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

IN RE OPINIONS & ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	Docket No. Misc. 13-08

OPINION

Before the Court is the Motion of the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic for the Release of Court Records.[1] The Movants ask the Court to "unseal its opinions addressing the legal basis for the 'bulk collection' of data" under the Foreign Intelligence Surveillance Act of 1978, codified as amended at 50 U.S.C. §§ 1801-1885c ("FISA") on the asserted ground that "these opinions are subject to the public's First Amendment right of access, and no proper basis exists to keep the legal discussion in these opinions secret." Mot. for Release of Ct. Records at 1. In fact, however, the four opinions responsive to the Movants' claim have never been subject to a sealing order issued by the Foreign Intelligence Surveillance Court (FISC). Moreover, the Executive Branch has declassified those opinions in substantial part and each of them has been made public by the Executive Branch or the FISC.

[1] Hereinafter, this motion will be referred to as the "Motion for the Release of Court Records" and cited as "Mot. for Release of Ct. Records." The American Civil Liberties Union ("ACLU"), the American Civil Liberties Union of the Nation's Capital ("ACLU-NC"), and the Media Freedom and Information Access Clinic ("MFIAC") will be referred to collectively as "the Movants." Documents submitted by the parties and orders and opinions of the Court in this matter are available on the Court's public website at http://www.fisc.uscourts.gov/public-filings.

Consequently, what the Movants now seek is access to the redacted, non-public material within those opinions, which remains classified by the Executive Branch.

I. Procedural Background.

The Movants filed the pending motion on November 7, 2013, in the wake of widely-publicized disclosures about the bulk collection of data by the United States government under FISA. Mot. for Release of Ct. Records at 1-4. The four opinions that address the legal basis for bulk collection under FISA were made public in 2013 and 2014 after classification reviews conducted by the Executive Branch and subject to redaction of text containing information that the Executive Branch found to be classified. The United States' Opposition to the Motion of the ACLU for the Release of Court Records at 1-2 ("Gov't Opp'n Br."). Before the filing of the Motion for the Release of Court Records, the FISC had published two of those opinions pursuant to FISC Rule of Procedure 62(a):

- Memorandum, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, No. BR 13-158 (Oct. 11, 2013) (McLaughlin, J.), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-1.pdf; and

- Amended Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, No. BR 13-109 (Aug. 29, 2013) (Eagan, J.), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf.

Id.

The other two opinions were released by the Executive Branch:

- Opinion and Order, [Redacted], No. PR/TT [Redacted] (Kollar-Kotelly, J.), *available at* https://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf; and

- Memorandum Opinion, [Redacted], No. PR/TT [Redacted] (Bates, J.), https://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

Id.[2]

On January 25, 2017, the undersigned judge dismissed the pending motion on the ground that the Movants lacked standing under Article III of the Constitution to bring a claim based on a First Amendment right of public access. *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under FISA*, 2017 WL 427591 (FISA Ct. Jan. 25, 2017). The FISC, sitting en banc, reconsidered that dismissal sua sponte and issued an opinion on November 9, 2017, which held by a 6-5 vote that Article III's standing requirement was satisfied. *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under FISA*, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017) (en banc). The en banc FISC vacated the January 25, 2017 opinion and remanded the matter to the undersigned judge for further consideration. *Id.* at 9.

On January 5, 2018, however, the FISC certified the question of Movants' Article III standing to the Foreign Intelligence Surveillance Court of Review (FISCR) pursuant to 50 U.S.C. § 1803(j) "because review by the FISCR would serve the interests of justice, a dispositive issue about standing was involved, and the split among the FISC Judges was very close and involved a difference of opinion about the law to apply, among other considerations." *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under FISA*, 2018 WL 396244 at *1 (FISA Ct. Jan. 5, 2018). The FISCR accepted the certification on January 9, 2018, and appointed Professor Laura K. Donohue to serve as amicus curiae. *In re Certification of Questions of Law*

[2] Those opinions concerned the production of tangible things under 50 U.S.C. § 1861 or the installation and use of pen register/trap-and-trace (PR/TT) devices under § 1842. Congress has since amended §§ 1861 and 1842 to require use of "specific selection terms," thereby eliminating bulk collection under those provisions. *See* USA FREEDOM Act of 2015, Pub. L. 114-232 § 101(a), 129 Stat. 269-70 (codified at § 1861(b)(2)(C)); § 101(b), 129 Stat. 270 (codified at § 1861(c)(2)(F)(iii)); § 103, 129 Stat. 272 (codified at § 1861(b)(2)(A) & (c)(2)(A), (3)); § 107, 129 Stat. 273-75 (codified at § 1861(k)(4)); § 201, 129 Stat. 277 (codified at §§ 1841(4), 1842(c)(3)).

to the FISCR, 2018 WL 2709456 at *1, 3 (FISA Ct. Rev. Jan. 9, 2018) (per curiam). On March 16, 2018, the FISCR held that the Movants meet the requirements for standing under Article III. *Id.* at *4-7. The FISCR did not decide whether the FISC had subject matter jurisdiction or reach the merits of Movants' claim. *Id.* at *3-4.

Upon remand, the undersigned judge entered an order scheduling briefing on whether the Court has subject matter jurisdiction over the Movants' claim and appointing Professor Donohue to contribute to that briefing as amicus curiae. Appointment of Amicus Curiae and Briefing Order, No. Misc. 13-08 (May 1, 2018). The Court is grateful to Professor Donohue for her able assistance.

The Court has fully considered the submissions of the parties and amicus. For the reasons stated below, the Court finds that (1) it has subject matter jurisdiction over the Motion for the Release of Court Records; and (2) the First Amendment does not confer a qualified right of public access to the material sought by the Movants, nor is there reason for the Court to exercise any discretion it may have to grant the relief requested. The Motion for the Release of Court Records accordingly will be denied and the motion will be dismissed.

II. The Court Has Subject Matter Jurisdiction Over the Movants' Claim.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (citations omitted). The FISC is a federal court with specialized jurisdiction concerning applications and certifications filed by the government and related to the collection of foreign intelligence. 50 U.S.C. §§ 1803(a)(1), 1822 (c),

1842(b)(1) and (d)(1), 1861(b)(1)(A) and (c)(1), 1881a(i), 188lb(a), 1881c(a), and 1881d(a).

Although Movants' First Amendment right of access claim falls outside the jurisdictional provisions noted above, Movants assert that the FISC has subject matter jurisdiction over the claim pursuant to the FISC's inherent authority over its own records and as ancillary to its jurisdiction over the applications and proceedings which resulted in the opinions to which Movants seek access. *See* Movants' Opening Brief in Response to the Court's Order of May 1, 2018 at 4-12 ("Movants' Br."). Amicus asserts that adjudication of the Movants' claim is within the "essential inherent power" conferred by Article III of the Constitution. *See* Brief of Amicus Curiae at 18-24 ("Amicus Br."). The government argues that the FISC has no jurisdiction to adjudicate Movants' claim because it falls outside its statutory grant of subject matter jurisdiction and is not covered by the doctrine of ancillary jurisdiction. *See* United States' Response Brief Regarding Subject Matter Jurisdiction at 7-11 ("Gov't Resp. Br."). For the reasons discussed below, the Court finds that it has ancillary jurisdiction over Movants' claim.

