UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE ORDERS ISSUED BY THIS COURT INTERPRETING SECTION 215 OF THE PATRIOT ACT	))))	Docket No.: Misc. 13-02

THE UNITED STATES' OPPOSITION TO THE MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, *ET AL.*, FOR THE RELEASE OF COURT RECORDS

JOHN P. CARLIN
Acting Assistant Attorney General
for National Security

J. BRADFORD WIEGMANN
Deputy Assistant Attorney General

TASHINA GAUHAR
Deputy Assistant Attorney General

JEFFREY M. SMITH
NICHOLAS J. PATTERSON
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Phone: (202) 514-5600
Fax: (202) 514-8053

Attorneys for the United States of America

The American Civil Liberties Union and two other entities (hereinafter "ACLU") seek the publication of opinions of this Court that "evaluat[e] the meaning, scope, and constitutionality of Section 215 of the Patriot Act, 50 U.S.C. § 1861." Motion at 1. The ACLU's primary argument is that such publication is compelled by the First Amendment of the U.S. Constitution, an argument that repeats contentions that this Court twice rejected when the ACLU raised them six years ago. *See id.* at 6-15. This Court's ruling in *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (Foreign Intel. Surv. Ct. 2007) ("*In re Release*"), was correct at the time this Court issued it, as was this Court's ruling denying the ACLU's motion for reconsideration, *see In re Motion for Release of Court Records*, Memorandum Opinion, Docket No. Misc. 07-01 (Foreign Intel. Surv. Ct. Feb. 8, 2008) ("*In re Release II*") (attached as Appendix A). The ACLU decided not to appeal those decisions, and both remain correct today.

The ACLU's secondary argument is that this Court should exercise its discretion to publish its opinions "evaluating the meaning, scope, and constitutionality of Section 215." *See* Motion at 15-18. The ACLU has no standing to bring such a motion because it was not a party to any relevant opinion. *See* U.S. Foreign Intelligence Surveillance Court ("FISC"), Rule of Procedure 62(a) (2010) (providing that the process for deciding whether to publish a FISC opinion begins "*sua sponte* or on motion by a party"). The Court should thus deny the Motion. Of course, a judge of this Court who has issued an opinion may, if he or she elects, *sua sponte* begin the process for considering whether that opinion should be published. *See id.* If the Court, in its discretion, chooses to undertake this process, it should, as explained below, simply follow its clear rules, including FISC Rules of Procedure 3 and 62.

In any event, the Government is mindful of the delicate balance between the need for secrecy in conducting intelligence activities to protect national security and the interest in transparency and public accountability. For this reason, the Government continues to review material, including opinions of this Court, for potential declassification and release to the public, where national security will allow. Thus, a declassification review process is already occurring.

BACKGROUND

The ACLU previously came before this Court on the "Motion of the American Civil Liberties Union for Release of Court Records," filed on August 9, 2007 ("ACLU 2007 Motion"). In that motion, the ACLU sought the release of what it identified as court orders and government pleadings regarding a program of surveillance of suspected international terrorists by the National Security Agency ("NSA") that had previously been conducted without court authorization. *See* ACLU 2007 Motion at 2 n.2, 3-9. This Court—after considering the ACLU's motion, an opposition by the Government, and the ACLU's reply—issued a Memorandum Opinion and Order denying the ACLU Motion on December 11, 2007. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484.

This Court held that the First Amendment does not provide a right of public access to such records, in whole or in part, under the test establishing such a right in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"). *See In re Release,* 526 F. Supp. 2d at 491-97. Additionally, the Court declined to exercise any residual discretion it might possess "to undertake the searching review of the Executive Branch's classification decisions requested by the ACLU," without prejudice to the ACLU's "pursuing whatever remedies may be available to it in a district court through a . . . request addressed to the Executive Branch" under the

Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). *See In re Release*, 526 F. Supp. 2d at 497.

On December 20, 2007, the ACLU filed a "Motion for Reconsideration or Reconsideration *En Banc*," the Government responded on January 8, 2008, and this Court denied the ACLU's request for reconsideration on February 8, 2008. In denying the ACLU's reconsideration motion, this Court held that the ACLU's motion "presents nothing that can be regarded as an intervening change in controlling law or newly available evidence. Furthermore, the ACLU fails to demonstrate clear error or manifest injustice in the prior opinion." *See In re Release II,* at 3-4. Specifically, this Court held that "the ACLU has failed to demonstrate any error, let alone clear error or manifest injustice, in the Court's prior holding that the ACLU has no First Amendment right of access to the documents it seeks." *Id.* at 9. This Court also reaffirmed that it would not release the requested records as a matter of discretion because the "unacceptable risks to the national security and to the proper functioning of the FISA process . . . simply outweigh the potential benefits from discretionary release." *Id.* at 10.

The ACLU did not subsequently appeal this Court's opinion in *In re Release* or its denial of reconsideration in *In re Release II* to the U.S. Foreign Intelligence Surveillance Court of Review.

In the instant Motion, the ACLU requests that this Court publish FISC opinions evaluating the meaning, scope, and constitutionality of Section 215 of the USA PATRIOT Act, 50 U.S.C. § 1861. Motion at 1. The ACLU relies on the same legal arguments it twice submitted to this Court in 2007 and which, as described above, this Court previously denied.

The ACLU, for a third time, argues for disclosure of this Court's records pursuant to a First Amendment right of access or for this Court to release the records as a matter of discretion.

