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.: MISC 08-01

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

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

The American Civil Liberties Union ("ACLU") respectfully submits this reply in support of its Motion For Leave to Participate in Proceedings Required by § 702(i) of the FISA Amendments Act of 2008.

The government's opposition fundamentally mischaracterizes the nature of the relief that the ACLU seeks. First, the ACLU is not seeking to participate in all proceedings conducted under section 702(i). To the contrary, its motion relates solely to proceedings in which this Court will address the scope, meaning, or constitutionality of the Act. Second, the ACLU is not seeking access to properly classified information. That proceedings under section 702(i) may involve classified information, however, does not mean that the government cannot file a public legal brief (with appropriate redactions), that this Court cannot issue a public legal opinion (with appropriate redactions), or that third parties like the ACLU cannot file *amicus* briefs. That proceedings under section 702(i) may involve classified information, in other words, does not mean that this Court should (or must) issue a secret ruling after hearing secret arguments from the government alone.

I. THIS COURT HAS AUTHORITY TO GRANT THE REQUESTED RELIEF.

There is no merit to the government's argument that the Court lacks authority to grant the relief that the ACLU has requested. The ACLU submitted its motion under this

Court's Rules of Procedure Effective Feb. 17, 2006 ("FISC Rules"). The rules were promulgated under the Rules Enabling Act, which states that: "[t]he 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* FISC Rules, Rule 2. The FISC Rules make clear that the Court can publish its own opinions. FISC Rules, 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 rules also make clear that the Court can hear motions submitted by, and hear argument from, parties other than the government. FISC Rules, Rule 6 ("An attorney may appear on a matter with permission of the Judge before whom the matter is pending."); 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").

This Court also has *inherent* authority to grant the relief that the ACLU has sought here. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("[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 citations and quotation marks omitted)). The Court's inherent authority is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* (internal citation and quotation marks omitted). Every court has inherent supervisory authority over its own docket, *see Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 598 (1978); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), and this Court

is no exception, as one judge of this Court has already recognized, *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486 (FISA Ct. 2007).

The Court's inherent power encompasses the authority to appoint *amici* to file briefs and present argument. *See, e.g., United States v. Providence J. Co.*, 485 U.S. 693, 704 (1988) ("it is well within this Court's authority to appoint an *amicus curiae* to file briefs and present oral argument"); *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.C. Cir. 2003) (stating that court has the discretion to "determine the fact, extent, and manner of participation by the *amicus*"); *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982); *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970); *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990) ("A federal district court possesses the inherent authority to appoint an *amicus curiae* to assist the court in its proceedings."). The Court's inherent power also encompasses the authority to seal or unseal materials on the Court's docket. *See, e.g., United States v. Wecht*, 484 F.3d 194, 211-12 (3d Cir. 2007); *Nixon*, 435 U.S. at 598; *In re Matter of Sealed Affidavit(s)*, 600 F.2d 1256, 1257-58 (9th Cir. 1979); *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 modify or lift protective orders that it has entered" (internal quotation marks omitted)).[1]

Finally, this Court can also draw authority from the All Writs Act, which states

[1] Courts also have inherent authority to request third-party briefing on legal issues arising in *ex parte* proceedings, *see, e.g., In re U.S. for Orders Authorizing Use of Pen Registers*, 515 F. Supp. 2d 325 (E.D.N.Y. 2007) (court requested Federal Defenders of New York to file an amicus brief addressing whether 18 U.S.C. §§ 3121-3127 and the Fourth Amendment permitted the government to obtain "post cut-through dialed digits" through a pen register), and to appoint counsel to represent unnamed individuals whose constitutional rights may be implicated by a specific surveillance order, *In re U.S. for Installation of a Pen Register*, 415 F. Supp. 2d 211, 212-13 & n.2 (W.D.N.Y. 2006) (appointing counsel to represent unnamed cell phone users and providing them with a public "'fictional' version" of the *ex parte* application reflecting identical legal issues).