The Supreme Court has recognized the authority of federal courts to exercise ancillary jurisdiction over claims outside their statutory grant for two purposes: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 379-80 (reversing the district court's enforcement of a settlement agreement, which arose from a lawsuit previously before the court, as "quite remote from what courts require in order to perform their function") (citations omitted).

In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Supreme Court summarized the roots of the authority that came to be described in *Kokkonen's* second prong:

> It 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." *United States v. Hudson,* 7 Cranch 32, 34, 3 L. Ed. 259 (1812); see also *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764, 100 S. Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (citing *Hudson*). For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn,* 6 Wheat. 204, 227, 5 L. Ed. 242 (1821); see also *Ex parte Robinson,* 19 Wall. 505, 510, 22 L. Ed. 205 (1874). These powers are "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." *Link v. Wabash R. Co.,* 370 U.S. 626, 630–631, 82 S. Ct. 1386, 1388–1389, 8 L.Ed.2d 734 (1962).

Chambers, 501 U.S. at 43.

As an Article III court, *see In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *4, citing *In re Sealed Case*, 310 F.3d 717, 731, 732 n.19 (FISA Ct. Rev. 2002) (per curiam), the FISC possesses the same inherent authority recognized in *Chambers* and *Kokkonen*.[3] Whether the FISC has ancillary jurisdiction to adjudicate the Movants' claim therefore depends on whether the exercise of such jurisdiction is necessary to its successful functioning.

The supervisory power courts hold over their own records is well-established. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files"); *Gambale v. Deutsche Bank AG,* 377 F.3d 133, 141 (2d Cir. 2004) ("The court's supervisory power does not disappear because jurisdiction over the relevant

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[3] This principle is reflected in certain provisions of the FISC's statutory mandate. *See* 50 U.S.C. § 1803(g)(1) ("The [FISC and FISC Court of Review] may establish such rules and procedures, and take such actions, as are reasonably necessary to administer their responsibilities under this [Act]."); §1803(h) ("Nothing in this [Act] shall be construed to reduce or contravene the inherent authority of [the FISC] to determine or enforce compliance with an order or rule of such court or with a procedure approved by such court.").

controversy has been lost. The records and files are not in limbo. So long as they remain under the aegis of the court, they are superintended by the judges who have dominion over the court.").

In managing their proceedings and records, federal courts must observe constitutional rights. *See, e.g.*, *Doe v. Pub. Citizen*, 749 F.3d 246, 253 (4th Cir. 2014) (finding district court's sealing order violated the public's right of access under the First Amendment and remanding with instructions to unseal the record); *In re Providence Journal Co.*, 293 F.3d 1, 11-13 (1st Cir. 2002) (exercising advisory mandamus to resolve novel issues of great public importance and finding district court's practice of refusing to place legal memoranda on file in clerk's office violated First Amendment); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177, 1180-81 (6th Cir. 1983) (stating "the First Amendment and the common law do limit judicial discretion" and vacating district court's order sealing record of Federal Trade Commission proceeding for failing to state findings or conclusions justifying nondisclosure to public).

The manner in which the FISC manages its proceedings is also constrained by statute. FISA requires the FISC to adhere to specified security procedures:

> The record of proceedings under this [Act], including applications made and orders granted, shall be maintained under security measures established by the Chief Justice [of the United States] in consultation with the Attorney General and the Director of National Intelligence.

50 U.S.C. § 1803(c). The security measures established by the Chief Justice in accord with Section 1803(c) provide:

> Court Proceedings. The court shall ensure that all court records (including notes, draft opinions, and related materials) that contain classified national security information are maintained according to applicable Executive Branch security standards for storing and handling classified national security information. Records of the court shall not be removed from its premises except in accordance with the Act, applicable court rule, and these procedures.

Security Procedures Established Pursuant to Public Law No. 95-511, 92. Stat. 1783, as Amended, By the Chief Justice of the United States for the Foreign Intelligence Surveillance

Court and the Foreign Intelligence Surveillance Court of Review, ¶ 7 (2013) ("FISC Security Procedures").

To meet this responsibility, the FISC adopted rules of procedure which regulate how it handles and maintains national security information. *See, e.g.*, FISA Ct. R. Proc. 3 ("In all matters, the Court and its staff shall comply with the security measures established pursuant to 50 U.S.C. §§ 1803(c), 1822(e), 186l(f)(4), and 188la(k)(l), as well as Executive Order 13526, 'Classified National Security Information' (or its successor)"); FISA Ct. R. Proc. 62(b) ("Except when an order, opinion, or other decision is published or provided to a party upon issuance, the Clerk may not release it, or other related record, without a Court order. Such records must be released in conformance with the security measures referenced in Rule 3."). Rule 62(b) limits public access to FISC opinions by prohibiting release by the Clerk of Court to anyone other than the government at time of issuance unless specifically authorized by Court order. These restrictions endure unless release is ordered by the Court, regardless of the status of the underlying matter.

The Supreme Court has recognized a First Amendment right of public access to some judicial proceedings. *See, e.g.*, *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"); *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596 (1982). When a claimant asserts that right of access with respect to the proceedings or documents of a federal court established under Article III, it is necessary for that court to be able to adjudicate the claim, lest its own actions violate the First Amendment.[4] In this case, the FISC's

[4] Moreover, adjudicating such claims may involve factual issues which are best assessed by the court whose proceedings or records are at issue. *See, e.g.*, *Globe Newspaper*, 457 U.S. at 606-08 (First Amendment challenge to closure of a criminal trial during testimony of a minor victim of a sexual offense required trial court to assess factors such as victim's "psychological maturity and understanding" and "the interests of parents and relatives"); *United States v. Wecht*, 537 F.3d 222, 239-42 (3d Cir. 2008) (First Amendment challenge to withholding names of jurors from the public in a criminal trial required district court to evaluate whether risks to jurors were "serious and specific"); *Oregonian Pub. Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1467 (9th Cir. 1990) (First

statutory obligation to maintain its records securely underscores the need for it to be able to adjudicate Movants' claim. In seeking access to certain FISC opinions, Movants posit a First Amendment right that may conflict with the above-described security procedures, which are required by statute and effected through the FISC's rules. The FISCR has found Movants' claim to be judicially cognizable. *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *7. If Movants' claim has merit, the First Amendment may require modification to the manner in which the FISC maintains its opinions.[5] It is necessary, therefore, for the FISC to adjudicate Movants' claim in order to ensure that its proceedings comport with a correct understanding of both the First Amendment and statutorily required security procedures. The FISC's ability to "function successfully" and "manage its proceedings," *Kokkonen*, 511 U.S. at 379-80, would be significantly compromised if it lacked authority to adjudicate First Amendment claims such as the one asserted by Movants.

The fact that Congress has conferred on the FISC subject matter jurisdiction over a narrow range of matters, in comparison with the jurisdiction of federal district courts, does not detract from the grounds for finding ancillary jurisdiction. The "doctrine of ancillary jurisdiction . . . recognizes federal courts' jurisdiction over some matters (*otherwise beyond their competence*) that are incidental to other matters properly before them." *Kokkonen*, 511 U.S. at 378 (emphasis added). Other specialized courts of law have recognized their authority to decide Constitution-based claims related to their own proceedings, despite not having original

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Amendment challenge to sealing of plea agreement required district court to evaluate "evidentiary support" for contention that exposure of defendant's cooperation with law enforcement would threaten his and his family's safety).