ARGUMENT

I. There Is No First Amendment Right of Access to Judicial Opinions of the Foreign Intelligence Surveillance Court.

The ACLU seeks to re-litigate an issue this Court has correctly decided against it. *See In re Release*, 526 F. Supp. 2d 484; *In re Release II*, Docket No. Misc. 07-01. The current Motion should be denied for the same reasons. In rejecting the ACLU's earlier challenge, this Court applied the "experience and logic" test that the Supreme Court established in *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 9, and held that "[e]lectronic surveillance proceedings under 50 U.S.C. §§ 1804-1805 do not . . . meet th[e]se tests." *In re Release*, 526 F. Supp. 2d at 492; *see also id.* at 497 (holding that the First Amendment provides no public right of access to FISC documents); *In re Release II*, at 9 (holding that the ACLU "failed to demonstrate any error, let alone clear error or manifest injustice, in the Court's prior holding that the ACLU has no First Amendment right of access to the documents it seeks"). This Court should follow its well-reasoned earlier opinions in evaluating the ACLU's current motion—which essentially repeats the ACLU's prior arguments—and deny the ACLU's Motion.

A. The ACLU Fails the "Experience" Prong of *Press-Enterprise II.*

In *In re Release* and *In re Release II*, this Court correctly applied the "experience" prong of the *Press-Enterprise II* test, which asks whether "the place and the process have historically been open to the press and general public," 478 U.S. at 8 (citations and internal quotation marks omitted), and held that the ACLU did not satisfy this prong. 526 F. Supp. 2d at 492-93. This same analysis applies here.

In arguing that this Court "erred," Motion at 7, in applying the "experience" test to its prior right of access motion, the ACLU misunderstands this Court's analysis. The ACLU claims that the Court "failed to identify the proper focus of the 'experience' prong" by focusing on "the past practice of the specific forum [the FISC]" rather than "the *type* of judicial records or process to which" the movant sought access. Motion at 6-7. However, this Court's "experience" analysis was clearly consistent with the Supreme Court's interpretation: "the 'experience' test of *Globe Newspaper* does not look to the particular practice of any one jurisdiction, but instead to the experience in that *type* or *kind* of hearing throughout the United States." *El Vocero de P.R. (Caribbean Intern. News Corp.) v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (quotation marks omitted) (emphasis in original). In *In re Release*, this Court looked to the FISC's experience in handling its unique *type* of proceedings and in handling its unique *kinds* of records.[1]

Indeed, this Court rejected a similar challenge to its application of the *Press-Enterprise II* test raised by the ACLU in its 2007 motion for reconsideration. This Court held that the ACLU, in arguing that the "experience" test should analyze the tradition of public access to decisions of Article III courts generally, was presenting "an incorrect framing of the question." *In re Release*

[1] The ACLU's comparison of *In re Release* to the case in *El Vocero* is inapposite. In *El Vocero*, the Supreme Court analyzed a particular type of hearing—a preliminary hearing—which is common to many jurisdictions throughout the United States, unlike the FISC's unique type of proceedings. *El Vocero*, 508 U.S. at 150-51. The Supreme Court found that although the Puerto Rican Supreme Court had relied on a Puerto Rican tradition of closed preliminary hearings, the "established and widespread tradition of open preliminary hearings among the States was canvassed in *Press-Enterprise* and is controlling here." *Id.* (citations omitted). In other words, the Supreme Court held that the traditions of a particular jurisdiction in handling a particular type or kind of hearing were overcome by the general experience of how all U.S. jurisdictions handled such hearings.

II, at 6. Instead, this Court found *Press-Enterprise II* "requires that the tests of experience and logic be applied to the '*particular* proceeding *in question*.'" *Id.* (quoting *Press-Enterprise II*, 478 U.S. at 9 (emphasis added by this Court)). Thus, this Court found that the tests of "experience" and "logic" have not been applied to categories as sweeping as all decisions of Article III courts, but "rather to narrower classes that permit a meaningful assessment of the effects of public access on a *particular type* of judicial process—for example, district court proceedings (and related records) that are ancillary to grand jury operations." *In re Release II,* at 6 (citing *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502-03 (D.C. Cir. 1998); *United States v. Smith*, 123 F.3d 140, 148-50 (3d Cir. 1997)).

As this Court explained, "[t]he FISC is a unique court." *In re Release*, 526 F. Supp. 2d at 487. Whereas "[o]ther courts operate primarily in public, with secrecy the exception; the FISC operates primarily in secret, with public access the exception." *Id.* at 488. The FISC maintains this operational secrecy because, unlike any other court, its "entire docket relates to the collection of foreign intelligence by the federal government." *Id.* at 487. Indeed, proceedings before the FISC involve highly sensitive and classified matters involving national security, relating, for example, to efforts by the United States to foil acts of international terrorism. By their very nature, such proceedings need to be conducted in secrecy. Additionally, unlike the operations of any other court, the FISC's operations are governed "by FISA, by Court rule, and by statutorily mandated security procedures issued by the Chief Justice of the United States [which] [t]ogether . . . represent a comprehensive scheme for the safeguarding and handling of FISC proceedings and records." *Id.* at 488. Thus, the FISC's proceedings and the handling of its records are different in type or kind from the proceedings and handling of records in any other

U.S. court, and it is appropriate "to apply the *Press-Enterprise II* tests to the proceedings and records of the FISC, rather than to the decisions of all Article III courts." *In re Release II*, at 6.

