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

IN RE MOTION FOR RELEASE OF COURT RECORDS	Docket No.: MISC. 07-01

REPLY OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF MOTION FOR RELEASE OF COURT RECORDS

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PRELIMINARY STATEMENT

The American Civil Liberties Union ("ACLU") respectfully submits this reply in support of its Aug. 8th Motion for Release of Court Records (hereinafter, "ACLU Motion"). The ACLU's Motion seeks the unsealing of certain surveillance orders issued by this Court and of legal briefs submitted by the government in connection with those orders. In opposition to the ACLU's motion, the government argues that the Court does not have authority to unseal its own orders (or the other sealed materials) and that in any event the Court should defer to the government's determination that the sealed materials are properly classified in their entirety.

Neither of the government's contentions has merit. Every court has authority over its own docket, and this authority extends to decisions concerning the sealing of materials. While the government insists that the sealed materials are classified in their entirety, this Court has both the authority and the obligation to ensure that the classification is proper. Given the many public statements made by government officials, it is plain that at least some portion of the sealed materials can be disclosed. Indeed, this has become even more evident since the ACLU filed its motion. Several days before the government filed its opposition, Director of National Intelligence Mike McConnell made the following statements to a reporter from the El Paso Times:

> So, [the NSA Program] was submitted to the FISA court and the first ruling in the FISA court was what we needed to do we could do with an approval process that was at a summary level and that was OK, we stayed in business and we're doing our mission. . . .
>
> The FISA court ruled presented the program to them and they said the program is what you say it is and it's appropriate and it's legitimate, it's not an issue and was had approval. But the FISA process has a renewal. It comes up every so many days and there are 11 FISA judges. So the second judge looked at the same data and said well wait a minute I interpret the law, which is the FISA law, differently. And it came down to, if it's on a wire and it's foreign in a foreign country, you

> have to have a warrant and so we found ourselves in a position of actually losing ground because it was the first review was less capability, we got a stay and that took us to the 31st of May. After the 31st of May we were in extremis because now we have significantly less capability. . . .
>
> The issue is volume and time. . . . My argument was that the intelligence community should not be restricted when we are conducting foreign surveillance against a foreigner in a foreign country, just by dint of the fact that it happened to touch a wire.

Transcript, *Debate on the Foreign Intelligence Surveillance Act*, El Paso Times, Aug. 22, 2007.[1]

Thus, while the government contends to this Court that the sealed materials are properly classified and must remain secret in their entirety, administration officials continue publicly to reference, characterize, and discuss the materials in the service of a legislative and political agenda. The Court should not permit this abuse of the classification power to continue. If the administration can publicly discuss the sealed materials, the public should have firsthand access to them. Depriving the public of access to materials that plainly should not be sealed in their entirety undermines faith in government and ultimately jeopardizes the relatively limited information that should truly be kept secret. *See New York Times Co. v. United States*, 403 U.S. 713, 729 (Stewart, J., concurring) ("[W]hen everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. . . . [T]he hallmark of a truly

[1] The transcript is available at http://www.elpasotimes.com/news/ci_6685679. In the same interview, Director McConnell also confirmed that private sector corporations had assisted the government in conducting the "terrorist surveillance program." He had previously determined that this same information was a state secret, asserting in an affidavit that "[t]he disclosure of any information that would tend to confirm or deny allegations of [telecommunication company] assistance" with respect to the NSA Program "would cause exceptionally grave harm to the national security." *In re Nat'l Sec. Agency Telecommunications Records Litig.*, No. 06-01791, Dkt. No. 295-3 (N.D. Cal. May 25, 2007) (Public Declaration of J. Michael McConnell).

effective internal security system would be maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.").

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR THE ACLU'S MOTION.

