Docket No. FISCR 18-01

In the

United States Foreign Intelligence Surveillance Court of Review

IN RE: CERTIFICATION OF QUESTIONS OF LAW TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

Upon Certification for Review by the United States Foreign Intelligence Surveillance Court

BRIEF OF AMICUS CURIAE

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STATEMENT REGARDING ORAL ARGUMENT

Amicus curiae respectfully requests oral argument in this matter. As the En Banc Court recognized, this is a "novel legal claim." *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, at *1 (FISA Ct. Nov. 9, 2017) (en banc) (App. C 33) [hereinafter En Banc Op.]. It is also a case of enormous national importance. It goes to the heart of the rule of law, as well as the common law and First Amendment right of public access to judicial opinions. In addition, it raises significant separation of powers concerns. Neither the Presiding Judge nor the En Banc Court, moreover, had the benefit of a hearing. Amicus curiae believes that oral argument would provide substantial assistance to the Court.

QUESTION PRESENTED

Whether the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic (collectively "the Movants") have "standing to assert" a "First Amendment right of public access to [Foreign Intelligence Surveillance Court] judicial opinions." Order, *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. 18-01 (FISA Ct. Rev. Jan. 9, 2018) (App. C 31)

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IDENTITY AND INTEREST OF AMICUS CURIAE

Laura K. Donohue is the Agnes N. Williams Research Professor of Law at Georgetown University Law Center, Director of the Center on National Security and the Law, Director of the Center on Privacy and Technology, and Senior Scholar at the Center for the Constitution. She holds her Ph.D. in History from the University of Cambridge, England, her J.D. (with Distinction) from Stanford Law School, and her A.B. (with Honors) in Philosophy from Dartmouth College. On November 25, 2015, the Foreign Intelligence Surveillance Court designated her as eligible to serve as an amicus curiae pursuant to 50 U.S.C. §1803(i)(1). On January 9, 2018, consistent with 50 U.S.C. §1803(i)(2)(A), the Foreign Intelligence Surveillance Court of Review appointed her as amicus curiae in the matter before the Court.

INTRODUCTION

The En Banc Court got it right: Movants have asserted a sufficient injury-in-fact for standing. En Banc Op. at *18. Movants have the right to be heard regarding their constitutional right of access to the Court's opinions. The question is not the extent of the underlying right, but whether it is cognizable—i.e., "capable of being known or recognized," *Black's Law Dictionary* (10th ed. 2014), cited and quoted in *Id.* at *9. Courts have repeatedly assumed and expressly recognized a First Amendment right of access to judicial records, which establishes a cognizable interest. *See, e.g.*, *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 505-10 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-11 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). *See also Id.* at *10-14.[1] It is precisely the type of interest that "deserve[s] protection against injury." *Id.* at *10 (internal quotations omitted); *see* discussion, *infra*.

The En Banc Court also correctly recognized the distinction between the question of standing and examination of the underlying cause of action: "At bottom, the legally-protected interest test is not concerned with determining the proper scope of the First Amendment right or whether a plaintiff is correct that such a right has in fact been invaded; that is a merits inquiry." *Id.* at *9. Even if one adopts the dissent's approach,

[1] The "injury is 'concrete,' and 'actual,' because the opinions are…not available." En Banc Op.. at *8. It is also sufficiently particularized. *Id.*

reflected in the question certified to the Court, Movants have a cause of action. *See* Dissent, En Banc Op., at *1 ("Movants want us to rule that they have a 'right' of access to [classified] information."). *Cf. In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under FISA*, No. Misc. 13-08, 2017 WL 427591, at *29 (Collyer, J.), (App. D 77) ("the question for this Court is whether the First Amendment applies.") [hereinafter Collyer Op.]; William A. Fletcher, *The Structure of Standing*, 98 Yale L. J. 221, 233 (1988) (injury "must be seen as part of the question of the nature and scope of the substantive legal right.") The inquiry engages the merits. This brief thus focuses on the legal interest, underscoring the well-established common law and First Amendment right of public access to judicial opinions and the significant rule of law and separation of powers issues at stake to make the argument that Movants have the right to be heard on the scope of their First Amendment rights.

SUMMARY OF THE ARGUMENT

Movants are seeking access to judicial opinions that carry the force of law. Reliance on procedural secrecy as a reason to deny public access is misplaced. The Foreign Intelligence Surveillance Court ("FISC") issues rulings on complex matters of law that impact citizens' rights and reveal the extent to which the executive acts legally. The Court and the government look to FISC opinions as precedent. A robust body of law is evolving, with at least sixty opinions now in the public domain. Movants are not seeking access to classified procedures; they are seeking access to four opinions

with constitutional and statutory analysis that impact the rights of millions of Americans and provide insight into how the executive is wielding its power.

Movants have a common law right of public access to the law, which standing doctrine left untouched. The Supreme Court uses an historical test to determine the common law rights in the Constitution. Common law at the Founding relied upon and recognized the public right of access. The First Amendment incorporated and expanded upon the right. The expressive rights of speech, press, and assembly, together with the right to petition, require that citizens have access to the law.

Should the Court fail to find standing, it would undermine rule of law. The executive could use secret legal interpretations that the People would not knowingly countenance. It could break the law, without the electorate's knowledge. Separation of powers would be endangered. It does not matter that the opinions have been partially released; nor is it of any moment whether the Court may eventually reject a claim to particular, classified facts. In light of the important and well-established interest at stake, Movants have the right to argue a First Amendment right of access.

ARGUMENT

I. Movants seek access to judicial opinions that have the force of law.

The Constitution provides for the judicial power of the United States to be vested "in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, §1. In 1978 the Foreign Intelligence Surveillance Act established FISC.