Having established the uniqueness of the type of proceedings and handling of records, the Court applied the "experience" test of *Press-Enterprise II*, which asks whether "'the place and the process have historically been open to the press and general public.'" *In re Release*, 526 F. Supp. 2d at 492 (quoting *Press-Enterprise II*, 478 U.S. at 8). The Court explained that "the FISC has never held a public hearing in its history, and [only a few] opinions have been released to the public in nearly three decades of operation." *Id.*

The ACLU is incorrect in asserting that this Court limited its "analysis to whether the two published opinions of this Court 'establish a tradition of public access.'" Motion at 7. Rather, the Court employed an expansive analysis—"the FISC has issued literally thousands of classified orders to which the public has had no access," *In re Release*, 526 F. Supp. 2d at 492—in support of its holding that "there is no tradition of public access to government briefing materials filed with the FISC." *Id.* This is because, again, proceedings before the FISC involve highly sensitive and classified matters related to the nation's security, such as efforts to thwart acts of international terrorism.

While this Court did examine its two published opinions, it did so in the context of refuting the ACLU's argument that the Court had a tradition of releasing "FISC decisions of broad legal significance." 526 F. Supp. 2d at 493. The ACLU attempts to reintroduce essentially the same disclosure argument it previously made, and this Court rejected. Just as in *In re Release*, where the ACLU argued for release of certain FISC records based on their "broader significance" and "legal analysis and legal rulings concerning the meaning of FISA,"

id. at 493 (citing ACLU Reply at 13), the ACLU argues here for the release of specific FISC records because of their "critical importance" to public debate, Motion at 1, and because the records "interpret[] the meaning of public statutes." *Id.* at 8. However, as the Court noted in *In re Release*, although it has released a very limited number of opinions of broad legal significance, the FISC does not have a tradition of releasing opinions based on these criteria. Indeed, "the FISC has in fact issued other legally significant decisions that remain classified and have not been released to the public." *In re Release*, 526 F. Supp. 2d at 493; *see also In re Release II*, at 6-7 n.9 ("reject[ing] the [ACLU's] suggestion . . . that the amorphous and ill-defined category of 'decisions of broad legal significance' constitutes the proper frame of reference under *Press-Enterprise II*").

For these reasons, this Court was correct in holding that "the FISC is not a court whose place or process has historically been open to the public," and the Court should reaffirm that the ACLU's motion "does not satisfy the experience test for a First Amendment right of access." *In re Release,* 526 F. Supp. 2d at 493; *see also In re Release II*, at 6 (finding that "the 'experience' test is clearly not satisfied, for the reasons stated in the Court's prior opinion"); *cf. Am. Lib. Ass'n v. Faurer*, 631 F. Supp. 416, 421 (D.D.C. 1986) (holding that "no First Amendment right exists where disclosure of classified information would possibly endanger national security, even though the information had been previously in the public domain"), *aff'd sub nom. Am. Lib. Ass'n v. Odom*, 818 F.2d 81 (D.C. Cir. 1987) (affirmed on other grounds).

B. The ACLU Also Cannot Establish the "Logic" Prong of *Press-Enterprise II*.

Under *Press-Enterprise II*, both the "experience *and* logic" tests must be satisfied. 478 U.S. at 9 (emphasis added). Accordingly, as a threshold issue, because the ACLU's First Amendment claim fails the "experience" test—like its claim in *In re Release*, it "runs counter to

a long-established and virtually unbroken practice of excluding the public from FISA applications and orders"—the claim "fails" regardless of whether it passes the "logic" test. *In re Release*, 526 F. Supp. 2d at 493 (citing *Baltimore Sun Co. v. Goetz,* 886 F.2d 60, 64 (4th Cir. 1989) (failure to establish right of access because first prong is not satisfied); *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) (same)).

In *In re Release*, this Court also found that the benefits the ACLU claimed would result in that case (which are quite similar to those posited by the ACLU here, *see* Motion at 9-13), "fall short of satisfying the 'logic' test under *Press-Enterprise II*." *In re Release*, 526 F. Supp. 2d at 494; *see also In re Release II*, at 7 (holding that the "ACLU has failed to demonstrate any error in the Court's application of the 'logic' test"). This Court observed that, "to a considerable degree, comparable benefits could be ascribed to public access to any type of proceeding," 526 F. Supp. 2d at 494, and therefore the argument "'proves too much,' since it provides a rationale under which 'even grand jury proceedings would be public.'" *Id.* (quoting *In re Boston Herald, Inc.*, 321 F.3d 174, 187 (1st Cir. 2003)); *see also North Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002) (finding that were the "logic" prong only to determine whether openness serves some good, "it is difficult to conceive of a government proceeding to which the public would not have a First Amendment right of access").

This Court also observed that "the detrimental consequences of broad public access to FISC proceedings or records would greatly outweigh any such benefits" resulting from a finding of a First Amendment right of access to FISC records and proceedings. *In re Release*, 526 F. Supp. 2d at 494. In this vein, the Court found that the possible harms from a finding of a First Amendment-based right of access "are real and significant, and, quite frankly, beyond debate." *Id.* This observation is highly relevant here where the ACLU again seeks "broad public access to

FISC proceedings or records." *Id.* *Compare id.* at 485 (noting that the ACLU "seeks the release of what it identifies as court orders and government pleadings regarding a program of surveillance of suspected international terrorists by the National Security Agency (NSA) that had previously been conducted without court authorization") *with* Motion at 11 n.5 (seeking "opinions that evaluate the meaning, scope, and constitutionality of Section 215"). These concerns are similar to the concerns highlighted by other courts in decisions finding that the "logic" requirement was not met in the context of other types of proceedings and records.[2] Other concerns unique to FISA's national security context "are equally supportive of the conclusion that public access to FISA surveillance records does not and would not play 'a significant positive role in the functioning of the particular process in question.'" *Id.* at 494-95 (quoting *Press-Enterprise II*, 478 U.S. at 8).