This Court has the authority to consider the ACLU's motion. The ACLU submitted this motion under this Court's Rules of Procedure Effective Feb. 17, 2006 ("2006 FISC Rules"). The Court's rules were promulgated under the Rules Enabling Act, which states that "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business." 28 U.S.C. § 2071(a); *see also* 2006 FISC Rules, Rule 2. The rules appear to contemplate that a motion for the release of records may be filed by a member of the public; they also indicate that non-government attorneys may appear before the Court with permission. ACLU Motion 2 n.2. To the extent that the rules are ambiguous, they should be construed broadly, because, as discussed below, Article III courts have a duty to consider motions that raise right-of-access claims.[2]

The Court also has authority to grant the relief that the ACLU seeks. In fact, the Court can draw such authority from at least three different sources. The Rules themselves indicate that "Court orders or other materials may be released" with prior motion to the Court. 2006 FISC Rules, Rule 7(b)(ii); *see also* Rule 5(c) ("On request by a Judge, the Presiding Judge, after consulting with the other Judges of the Court, may direct that an Opinion be published."). The

[2] If the Court finds that its rules are silent as to third-party motions for publication of court records, the ACLU respectfully requests that the Court consider its motion as a petition for intervention under Federal Rule of Civil Procedure 24. *See* 2006 FISC Rules, Rule 1 ("Issues not addressed in these rules may be resolved under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure."); *see also Pansy v. Borough of Stroudburg*, 23 F.3d 772, 778 (3d Cir. 1994) (recognizing that intervention under Rule 24 is an appropriate vehicle for asserting right of access by third party).

All Writs Act, 28 U.S.C. § 1651, states that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Most fundamentally, every court has inherent supervisory power over its own docket. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("[i]t has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others" (internal quotation marks omitted and second alteration in original)).[3]

The government's contention that this Court's contempt power exhausts its inherent authority, Opposition to the American Civil Liberties Union's Motion for Release of Court Records (hereinafter, "Gov't Br.") 3, is simply incorrect. The inherent authority of a court extends to, among other things, the power to control the admission to the court's bar; vacate its own judgment upon proof that a fraud has been perpetrated upon the court; eject a disruptive criminal defendant from the court room; dismiss an action on grounds of *forum non conveniens*; and dismiss a suit *sua sponte* for failure to prosecute. *Chambers*, 501 U.S. at 44-45. Most relevant here, "every court has supervisory power over its own records and files." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978); *see also Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004) ("[i]t is undisputed that a district court retains the power to

[3] Indeed, this is true even of courts of specialized jurisdiction established under Article I. *See, e.g., United Med. Supply Co., Inc. v. United States*, 77 Fed. Cl. 257, 264 (Fed. Cl. 2007) ("Although established under Article I of the Constitution, this court, no less than any Article III tribunal, possesses, [] inherent authority"); *In re Rivera*, 369 B.R. 193, 202 (Bankr. D.N.J. 2007); *Black v. United States*, 24 Cl. Ct. 461, 464 (Cl. Ct. 1991); *Stam v. Derwinski*, 1 Vet. App. 317, 319-20 (Vet. App. 1991); *Anonymous v. Comm'r of Internal Revenue*, 127 T.C. 89, 90-91, 95 (T.C. 2006); *United States v. Thompson*, 37 M.J. 1023, 1028 (A.C.M.R. 1993).

modify or lift protective orders that it has entered" (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987))).

It is true, of course, that this Court is a court of specialized jurisdiction. 50 U.S.C. § 1803; Gov't Br. 3. FISA cannot fairly be read, however, to extinguish this Court's inherent supervisory authority over its own docket or implicitly to deny this Court the power that the Rules Enabling Act and All Writs Act expressly grant. *See Chambers*, 501 U.S. at 47 ("we do not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power" (internal quotation marks omitted)); *Lin v. Dep't of Justice*, 473 F.3d 48, 53 (2d Cir. 2007) ("before we will conclude that Congress intended to deprive us of our inherent powers, we require something akin to a clear indication of legislative intent" (internal citation omitted)); *Armstrong v. Guccione*, 470 F.3d 89, 102 (2d Cir. 2006) ("Congress may restrict the courts' inherent powers by 'inference,' but only where such an inference is 'necessary and inescapable.' . . . In the absence of a clear indication, whether express or implied, the Supreme Court has 'resolve[d] ambiguities [in the statute or rule at issue] in favor of that interpretation which affords a full opportunity for . . . courts to [act] in accordance with their traditional practices.'" (internal citation omitted)). If the government were correct that FISA denied this Court the inherent powers enjoyed by other Article III (and Article I) courts, this Court could not properly have published its rulings on earlier occasions, ACLU Motion 14, and it is not clear on what basis this Court would be able to enforce its rulings with contempt, though the government concedes that it can, Gov't Br. 3. That this Court is a court of specialized jurisdiction does not deny it control of its own docket. Other courts of specialized jurisdiction consider motions for access as a matter of course. *See, e.g., United States v. Hershey*, 20 M.J.