50 U.S.C. §1803(a), (b) (West 2015). Every court that has considered the issue has determined that FISC is an Article III court.[2]

A. The FISC's role has evolved from primarily issuing orders to making determinations on complex matters of law.

In 1978, FISC's role was to determine whether the executive had established probable cause before it issued orders for domestic electronic surveillance for foreign intelligence purposes. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–1811 (2012)). FISC thus initially functioned as a warrant-granting body, issuing more than 14,000 orders and only one opinion 1978-2001.[3] Applications were sealed and procedures conducted in camera and ex parte, yielding a "long-established and virtually unbroken practice of excluding the public from FISA applications and orders." *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 493 (FISA Ct. 2007). Starting in 2001, Congress began making significant changes to FISA, raising myriad questions about

[2] *See, e.g.*, Collyer Op. at 6; *In re Sealed Case*, 310 F.3d 717, 731 (FISA Ct. Rev. 2002) (per curiam); *United States v. Cavanaugh*, 807 F.2d 787, 792 (9th Cir. 1987); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985), *judgment aff'd*, 788 F.2d 566 (9th Cir. 1986).

[3] FISA Annual Reports to Congress 1979-2002, *Foreign Intelligence Surveillance Act*, Fed'n of Am. Scientists, https://fas.org/irp/agency/doj/fisa/ (last visited Feb. 20, 2018); *In re Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property* (FISC Ct. June 11, 1981), *reprinted in* S. Rep. No. 97-280, at 16-19 (1981).

the statutory language.[4] Technology also advanced, and the government began seeking novel and interpretations of the law, forcing the FISC to consider constitutional limits and to determine whether requests were ultra vires the governing statutes. As Presiding Judge John Bates explained on one such occasion,

> The current application relies on [the] prior framework, but also seeks to expand authorization in ways that test the limits of what the applicable FISA provisions will bear. Mem. Op., *[REDACTED]*, No. PR/TT [REDACTED], at *4 (FISA Ct.) (Bates, J.) (App. F 149) [hereinafter Bates Mem. Op.][5]

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[4] *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §§206, 208, 214, 215, 218, 504, 1003, 115 Stat. 272, 287; USA PATRIOT Improvement and Reauthorization Act of 2005 § 106, 120 Stat. 192, 196 (codified as amended at 50 U.S.C. §1861 (2012)); Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 ("PAA"); FISA Amendments Act of 2008, Pub. L. No. 110-261, 121 Stat. 522, 552 ("FAA"). *See also* Mem. Op., *In re Directives to Yahoo!, Inc. Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 105B(g): 07-01, at *3, (FISA Ct. Apr. 25, 2008) (App. G 422) ("the PAA…is hardly a model of legislative clarity or precision."); Suppl. Op., *In re Production of Tangible Things From [REDACTED]*, No. BR 08-13, at *2-3 (FISA Ct. Dec. 12, 2008), (App. G 520) [hereinafter Suppl. Op. 2008] (comparing 50 U.S.C. §1861 to 18 U.S.C. §§2702-2703).

[5] *See also* Op. and Order, *[REDACTED]*, No. PR/TT [REDACTED], at *1-2 (FISA Ct.) (Kollar-Kotelly, J.), (App. F 266) [hereinafter Kollar-Kotelly Op.] ("This application seeks authority for a much broader type of collection than other pen register/trap and trace applications."); Order, *In re [REDACTED]*, No. [REDACTED], at *12 (FISA Ct. May 31, 2007) (Vinson, J.), (App. G 525) (arguing for collection not just to/from but also "about" a selector); Order and Mem. Op., *In re [REDACTED]*, No. [REDACTED] (FISA Ct. Apr. 3, 2007), (App. G 554) (arguing expanded understanding of "facility"; stating that the NSA makes the probable cause finding for selectors); Primary Order, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.) (Walton, J.), (App. G 576) (seeking bulk production of Internet metadata using PR/TT); Suppl. Op. and Amend. to Primary Order, *[REDACTED]* at *3-4 (FISA Ct.) (Bates, J.), (App. G 614) ("Under the expansive interpretation of the relevant statutory provisions put forward by the

1. The Court engages in constitutional and statutory analysis, issues rulings that impact rights, and monitors the extent to which the government acts lawfully.

The FISC rules on critically-important First, Fourth, and Fifth Amendment questions, the answers to which, daily, impact every U.S. citizen.[6] The Court also examines complex matters of statutory construction.[7] It monitors how the government wields its power. Mem. Op. and Order, *[REDACTED]*, at *11 (FISA Ct. 2009), (App. G 591). FISC opinions reveal the extent to which the executive violates the law.[8]

2. The FISC looks to its opinions as findings, holdings, and precedent.

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government…[]after careful consideration, the Court adopted a less expansive interpretation.")

[6] *See, e.g.*, Order and Mem. Op., *In re Proceedings Required by Section 702(i) of the FISA Amendments Act of 2008* (FISA Ct. Aug. 27, 2008), (App. G 626); Op. on Mot. for Disclosure of Prior Decisions, *[REDACTED]* (FISA Ct. 2014), (App. G 637) Mem. Op. and Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-158 (FISA Ct. Oct. 11, 2013), (App. F 353) [hereinafter McLaughlin Mem. Op.]; *In re Sealed Case*, 310 F.3d at 745.

[7] *See, e.g.*, Suppl. Op. 2008. *See also* App. A.

[8] *See, e.g.,* Suppl. Op. and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things [REDACTED]*, No. BR 09-15, at *3-4 (FISA Ct. Nov. 5, 2009) (Walton, J.), (App. G 607) (NSA sent query results to email list of 189 analysts, "only 53 of whom had received the required training"); Mem. Op., [REDACTED], 2011 WL 10945618 (FISA Ct. Oct. 3, 2011) (Bates, J.) (NSA misled Court, violating FISA and the Fourth Amendment); Bates Mem. Op. at *2-3, *18, *100-105 ("NSA exceeded the scope of authorized acquisition continuously during the more than [REDACTED] years of acquisition"; FBI, CIA, NCTC "accessed unminimized [USP] information").