An additional consideration recognized by this Court is that a finding of a First Amendment right of access "would result in a diminished flow of information [from the Government to the Court], to the detriment of . . . the FISA process." 526 F. Supp. 2d at 496-

---

[2] *See In re Release*, 526 F. Supp. 2d at 494 n.26 (citing *In re Boston Herald, Inc.*, 321 F.3d at 188 (discussing privacy concerns and the chilling of sources of information regarding public access to records regarding eligibility for assistance under Criminal Justice Act (CJA)); *Smith*, 123 F.3d at 148 (making grand jury proceedings public could result in flight of those about to be indicted and expose the "accused but exonerated . . . to public ridicule") (internal quotation marks omitted); *Baltimore Sun Co.*, 886 F.2d at 64 (access to search warrant affidavit may disclose wiretaps not yet terminated or reveal identities of, and thereby endanger, informants); *United States v. Corbitt*, 879 F.2d 224, 229-35 (7th Cir. 1989) (noting privacy concerns of defendants and third parties, and the risks of impeding flow of information from confidential sources and of compromising ongoing investigations, regarding claim of public access to presentence report); *Times Mirror Co.*, 873 F.2d at 1215-16 (access to search warrant proceedings, or to supporting affidavits while investigation is ongoing, would risk destruction of evidence, coordination of false testimony, and flight of suspects, and result in public embarrassment of persons named). *But see In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) ("logic" prong satisfied for access to search warrant affidavits).

97.[3] Specifically, if the Court were to find a First Amendment-based right of access to FISC opinions, the "greater risk of declassification and disclosure over Executive Branch objections" would have the potential to "chill the government's interactions with the Court." *Id.* at 496. This Court observed that such a "chilling effect could damage national security interests, if, for example, the government opted to forgo surveillance or search of legitimate targets in order to retain control of sensitive information that a FISA application would contain." *Id.* In addition, this Court found that in cases that are presented to the Court, "the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decisionmaking and effective oversight could also be threatened." *Id.; see also In re Release II*, at 7-8 (reiterating the harms the Court described in *In re Release*).

Of course, recent unauthorized disclosures of classified information concerning intelligence activities authorized by this Court pursuant to Section 215 have necessarily affected the Government's assessment of the need for continued classification of certain information, but they should not affect the constitutional analysis grounded in the unique nature of this Court. In light of the recent unauthorized disclosures, the Government declassified some information, including information concerning intelligence collection under Section 215, so as to provide the

---

[3] This Court's interpretation of the "logic" test was firmly grounded in the decisions of other courts that had encountered similar situations. *See In re Release*, 526 F. Supp. 2d at 496 n.33 (citing *In re Boston Herald*, 321 F.3d at 188 (in CJA context, the "specter of disclosure . . . might lead defendants (or other sources called upon by the court) to withhold information"); *Gonzales*, 150 F.3d at 1259 (analogizing to grand juries, which "function best in secret . . . because secrecy 'encourage[s] free and untrammeled disclosures,'" and finding that "[w]ithout an assurance that the information revealed at CJA hearings and in documents submitted to the court will not be disclosed, a defendant and his or her counsel would be discouraged from fully disclosing information") (quoting *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 219 n.10 (1979)); *Corbitt*, 879 F.2d at 232-35 (relying on need to preserve "free flow of information" to sentencing judge, and "untoward effects" disclosure could have "on the gathering of information in future presentence investigations," in rejecting claimed First Amendment right of access to presentence report)).

public with appropriate context and to inform the ongoing public discussions of the activities in question. To ensure that the exercise of those authorities and the need for secrecy is balanced with the interest in transparency and public accountability, the Government continues to review relevant material, including opinions of this Court, to determine whether, in light of present circumstances, there is additional information that should be declassified and released to the public, consistent with the need to protect sources and methods and national security. That it is appropriate for the Government to conduct such a review at this time does not suggest that this Court should recognize a broad-based constitutional right whose implications would stretch far beyond the current circumstances, threatening the serious negative consequences that this Court identified in *In re Release*.

* * *

Just as in *In re Release*, "with both the 'experience' and 'logic' tests unsatisfied," this Court should conclude that "there is no First Amendment right of access to the requested materials." *In re Release*, 526 F. Supp. 2d at 497; *see also In re Release II*, at 9 (holding that "the ACLU has failed to demonstrate any error . . . in the Court's prior holding that the ACLU has no First Amendment right of access to the documents it seeks").

II. The Court Has Discretion To Publish Any of Its Opinions, and if It Chooses to Do So, It Should Follow the Process Set Forth in the Court's Rules.

To the extent that the ACLU moves this Court to publish certain of its opinions, the Motion should be denied because only a party to an underlying opinion may move the Court for publication. The ACLU correctly identifies the rule that governs the release of FISC opinions—FISC Rule of Procedure 62(a). That Rule provides in its entirety:

Rule 62. Release of Court Records

> **(a) Publication of Opinions.** The judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).

FISC Rule of Procedure 62(a).