[5] It must be noted that this Court's authority to decide the instant matter does not depend on the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.").

jurisdiction over claims "arising under the Constitution," as conferred upon federal district courts by 28 U.S.C. § 1331. *See In re Symington*, 209 B.R. 678, 691-92 (1997) ("This Court unquestionably has subject matter jurisdiction over [news companies' motion to intervene and strike protective order keeping debtor records private] . . . . As long as a protective order remains in effect, the court that entered the order retains the power to modify it . . .") (citations omitted).[6] *See also Dacoron v. Brown*, 4 Vet. App 115, 119 (1993) ("[N]othing in the above analysis [recognizing district court jurisdiction over Constitutional claims] implies that this Court does not have power to review claims pertaining to the constitutionality of statutory and regulatory provisions. Such authority is inherent in the Court's status as a court of law, and is expressly provided in 38 U.S.C. § 7261(a)(1) . . .") (citations omitted).

The government suggests that the FISC lacks jurisdiction over Movants' claim because the opinions to which Movants seek access were not issued in proceedings currently before the FISC. *See* Gov't Resp. Br. at 9-11 (contrasting Movants' claim seeking "documents from other cases" with claims relating to unlawful disclosure of information "in ongoing . . . actions pending in district court" and "efforts to intervene in an extant case"). While the government is correct insofar as the associated intelligence-gathering authorizations granted by the FISC have expired, the FISC has a continuing obligation to maintain the records of those proceedings in accord with Section 1803(c) and Rule 62(b). Moreover, that obligation remains in place for those portions of the requested opinions that are

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[6] *Cf. In re Alterra Healthcare Corp.*, 353 B.R. 66, 70 (2006) (finding newspaper's First Amendment, federal common law, and statutory claims for access to several settlement agreements, which had been filed under seal pursuant to orders of the bankruptcy court, to be "a core proceeding over which the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) & 157(b)(2)(A)"); *In re Bennett Funding Group, Inc.*, 226 B.R. 331, 332-33 (1998) (adjudicating newspaper's First Amendment and federal common law right of access to retainer agreement filed in camera pursuant to core jurisdiction under 28 U.S.C. §§1334(b) and 157(a), (b)(1) and (2)(A))).

still classified and not available to the public, notwithstanding the release of other portions based on Executive Branch declassification decisions.

In light of the above analysis and consistent with this Court's prior decisions,[7] the Court will exercise ancillary jurisdiction pursuant to *Kokkonen's* second prong and proceed to the merits.

III. The First Amendment Does Not Provide a Qualified Right of Public Access to the Opinions at Issue.

Movants and Amicus urge the Court to apply the "experience-and-logic" test articulated in *Press-Enterprise II* and find a First Amendment right of public access to FISC opinions. Mot. for Release of Ct. Records at 12; Reply Brief of Amicus Curiae ("Amicus Reply Br.") at 45-47.[8]

> Under the First Amendment, . . . the Supreme Court has applied what is referred to as the experience-and-logic test to determine whether there is a constitutional right of access to particular court records or proceedings. That test entails asking whether the record or proceeding in question has "historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question."

In re Certification of Questions of Law to FISCR, 2018 WL 2709456 at *3 (quoting *Press-Enterprise II*, 478 U.S. at 8). If these questions are answered affirmatively, then the First Amendment confers a qualified right of public access, *Press-Enterprise II*, 478 U.S. at 8, which entails a "presumption of openness [which] may be overcome only by an overriding interest

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[7] *See In re Mot. for Release of Court Records*, 526 F. Supp. 2d 484, 487 (FISA Ct. 2007) ("*In re Motion for Release of Court Records 2007*") (recognizing authority over court records and concluding, "it would be quite odd if the FISC did not have jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files"); *In re Orders of Court Interpreting Section 215 of Patriot Act*, 2013 WL 5460064 (Sept. 13, 2013) (exercising subject matter jurisdiction over third party claim for access to FISC records); and *In re Mot. for Consent to Disclosure of Court Records or, in the Alternative, Determination of the Effect of Court's Rules on Statutory Access Rights*, 2013 WL 5460051 at *2 (June 12, 2013) (finding jurisdiction to adjudicate a dispute over whether a FISC rule prohibited the government from disclosing its copies of a FISC opinion pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552).

[8] Amicus also argues that the common law provides a public right of access, *see* Amicus Reply Br. at 34-45; however, Movants have asserted only a First Amendment claim.

based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). Although the Supreme Court has never applied the experience-and-logic test "outside the context of criminal judicial proceedings or the transcripts of such proceedings," *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003), the FISCR's opinion in *In re Certification of Questions of Law to FISCR* indicates that it is applicable here.

A. The Proper Framing of the Experience-and-Logic Test

How broadly or narrowly to apply the experience-and-logic test has sometimes been a vexing question,[9] but the reasoning of the Supreme Court in *Press-Enterprise II* provides guidance. The Supreme Court observed that, "[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Press-Enterprise II*, 478 U.S. at 8-9. This distinction makes it evident that the experience-and-logic inquiry described in *Press-Enterprise II* should be directed with sufficient precision to appreciate the history and nature of the particular type of proceeding or document in question. *See Times Mirror Co. v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989) ("the Supreme Court has implicitly recognized that the public has no [First Amendment] right of access to a particular proceeding without first establishing that the benefits of opening the proceedings outweigh the costs to the public").

[9] *See, e.g., Dhiab v. Trump*, 852 F.3d 1087, 1104 (D.C. Cir. 2017) (*Press-Enterprise II* did not explain "whether we look to broad or narrow categories" and "the likely categories" in *Dhiab* "may range among civil actions generally, habeas actions, habeas actions relating to conditions of confinement, and finally habeas actions related to Guantanamo") (Williams, J., concurring in part and concurring in the judgment).

FISC judges have applied the experience-and-logic test with sufficient particularity to take into account the distinctive characteristics of FISC proceedings. *See In re Motion for Release of Court Records 2007*, 526 F. Supp. 2d 484, 492 (FISA Ct. 2007) (applying "experience and logic" test to electronic surveillance proceedings under 50 U.S.C. §§ 1804-1805); *In re Proceedings Required by § 702(i)*, 2008 WL 9487946 at *3-4 (FISA Ct. Aug. 27, 2008) (applying test to records relating to FISC review of government's certification and procedures for acquisition of foreign intelligence information under Section 702 of FISA, codified at 50 U.S.C. § 1881a).[10] The FISCR has also endorsed this approach. *See In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *1 ("The work of the FISC is different from that of other courts in important ways that bear on the First Amendment analysis.").