The Court cites to its opinions as precedent in support of points of law—even when its previous decisions remain classified.[9]

3. The executive looks to FISC opinions and holdings as precedent.

The executive avails itself of the precedential power of FISC opinions. In *ACLU v. Clapper*, for instance, the government argued in support of its position,

> [S]ince May 2006, fourteen separate judges of the FISC have concluded on thirty-four occasions that the FBI satisfied this requirement, finding "reasonable grounds to believe" that the telephony metadata … are relevant to authorized investigations. Defs.' Mem. Of Law in Opp'n to Pls.' Mot. For a Prelim. Inj. at 16, *ACLU v. Clapper*, 959 F. Supp. 2d 724 (2013) (No. 13 Civ. 3994(WHP)), 2013 WL 5744828.

It cited Judge Eagan's memorandum opinion in support of its interpretation of "relevance." *Id.* This matter is no different. The government *begins* its En Banc brief, "It is well-settled that there is no First Amendment public right of access to the proceedings, records, and rulings of this Court," citing to four FISC opinions and orders in support. United States Legal Br. to the En Banc Ct., at *1, (App. E 120).

4. A robust body of law is developing, with at least sixty declassified opinions and well over one hundred orders in the public domain.

[9] *See, e.g.*, 551 F.3d at 1010; McLaughlin Mem. Op. at *3-4; Bates Mem. Op., at *6, *74-75; Mem. Op., *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 14-96, at *2 (Zagel, J.) (FISA Ct. June 19, 2014), (App. G 647); Amended Mem. Op. and Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-109, at *19-20 (FISA Ct. Aug. 29, 2013) (Eagan, J.) (App. F 376) [hereinafter Eagan Mem. Op.].

More than two decades after its 1981 opinion, the Court issued two opinions. 310 F.3d at 717; *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (FISA Ct. 2002), *rev'd by In re Sealed Case*. Since 2007, the Court and DNI have released at least fifty-seven more opinions. *See* App. A (listing seventeen opinions posted by FISC, thirty-five by ODNI, and eight by others). The Appendix provides charts with links to 60 publicly-available opinions and 113 orders, that together underscore the importance of the Movants' interest. *See* App. A, B, F, G.

B. Movants are *not* seeking access to applications, orders, or proceedings.

The language in the record makes repeated reference to applications, orders, and proceedings, not to what is actually being sought, which are *judicial opinions*.[10] The Government misleadingly quotes the Court's framing of the experience test as:

> whether '*proceedings* that relate to applications made by the Executive Branch for the issuance of court orders approving authorities covered exclusively by FISA' have 'historically been open to the press and general public.' They have not. *Id.* (quoting Collyer Op. at *19) (emphasis added).

In support of its proposition that "It is well-settled that there is no First Amendment public right of access to the proceedings, records, and rulings of this court," the government cites to a case that rests entirely on procedural considerations. *Id.* at *1,

[10] *See, e.g.*, United States' Resp. to Movant's En Banc Opening Br., at *1-3 (App. E 133) ("This Court explained that "the ACLU's First Amendment claim runs counter to a long-established and virtually unbroken practice of excluding the public from FISA *applications and orders*.") *Id.* at *3 (quoting and citing *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 494 (FISA Ct. 2007))

citing 526 F. Supp. 2d at 487-90. The Dissent falls subject to the same pitfall. It states, "FISC proceedings are classified. [] No member of the public would have any 'right' under the First Amendment to ask to observe a hearing in the FISC courtroom. Dissent, En Banc Op., at *1. Although the dissent goes on to note that Movants are seeking access to opinions, its analysis is based on proceedings.[11] *Cf.* Collyer Op. at *40 ("Because the First Amendment qualified right of access does not apply to the FISC proceedings at issue…the Movants have no legally protected interest.")

C. Movants are seeking access to four opinions that contain legal analysis, affect citizens' rights, and reveal government malfeasance.

The four opinions contain constitutional and statutory analysis, impact rights, and reveal government misbehavior—all matters of law. Judge McLaughlin's opinion analyzes "'relevance' and examines the applicability of the Fourth Amendment to the production" of metadata. McLaughlin Mem. Op., at *3. Judge Eagan's opinion discusses the Fourth Amendment, statutory analysis, canons of statutory construction, and the meaning of "relevance." Eagan Mem. Op. The language is that of a holding. *Id.* at *28 ("[T]he Court finds that there is no Constitutional impediment" and "concludes that there are facts showing reasonable grounds.") The Court looks to

[11] "The First Amendment provides no general right of access to government *proceedings*…Nor does [it] provide a … general right of access to '*judicial proceedings.*'" *Id.* at *6; "[T]here is no First Amendment right to access government *proceedings* [the] exception is limited to *judicial proceedings* that satisfy…the 'experience' and 'logic' tests." *Id.* at *6-7; examination of criminal versus civil proceedings, classified proceedings. *Id.* at *8. (emphasis added throughout)

FISC decisions examining "the issue of relevance for bulk collections" to shape the analysis. *Id.* at *19-20. Judge Kollar-Kotelly's opinion similarly engages in matters of constitutional and statutory importance. Kollar-Kotelly Op. at *1. It analyzes the meaning of "devices" in 50 U.S.C. §§1841-46, looks at retention, access, use, and dissemination, and questions whether the installation and use of the devices "will comply with the First and Fourth Amendments." *Id.* at *2-3. The method of collection is heavily redacted, despite the Court's conclusion the collection falls within "the plain meaning of sections 3127(3) and (4)." *Id.* at *12-14, *18, *26. The Court recognizes that "The raw volume of the proposed collection is enormous" and will have a direct impact on United States Persons ["USPs"] "located within the United States who are not the subject of any FBI investigation." *Id.* at *39. It finds bulk collection consistent with the Fourth Amendment, despite "the fact that only a very small proportion of the huge volume of information collected will be directly relevant to the FBI's [REDACTED] investigations." *Id.* at *54. Judge Bates's opinion, in turn, wrestles with government non-compliance. Bates Mem. Op., at *15 n.17, *20-21. It, too, addresses complex questions of law. *E.g.*, *id.* at *24, *31, *57-71. It looks at illegally-collected information acquired in the United States, noting that the government sought to retain and use citizens' information in violation of criminal statutes. *Id.* at *98-108.