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." 28 U.S.C. § 1651. As the Supreme Court has explained, the All Writs Act "has served since its inclusion . . . as a legislatively approved source of procedural instruments designed to achieve the rational ends of law." *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (internal quotation marks omitted). "Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172-73 (1977) (internal quotation marks omitted).

Nothing in the FISA Amendments Act forecloses the Court from granting the relief that the ACLU seeks here. The government points out that section 702(h) of the Act expressly permits electronic communication service providers to appear before the Court to challenge directives issued by the government, Gov't Opp. 6, but nothing in the Act, or for that matter in the Act's legislative history, suggests that Congress meant this provision to foreclose by implication the participation of third parties in other contexts. In fact, certain provisions of FISA provide for the participation of third parties in other contexts. *See, e.g.*, 50 U.S.C. §§ 1806(f), 1825(g), 1861(f). This Court has never interpreted these provisions to bar it from accepting *amicus* briefs, ACLU Mot. 10 (listing instances in which Court has accepted such briefs), and one judge of this Court has expressly rejected the contention that these provisions bar the Court from hearing third-party motions, *see In re Motion for Release of Court Records*, 526 F. Supp. 2d. at 487. Had Congress disapproved of this Court's tradition of accepting *amicus* briefs on

issues of broad significance, it could have expressly prohibited the Court from considering such briefs when it enacted the FISA Amendments Act. This Court should not find the FISA Amendments Act to have extinguished its inherent authority by implication. *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 quotation marks and citation omitted)); *Armstrong v. Guccione*, 470 F.3d 89, 102 (2d Cir. 2006).

Nor does section 702(k)(2) foreclose the court from granting the relief the ACLU has sought here. Gov't Opp. 6-7. While that provision states that "petitions" relating to directives served on electronic communication service providers "shall be filed under seal," this language simply does not address the issues presented here – whether the Court can consider amicus briefs and oral argument from third parties, whether the Court can order the government to file public briefs (with redactions to protect properly classified information), and whether the Court can publish its own opinions (again, with redactions to protect properly classified information). The remainder of section 702(k)(2) *does* address "government submission[s]," but it cannot fairly be read to extinguish this Court's inherent supervisory power over its own docket. Indeed, in another context the government has conceded that statutory language virtually identical to that of 702(k)(2) must be read to allow a court to unseal court records initially filed *ex parte* and to conduct adversarial proceedings where necessary or appropriate. Sections 2709 and 3511

of Title 18 of the U.S. Code allow recipients of "national security letters" to contest the validity of such letters, as well as the validity of associated non-disclosure orders, in U.S. district courts. Section 3511(e) provides, however, that a court "shall, upon request of the government, review ex parte and in camera any government submission or portions thereof, which may include classified information." 18 U.S.C. § 3511(e). When the recipient of a national security letter challenged the constitutionality of this provision, the government took the position that the provision did not "strip the district court of its inherent authority to determine that a matter submitted need not remain under seal." Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Government's Motion to Dismiss or for Summary Judgment, *Doe v. Gonzales*, Docket No. 04-cv-2614 (filed Nov. 8, 2006) at 46-47. A federal judge ultimately agreed that the provision permitted the court to determine for itself whether evidence submitted *ex parte* should be unsealed. *Doe v. Gonzales*, 500 F. Supp. 2d 379, 423 (S.D.N.Y. 2007). Section 702(k)(2), like the national security letter provision, leaves the court's inherent powers untouched.[2]

II. THIS COURT SHOULD GRANT THE RELIEF THAT THE ACLU HAS REQUESTED.

As the ACLU has explained, ACLU Mot. 7, the FISA Amendments Act expressly requires this Court to consider the constitutionality of the government's targeting and

[2] The national security letter statute also provides that in challenges brought by NSL recipients, courts "must close any hearing," and that "[p]etitions, filings, records, orders, and subpoenas must . . . be kept under seal" to the extent necessary to prevent the unauthorized disclosure of the fact that the FBI served a national security letter. 18 U.S.C. § 3511(d). In *Doe*, this language, too, was found to leave the Court's supervisory authority untouched. *See Doe*, 500 F. Supp. 2d at 423 (interpreting statute to permit unsealing so as not to "displace[ ] the role of the court in determining, in each instance, the extent to which documents need to be sealed or proceedings closed," and stating that statute did not allow sealing decisions to be "made unilaterally by the government").

