about whether the government's asserted interest . . . . is compelling or overriding . . . . [A] generalized assertion ... of the information's classified status . . . . is not alone sufficient to overcome the presumption in favor of open trials.

See also United States v. Moussaoui, 65 Fed. Appx. 881, 887 (4th Cir. 2003) ("the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents"); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 711 (6th Cir. 2002) (refusing government's request to close immigration proceedings involving national security information). The fact that this Court's orders (or the government's submissions) may contain classified information does not automatically prevent their disclosure and certainly does not require that they be withheld from the public in their entirety.

The Court has the authority and, indeed, the obligation to independently review whether information in the sealed materials is properly classified. *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) (stating, in a Freedom of Information Act case, that the "court must make a de novo review of the agency's classification decision, with the burden on the

agency to justify nondisclosure"). In determining whether information is properly classified, the Court must evaluate whether disclosure could be expected to cause harm to the nation's security, Exec. Order No. 13,292, § 1.2 (Mar. 25, 2003), or whether, contrary to the Executive Order's prohibition, the information has been classified in order to "conceal violations of law, . . . prevent embarrassment[,] . . . or prevent or delay the release of information that does not require protection in the interest of national security," *id.* § 1.8.[17] Again, information should remain classified only if the executive can demonstrate, with specificity, that its release would harm national security. *See, e.g., In re Washington Post*, 807 F.2d at 391.

A letter from the Presiding Judge of this Court to Senators Leahy and Specter states that the January 10th orders, which had been requested by the Senate Judiciary Committee, "contain" classified information, presumably indicating that, while some information in the January 10th orders and associated documents is classified (whether properly or improperly), some information is not. It is commonplace, however, for documents containing properly classified information to be released with redactions. *See, e.g., United States v. Poindexter,* 732 F. Supp. 165, 169-70 (D.D.C. 1990) (requiring release of redacted or edited tape of former-President Reagan's testimony); *United States v. Pelton,* 696 F. Supp. at 159 (requiring release of redacted tape transcripts). That the

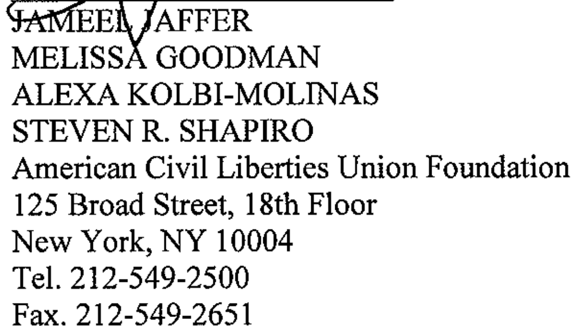
[17] Even a *statutory* secrecy requirement is insufficient – in and of itself – to trump the First Amendment right of access to judicial documents and proceedings. *See, e.g., In re the Matter of The New York Times*, 828 F.2d at 115 (stating that government could not justify seal "simply [by] cit[ing] Title III" because "a statute cannot override a constitutional right"); *United States v. Gerena,* 869 F.2d 82, 85 (2d Cir. 1989); *United Ressam,* 221 F. Supp. 2d at 1259-60 (discussing the Classified Information Procedures Act); *United States v. Pelton,* 696 F. Supp. 156 (D. Md.1986) (same); *In re Washington Post,* 807 F.2d at 393.

sealed materials may contain some classified information does not mean that they must be kept from the public in their entirety.[18]

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests that this Court release the sealed materials. The ACLU requests that these materials be released as quickly as possible and with only those redactions essential to protect information that the Court determines, after independent review, to be properly classified.

Respectfully submitted,



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[18] At a minimum, the Court should order the government to release an unclassified summary of the sealed materials. *Cf.* Classified Information Procedures Act, 18 U.S.C. App. 3 § 4 (requiring disclosure of summaries). Given the significance of the sealed materials, it is also open to the Court to request that the executive branch declassify information. *Cf. Ressam*, 221 F. Supp. 2d at 1264-65 (giving the government "time to declassify documents prior to ordering their disclosure" where the documents were "subject to the First Amendment right of access" and directing the government to declassify the documents by a date certain).