II. Movants have a common law right of public access to judicial opinions.

As an Article III Court, the FISC is imbued with "the judicial Power" and subject to its limitations, given form in "cases" and "controversies". U.S. Const. art. III, §2. The case or controversy requirement performs three vital functions. First, it establishes a core judicial power: vindication of a legal right, for which a remedy must be available. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 170 (1803). Second, it ensures that the courts only take up issues amendable to judicial resolution. *Flast v. Cohen*, 392 U.S. 83, 95 (1968), *quoted in* Collyer Op., at *6; *Vermont Agency of Nat. Res. v United States ex rel. Stevens*, 529 U.S. 765, 774 (2000). For this, a cause of action must be established. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Third, it protects against judicial overreach, preserving separation of powers. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Frothingham v. Mellon*, 262 U.S. 447, 489 (1923). From the earliest days of the Republic, the understanding has been that courts cannot issue advisory opinions; nor may they assume other branches' responsibilities or cast about to find actions to which they object.[12]

A. Standing doctrine leaves the common law right of access untouched.

Justiciability doctrine polices the case or controversy boundary, with standing serving as one of its key elements. Inquiry centers on whether the plaintiff is the right

[12] *See, e.g.*, Letter from Thomas Jefferson, Sec'y of State, to Chief Justice Jay and Associate Justices (July 18, 1793), *reprinted in* Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 51 (6th ed. 2009); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Marbury*, 5 U.S. at 170.

person to come before the court. *Warth v. Seldin*, 422 U.S. 490 (1975); *Baker v. Carr*, 369 U.S. 186, 204 (1973). The Supreme Court has long recognized that it is distinguishable from a cause of action. *See, e.g.*, *Clarke v. Securities Industry Assoc.*, 107 S. Ct. 750, 759 (1987). The doctrine, however, has become difficult to navigate. Collyer Op. at *11. Until the 1970s, the requirements of injury-in-fact, causation, and redressability were virtually unknown. Cass R. Sunstein, *What's Standing after* Lujan? *Of Citizen Suits, "Injuries," and Article III,* 91 Mich. L. Rev. 163, 168 (1992). In the time that has since elapsed, a tapestry of tests has emerged. In *Spokeo Inc. v. Robins*, the Supreme Court reaffirmed that there are myriad ways to think about access to the courts. 136 S.Ct. at 1548-49 (stating *Lujan* test, noting generalized grievances, discussing concrete and particularized, actual or imminent, and conjectural or hypothetical; distinguishing between tangible and intangible; and adopting a common law approach).

Although *Lujan v. Defenders of Wildlife* has become standard framing, it analyzed a specific question: how standing doctrine applies when Congress has provided a statutory right of action. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). *Lujan* requires (a) an injury in fact (concrete and particularized and actual or imminent/not conjectural or hypothetical); (b) caused by the defendant; and (c) that is redressable. 504 U.S. at 560-61. The Court determined that a congressionally-conferred cause of action does not resolve the standing question. Simultaneously, its approach reaffirmed

that injuries long recognized at common law remain cognizable in the courts. *Id.* at 561, *accord Spokeo*, 136 S. Ct. 1540 (2016). Without standing, individuals would not be able to protect such rights.

Under *Lujan* and its progeny, an injury borne by many can give rise to standing. For example, voting-related information, which involves "the most basic of political rights," can give rise to standing even though it is "widely shared." *FEC v. Akins*, 524 U.S. 11, 24-25 (1998) (finding standing to pursue claim to political information under Federal Election Campaign Act statutory cause of action).[13] Further, standing analysis necessarily links to historically-recognized claims. As articulated by Justice Alito, because the doctrine is "grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relation to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549.

B. The Supreme Court uses an historical test to determine the common law rights incorporated into the Constitution.

The Supreme Court applies an historical test to determine common law rights incorporated in the Constitution. The Court has consistently held, for instance, that the common law encapsulated in the Seventh Amendment refers to "the common law of

[13] Similarly, a lack of housing information is sufficient to establish standing. *Havens Realty Corp v. Coleman*, 455 U.S. 363, 373-74 (1982). Where plaintiffs allege a right to information, petition for access, and are denied the material, they have standing. *Doe v. Pub. Citizen*, 749 F.3d 246, 264 (4th Cir. 2014).

England." *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (Story, J.); *see also Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377 (1913). *Pari passu*, the writ of habeas corpus "became an integral part of our common-law heritage by the time the Colonies achieved independence." *Rasul v. Bush*, 542 U.S. 466 (2004) (internal citations omitted). "[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). The Court looked to the writ's "historical core" to prevent the executive from wrenching habeas from the Court's jurisdiction. 542 U.S. 474; *see also Boumediene v. Bush*, 553 U.S. 723, 726 (2008). Like habeas, the right of access to judicial opinions arose centuries ago, becoming "an integral part of our common law heritage." *See Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973).

C. English common law recognizes and relies upon a public right of access to judicial opinions.

Since the time of Edward II, who ruled England 1307-1327, English judicial records have been public. 1 William Blackstone, *Commentaries on the Laws of England* *71-72 (1765) [hereinafter "*Commentaries*"]. In 1372 Parliament expanded the common law right of access to include all court records and evidence, even if used against the king. *Compare* 46 Edw. 3 (1372) (Eng.), *reprinted in* 2 *Stat. at Large* 191, 196-97 (Danby Pickering ed., 1762), *with* 14 Edw. III, stat. 1, c. 14. Sir Edward Coke

looked back to the petition to highlight the rule that records and reports be available to any subject for the purpose of discovering precedent:

> [W]hensoever a man is enforced to yield a reason of his opinion or judgment, that then he set down all authorities, precedents, reasons, arguments and inferences whatsoever that may be probably applied to the case in question.[] These records, for that they contain great and hidden treasure, are faithfully and safely kept (as they well deserve) in the King's Treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto, which was the ancient law of England, and so is declared by an act of Parliament in 46E 3. 3 Cook Reports, preface, *reprinted in* 2 Edward Coke, *The Reports of Sir Edward Coke in Thirteen Parts* iv (London, Joseph Butterworth and Son1826).