433, 436-38 (C.M.A. 1985); *United States v. Scott*, 48 M.J. 663, 665 (Army Ct. Crim. App. 1998); *In re Alterra Healthcare Corp.*, 353 B.R. 66, 73-74 (Bankr. D. Del. 2006).[4]

The government's construction of FISA is untenable as a matter of ordinary statutory interpretation. In addition, to adopt the construction would raise serious constitutional questions. Plainly, Congress cannot limit by statute a right of access that is protected by the Constitution. *See, e.g., In re Matter of The New York Times*, 828 F.2d 110, 115 (2d Cir. 1987) (noting that government cannot justify a seal "simply [by] cit[ing] Title III" because "a statute cannot override a constitutional right"); ACLU Motion 21 n.17. Moreover, while Congress can limit and regulate courts' inherent powers in some circumstances, *Chambers*, 501 U.S. at 47 ("the inherent power of lower federal courts can be limited by statute and rule, for these courts were created by act of Congress" (internal quotation marks omitted)), a statute that required a court to issue legal rulings but deprived it of the authority to disclose those rulings even in the face of First Amendment interests would raise serious questions relating to the separation of powers, *see, e.g., id.* at 58 (Scalia, J., dissenting on other grounds) ("[s]ome elements of [the courts'] inherent authority are so essential to '[t]he judicial Power,' . . . that they are indefeasible, among which is a court's ability to enter orders protecting the integrity of its proceedings"); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 560-64 (3d Cir. 1985) (en banc) (proposing a three-tier

[4] It is not clear whether the government is suggesting that the ACLU lacks *standing* to assert a right of access. If this is the government's suggestion, it is wrong – as to both the constitutional and common law right of access. *See, e.g., Pansy*, 23 F.3d at 777 ("We have routinely found, as have other courts, that third parties have standing to challenge protective orders and confidentiality orders in an effort to obtain access to information or judicial proceedings . . . . The Newspapers may have standing notwithstanding the fact that 'they assert rights that may belong to a broad portion of the public at large.'"); *Nixon*, 435 U.S. at 597-98 ("The interest necessary to support the issuance of a writ compelling access [to judicial records] has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, . . . and in a newspaper publisher's intention to publish information concerning the operation of government[.]").

categorization of inherent powers in which the uppermost tier is composed of "activity so fundamental to the essence of a court" that to deprive the court of this authority would be a "separation of powers" violation).[5]

The government's contention that the Freedom of Information Act is "the only appropriate avenue for the ACLU's request," Gov't Br. 5, does not warrant an extended response. As the government acknowledges, *id.*, FOIA applies only to executive agencies and not to the courts, *see* 5 U.S.C. § 552(a)(3). Moreover, while FOIA creates statutory rights, it does not displace rights guaranteed by the First Amendment. *See Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (considering both FOIA and First Amendment right of access claims); *Doe v. Gonzales*, 386 F. Supp. 2d 66, 78 (D. Conn. 2005) (distinguishing between "a constitutionally guaranteed right" and FOIA – "a right created, and limited, by statute"). Indeed, if FOIA preempted the ACLU's motion, it would presumably preempt similar motions in all Article III courts, and obviously this is not the case. *See, e.g.*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980).[6]

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[5] The government's suggestion that the Sixth Circuit has already rejected the claims presented here is unfounded. Although the ACLU moved the Sixth Circuit to release certain of the sealed materials, the Sixth Circuit declined to reach the merits because no member of the Court relied on the sealed materials in reaching his or her decision. *Am. Civil Liberties Union, v. Nat'l Sec. Agency*, Nos. 06-2095, 06-2140, Dkt. No. 94 (6th Cir. July 6, 2007).