One of the most distinctive characteristics of the FISC's review and disposition of FISA applications is that, under the framework established by Congress, such work is not open to the public. In addition to the requirement that the FISC comply with security measures adopted by the Chief Justice (*see supra* pp. 7-8), orders directing third parties to produce tangible things in support of foreign intelligence investigations must be entered ex parte and not disclose the nature of the investigation for which they are issued. *See* 50 U.S.C. § 1861(c)(1), (2)(E). Recipients of such orders are subject to nondisclosure requirements. 50 U.S.C. § 1861(d)(1). Petitions

[10] In this regard, these FISC decisions align with those of numerous other courts, which have applied the experience-and-logic test to the particular type of judicial proceeding or document to which a First Amendment right of access has been asserted. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 10 (applied to preliminary hearings of the type conducted in California criminal proceedings); *In re Morning Song Bird Food Litig.*, 831 F.3d 765, 777 (6th Cir. 2016) (applied to objections to presentence reports); *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 291-92 (4th Cir. 2013) ("*In re § 2703(d) Application*") (applied to § 2703(d) orders and proceedings); *In re Hearst Newspapers, LLC*, 641 F.3d 168, 177-80 (applied to sentencing proceedings); *In re Application of the New York Times Co. to Unseal Wiretap & Search Warrant Materials*) ("*In re Application of New York Times*"), 577 F.3d 401, 409-10 (2d Cir. 2009) (applied to Title III wiretap applications); *Wecht*, 537 F.3d at 235-39 (applied to names of jurors and prospective jurors in criminal trials); *United States v. Corbitt*, 879 F.2d 224, 228-36 (7th Cir. 1989) (applied to presentence reports); *Times Mirror Co.*, 873 F.2d at 1213-18 (applied to pre-indictment search warrant proceedings and materials).

challenging such orders "shall be filed under seal" and, when adjudicating such petitions, the FISC "shall, upon request of the Government, review ex parte and in camera any government submission, or portions thereof, which may include classified information." 50 U.S.C. § 1861(f)(5); *see also* 50 U.S.C. § 1881a(l)(2) (equivalent provision for FISC proceedings on petitions to challenge or enforce directives under Section 702 of FISA). FISC proceedings on applications to approve installation and use of PR/TT devices and other forms of intelligence collection also must be closed to the public and any resulting orders that are served on third parties are protected from further disclosure.[11] Finally, even the congressionally-mandated process for release of FISC opinions that involve "a significant construction or interpretation" of law, *see* 50 U.S.C. § 1872(a), does not presume openness. Rather, it involves an Executive Branch declassification review that results in public release of each such opinion "to the greatest extent practicable," "*consistent with*" the results of that review, which may involve redaction of sensitive information or release of a summary in place of the opinion itself. § 1872(a), (b), (c) (emphasis added). *See also In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *1 (the "legal analysis" in FISC opinions "often contain[s] highly sensitive information, the release of which could be damaging to national security").

The foregoing considerations instruct that the FISC should apply the experience-and-logic test solely in the context of this Court's opinions relating to foreign intelligence collection. Movants prefer a broader perspective and argue that the Court should apply the experience-and-

[11] PR/TT orders must be entered ex parte and provide that persons directed to assist in installing or operating a PR/TT device shall do so "in such a manner as will protect its secrecy" and "shall maintain, under security procedures approved by the Attorney General and the Director of National Intelligence, any records concerning the pen register or trap and trace device or the aid furnished." 50 U.S.C. § 1842(d)(1), (2)(B). Similar provisions apply to FISC orders approving electronic surveillance, *see* 50 U.S.C. § 1805(a), (c)(2)(B)-(C), physical search, *see* 50 U.S.C. § 1824(a), (c)(2)(B)-(C), and certain acquisitions targeting U.S. persons who are outside the United States, *see* 50 U.S.C. §§ 1881b(c)(1), (5)(B)-(C) and 1881c(c)(1).

logic test to judicial opinions generally, or at least to such opinions that interpret the "meaning and constitutionality of public statutes." Mot. for Release of Ct. Records at 13-17.[12] But using such a broad platform to evaluate experience and logic would lose focus on the distinctive characteristics of FISC opinions and proceedings described above.

Movants' reasoning behind their proposal is not persuasive. First, Movants assert that the experience inquiry "'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.'" *Id.* at 13 (quoting *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (emphasis in original); *accord* Amicus Reply Br. at 50. But the FISC is not one forum among others similarly situated: it has singular and national jurisdiction over all FISA applications. *See* 50 U.S.C. §§ 1803(a)(1), 1822(c), 1842(b), 1861(b)(1), 1881a(j)(1)(A), 1881b(a)(1), 1881c(a)(1). The FISC is the only forum that conducts the relevant types of proceedings and issues the relevant types of opinions.

Relatedly, Amicus argues that "'[t]radition is not meant . . . to be construed narrowly'" and the Court should look "'to analogous proceedings and documents of the same type or kind.'" Amicus Reply Br. at 50-51 (quoting *In re Boston Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003)). But in the decision relied upon, the First Circuit also observed that "analogies" to other procedural contexts must be "solid ones" that "serve as reasonable proxies for the 'favorable judgment of experience' concerning access to the actual documents in question." *In re Boston Herald*, 321 F.3d at 184 (quoting *Press-Enterprise II*, 478 U.S. at 8). Accordingly, the First Circuit dismissed as "too broad" a proposed analogy between access to criminal trials and access to documents submitted ex parte in support of a defendant's request for assistance with legal

[12] Amicus similarly argues that the inquiry should encompass how judicial opinions "are treated based on the common law right of access" and the history of public access to documents in other courts – either other specialized Article III courts, *e.g.*, the U.S. Court for International Trade, or Article III courts generally. *See* Amicus Reply Br. at 47-52.

expenses. 321 F.3d at 184. Similarly, the Fourth Circuit in *In re § 2703(d) Application* rejected the argument that a claimed right of public access to an order under Section 2703(d) of Title 18 of the U.S. Code could be founded on the "long history of access to judicial opinions and orders," because that interpretation of the First Amendment was "too broad, and directly contrary" to precedent "that this right extends only to *particular* judicial records and documents." 707 F.3d at 291 n.8 (emphasis in original; internal quotation marks omitted). This Court concludes that public access to opinions issued in civil and criminal proceedings in other courts does not bear on the experience inquiry here due to the distinctive nature of the underlying FISC proceedings.

Movants reason that the experience-and-logic test should be more generously analyzed when "access to a *new* forum" is at issue "[b]ecause there will never be a tradition of public access in new forums," Mot. for Release of Ct. Records at 14 (emphasis in original); however, they do not explain why the FISC, which has continuously entertained applications for approval of foreign intelligence collection since 1979, should be regarded as so new that it cannot have established its own "history" regarding public access.[13] In any case, due to the FISC's purported youth, Movants urge reliance on a broader category of "judicial opinions interpreting the meaning and constitutionality of public statutes" to gauge experience and logic. *See id.*, *citing New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 299 (2d Cir. 2012)

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[13] *Cf. In re Application of New York Times*, 577 F.3d at 410 (reviewing in 2009 how Title III wiretap applications have been handled since Title III's enactment in 1968 and concluding that such applications "have not historically been open to the press and general public," notwithstanding claimant's contention that such applications "are merely judicial records that, like search warrants or docket sheets, have been historically open to public access"); *In re Application of Leopold to Unseal Certain Electronic Surveillance Applications and Orders*, 300 F. Supp. 3d 61, 87-88 (D.D.C. 2018) (describing as "doubtful" whether, over 31 years after enactment of § 2703(d), orders issued thereunder "are of such recent vintage" that the court should broaden the experience inquiry to encompass whether search warrant materials have historically been open to the public), *reconsideration denied*, 327 F. Supp. 3d 1 (D.D.C. 2018), *appeal filed* (D.C. Cir. Sept. 19, 2018).