Even the much-despised Star Chamber "heard cases in public." 5 William Holdsworth, *A History of English Law* 156 (4th ed. 1927). Public hearings and the presence of lawyers meant widespread knowledge of the court's decisions. *Id.* *See also* William Hudson, *A Treatise of the Court of the Star Chamber* 48 (Francis Hargrave ed., 2008) (1791).

Common law itself *depended* upon the promulgation of judicial decisions, initially for "common erudition" and thereafter for authoritative case law. John Baker, *Oxford History of the Laws of England* 488 (2003). *Genera customes* "guided and directed" the "proceedings and determinations of the king's ordinary courts of justice." 1 *Commentaries* *68. They depended "upon immemorial usage…for their support." *Id.* Judges served as "the depositary of the laws," their decisions providing "the principal and most authoritative evidence" of the law. *Id.* Blackstone noted the importance of public access:

The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of records, *in publick repositories set apart for that particular purpose; and to them frequent recourse is had,* when any critical question arises, in the determination of which former precedents may give light or assistance. *Id.* (emphasis added)

Judicial decisions were "not only preserved as authentic records in the treasuries of the several courts," but they were "handed out to public view in the numerous volumes of reports." *Id.* at *71. According to Blackstone, the reports included "histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides; and the reasons the court gave for their judgment." *Id.*[14] As Greenleaf later summarized,

> [I]n regard to the inspection of public documents, it has been admitted, from a very early period, that the inspection and exemplification of the records of the king's courts is the common right of the subject. 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 471 (Boston, Little, Brown, & Co. 16th ed. 1899).

D. From the founding of the Republic, U.S. courts have recognized a common law public right of access to judicial opinions.

In 1834 the Supreme Court unanimously recognized the common law right of access to judicial opinions when it determined that a court reporter could not hold a copyright to them, as they were in the public domain. *Wheaton v. Peters*, 33 U.S. (8

[14] English law drew a line between formal matters of record and other judicial muniments. *Hewitt v. Pigott* (1831) 131 Eng. Rep. 155, 7 Bing. 400; *Browne v. Cumming* (1829) 109 Eng. Rep. 377, 10 B. & C. 70; *Turner v. Eyles* (1803) 127 Eng. Rep. 248, 3 Bos. & Pul. 456. The fact a document was not part of the formal record, though, still did not insulate it from public view. *See Fox v. Jones* (1828) 108 Eng. Rep. 897, 7 B. & C. 732; *Taylor v. Sheppard* (1835) 160 Eng. Rep. 110, 1 Y. & C. Ex. 271.

Pet.) 591, 668 (1834). No more so could a bookseller hold an exclusive copyright to the written opinions of state judges:

> The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute. *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

As recognized by lower courts,

> The right to examine certain records and papers…exists as to the books containing the docket or minute entries of the judgments and decrees of the court. *In re McLean*, 16 F. Cas. 237, 239 (C.C.S.D. Ohio 1879) (No. 8877); *see also Bullitt County v. Washer*, 130 U.S. 142, 149 (1889); *In re Chambers*, 44 F. 786 (C.C. Neb. 1891).

State courts followed suit. All persons, even if they were not citizens, had a right to inspect court records. *See, e.g.*, *Nash v. Lathrop*, 6 N.E. 559, 560-61, 563 (Mass. 1886); *Nowack v. Fuller*, 219 N.W. 749, 750 (Mich. 1928). As early as 1894, the District of Columbia recognized public access. The Court denounced a motion to "preserve [court records] in secrecy," distinguishing between judicial records and "other mere official records." *Ex parte Drawbaugh*, 2 App. D.C. 404, 404, 407 (Ct. App. D.C. 1894).

> The rules of the Patent Office have no application to the proceedings of this court... They may be very necessary and proper for conducting the affairs of that office…but it does not follow that similar rules should be adopted and enforced as applicable in an appellate court of record. *Id.* at 405.

Permeating these decisions was the understanding that the court's legitimacy depended upon open access to its decisions.[15] In the mid-20th century, common law continued to embrace access to judicial records. 45 Am. Jur. *Records and Recording Laws* §17 (1956); 53 C.J.S. *Records* § 40 (1931); M.C. Dransfield, Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260 (1948).

In the 1960s, different methods of reproduction brought new questions to the fore. The courts reiterated the common law right to inspect judicial records. *See, e.g., People ex. rel. Gibson v. Peller*, 181 N.E.2d 376, 378 (Ill. Ct. App. 1962); *Moore v. Bd. of Chosen Freeholders of Mercer County*, 184 A.2d 748, 754 (N.J. Super. Ct. App. Div. 1962). Third parties sought non-documentary evidence introduced at trial.[16] The courts doubled down, stating, "The existence of the common law right to inspect and copy judicial records is beyond dispute." 635 F.2d at 947-48. Where denied, it tended to be in the service of competing rights, such as fair trial or freedom of the press. *See, e.g.*, 654 F.2d at 431. Judges also looked to the role that the documents played in the adjudicative process and their relationship to substantive rights. *See, e.g., In re U.S.*

[15] *See, e.g., Ex parte Gay*, 20 La. Ann. 176, 177 (La. 1868). *See also Scott v. Stutheit*, 121 P. 151, 154 (Colo. App. 1912). ("The law is well settled…that…a judgment or decree, to be valid, must be rendered in open court during term time…This is the general rule in this country, and has been adopted by the appellate courts in most, if not all, of the states of the Union.")