[6] The government proposes, in one sentence, that a decision by this Court to disclose the sealed materials "might well be unreviewable, unlike in the FOIA context." Gov't Br. 7. This concern is unfounded. *See In re Sealed Case*, 310 F.3d 717, 721 (For. Int. Surv. Ct. Rev. 2002) (rejecting construction of 50 U.S.C. § 1803 that would have "elevate[d] form over substance and deprive[d] the government of judicial review of the [procedure] imposed by the FISA court"). The Court of Review has the authority to determine whether this Court has exceeded its jurisdiction. *See Schlagenhauf v. Holder*, 379 U.S. 104, 109-12 (1964); *La Buy v. Howes Leather Co., Inc.*, 352 U.S. 249, 254-60 (1957); *S.E.C. v. Krentzman*, 397 F.2d 55 (5th Cir. 1968).

II. THIS COURT HAS BOTH THE AUTHORITY AND THE OBLIGATION TO CONSIDER WHETHER THE SEALED MATERIALS ARE PROPERLY CLASSIFIED.

For reasons that the ACLU discussed in its motion, ACLU Motion 10-13, the public interest would be served by disclosure of the sealed materials. The Court should consider releasing the sealed materials for this reason alone. Because the question of public access implicates constitutional and common law rights, ACLU Motion 16-22, this Court has not only the authority but the duty to determine whether the materials are properly classified.

The government states that the sealed materials are classified in their entirety and that its classification decisions are entitled to the "utmost deference." Gov't Br. 9. The deference that ordinary district courts accord in national security cases, however, is not appropriate in the present context. This Court is not an ordinary district court but rather a specialized body with considerable expertise in the area of national security, and the material that the ACLU seeks consists not of factual information but legal analysis. In any event, even if the government is entitled to some degree of deference, "deference is not equivalent to acquiescence," *Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998); *Hepting v. AT & T*, 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006) (noting that "to defer to a blanket assertion of secrecy" concerning the NSA's activities would be "to abdicate" judicial duty where the subject "ha[d] been so publicly aired"), *appeal docketed*, No. 06-17132 (9th Cir. Nov. 8, 2006), and this Court has an obligation to exercise meaningful oversight, *see, e.g., Elec. Privacy Info. Ctr. v. Dep't of Justice*, --- F. Supp. 2d ----, 2007 WL 2483953, *9 (D.D.C. Sept. 5, 2007) (stating, in connection with FOIA suit for documents relating to surveillance by the NSA: "While the court is certainly sensitive to the

government's need to protect classified information . . . essentially declaring 'because we way so' is an inadequate method" of justifying blanket secrecy).[7]

There is reason to view with deep skepticism the government's claim that the sealed materials are properly classified in their entirety. Over the last nine months, government officials have repeatedly referenced, characterized, and described the sealed materials in public statements and comments to the media. ACLU Motion 3, 5-8, 12-13. As discussed above, this pattern has continued since the ACLU filed its motion. Most notably, Director McConnell discussed the sealed materials in detail in an interview with the El Paso Times, but there have been other examples as well, *see* Joby Warrick and Walter Pincus, *How the Fight for Vast New Spying Powers Was Won*, Wash. Post, Aug. 12, 2007 (quoting an anonymous senior administration official stating that after the limiting FISC ruling "the world flipped upside down"; that the government "shoved a lot of warrants at the court" but the court could not keep up; and that, at a meeting between FISC judges and Director McConnell, FISC judges said that "[w]e don't make legislation – we interpret the law"). The government fails even to mention these recent public statements in its brief; instead, it contends that the ACLU is relying on public "speculation" about the FISC materials, Gov't Br. 15, and it continues to insist that the only information that can possibly be made public is the information that Attorney General Gonzales made public many months ago, Gov't Br. 10 n.7; *see also id.* at 13 (stating that the sealed materials "contain no information that can be released without harming national security"). The

[7] As the ACLU has noted, courts test the government's classification decisions in an array of contexts. ACLU Motion 20 (citing cases involving FOIA, the Classified Information Procedures Act, and CIA pre-publication review). *Cf. United States v. Reynolds*, 345 U.S. 1 (1953) (requiring independent judicial review of executive's invocation of state secrets privilege).

government's argument here is impossible to square with the numerous and detailed statements that officials have made to the press and public.