Because the ACLU is not a party to any opinions at issue, its Motion should be denied. Apart from this Motion, a *sua sponte* request from a judge who authored a particular opinion could trigger this process. If a judge of this Court determines, *sua sponte*, that an opinion that he or she authored should be published, then that judge may make a request to the Presiding Judge. The Presiding Judge would then consult with the other judges of the Court and decide whether or not to direct the publication of the opinion at issue. Because "[i]ts entire docket relates to the collection of foreign intelligence by the federal government," the publication of this Court's opinions is the exception rather than the rule. *In re Release*, 526 F. Supp. 2d at 487-88; *see also id.* at 495 (observing that "release [of FISC materials] with redactions may confuse or obscure, rather than illuminate, the decisions in question"). Nevertheless, publication is within the Court's discretion, and the process for determining which opinions should be published is within the sound discretion of the judges of this Court.

Once the Presiding Judge has decided to direct publication of an opinion, the Court is empowered to "direct the Executive Branch to review the [opinion] and redact it as necessary to ensure that properly classified information is appropriately protected." FISC Rule of Procedure 62(a). This power is necessary because "[i]n all matters, the Court and its staff shall comply

with the security measures established pursuant to [congressional mandate], as well as Executive Order 13526." FISC Rule of Procedure 3; *see also* FISC Rule of Procedure 62(b) (mandating that a release of FISC records must be conducted "in conformance with the security measures referenced in Rule 3"). Executive Order 13,526 "prescribes a uniform system for classifying, safeguarding, and declassifying national security information," and under that system only certain designated Executive Branch officials can classify or declassify national security information. *See* E.O. 13,526 (Dec. 29, 2009). Thus, pursuant to this Court's Rules of Procedure, the Court cannot release an opinion that contains (or may contain) classified information without first ordering the Executive Branch to conduct a classification review of the opinion and "redact it as necessary to ensure that properly classified information is appropriately protected." FISC Rule of Procedure 62(a).

Indeed, as this Court has recognized, "if the FISC were to assume the role of independently making declassification and release decisions . . . there would be a real risk of harm to national security interests and ultimately to the FISA process itself." *In re Release*, 526 F. Supp. 2d at 491. "FISC judges do not make classification decisions and are not intended to become national security experts." *Id.* at 495 n.31 (citing H.R. Rep. No. 95-1283, pt. 1, at 25-26 (1978)). And, while they may have "more expertise in national security matters than a typical district court judge, that expertise [does] not equal that of the Executive Branch, which is constitutionally entrusted with protecting the national security." *Id.* Thus, this Court has recognized that classification and declassification decisions are the province of the Executive

Branch, and "there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions."[4] 526 F. Supp. 2d at 491.

In its motion, the ACLU "recognize[s] that this Court's docket encompasses a great deal of material that is properly classified," and states that it does not seek disclosure of "any properly classified information." Motion at 16. Nevertheless, the ACLU suggests that the FISC could release opinions "without prior Executive Branch . . . review." *Id.* However, where an opinion contains (or may contain) classified information, FISC Rule of Procedure 3, which incorporates Executive Order 13,526, constrains the Court from releasing the opinion until classified information has been redacted and recognizes that such redaction can only be done by authorized officials within the Executive Branch. Indeed, this Court recently reiterated that "[i]t is fundamentally the Executive Branch's responsibility to safeguard sensitive national security information." *In re Motion for Consent to Disclosure of Court Records*, Docket No. Misc. 13-01, at 6 (June 12, 2013) (citing *Department of Navy v. Egan*, 484 U.S. 518, 527-29 (1988)) (*available at*: www.uscourts.gov/uscourts/courts/fisc/misc-13-01-opinion-order.pdf). This Court's rules provide the way for the Executive Branch to do so.

Because this Court cannot release properly classified information, and only certain designated officials within the Executive Branch can determine whether information remains properly classified, it would be an abuse of discretion for the Court to release any opinion that

[4] This is not to say that Executive Branch classifications are never judicially reviewable. The proper means to obtain such review is through a Freedom of Information Act request and subsequent action in district court. *See In re Release*, 526 F. Supp. 2d at 491 n.18, 496 n.32.

may contain classified information without first providing the Executive Branch an opportunity to review the opinion and redact all properly classified information.[5]

CONCLUSION

For the reasons stated above, the ACLU's Motion should be denied.

July 5, 2013

Respectfully submitted,

JOHN P. CARLIN
Acting Assistant Attorney General
for National Security

J. BRADFORD WIEGMANN
Deputy Assistant Attorney General

TASHINA GAUHAR
Deputy Assistant Attorney General

JEFFREY M. SMITH
NICHOLAS J. PATTERSON
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Phone: (202) 514-5600
Fax: (202) 514-8053

Attorneys for the United States of America

[5] Sixteen members of the House of Representatives as *amici curiae* raise two concerns regarding information sharing between the Executive Branch and Congress: (1) that because much of the information they receive is classified, they cannot discuss it in congressional debate or with their constituents, and (2) that some of the information is so sensitive that it is shared only with congressional and/or committee leaders and not with all members of Congress. *See* Brief of Rep. Amash, *et al.* (filed June 28, 2013). The relief sought by the ACLU could not alleviate either of these concerns. As *amici* recognize, the ACLU "explicitly does not ask for the disclosure of classified information," *Amici* Brief at 13-14, and thus its Motion would not affect the information that members cannot discuss publicly or that is so sensitive that only certain leaders receive it.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the United States' Opposition to the Motion of the American Civil Liberties Union, *et al.*, for the Release of Court Records was served via Federal Express overnight delivery on this 5th day of July, 2013, addressed to:

David A. Schulz
Media Freedom and Information Access Clinic
Yale Law School
40 Ashmun Street, 4th Floor
New Haven, CT 06511
david.schulz@yale.edu

Alex Abdo
Brett Max Kaufman
Patrick Toomey
Jameel Jaffer
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
aabdo@aclu.org

Arthur B. Spitzer
American Civil Liberties Union of the
Nation's Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, DC 20008
artspitzer@aclu-nca.org

Gregory L. Diskant
Benjamin S. Litman
Richard I. Kim
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
blitman@pbwt.com

Nicholas J. Patterson

APPENDIX A

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE MOTION FOR RELEASE OF COURT RECORDS

Docket No.: MISC. 07-01

MEMORANDUM OPINION[1]

This matter first came before the Court on the "Motion of the American Civil Liberties Union for Release of Court Records," filed on August 9, 2007 ("ACLU Motion"). In its motion, the American Civil Liberties Union (ACLU) sought the release of what it identifies as court orders and government pleadings regarding a program of surveillance of suspected international terrorists by the National Security Agency (NSA) that had previously been conducted without court authorization. See ACLU Motion at 2 n.2, 3-9. After consideration of the motion; the government's opposition to the motion, filed on August 31, 2007 ("Gov't Opp."); and the ACLU's reply, filed on September 14, 2007 ("ACLU Reply"), the Court issued a Memorandum Opinion and Order denying the ACLU Motion on December 11, 2007. See In re Motion for Release of Court Records, No. MISC. 07-01 (FISC Dec. 11, 2007) (In re Motion).

The ACLU sought public release of these documents "with only those redactions essential to protect information that the Court determines . . . to be properly classified" after "independent review," ACLU Motion at 2-3, under a standard less deferential than "ordinary district courts accord" classification decisions of the Executive Branch, ACLU Reply at 8. Addressing the three arguments presented by the ACLU, the Court held, first, that there was no common law

---

[1] The FISC Security Officer has compared this opinion and the accompanying order to the unclassified filings by the government in this case, and determined that the opinion and order do not contain any classified information.

right of public access to the records as a whole, or to such portions of the records that the Court might release after conducting such a review. In re Motion, slip op. at 10-12. The Court next held that the First Amendment does not provide a right of public access to these records, in whole or in part, under the criteria for establishing such a right in Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II). In re Motion, slip op. at 13-22. Finally, the Court declined to exercise any residual discretion it may have "to undertake the searching review of the Executive Branch's classification decisions requested by the ACLU," without prejudice to the ACLU's "pursuing whatever remedies may be available to it in a district court through a . . . request addressed to the Executive Branch" under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). Id. at 22.

On December 21, 2007, the ACLU filed a "Motion for Reconsideration or Reconsideration En Banc" ("Recon. Motion"), and the government subsequently submitted a response on January 8, 2008. For the reasons stated herein, the ACLU's request for reconsideration will be denied.[2]

---

[2] The ACLU's request for reconsideration en banc will also be denied. As authority for this Court to sit en banc, the ACLU cites this Court's decision in In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp.2d 611 (FISC), rev'd sub nom. In re Sealed Case, 310 F.3d 717 (FISC Rev. 2002). But the Foreign Intelligence Surveillance Court of Review specifically stated that FISA does not contemplate an en banc proceeding before this Court. In re Sealed Case, 310 F.3d at 721 n.5. That statement by the Court of Review would appear to put an end to the ACLU's motion for en banc reconsideration. But even assuming, arguendo, that this Court does have authority to sit en banc in this case, the decision in this matter simply does not warrant reconsideration en banc. This footnote has been circulated to all the other judges of this Court, and they are in agreement with it.

I. The Standards for Reconsideration.

The rules of the FISC do not directly provide for motions for reconsideration. However, FISC Rule of Procedure 1 states that "[i]ssues not addressed in these rules may be resolved under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure." FISC Rule 1. In this case, it is logical to apply the standards of Federal Rule of Civil Procedure 59(e) to the ACLU's request for reconsideration.[3] A district court "properly invokes its discretion to grant a Rule 59(e) motion if it finds there is: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or manifest injustice." Lance v. United Mine Workers of Am. 1974 Pension Trust, 400 F. Supp.2d 29, 31 (D.D.C. 2005); accord, Ciralsky v. CIA, 355 F.3d 661, 671 (D.C. Cir. 2004); Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). A motion for reconsideration is not an opportunity for a party merely to reassert factual or legal arguments that were already presented,[4] or to rely on theories it could have put forward earlier.[5]

The ACLU's motion for reconsideration presents nothing that can be regarded as an intervening change in controlling law or newly available evidence. Furthermore, the ACLU fails

---

[3] "Courts have routinely construed papers captioned 'motion to reconsider' as a motion to alter or amend the judgment under Rule 59(e)." Emory v. Sec'y of the Navy, 819 F.2d 291, 293 (D.C. Cir. 1987) (per curiam).

[4] Fresh Kist Produce, LLC v. Choi Corp., 251 F. Supp.2d 138, 140 (D.D.C. 2003); Consol. Edison Co. of New York v. O'Leary, 184 F.R.D. 1, 2 (D.D.C. 1998); New York v. United States, 880 F. Supp. 37, 38 (D.D.C. 1995) (per curiam).