[16] *See, e.g., Nixon v. Warner Commc'n, Inc.*, 435 U.S. 589 (1978); *United States v. Myers* (In re Nat'l Broad. Co.), 635 F.2d 945, 947-48 (2d Cir. 1980); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 425 (5th Cir. 1981).

for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 291 (4th Cir. 2013); *In re Providence Journal Co.*, 293 F.3d 1, 9 (1st Cir. 2002); *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997). What was not questioned was whether the public had a right to actual decisions. To the contrary, since 1834, the courts have explicitly recognized that judicial opinions belong to the People. *See* 33 U.S. at 668.

III. The First Amendment encapsulates and expands the common law right of access to judicial opinions.

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. This language incorporates and goes beyond the common law right of access. *See, e.g.*, 749 F.3d at 265; *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988)). The expressive rights of speech, press, and assembly are related but distinct. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Scholars and jurists have long acknowledged their "core." *See Globe Newspaper Co.*, 457 U.S. at 603, 606; *Richmond Newspapers*, 448 U.S. at 575, 578, 580; *Branzburg v. Hayes*, 408 U.S. 665, 680-81 (1972); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 452, 456 (1985). The doctrinal emphasis reflects that the media has tended to bring judicial access suits (the right to court documents concomitant to freedom of the press), as well as the extent to which voting has become the participatory cornerstone of our democracy (underscoring the importance of a free flow of information to the

electorate). Despite the desuetude of the right to petition, the Framers considered it one of the most important protections. John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* 4 (1986).

A. As an historical matter, the right to petition was independent of, and of greater importance than, freedom of speech, press, and assembly.

Traditionally, the right to petition surpassed speech, press, and assembly in importance.[17] It allowed individuals to seek redress for wrongs and "could force the government's attention on the claims of the governed when no other mechanism could." Gregory A. Mark, *The Vestigial Constitution, The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2157 (1998). Subjects could go directly to the Crown to challenge lesser tribunals and authorities. *Id.* at 2163. The right applied to the colonies, even as the Crown's failure to respond to petitions provided grounds for rebellion. Declaration of Independence para. 30. ("In every stage of these Oppressions we have Petitioned for Redress in the most humble Terms. Our repeated Petitions have been answered only by repeated Injury.") Anti-federalists attacked Constitution for failing to protect the right.[18] James Madison therefore

[17] Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 Hastings Const. L.Q. 15, 17, 34-39 (1993); Norman B. Smith, *"Shall Make No Law Abridging…": An Analysis of the Neglected, But Nearly Absolute, Right of Petition,* 54 U. Cin. L. Rev. 1153, 1165-67 (1986).

[18] *See, e.g.*, Letters from the Federal Farmer (Dec. 25, 1787), *reprinted in* 2 *The Complete Anti-Federalist* 256, 274 (Herbert J. Storing ed. 1981); *Centinel II*, Philadelphia Freeman's Journal, (Oct. 24, 1787), *reprinted in* 13 *The Documentary*

incorporated it into the Bill of Rights, proposing that it apply to the legislature.[19] Parliament had acted as a judicial body, so separation of powers required a shift to "government" to allow for judicial redress. Accordingly, the Select Committee altered the language to apply to all three branches.[20]

The right to petition is distinct from the other expressive rights in that it protects (a) active political engagement; (b) directed at a particular body of persons; (c) demanding an action in response; and (d) not diluted through representation, giving citizens a better opportunity to be heard. It ensures that changes in society are reflected in government. *See Thomas*, 323 U.S. at 545-46 (Jackson, J., concurring). It prevents the government from being the guardian of the collective public will. *Id.* at 545. It gives citizens the ability to *do* something about their concerns.

B. The right to petition requires a right of access to judicial opinions.

History of the Ratification of the Constitution 457, 466-67 (Merrill Jensen ed., 1976); Richard Henry Lee's Amendments, The Confederation Congress and the Constitution (Sept. 27, 1787), *reprinted in* 13 *The Documentary History of the Ratification of the Constitution* 229, 239.

[19] 1 *Annals of Congress* 434 (Washington, D.C., Gales and Seaton, Joseph Gales ed., 1834) ("The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.").

[20] "The freedom of speech, and of the press, and the right of the people peaceably to assemble, and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed." House of Representatives Journal (Aug. 1789), *reprinted in* 5 Bernard Schwartz, *The Roots of the Bill of Rights* 1122 (1980). *See also* House Debates (July-Aug. 1789), *reprinted in* 5 Schwartz, *supra*, at 1125-38 (adopting the text); Senate Journal (Aug.-Sept. 1789), *reprinted in* 5 Schwartz, *supra*, at 1148-49 (altering "apply" to "petition").

The right of access to the courts has long been recognized by the Supreme Court as "part of the right of petition protected by the First Amendment." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).[21] Citizens cannot petition and seek redress, if they cannot access the law. The case is even stronger in relation to government malfeasance, where remedies for unlawful conduct create a "constitutional antidote" to sovereign immunity. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims against the Government*, 91 Nw. U. L. Rev. 899, 899 (1997). "These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc.*, 448 U.S. at 575.[22] The First Amendment thus,

> embodies more than a commitment to free expression…it has a *structural* role to play in securing and fostering our republican system of self-government…. Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. *Id.* at 587 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).(emphasis in original)

[21] *Accord Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907); *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064, 1076 (3d Cir. 1990); *NAACP v. Button*, 371 U.S. 415, 429-30 (1963); *see also* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557 (1999) (finding historical, textual, and policy support for reading the First Amendment to include a right of access to the courts).

[22] *Accord Globe Newspaper Co.*, 457 U.S. at 604-605; *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *see also Thornhill v. Alabama*, 310 U.S. 88, 95-96 (1940).

It protects the "conditions of meaningful communication" by prohibiting the government "from limiting the stock of information from which members of the public may draw." *Id.* at 588, 576; *accord Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). For court records, the test is "whether the place and process have 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." *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8-10 (1986). The courts include witness testimony, voir dire, preliminary hearings, bail pleas, sentencing hearings, and criminal and civil trials. *Id.* at 10-15; *Press-Enterprise I*, 464 U.S. 505-510; *Globe Newspaper Co.*, 457 U.S. at 603-06.