("*NYCLU*").[14] But even if the FISC were "new," its singular caseload and statutory obligations require the experience-and-logic to be applied in a more focused and, necessarily, limited fashion. *See In re Boston Herald*, 321 F.3d at 184 (even if the type of proceeding at issue is of "relatively recent vintage," other types of proceedings can be relevant only if they "serve as reasonable proxies for the favorable judgment of experience concerning access to the actual documents in question") (internal quotation marks omitted).

The Second Circuit's decision in *NYCLU* does not indicate otherwise. *NYCLU* involved a claimed First Amendment right of public access to hearings before the Transit Adjudication Bureau (TAB) concerning alleged violations of public transit rules of conduct. The TAB was an administrative body created to lessen the burden of adjudicating such violations in criminal court. 684 F.3d at 289-93. In applying the experience-and-logic test, the Second Circuit considered the historical openness of such transit-rule adjudications in criminal court, as well as the practices of the TAB. *Id.* at 300. It did so in part because the TAB was new but more importantly because the TAB and the criminal court were functionally equivalent, that is, "[t]he *process* that goes on at TAB hearings is *a determination of whether a respondent has violated a Transit Authority Rule.* And *that* process was presumptively open . . . when such proceedings were heard only" in the criminal court. *Id.* at 301-02 (emphasis in original).

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[14] Movants also cite *In re Copley Press, Inc.*, 518 F.3d 1022 (9th Cir. 2008). Mot. for Release of Ct. Records at 14. That decision did not involve an expansive application of the experience-and-logic test in view of a "new forum." Instead, it followed Ninth Circuit precedent that satisfaction of the logic prong can be sufficient to establish a qualified right of public access, even if the experience prong is not satisfied. 518 F.3d at 1026-27 (relying on *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 948 (9th Cir. 1998) and *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1516-17 (9th Cir.1988)). Although the Tenth Circuit agreed, *see United States v. Gonzales*, 150 F.3d 1246, 1258 (10th Cir. 1998), the weight of circuit authority requires satisfaction of both prongs, *see Sullo & Bobbitt, PLLC v. Milner*, 765 F.3d 388, 393-94 (5th Cir. 2014); *In re Application for § 2703(d) Order*, 707 F.3d at 291; *In re Search of Fair Finance*, 692 F.3d 424, 429-31 (6th Cir. 2012); *In re Application of New York Times*, 577 F.3d at 409-10; *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 213 (3d Cir. 2002); *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997). The Court need not address this dichotomy because it finds that neither experience nor logic is satisfied in this case. *See infra* pp. 19-30.

Finally, Movants warn that a narrow experience inquiry "would permit Congress to circumvent the constitutional right of access altogether – even as to, say, criminal trials – simply by providing that such trials henceforth be heard in a newly created forum." Mot. for Release of Ct. Records at 14. Their concern is both hypothetical and probably unconstitutional. In addition, it presupposes a prior right of public access which never existed. Before Congress established the FISC, there were no judicial proceedings on applications for approval of foreign intelligence collection and Executive Branch documents and deliberations regarding foreign intelligence collection were hardly open to the public.

Accordingly, the Court will apply the experience-and-logic test to FISC opinions concerning requests for approval of foreign intelligence collection; more specifically, opinions issued by the FISC in: (1) ex parte proceedings on government applications for approval of particular forms of intelligence gathering, *see, e.g.*, 50 U.S.C. §§ 1804-1805 (electronic surveillance), or involving reviews of certifications and procedures respecting acquisition of foreign intelligence information pursuant to § 1881a(j); (2) ex parte proceedings on government requests to modify orders previously issued in such proceedings; and (3) adversarial proceedings between the government and a person directed to provide information or otherwise assist in foreign intelligence collection, *see, e.g.*, §1881a(i)(4)-(5) (proceedings on petitions to challenge or enforce directives issued under § 1881a(i)(1)). The following discussion refers to these types of proceedings as "foreign intelligence proceedings."

B. Application of the Experience-and-Logic Test

For the reasons explained below, the Court concludes that the asserted right of public access fails under both the experience inquiry and the logic inquiry.

1. Experience

The experience inquiry concerns "whether the record or proceeding in question has 'historically been open to the press and general public.'" *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *3 (quoting *Press-Enterprise II*, 478 U.S. at 8) (citation omitted).

For the first 30 years of the FISC's existence, there plainly was no history of openness respecting FISC opinions. Prior to 2007, just two FISC opinions had been publicly released.[15] The opinion in *In re Motion for Release of Court Records 2007*, 526 F. Supp. 2d 484, which was the third FISC opinion to be publicly released, concerned an adversarial proceeding initiated by a non-governmental party claiming a First Amendment right of access to FISC records, much like the current proceeding. In that matter, the Court found no tradition of public access, even for "cases presenting legal issues of broad significance," and described the FISC as "not a court whose place or process [had] historically been open to the public." *Id.* at 493.

In contrast, Movants and Amicus point to the considerably larger number of FISC opinions and orders that have been made public since *In re Motion for Release of Court Records 2007*. *See* Movants' Br. at 17; Amicus Reply Br. at 49-50. According to the catalog of publicly available FISC and FISCR opinions compiled by Amicus, *see* Amicus Appendix at Tab A, *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 (No. 18-01) ("Amicus Appendix"), 54 FISC opinions have been released since the issuance of that opinion, certainly a notable increase. Nevertheless, the relatively recent public accessibility of a greater number of

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[15] *See In re Motion for Release of Court Records 2007*, 526 F. Supp. 2d at 488 n.13 (referencing prior releases of *In re All Matters Submitted to FISC*, 218 F. Supp. 2d 611 (FISA Ct. 2002), *rev'd sub nom. In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002), and *In re Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property* (FISA Ct. June 11, 1981), *reprinted in* S. Rep. 97-280 at 16-19 (1981)).

FISC opinions falls far short of establishing that opinions issued by the FISC in foreign intelligence proceedings have "'historically been open to the press and general public.'" *See In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *3 (quoting *Press-Enterprise II*, 478 U.S. at 8).

First, six of the 54 opinions cited by Amicus are inapposite because they were issued in unclassified adversarial proceedings arising from third parties' claims for relief, not in foreign intelligence proceedings.[16] The release of those six opinions is no more relevant to the experience inquiry in this case than, for example, the public accessibility of federal district court opinions issued in civil litigation.