[5] Howard v. Gutierrez, 503 F. Supp.2d 392, 394 (D.D.C. 2007); Fresh Kist Produce, 251 F. Supp.2d at 140.

to demonstrate clear error or manifest injustice in the prior opinion. The motion for reconsideration is accordingly denied.

II. There Is No Common Law Right of Public Access.

In its prior opinion, the Court concluded that any common law right of public access that might otherwise exist has been pre-empted by the Foreign Intelligence Surveillance Act of 1978, codified as amended at 50 U.S.C. §§ 1801-1871 (FISA), and the Security Procedures adopted thereunder.[6] In re Motion, slip op. at 11-12. This is because FISA and the Security Procedures strictly limit access to FISC records and proceedings, see id. at 6-10, and these limitations are inconsistent with a common law right of public access.

The ACLU now asserts that this Court "erred in holding that it must treat the executive's classification decisions as conclusive." Recon. Motion at 11. But the Court did not so hold. Rather, the Court held that FISA and the Security Procedures promulgated thereunder were inconsistent with the claim that the ACLU or other members of the public had a common law *right* to *require* the Court independently to review Executive Branch classification decisions and release documents found to be improperly classified. It was only in this context – that is, in the course of holding that any common law right of access had been pre-empted – that the Court noted that, "[u]nder FISA and the applicable Security Procedures, there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions." In re Motion, slip op. at 11. Hence, the Court simply did not decide whether the FISC, in an

---

[6] See *Security Procedures Established Pursuant to Public L. No. 95-511, 92 Stat. 1783, by the Chief Justice of the United States for the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review* (May 18, 1979) ("Security Procedures"), reprinted in H.R. Rep. No. 96-558, at 7-10 (1979).

appropriate case, would have the authority to override Executive Branch classification decisions as a matter of discretion. The ACLU's claim of error therefore misses the mark, because it is aimed at a holding that this Court did not in fact make. And the ACLU has failed to demonstrate clear error or manifest injustice in the Court's actual holding, which was that any common law right of public access that might otherwise exist has been pre-empted by FISA and the Security Procedures.

As an independent ground for holding that there is no applicable common law right, the Court also found that, "if the FISC were to assume the role of independently making declassification and release decisions in the probing manner requested by the ACLU, there would be a real risk of harm to national security interests and ultimately to the FISA process itself." In re Motion, slip op. at 12. As noted below in the context of the "logic" test under Press-Enterprise II, the ACLU fails to refute this rationale as well.

III. There Is No First Amendment Right of Access.

Contrary to the suggestion of the ACLU, the Court's prior opinion did not hold that "First Amendment interests are not implicated by the sealing of judicial opinions concerning the scope and meaning of FISA." Recon. Motion at 13. Rather, it applied the governing "experience and logic" tests specified in Press-Enterprise II, 478 U.S. at 8-9, which is the controlling Supreme Court precedent, to determine whether the ACLU had a First Amendment right to access the opinions and records in question. See In re Motion, slip op. at 13-22.[7]

[7] The ACLU does not challenge the holding, see id. at 16, that both the experience and logic tests must be satisfied to establish a First Amendment right of public access.

Under the "experience" test, the ACLU argues that the appropriate inquiry is whether there is a tradition of public access to decisions of Article III courts. Recon. Motion at 13. That is an incorrect framing of the question. Press-Enterprise II requires that the tests of experience and logic be applied to the "particular proceeding in question" 478 U.S. at 9 (emphasis added). Thus, the tests of experience and logic have not been applied to categories as sweeping as all decisions of Article III courts, but rather to narrower classes that permit a meaningful assessment of the effects of public access on a particular type of judicial process – for example, district court proceedings (and related records) that are ancillary to grand jury operations. See In re Motions of Dow Jones & Co., 142 F.3d 496, 502-03 (D.C. Cir. 1998); United States v. Smith, 123 F.3d 140, 148-50 (3d Cir. 1997).[8] Moreover, as explained in the Court's earlier opinion, see In re Motion, slip op. at 6-10, the FISC is a unique court created to deal with classified foreign intelligence matters in a secure and non-public fashion. It is therefore appropriate in this case to apply the Press-Enterprise II tests to the proceedings and records of the FISC, rather than to the decisions of all Article III courts. And once FISC records and proceedings are accepted as the appropriate category for analysis under Press-Enterprise II, the "experience" test is clearly not satisfied, for the reasons stated in the Court's prior opinion. See In re Motion, slip op. at 14-16.[9]

---

[8] Contrary to the ACLU's contention, see Recon. Motion at 13 n.13, the decision in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), does not support the broad analysis that the ACLU advocates. In that case, the tests of experience and logic were applied to the category of criminal trials, not to all court proceedings or even to all trials.

[9] The ACLU argues in its motion for reconsideration (Recon. Motion at 13) that the FISC simply has no tradition of issuing decisions of broad legal significance, either publicly or nonpublicly. But the fact remains that some "legally significant [FISC] decisions . . . remain classified and have not been released to the public." In re Motion, slip op. at 15. More fundamentally, the Court rejects the suggestion (see ACLU Reply at 13) that the amorphous and

(continued...)