Search warrant proceedings, like those undertaken by FISC, are "necessarily ex parte, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove the evidence." *Franks v. Delaware*, 438 U.S. 154, 169, (1978); *accord United States v. U.S. District Court*, 407 U.S. at 297, 321 (1972). The circuits are split on search warrant affidavits. *Compare In re Search Warrant for Secretarial Area*, 855 F.2d 569, 572-75 (8th Cir. 1988), *with Times Mirror Co. v. Copley Press, Inc.*, 873 F.2d 1210, 1213-19, *amended on reh'g*, (9th Cir. 1989).

What is being sought here, however, are not orders and applications. Movants are seeking access to opinions. In assessing the historical record for a "tradition of open[ness]," the Courts do "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 Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (quoting *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)) (emphasis added). In a system built on rule of law and common law tradition, opinions are absolutely a matter of public record. FISC's practice reflects this, with sixty opinions now public. App. A. The motion before the Court also passes the logic test of *Press-Enterprise I*, wherein certain procedures and records can be closed from public inspection, when it is narrowly tailored to serve a higher interest, such as justice or fairness. *Press-Enterprise 1*, 464 U.S. at 510. In this case, justice *requires* access to the law:

> The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute. *Banks v. Manchester*, 128 U.S. at 253.

IV. Failure to recognize Movant's right of access would undermine rule of law.

In 1989 Justice Scalia noted, "In a judicial system such as ours, in which judges are bound not only by the text of code or Constitution, but also by the prior decisions of superior courts…courts have the capacity to 'make' law." Antonin Scalia, *The Rule of Law is the Law of Rules*, 56 U. Chi. L. Rev. 1175, 1175-81 (1989). The four opinions being sought constitute law.

For millennia, access to the law has been the hallmark of rule of law. As developed in the writing of Aristotle, Cicero and St. Augustine, *lex iniusta lex non est.* Thomas Aquinas, *Summa Theologiae*, I-II, Q. 96, Art. 4 (Fathers of the Eng. Dominican

Province trans., 1947). To be morally binding, law must be promulgated. *Id.* Early liberal, democratic theorists adapted the concept of natural law to political obedience. Where the government ceases to protect individuals in their lives, liberties, and estates, and each person, in their own conscience, satisfied that the conditions are met, then individuals have not just the right but the duty to rebel. John Locke, *Second Treatise of Government* (Richard Cox ed. 1982) (1690). Deciding whether to obey requires knowing how the government wields its power, which acts as the most important constraint on government. As Jeremy Bentham explained,

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance. 1 Jeremy Bentham, *Rationale of Judicial Evidence* 524 (London, Hunt and Clar 1827).

Nearly every modern jurisprudence theorist follows suit. John Rawls considers publicity to be a formal constraint. John Rawls, *A Theory of Justice* 130, 133 (1971). John Finnis states that the justness of a law depends upon whether the law itself has been made publicly available. John Finnis, *Natural Law and Natural Rights* 351-68 (2d ed. 2011). H.L.A. Hart's famous "rule of recognition" requires that citizens and officials know what the law is and how it is being implemented. H.L.A. Hart, *The Concept of Law* 91 (1994). Lon Fuller's eight principles, which define law, include, inter alia, the requirement that rules be widely promulgated to ensure that society knows their remit. Lon Fuller, *The Morality of Law* 39, 47 (1964). He emphasizes the

importance of consistency between the law as written and applied, an issue of great moment in FISC's interpretation of statutory language. For Fuller, a failure to meet the requirements does not simply result in a bad system of law. It "results in something that is not properly called a legal system at all." *Id.*

Access to judicial opinions also deepens faith in the judiciary. Justice must not just be done, but be seen to be done. *Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring and dissenting); *Offutt v. United States*, 348 U.S. 11 (1954). The Court has long recognized the "nexus between openness, fairness, and the perception of fairness." *Richmond Newspapers Inc.*, 448 U.S. at 570. Courts need not be infallible; however, it is difficult for people "to accept what they are prohibited from observing." *Id.* at 573. As the Third Circuit recognized:

> Public confidence [in the judiciary] cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view. *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978).

Access educates the public and builds faith in the courts. John Wigmore put it well:

> Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy. 6 John H. Wigmore, *Evidence* § 1834 (James H. Chadbourn ed., 1976); *see also* 1 Bentham, *supra*, at 525.

FISC plays a critical role in the balance of power.[23] It is in the Court's best interests for the public to *see* it does so and that it respects the longstanding Article III norm of public access to the law.

V. Failure to find standing would enable executive branch malfeasance and override separation of powers.

The government asserts the authority, acknowledged by Court, "to classify and control access to information bearing on national security." *Dep't of the Navy v. Eagan*, 484 U.S. 518, 527 (1988), *quoted* and *cited in* U.S. Resp. to Movant's En Banc Opening Br., at *5; *accord CIA v. Sims*, 471 U.S. 159, 170 (1985). It finds root in the vesting and commander-in-chief clauses. U.S. Const. art. II, §1(1); *Id.* §2(1); Exec. Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009). In national security, *certain factual* information must remain protected. But the government then makes a light-year leap to say that this authority gives it the power to prevent the Court from publishing its opinions on matters of law. Such brazen ipse dixit carries enormous risk.