The large majority of the remaining 48 opinions was made available by the Executive Branch beginning in 2013, after then-President Barack Obama directed the Director of National Intelligence (DNI) to "declassify and make public as much information as possible about certain sensitive programs while being mindful of the need to protect sensitive classified intelligence and national security." *See* Press Release, Shawn Turner, Director of Public Affairs, Office of the DNI, *DNI Declassifies Intelligence Community Documents Regarding Collection under Section 702 of the Foreign Intelligence Surveillance Act (FISA)* (August 21, 2013), https://www.odni.gov/index.php/newsroom/press-releases/press-releases-2013/item/915-dni-declassifies-intelligence-community-documents-regarding-collection-under-section-702-of-the-foreign-intelligence-surveillance-act-fisa. During 2013 and 2014, the Executive Branch released

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[16] Two of those opinions, *In* re *Opinions & Orders of Court Addressing Bulk Collection of Data under FISA*, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017), and *In re Opinions & Orders of Court Addressing Bulk Collection of Data under FISA*, 2017 WL 427591 (FISA Ct. Jan. 25, 2017), were issued in this very case. The other four are: *In re Proceedings Required by Section 702(i) of FISA Amendments Act of 2008*, 2008 WL 9487946 (FISA Ct. Aug. 27, 2008); *In re Motion for Consent to Disclosure of Court Records or, in the Alternative, a Determination of the Effect of the Court's Rules on Statutory Access Rights*, 2013 WL 5460051 (FISA Ct. June 12, 2013); *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, 2013 WL 5460064 (FISA Ct. Sept.13, 2013); and *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, 2014 WL 5442058 (FISA Ct. Aug.7, 2014).

eleven FISC opinions that had been issued in foreign intelligence proceedings.[17] In comparison, during the same period, the FISC itself released seven opinions issued in foreign intelligence proceedings, five of them in redacted form after declassification review by the Executive Branch.[18]

In June 2015, Congress amended FISA to mandate an Executive Branch declassification review of significant FISC opinions. USA FREEDOM Act § 402(a)(2), 129 Stat. 281 (codified at 50 U.S.C. § 1872(a)); *see also supra* p. 14 and *infra* pp. 28-29. Since that provision came into

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[17] *Id.* (providing links to three FISC opinions); Press Release, James R. Clapper, Director of National Intelligence, *DNI Clapper Declassifies Intelligence Community Documents Regarding Collection under Section 501 of the Foreign Intelligence Surveillance Act (FISA)* (Sept.10, 2013), https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/927-dni-clapper-declassifies-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act-fisa (providing links to two FISC opinions); Press Release, James R. Clapper, Director of National Intelligence, *DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection under Section 501 of FISA* (Nov.18, 2013), https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/964-dni-clapper-declassifies-additional-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act (providing links to Opinion and Order, [Redacted], No. PR/TT [Redacted] (Kollar-Kotelly, J.) and Memorandum Opinion, [Redacted], No. PR/TT [Redacted] (Bates, J), two of the four opinions at issue in this matter); *Statement by the ODNI and U.S. Department of Justice on the Declassification of Documents Related to the Protect America Act Litigation* (Sept. 11, 2014), https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1109-statement-by-the-odni-and-the-u-s-doj-on-the-declassification-of-documents-related-to-the-protect-america-act-litigation (providing links to two FISC opinions); and *DOJ Releases Additional Documents Concerning Collection Activities Authorized By President George W. Bush Shortly After The Attacks Of September 11, 2001* (Dec. 12, 2014), https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1152-the-doj-releases-additional-documents-concerning-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-september-11-2001 (providing link to one 2007 FISC Opinion).

An eleventh opinion, Order and Memorandum Opinion, *In re [Redacted]*, No. [Redacted], (FISA Ct. Aug. 2, 2007) was released by the Department of Justice in December 2014 to a FOIA requester. *See* Amicus Appendix, Entry 50.

[18] *In re Application of FBI*, 2013 WL 9838183 (FISA Ct. Feb. 19, 2013); *In re Application of FBI for Order Requiring Prod. of Tangible Things*, 2013 WL 5741573 (FISA Ct. Aug. 29, 2013); Memorandum Opinion, *In re Application of FBI for Order Requiring Prod. of Tangible Things*, No. BR 13-158 (FISA Ct. Oct. 11, 2013) (McLaughlin, J.); Opinion and Order, *In re Application of FBI for Order Requiring Production of Tangible Things*, No. BR 14-01 (FISA Ct. March 7, 2014) (Walton, J.), *available at* https://fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-1.pdf; Opinion and Order, *In re Application of FBI for Order Requiring Production of Tangible Things*, No. BR 14-01 (FISA Ct. March 12, 2014) (Walton, J.), *available at* https://fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-2.pdf; *In re Application of FBI*, 2014 WL 5463097 (FISA Ct. March 20. 2014); *In re Application of FBI*, 2014 WL 5463290 (FISA Ct. June 19, 2014).

The FISCR released an eighth FISC opinion, Memorandum Opinion, *In re Directives [Redacted] Pursuant to Section 105B of FISA*, No. 105B(g): 07-01 (FISA Ct. Apr. 25, 2008), in redacted form following declassification review by the Executive Branch as part of its record in *In re Directives [Redacted] Pursuant to Section 105B of FISA*, 551 F.3d 1005 (FISA Ct. Rev. 2008).

effect on June 2, 2015, 28 opinions issued by the FISC in foreign intelligence proceedings have been released, *see* Amicus Appendix, Entries 2, 5-12, 19, 20, 22, 25, 30, 33-37, 40-42, 44, and 56-60, only three of them by the FISC. *See id.*, Entries 6, 8, and 10. Since the compilation of the Amicus Appendix, Professor Donohue, in collaboration with the Georgetown University Edward Bennett Williams Law Library, has made publicly available a collection of resources on foreign intelligence law, including publicly released FISC opinions.[19] Those materials include an additional nine FISC opinions from foreign intelligence proceedings that have been released by the Executive Branch in redacted form, consistent with its classification determinations, since the submission of the Amicus Appendix.[20] Combined with those described in the Amicus Appendix (including two opinions released prior to 2007, *see supra* p. 19), that makes for 58 opinions FISC opinions issued in foreign intelligence proceedings that have been publicly released.

The circumstances of the vast majority of those releases are actually a testament to the FISC's history of closure with regard to such opinions. For the entire history of the FISC,

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[19] *See* https://repository.library.georgetown.edu/handle/10822/1052698.

[20] Memorandum Opinion and Order, [Redacted], (FISA Ct. Sept. 4, 2019), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1056862/gid_c_00259.pdf?sequence=1&isAllowed=y; Memorandum Opinion and Order, [Redacted], (FISA Ct. Oct. 18, 2018), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1056860/gid_c_00258.pdf?sequence=1&isAllowed=y; Supplemental Opinion and Accompanying Primary Order, [Redacted], (FISA Ct. Dec. 18, 2008), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052763/gid_c_00034.pdf?sequence=3&isAllowed=y; Order Authorizing Electronic Surveillance and Accompanying Opinion, [Redacted], (FISA Ct. [date redacted]), (Davis, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052779/gid_c_00153.pdf?sequence=3&isAllowed=y; Memorandum Opinion, [Redacted], (FISA Ct. [date redacted], (Feldman, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052784/gid_c_00159.pdf?sequence=5&isAllowed=y; Opinion, [Redacted], (FISA Ct. [date redacted]), (Kollar-Kotelly, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052986/gid_c_00139.pdf?sequence=3&isAllowed=y; Opinion and Order, [Redacted], (FISA Ct. [date redacted], (Gorton, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052989/gid_c_00155.pdf?sequence=2&isAllowed=y; Opinion and Order, [Redacted], (FISA Ct. [date redacted] (Hogan, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1053863/gid_c_00254.pdf?sequence=1&isAllowed=y; Opinion and Order, [Redacted], (FISA Ct. [date redacted] (Hogan, J.), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/1052785/gid_c_00138.pdf?sequence=3&isAllowed=y.