With regard to the "logic" test, the Court did not hold, as the ACLU suggests, that judicial decisions about the meaning of a federal statute should be "kept secret from the public simply because the executive has demanded that they be kept secret." Recon. Motion at 15. Rather, under the "logic" test, the relief requested by the ACLU – application by the FISC of *a more probing standard* of judicial review of Executive Branch classification decisions than a federal district court would apply – would result in harmful consequences that outweigh any likely public benefits. In re Motion, slip op. at 18-21.[10]

The ACLU has failed to demonstrate any error in the Court's application of the "logic" test. In its prior opinion, the Court reasoned that the benefits to the public of the process requested by the ACLU would be diminished, "insofar as release with redactions may confuse or obscure, rather than illuminate, the decisions in question." In re Motion, slip op. at 19. The Court also noted the harmful consequences of granting the relief requested. First, if the Court were to engage in the heightened form of judicial review requested by the ACLU, the Court might err in its declassification decisions and release properly classified information, thus damaging the national security. Id. Second, the proper functioning of the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification decisions to a heightened form of judicial review. In particular, the government might opt to forgo surveillance and search of legitimate targets in order to retain

---

[9](...continued)
ill-defined category of "decisions of broad legal significance" constitutes the proper frame of reference under Press-Enterprise II.

[10] Of course, nothing in the Court's prior opinion or in this opinion prevents release of any part of a FISC decision under FOIA, should such release be appropriate pursuant to that statute.

control of sensitive information; government officials might choose to conduct a search or surveillance without FISC approval where the need for such approval is unclear; and in cases that are submitted, the free flow of information to the FISC could be threatened. Id. at 20.

The ACLU contends that the Court erred in noting the diminished benefits of a redacted or partial release of the documents in question, because "it is not appropriate for this Court (or any other) to keep information secret on the grounds that its disclosure could confuse the public." Recon. Motion at 16. But the Court did not keep information secret on the grounds that its disclosure could confuse the public. Instead, the Court conducted the balancing of benefits and harms required under the logic test. And in conducting that analysis, it was appropriate to consider the quantum of benefit that inhered in the heightened review requested by the ACLU so that the Court could make a correct judgment as to whether that benefit outweighed the (considerable) costs. Here, the benefit was diminished because of the potential for confusion from a redacted release.

The ACLU also argues against this Court's concern that, if the ACLU's motion were granted, the Court might err by releasing information that in fact should remain classified, and thereby damage the national security. Recon. Motion at 15. First, the ACLU asserts that these risks are equally present in FOIA litigation. But as the prior opinion noted, the issue before the Court was the cost of applying "the less deferential standard sought by the ACLU." In re Motion, slip op. 19 (emphasis added); see also id. at 21 n.32. Applying that less deferential standard would increase the risk of erroneous release beyond that incurred in a FOIA action. Second, the ACLU suggests that a heightened standard of review is appropriate because constitutional rights are at stake. But that puts the cart before the horse. The purpose of the

experience and logic tests is to determine whether a constitutional right is in fact at stake.

The ACLU does not address the Court's concern that the government might opt to forgo surveillance and search of legitimate targets in order to retain control of sensitive information. Nor does the ACLU address the Court's concern about ensuring the free flow of information from the government to the FISC in cases that are submitted. The ACLU does, however, suggest that it is inappropriate for the Court to consider the possibility that government officials might choose to conduct a search or surveillance without FISC approval where the need for such approval is unclear. Recon. Motion at 16. But there is no basis for the ACLU's suggestion that the Court's concern about government officials avoiding the FISC where the need for FISC approval is unclear constitutes a "capitulation to lawlessness" or an acceptance of "unconstitutional behavior" (Recon. Motion at 16).

For all of these reasons, the ACLU has failed to demonstrate any error, let alone clear error or manifest injustice, in the Court's prior holding that the ACLU has no First Amendment right of access to the documents it seeks.

IV. The Court Will Not Release the Records as a Matter of Discretion.

Finally, the ACLU's request that the Court exercise its discretion to review the sealed materials "in the unusual circumstances presented here" (Recon. Motion at 17) does not warrant reconsideration. The Court is aware of the ongoing congressional and public debate over extending or replacing the Protect America Act of 2007, and it acknowledges that release of the requested materials (at least in their unredacted form) could inform the public in that debate.

Nevertheless, the Court properly rejected the ACLU's request for release, and now denies the ACLU's motion for reconsideration. As noted above and in the Court's original opinion,

even assuming that this Court has the discretion independently to declassify materials over the Executive's objections, the searching review requested by the ACLU of the Executive Branch's classification decisions -- over and above that conducted by a district court under FOIA -- poses unacceptable risks to the national security and to the proper functioning of the FISA process. As already explained, these risks include the heightened possibility of erroneous judicial release of properly classified materials; the forgoing of search or surveillance against legitimate targets; avoidance of the FISC in cases where the need for FISC approval is unclear; and impediments to the free flow of information in cases that are submitted. In re Motion, slip op. at 19-20. These risks simply outweigh the potential benefits from discretionary release.

V. Conclusion.

The Court will therefore deny the ACLU's motion for reconsideration or reconsideration en banc.

JOHN D. BATES
Judge, Foreign Intelligence
Surveillance Court

February 8, 2008
Date

I, Karen E. Sutton, Clerk,
FISC, certify that this document
is a true and correct copy
of the original.

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE MOTION FOR RELEASE OF COURT RECORDS

Docket No.: MISC. 07-01

ORDER

IT IS HEREBY ORDERED that the Motion of the American Civil Liberties Union for Reconsideration or Reconsideration en Banc is DENIED.

JOHN D. BATES
Judge, Foreign Intelligence
Surveillance Court

February 8, 2008
DATE

I, Karen E. Sutton, Clerk,
FISC, certify that this document
is a true and correct copy
of the original.