The government's contention that disclosure of the sealed materials would reveal information about individual investigations and surveillance targets, Gov't Br. 11, is nothing more than a distraction. The ACLU does not seek the disclosure of this kind of information. The information that the administration has already made public, however, suggests that the sealed materials include legal analysis and legal rulings, and the administration's own public statements make clear that the materials can be discussed without reference to any particular investigation or surveillance target.

The government's suggestion that the release of the sealed materials would result in the disclosure of intelligence sources and methods, Gov't Br. 11, is also unfounded. That the government engages in electronic surveillance is no secret; there are federal laws that permit it to do this and the government reports on its use of these laws on a regular basis.[8] Nor is it a secret that the government engages in surveillance of both domestic communications and international ones, that it intercepts communications transmitted by wire and radio, and that some of its surveillance activities are overseen by this Court. Indeed, all of those things, besides having been discussed publicly by government officials, are evident from the face of the U.S. Code. The general rules regulating government surveillance are already public, as they would have to be in any democracy. *See generally* 50 U.S.C. § 1801 *et seq.* (FISA); 18 U.S.C. 2510 *et seq.* (Title III); Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (Aug. 5, 2007). Moreover, courts routinely interpret and analyze these rules in public opinions. *See, e.g., United States v. Pelton,* 835 F.2d 1067 (4th Cir. 1987); *United States v. Duggan*, 743 F.2d 59 (2d Cir.

[8] The reports are available at http://www.fas.org/irp/agency/doj/fisa/#rept.

1984). As the ACLU has pointed out, ACLU Motion 14-15, this Court and the Foreign Intelligence Surveillance Court of Review have both published their opinions before.

The government's brief is in essence a proposal that this Court should sanction the development of a body of secret law. But it is one thing to say that court orders relating to individual surveillance applications should be kept secret, as FISA generally requires;[9] it is another thing altogether to suggest that the Court should deny the public access to legal interpretations and analysis. To endorse the government's theory – that the disclosure of any ruling interpreting FISA would necessarily involve the disclosure of sources and methods – would, in addition to being inconsistent with the past practice of this Court and the federal courts more generally, require a significant retreat from the most fundamental of democratic values. *See Torres v. I.N.S.*, 144 F.3d 472, 474 (7th Cir. 1998) ("The idea of secret laws is repugnant."); *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."). Plainly, the concept of the rule of law requires that citizens know what the law is. Indeed, the idea of "secret law" has been rejected even in the FOIA context – a context that does not implicate the constitutional interests at stake here. *Providence Journal Co. v. Dep't of Army*, 981 F.2d 552, 556 (1st Cir. 1992) ("The FOIA was designed . . . as a means of deterring the development and application of a body of secret law."); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, --- F. Supp. 2d ----, 2007 WL 2483953, *7 ("an agency will not be permitted to develop a body of secret law" (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980))).

[9] As the government acknowledges, Gov't Br. 4, FISA permits the disclosure of individual surveillance applications and orders in certain circumstances, 50 U.S.C. § 1806(f).

The government paints the ACLU's motion as radical but in fact the relief it seeks is modest. It simply asks the Court to exercise the independent oversight that the Court's own rules contemplate, 2006 FISC Rules, Rules 5(c) & 7(b)(ii), and that the Constitution requires. If there is information in the sealed materials that is properly classified and that cannot be released without endangering the nation's security, that information should not be released. That the government has classified the sealed materials, however, does not mean that the materials are *properly* classified, and the mere fact that *some portion* of the sealed materials is properly classified does not mean that the materials are properly classified *in their entirety*. The decision whether these judicial documents should be released to the public should not be – and under the Constitution, *is* not – in the executive's hands alone.[10]

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

As the ACLU has explained, First Amendment interests support the disclosure of the material sought here. Indeed, the sealed materials consist at least in part of legal rulings, records that are at the core of the First Amendment's concern and to which the presumption of access plainly attaches. ACLU Motion 16-22.