Amicus has cited only twelve opinions issued in foreign intelligence proceedings published by the FISC itself. *See* Amicus Appendix, Entries 6, 8, 10, 14, 15, 16, 17, 18, 23, 26, 28, and 54.[21] Each of those opinions was made public in a form consistent with an Executive Branch declassification review, unless the opinion did not contain any classified information in the first instance.[22] The release of those few opinions in redacted form does not show a history of openness, supporting a First Amendment right of access.[23]

Finally, it weighs heavily against the asserted history of openness that of the 59 FISC opinions discussed above, only two were released between the Court's inception in 1979 and August 2013. *See supra* pp. 19-21. History is the past considered as a whole, not just the most recent developments. *Cf. North Jersey Media Group*, 308 F.3d at 211 ("the tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access").

Notably, FISC opinions that contained classified information have been released only after a review and redaction by the Executive Branch. Movants seek access to redacted classified information in opinions they have already received. Since such classified information has never been released by the FISC, in that regard there is *no* relevant experience.

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[21] Two of the twelve opinions are responsive to Movants' claim. *See Amicus Appendix, Entries 23 and 26*, referencing Memorandum Opinion, *In re Application of FBI for Order Requiring Prod. of Tangible Things*, No. BR 13-158 (FISA Ct. Oct. 11, 2013) and *In re Application of FBI for Order Requiring Prod. of Tangible Things*, 2013 WL 5741573, respectively.

[22] On December 17, 2019, the FISC published an order which included a discussion of the government's duty of candor in proceedings under Title I of FISA. *See* Order, *In re Accuracy Concerns Regarding FBI Matters Submitted to the FISC*, No. Misc. 19-02 (FISA Ct. Dec. 17, 2019). That order did not require a declassification review because it did not contain classified information in the first instance.

[23] Amicus also identified 113 FISC orders that have been released to the public. *See* Amicus Appendix at Tab B. That number is unpersuasive in the context of the thousands of orders issued by the FISC during its history that have not been publicly released. *See, e.g.*, Report of Director of Administrative Office of U.S. Courts on Activities of Foreign Intelligence Surveillance Courts for 2015, 2016, 2017 and 2018, https://www.uscourts.gov/statistics-reports/analysis-reports/directors-report-foreign-intelligence-surveillance-courts.

2. Logic

The logic inquiry concerns "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *3 (quoting *Press-Enterprise II*, 478 U.S. at 8; citation omitted). In making that determination, a court balances the benefits of public openness against any harms, *see, e.g., In re Search of Fair Finance*, 692 F.3d at 431-42; *In re Boston Herald, Inc.*, 321 F.3d at 186-88; *United States v. Gonzales*, 150 F.3d at 1259-60, including, when applicable, harm to national security, *see North Jersey Media Group*, 308 F.3d at 217.

Movants contend that access to FISC opinions will be beneficial in two particular ways: (1) public knowledge of the law is necessary for democratic governance, especially with regard to Executive Branch conduct that implicates constitutional rights, *see* Mot. for Release of Ct. Records at 16; and (2) access to FISC opinions specifically will promote public confidence in the FISC and the FISA process, enable "more refined decisionmaking in future cases," contribute to the decisionmaking of other courts, and "improve democratic oversight," *see id.* at 17-20. These are benefits that might plausibly accrue from public access to FISC opinions, just as they generally accrue from public access to other types of judicial opinions. But as with the experience inquiry, the proper focus of the logic inquiry must be on "'the functioning of the particular process in question.'" *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *3 (quoting *Press-Enterprise II*, 478 U.S. at 8; citation omitted); *see supra* pp. 12-18. "'[T]he value of access must be measured in specifics,'" *In re Search of Fair Finance*, 692 F.3d at 433 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J.,

concurring in the judgment),[24] and specific harms to the proceeding at issue outweigh generic assertions about the benefits of openness:

> ["]Every judicial proceeding, indeed every governmental process, arguably benefits from public scrutiny to some degree, in that openness leads to a better-informed citizenry and tends to deter government officials from abusing the powers of government." Yet, "because the integrity and independence" of proceedings such as the grand jury, jury deliberations, and the internal communications of the court "are threatened by public disclosures, claims of 'improved self-governance' and 'the promotion of fairness' cannot be used as an incantation to open these proceedings to the public."

United States v. Gonzales, 150 F.3d at 1260 (quoting *Times Mirror Co.*, 873 F.2d at 1213; internal citations omitted); *accord In re Search of Fair Finance*, 692 F.3d at 432-33 (finding that the general benefits of "assur[ing] that established procedures are being followed," promoting "the appearance of fairness," and providing "a check on . . . magistrate judges" were "outweighed by the very particular harms" to the "criminal investigatory process" that would result from publication of search warrant documents). *But see In re Search Warrant for Secretarial Area*, 855 F.2d 569, 572-74 (8th Cir. 1988) (First Amendment confers qualified right of public access to search warrant documents).

In *In re Motion for Release of Court Records 2007*, which involved an asserted First Amendment right of access to FISC electronic surveillance orders and related pleadings, the Court found that "the detrimental consequences of broad public access to FISC proceedings or records would greatly outweigh" any benefits. 526 F. Supp. 2d at 494. Those detrimental consequences included the identification of "methods of surveillance," which "would permit adversaries" to "conceal their activities;" disclosures of "confidential sources of information,"

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[24] The quoted passage from Justice Brennan's opinion continues: "Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring in judgment).

which "would chill current and potential sources from providing information" and "might put some in personal jeopardy;" and disclosures of intelligence gathering that could harm national security in other ways, "such as damaging relations with foreign governments." *Id.*

As here, the ACLU in *In re Motion for Release of Court Records 2007* sought access to "only those portions of the requested materials that the Court finds are not properly classified." *Id.* at 495. In that case, the Court found that the logic test would not be satisfied even if it were applied to "only those parts of the requested materials that the Court, after independent review, . . . determined need not be withheld." *Id.*[25] The Court noted that its review "might err by releasing information that in fact should remain classified," and thereby damage the national security. 526 F. Supp. 2d at 495. Moreover, "the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification to a heightened form of judicial review"[26] because the "greater risk of declassification and disclosure over Executive Branch objections would chill the government's interaction with the Court." 526 F. Supp. 2d at 496. The Court anticipated three deleterious consequences of that chilling effect: (1) it "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;" (2) it might create "an incentive for government officials to

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[25] The Court also expressed doubt "that the logic test should be so narrowly applied." *Id.* at 495 & n.29 (internal quotation marks omitted). Indeed, it is doubtful that a decision to release discrete information within a document could shed any light on whether general public access to other documents of the same type would benefit the particular process at issue. *See Globe Newspaper Co.*, 868 F.2d at 509-10 ("the fact that in certain cases access to the [requested] records may not be detrimental to the functioning" of the process in question, "and perhaps may even be beneficial to it, . . . is not sufficient reason to create a presumption in favor of openness") (emphasis omitted).