minimization procedures, *see* FAA, section 702(i). That inquiry is likely to require the Court to consider the scope, meaning, and constitutionality of the Act itself, because the procedures have meaning only when considered in the context of the Act. Especially because the FISA Amendments Act has such sweeping implications for the rights of U.S. citizens and residents, any consideration of these issues should be adversarial and as informed and transparent as possible. This Court should not issue a secret opinion after hearing secret arguments – and from only one side.

The government contends that "the certifications and procedures will all be classified" and that, as a result, the ACLU's "participation" in section 702(i) proceedings will be "meaningless." Gov't Opp. 10. This contention is misguided for multiple reasons. First, it is not at all obvious that the government's minimization and targeting procedures will be classified, and it is certainly not clear that they will be classified in their entirety. *Cf.* Letter from Hon. Colleen Kollar-Kotelly to Hon. Patrick J. Leahy (Aug. 20, 2002) ("I have also included four unclassified minimization procedures that are the subject of the [Court's May 17, 2002] opinion and orders."). Notably, the FISA Amendments Act seems to contemplate the possibility that at least some materials filed with the Court will be classified only in part. *See* FAA, section 702(k)(2) (referring to "portions of a submission" that "may include classified information").

Second, even if the government takes the position that its minimization and targeting procedures are classified, this Court has both the authority and responsibility to determine whether the procedures are *properly* classified. *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (recognizing appropriateness of judicial review of pre-publication classification determinations); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C.

Cir. 1983) (requiring de novo judicial review of pre-publication determinations to ensure that information was properly classified and to ensure that agency "explanations justf[ied] censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification"); *Hayden v. Nat'l Sec. Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979) (stating, in a Freedom of Information Act case, that the "court must make a [d]e novo review of the agency's classification decision, with the burden on the agency to justify nondisclosure"); *United States v. Rosen*, 487 F. Supp. 2d 703, 716 (E.D. Va. 2007) ("[A] generalized assertion . . . of the information's classified status . . . is not alone sufficient to overcome the presumption in favor of open trials."); *see also In re Wash. Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986) ("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.").[3]

More fundamentally, even if the government's targeting and minimization procedures are properly classified in their entirety, there is no reason why the government cannot file public versions of legal briefs that address the scope, meaning, and constitutionality of the Act itself. As the ACLU has noted, the government submitted public legal briefs when this Court considered the constitutionality of minimization

[3] The government states that this Court cannot "override" executive branch classification decisions, Gov't Opp. 9, and cites a passage from Judge Bates' opinion in *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 491. The passage cited by the government, however, dealt specifically with the question whether the ACLU had a common-law right of access to certain materials on the Court's docket, as Judge Bates himself explained in denying the ACLU's motion for reconsideration, *see In re Motion for Release of Court Records*, Docket No. Misc. 07-01, at 4 (FISA Ct., Feb. 8, 2008). To the extent Judge Bates' earlier ruling can be read for the broader proposition that this Court has no authority to review the executive's classification decisions, the ACLU respectfully submits that the ruling is incorrect.

procedures proposed after the enactment of the Patriot Act. ACLU Mot. 10-11; *see also* Letter from Hon. Colleen Kollar-Kotelly to Hon. Patrick J, Leahy (Aug. 20, 2002) ("To the extent that you or the Committee are interested in the memorandum of law submitted by the government to the FISA Court when it made its request of the Court, the Court has no objection to the government providing it to you."). While that proceeding, too, involved classified information (including the identity of the government's proposed surveillance target), the government was able to file its briefs publicly (with minimal redactions) because the principal issues before the Court were purely legal ones. For similar reasons, there is no reason why this Court could not publish its rulings about the scope, meaning, and constitutionality of the FISA Amendments Act. Indeed, other federal courts *routinely* publish decisions concerning the constitutionality of surveillance statutes and programs. *See, e.g., ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987); *Doe v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007). This Court has published its own decisions in the past, ACLU Mot. 12, and it has signaled its willingness to publish unclassified decisions in the future, *see* Letter from Hon. Colleen Kollar-Kotelly to Hon. Patrick J, Leahy (Aug. 20, 2002) ("Should the FISA Court issue any unclassified opinions or orders in the future, it would be our intention, as a Court, to release them and publish them.").[4]