Rather than grapple with the ACLU's argument, the government addresses a series of arguments that the ACLU has not made at all. Gov't Br. 17-19. The ACLU is not asking the Court to recognize a general right of access to government information, *id.* at 17, to information "compiled during . . . the investigation and prevention of terrorism," *id.* (quoting *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 935), or to properly classified information, *id.* at 19. Rather, the ACLU seeks court records containing legal reasoning and legal rulings, and only to the extent they

[10] The government's reliance on *Elec. Frontier Found. v. Dep't of Justice*, No. 07-403, Dkt. No. 16 (D.D.C. Aug. 14, 2007), is misplaced. The court in that case did not even examine the sealed materials, and no First Amendment claim was asserted.

contain legal reasoning and legal rulings. These materials implicate the First Amendment. ACLU Motion 17.

The government's argument that there is no tradition of access to FISC orders, Gov't Br. 19, is similarly misguided. The ACLU is not asserting that there is such a tradition; nor is it asking the Court to inaugurate one. The sealed materials at issue here, however, are not run-of-the mill surveillance orders that relate only to individual applications. As the government officials' public statements make clear, the orders are of broader significance and include legal analysis and legal rulings concerning the meaning of FISA. There is certainly a tradition of public access to judicial rulings of this kind, ACLU Motion 17-18, and this Court's past practice reflects a commitment to this tradition, *id.* at 14-15. Public access to the sealed materials is "logical" for the reasons that the ACLU has discussed at length, ACLU Motion 10-13 (discussing public interest in disclosure of sealed materials), as well as for the reasons that access to judicial rulings is logical as a general matter, *see, e.g.*, ACLU Motion 17-18 (discussing public interest in disclosure of judicial rulings); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1263 (W.D. Wash. 2002) (public judicial opinions "enhance[ ] public understanding and fairness of the judicial process"); *In re Grand Jury Proceedings*, 983 F.2d 74, 75 (7th Cir. 1992) ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat[.]").

The government's suggestion that the right of access does not attach to judicial rulings is incorrect. Most circuits have found that a First Amendment right of access attaches to civil proceedings. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1165; *Matter of*

Cont'l Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001). Other circuits have not yet confronted the question squarely but have recognized a common law right of access to civil judicial documents or trials. *See In re Providence Journal Co., Inc.*, 293 F.3d 1 (1st Cir. 2002); *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371 (8th Cir.1990); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003).[11] In any event, it is simplistic to characterize proceedings before this Court as civil proceedings. FISA-derived material is used in both criminal and civil proceedings; perhaps for this reason this Court's rules incorporate both criminal and civil rules. *See* 2006 FISC Rules, Rule 1 (stating that matters not address by this Court's rules "may be resolved under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure").

The Supreme Court has said that the First Amendment right of access serves "to ensure that [the] constitutionally protected discussion of governmental affairs is an informed one." *Globe Newspaper Co.*, 457 U.S. at 605. This important interest would be served by the disclosure of the sealed materials. Disclosure of the sealed materials – with redactions as necessary to protect information that is properly classified – would allow the public to better understand the meaning of an important federal statute, to better understand the implications of

[11] While the D.C. Circuit has declined to apply the First Amendment right of access in some contexts unrelated to criminal proceedings, *Flynt v. Rumsfeld*, 355 F.3d 697, 706 (D.C. Cir. 2004) (holding that the First Amendment does not guarantee the press the right to "embed" with military units); *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 934 (holding that there is no First Amendment right of access to investigative documents); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1333-36 (D.C. Cir. 1985) (finding that there is a "tradition of public access to court records" but there is no pre-judgment right of access to materials obtained through discovery), it has never held that the First Amendment right of access does not apply to civil proceedings.

recent amendments to that statute, and to participate meaningfully in the debate about whether recent amendments should be made permanent.

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. If the Court determines that oral argument would aid its resolution of the issues presented here, undersigned counsel will of course make themselves available at the Court's convenience.

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