[26] The ACLU had argued that the FISC should review Executive Branch classification decisions in a "probing manner" that is less deferential than the review of record releases under FOIA. 526 F. Supp. 2d at 491 & n.18. The ACLU and other Movants advocate for the same rigorous review by the FISC in this case. *See* Mot. for Release of Ct. Records at 25 ("Independent judicial review of any proposed redactions . . . is necessary because the standards that justify classification do not always satisfy the strict constitutional standard and . . . executive-branch decisions cannot substitute for the judicial determination required by the First Amendment.").

avoid judicial review" by conducting surveillance without FISC approval "where the need for such approval is unclear;" and (3) it could threaten "the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decisionmaking and effective oversight." *Id.*

The same anticipated harms preclude finding that the logic test is satisfied in this case. First, the fact that Movants seek access only to FISC opinions and not applications or other related documents does not abate the harms or distinguish *In re Motion for Release of Court Records 2007.* Given the extent to which sensitive information about subjects such as ongoing counterintelligence and counterterrorism investigations and means of technical collection appears in opinions issued by the FISC in foreign intelligence proceedings, the Court finds that the above-described harms can be anticipated from public access to such opinions.

Moreover, Movants have not demonstrated any error in the assessment of harms in *In re Motion for Release of Court Records 2007.* They have merely asserted without explanation that "the Court erred in concluding that public access would 'result in a diminished flow of information, to the detriment of the process in question.'" Mot. for Release of Ct. Records at 21 (quoting *In re Motion for Release of Court Records 2007*, 526 F. Supp. 2d at 496). But courts have found that public access to various types of proceedings and documents could impede the receipt of relevant information, including search warrant documents,[27] presentence reports and objections thereto,[28] and transcripts and materials respecting criminal defendants' requests for

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[27] *See, e.g., In re Search of Fair Finance*, 692 F.3d at 432 ("[P]ublic access to search warrant documents" would cause the government "to be more selective in the information it disclosed in order to preserve the integrity of its investigations. This limitation on the flow of information to the magistrate judges could impede their ability to accurately determine probable cause.").

[28] *See, e.g., In re Morning Song Bird Food Litig.*, 831 F.3d at 776 (disclosure "would tend to restrict the sentencing court's access to relevant knowledge by discouraging the transmission of information by defendants and cooperating third parties").

assistance with legal expenses.[29] In addition, it is not unreasonable to be concerned that a FISC judge "might err by releasing information that in fact should remain classified," thereby damaging national security. 526 F. Supp. 2d at 495. The FISCR has similarly recognized that the FISC "is not well equipped to make the sometimes difficult determinations as to whether portions of its orders may be released without posing a risk to national security or compromising ongoing investigations." *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *1. The logic inquiry requires a balancing of the benefits of openness against any concomitant harms, *see supra* p. 24, and the risk of harming national security through disclosure of sensitive information must be weighed in striking that balance.

Finally, Movants assert that Congress' decision in 2015 to establish an Executive Branch process to declassify and release significant FISC opinions, *see* USA FREEDOM Act of 2015 § 402(a)(2) (codified at 50 U.S.C. § 1872(a)), reinforces their arguments regarding the logic inquiry. Movants' Br. at 18. The Court disagrees. The key figure in the statutory process is the DNI who, unlike FISC judges, is particularly well situated to decide what information must be withheld to protect national security and what information is safe to release.[30] The DNI, in consultation with the Attorney General, must "conduct a declassification review" of FISC opinions that include "a significant construction or interpretation of any provision of law." 50 U.S.C. § 1872(a). Congress did not prescribe standards to apply in such review. Instead, it left Executive Branch classification standards in place and required that the opinions be made public

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[29] *In re Boston Herald*, 321 F.3d at 188 ("specter of disclosure . . . might lead defendants (or other sources called upon by the court) to withhold information"); *In re Gonzales*, 150 F.3d at 1259 (without "assurance that the information revealed . . . will not be disclosed, a defendant and his or her counsel would be discouraged" from full disclosure of information to the court).

[30] *Cf. Central Intelligence Agency v. Sims*, 471 U.S. 159, 180 (1985) ("[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process.").

"to the greatest extent practicable," "*consistent with*" the review's results. *Id.* (emphasis added). Important to the issues presented here, the statute specifically permits the DNI, in consultation with the Attorney General, to waive the publication requirement if doing so "is necessary to protect the national security of the United States or properly classified intelligence sources or methods," provided that an unclassified summary of the FISC's legal interpretation is prepared and published. 50 U.S.C. § 1872(c).

Movants advocate for a wholly different process in which the Court would independently apply criteria for withholding information that are more limited than those in the Executive Branch classification standards. *See* Mot. for Release of Ct. Records at 25. The Court's declination of that function is entirely congruent with 50 U.S.C. § 1872. To be sure, Section 1872 reflects a legislative judgment that public access to significant FISC opinions is desirable, but only when the DNI is satisfied that sensitive national security information is sufficiently protected. In fact, the provisions of Section 1872 contradict Movants' argument that the benefits of open access to such opinions outweigh the harms *as a general matter*. *See Globe Newspaper Co.*, 868 F.2d at 509 ("The First Amendment right of access attaches only to those governmental processes that as a *general* matter benefit from openness.") (emphasis in original).

This Court concludes that "public access" to FISC opinions in foreign intelligence proceedings does not and would not play a "significant positive role in the functioning" of the FISC, *In re Certification of Questions of Law to FISCR*, 2018 WL 2709456 at *3, particularly with regard to classified information that the Executive Branch would protect. Logic dictates otherwise.

IV. The Court Will Not Order Further Review as a Matter of Discretion.

FISC Rule 62(a) states:

> 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).

FISA Ct. R. Proc. 62(a) (emphasis in original). Movants assert that, "even if the Court holds that the First Amendment right of access does not attach . . ., it should nonetheless exercise its discretion – as it has in the past and in the public interest – to order the government to conduct a declassification review of its opinions pursuant to Rule 62." Mot. for Release of Ct. Records at 27. In support of that assertion, Movants cite an earlier instance in which the Court, as "an exercise of discretion," directed the government to submit proposed redactions of any opinion at issue so that its author, "with the benefit of [such proposal], may decide whether to propose publication pursuant to Rule 62(a)." *Id.* (quoting *In re Orders of Court Interpreting Section 215 of Patriot Act*, 2013 WL 54600644 at *8).

The cited case, however, presented materially different circumstances. Here, the Executive Branch has completed a declassification review of the opinions at issue. Consistent with that review, the opinions have been made available to the public in redacted form[31] and there is no particular reason to expect that further review will yield different results. Under the circumstances presented, the Court declines to direct a second declassification review.

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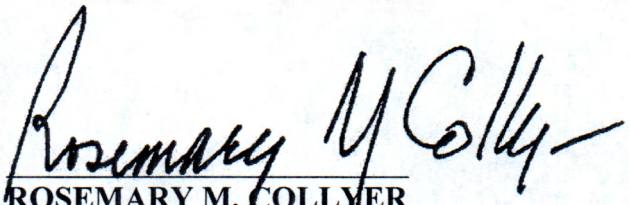
[31] Indeed, the FISC has previously engaged in the Rule 62(a) publication process for two of the four opinions at issue. *See supra* p. 2.

V. Conclusion.

For the foregoing reasons, the Court will dismiss the pending Motion for the Release of Court Records. A separate order accompanies this Opinion.

February 11, 2020



ROSEMARY M. COLLYER
Judge, United States Foreign
Intelligence Surveillance Court