Should the government prevail, it could engage in secret interpretations of the law that contravene the public will. One need not look far for examples. For years, the telephony metadata program operated in secret. When it became public, it generated a backlash in all three branches. On August 12, 2013, President Obama responded to

[23] *See, e.g.*, Opinion and Order, *[REDACTED]*, Nos. [REDACTED] (FISA Ct. May 13, 2011) (directing the Government to destroy information obtained by unauthorized electronic surveillance) (App. G 677).

the outcry by constituting a Review Group.[24] The group sharply criticized the telephony metadata program and recommended its immediate cessation. Review Grp. on Intelligence & Commc'ns Techs., *Liberty and Security in a Changing World* 17, 88 (2013). The Privacy and Civil Liberties Board (PCLOB), an institution floundering since its creation, took form. *See* Implementing Recommendations of the 9/11 Commissions Act of 2007, Pub. L. No. 110-53, 121 Stat. 266. It held hearings, received public input, and issued its first report in which it found "that the telephone records program fails to comply with Section 215." PCLOB, Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court, Jan. 23, 2014, at 10 (2014). PCLOB determined that the program was illegal. *Id.* It recommended the end of bulk collection. *Id.* at 16. In the courts, the Second Circuit referred to the government's interpretation of Section 215 as "unprecedented and unwarranted," holding the program unlawful. *ACLU v. Clapper*, 785 F.3d 787, 812 (2d Cir. 2015). Numerous suits raised Fourth Amendment challenges.[25] One Court granted a preliminary injunction to enjoin collection and query of plaintiff's telephony metadata. *Klayman*

[24] *Presidential Memorandum—Reviewing Our Global Signals Intelligence Collection and Communications Technologies*, White House. (Aug. 12, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/08/12/presidential-memorandum-reviewing-our-global-signals-intelligence-collec.

[25] *See Smith v. Obama*, 24 F. Supp. 3d 1005 (D. Idaho 2014); 959 F. Supp. 2d 724; *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013); *U.S. v. Moalin*, No. 10cr4246 JM, 2013 WL 6079518 (S.D. Cal. Nov. 18, 2013).

v. Obama, 142 F. Supp. 3d 172 (2015). Congress, for its part, held hearings and passed a new law, outlawing bulk collection under section 215 *and* PR/TT. Uniting and Strengthening America By Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015, Pub. L. No. 114-23, §§ 103, 201, 129 Stat. 268, 272, 277 (2015). Congress required FISC to appoint amici curiae "to assist…in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law." *Id.* §401. It directed that the Court designate individuals with "expertise in privacy and civil liberties." *Id.* The fact that FISC already knew about the program mattered little. It was public access and the disapproval of the People, that drove reform.

Should the government prevail, it would increase the risk of the executive acting badly. FISC opinions show repeated noncompliance. The government could use classification to prevent *any* judicial decision from reaching light of day, potentially hiding even gross violations of law. It could use section 215 powers to build social networks or to target political opponents, yet the electorate would remain ignorant.

The government's failure to acknowledge any limiting principle to its claim further threatens separation of powers. *See* United States' Opp'n to the Mot. of the ACLU et al., for the Release of Court Records, at *4-6 (App. E 140). Judicial opinions belong to the courts. En Banc Op. at *16. Should the Court find for the government, Art. II would trump Article III in an area of core Article III powers. Congress rejects the same

argument the government is making. The Senate retains the right to declassify material when it determines that doing so would be in the public interest. S. Res. 400, 94th Cong. § 8(a) (1976). The Senate Select Committee on Intelligence can declassify witness names and make classified material available.[26] HPSCI considers matters of national defense and "[s]uch other concerns, constitutional or otherwise, as may affect the public interest of the United States." HPSCI Rule (f)(2)(A), (D). FISC, too, controls "its own records and files." *Nixon*, 435 U.S. at 598, *cited* and *quoted in* 526 F. Supp. 2d at 486). It cannot forego its constitutional responsibility to rule on law.

CONCLUSION

Movants have the right to make their case to the Court about the scope of their First Amendment right of access to judicial opinions. They have a legally-cognizable interest in access to the law, recognized by common law and the First Amendment. Rule of law requires access to the law. To hold otherwise would open the door to bad behavior, undermine judicial legitimacy, and harm separation of powers.

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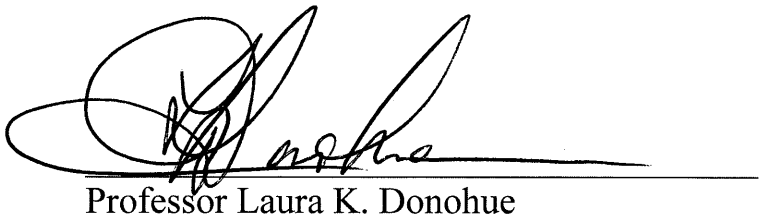
[26] Rules of Procedure of the Select Committee on Intelligence, 115th Cong., Rules 8.10, 9.5, 9.7; *see also* Rules of House of Representatives, 115th Cong., Rule X, 11(g)(1); Rules of Procedure for the Permanent Select Committee on Intelligence (HPSCI), U.S. House of Representatives, 115th Cong., Rules 6, 12-14, 12(a), 14(*l*).

CERTIFICATE OF COMPLIANCE

Pursuant to FISC Ct. Rev. R. P. 15(d)(1)-(2), undersigned certifies that this brief complies with (A) the content requirements of FISC Ct. Rev. R. P. 14(a)(2)-(8) and (10), with the exceptions noted in FISC Ct. Rev. R. P. 15(b)(A)-(C); and (B) the type-volume limitations referenced in FISC Ct. Rev. R. P. 9(c) and Fed. R. App. P. 29(d) and 32(a).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii), this brief includes 8,539 words.
2. This brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count of this word-processing system in preparing this certificate.



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Dated: Feb. 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February 2018, I provided one original and five copies of the amicus brief to Ms. LeeAnn Hall, Clerk of Court, Foreign Intelligence Surveillance Court of Review, who has informed me that the Litigation Security Group will deliver a copy of the brief to:

United States Department of Justice
National Security Division
950 Pennsylvania Ave., NW, Room 6150
Washington, D.C. 20530

I also sent one copy of the amicus brief via Federal Express to each of the following parties:

Media Freedom Information Access Clinic
Abrams Institute
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Knight First Amendment Institute at Columbia University
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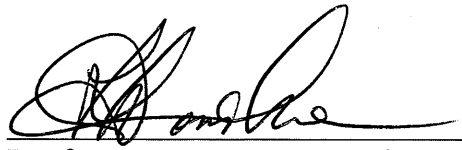

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