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[4] The government suggests that the ACLU is improperly seeking to "use this Court as a forum to launch a facial challenge to the FISA Amendments Act." Gov't Opp. 12. However, it is the statute (and not the ACLU) that requires the Court to consider the constitutionality of the government's targeting and minimization procedures. The ACLU is not asking this Court to address any issue that it would not otherwise have to address.

As to the government's argument that the FISA Amendments Act is facially constitutional because it *could* be implemented in a constitutional manner, it is well-

The government suggests that the ACLU's motion should be denied because there is a "30-year history of *ex parte* proceedings in this Court." Gov't Opp. 4. As the ACLU's motion noted, however, the Court has allowed for public participation in other contexts. ACLU Mot. 10; *see also In re Sealed Case*, 310 F.3d 717, 719 (FISA Ct. Rev. 2002) ("Since the government is the only party to FISA proceedings, we have accepted briefs filed by the [ACLU] and the National Association of Criminal Defense Lawyers . . . as *amici curiae*."). More importantly, the ACLU is seeking to participate not in the kind of proceeding that has historically been conducted *ex parte* but in a proceeding in which this Court is likely to consider the meaning, scope, and constitutionality of a newly enacted federal statute. This statute represents the most significant revision of the country's foreign intelligence laws in 30 years and has broad implications for all Americans. It is disingenuous for the government to suggest that the ACLU is seeking to overturn this Court's long tradition of *ex parte* proceedings when that tradition is almost entirely confined to applications for individual surveillance orders. The proceeding to which the ACLU is seeking access – and "access" only in a limited sense – is fundamentally different from proceedings conducted under 50 U.S.C. §§ 1805 and 1824.

In the context of proceedings under section 702(i), this Court is likely to address constitutional questions of extraordinary significance. This Court should not develop a

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settled that a surveillance statute that lacks constitutionally required safeguards is invalid on its face. *See, e.g.*, *Berger v. New York*, 388 U.S. 41, 60 (1967) (holding unconstitutional on its face a surveillance statute that failed to provide "adequate judicial supervision or protective procedures"); *Sibron v. New York*, 392 U.S. 40, 59 (1968) (stating that facial invalidation appropriate where challenge was to "adequacy of the procedural safeguards written into a statute"); *United States v. Shields*, 522 F. Supp. 2d 317, 336 (D. Mass. 2007) ("There is a critical difference between a challenge to a statute, which although it provided proper procedural safeguards, is applied unconstitutionally to a particular individual, and a statute which simply omits safeguards which are clearly required by the Constitution.").

secret body of law on matters that are of such profound importance to the general public.[5]

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests that its motion be granted.

Respectfully submitted,

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[5] During a recent hearing, several witnesses testified to the Senate Judiciary Committee about the dangers that would attend the development of such a body of secret law. *See* Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the Senate Judiciary Committee, 110th Cong. (2008) (testimony of J. William Leonard, Former Director Information Security Oversight Office) (stating, with respect to recent opinions of this Court, "When you think about the significant surveillance capability that this government has, I think it's [of] profound interest [to] every American to know to what extent and under what circumstances they may in fact be subject to government surveillance."); *id.* (testimony of Steven Aftergood, Director, Project on Government Secrecy, Federation of American Scientists) ("[I]t has become evident that there is a body of common law derived from the decisions of the Foreign Intelligence Surveillance Court that potentially implicates the privacy interests of all Americans. Yet knowledge of that law is deliberately withheld from the public. In this way, 'secret law' has been normalized to a previously unknown extent and to the detriment, I believe, of American democracy.").