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

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

# THE UNITED STATES' RESPONSE BRIEF REGARDING SUBJECT MATTER JURISDICTION


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## INTRODUCTION

This Court possesses the full range of inherent powers of an Article III court, including powers "to punish contempt, to regulate admission to [practice before it], to discipline attorney misconduct, to dismiss lawsuits for failure to prosecute, and to enforce decorum in the courtroom." Movants' June 13, 2018 Brief at 4. But Article III inherent powers do not create subject matter jurisdiction over a suit by a third-party litigant asserting a broad request for records from prior cases. The relevant question is not one of power but of jurisdiction over the particular case or controversy brought by movants. "Only Congress may determine a lower federal court's subject-matter jurisdiction" over cases, *Greenlaw v. United States*, 554 U.S. 237, 257-58 (2008) (quotation marks omitted), and this jurisdiction "is not to be expanded by judicial decree," *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *accord Gunn v. Minton*, 568 U.S. 251, 256-58 (2013).

The Court must begin (as movants do not) with the "presum[ption] that a cause lies outside this limited jurisdiction." *Kokkonen*, 511 U.S. at 377. Here, there is no congressional authorization to rebut that presumption. Congress has assigned this specialized Court two categories of cases—adjudications of government applications and certifications regarding foreign intelligence collection authorized by the Foreign Intelligence Surveillance Act ("FISA"), and adjudications of certain challenges by recipients of FISA process—and movants' claims do not fall within either category. Moreover, this Court does not have ancillary subject-matter jurisdiction over this case because "[t]he facts to be determined" in this action "are quite separate from the facts" determined in earlier FISC proceedings, and adjudication of movants' claims is not "essential" to the conduct of the work assigned to this Court by Congress. *Id.* at 381. Statutory subject matter jurisdiction over claims seeking access to national security information

classified by the Executive Branch lies not in this Court, but in the U.S. District Court. *See* 28 U.S.C. § 1331; 5 U.S.C. § 552(a).

## BACKGROUND

In 1978, Congress enacted FISA, which provided for a judicial oversight and approval role regarding the government's collection of foreign intelligence. *See* S. Rep. No. 95-604, at 16 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3917 ("[T]he courts for the first time will ultimately rule on whether such foreign intelligence surveillance should occur."); *see also id.* at 7, 1978 U.S.C.C.A.N. at 3908 (FISA intended to strike "a fair and just balance between protection of national security and protection of personal liberties"). To undertake this important task, Congress created two highly specialized courts: this Court (the "FISC") and the Foreign Intelligence Surveillance Court of Review (the "Court of Review"). Congress deemed "consolidation of judicial authority in a special court" to be necessary due to "[t]he need to preserve secrecy for sensitive counterintelligence sources and methods." S. Rep. No. 95-701, at 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 3980.[1]

Congress was, of course, "well aware of the importance of secrecy in the intelligence field." *CIA v. Sims*, 471 U.S. 159, 172 (1985); *accord id.* at 172 n.16 ("Secrecy is inherently a key to successful intelligence operations."). By the time Congress created this Court, Congress

[1] An earlier version of the bill that would become FISA would have empowered select district judges to adjudicate FISA applications, but Congress instead decided to create "a special court [sitting] continuously in the District of Columbia." S. Rep. No. 95-604, at 48 (1977). Congress created this Court "upon the recommendation of the General Counsel of the Administrative Office of the U.S. Courts." *Id.* at 47-48 & n.28. In testimony before the Senate, the General Counsel explained that judges on this new Court "would be chosen with discretion" and "could be relied upon to maintain the security of intelligence." *Foreign Intelligence Electronic Surveillance: Hearing on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the H. Permanent Select Comm. on Intelligence*, 95th Cong. 74 (1978) (statement of Carl H. Imlay).

had for years "simply and pointedly protected [from disclosure] all sources of intelligence that provide, or are engaged to provide, information the [Intelligence Community] needs to perform its statutory duties with respect to foreign intelligence." *Id.* at 169-70; *see also id.* at 170 (observing that the reasons "to protect the secrecy and integrity of the intelligence process . . . are too obvious to call for enlarged discussion"). Congress created this Court to allow adjudication of certain FISA issues without endangering the secrecy of that national security information.

To ensure the protection of classified national defense and intelligence information, Congress provided that the Court's files, including its orders, "shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General" and the nation's top intelligence official, originally the Director of Central Intelligence and now the Director of National Intelligence. 50 U.S.C. § 1803(c). The currently applicable Security Procedures were issued by Chief Justice Roberts on February 21, 2013. *See 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* (Feb. 21, 2013). They provide for both the Court's judges and its staff to undergo appropriate FBI background checks "under applicable Executive Branch standards for investigations performed in support of determinations of eligibility for access to sensitive compartmented information or other classified national security information," *id.* ¶¶ 3, 4, and that "[m]embers of the [C]ourt and [C]ourt personnel shall be briefed on security measures appropriate to the functions of the [C]ourt by designees of the Attorney General and the Director of National Intelligence," *id.* ¶ 9. The Security Procedures further require 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," *id.* ¶ 7.

Consistent with the statutorily-required Security Procedures imposed by the Chief Justice, this Court has promulgated rules that provide that, "[i]n all matters, the Court and its staff shall comply with the security measures established pursuant to [FISA], as well as Executive Order 13526, 'Classified National Security Information' (or its successor)." FISC Rule of Procedure 3. The rules permit an order, opinion, or other decision to be published only upon the direction of the Presiding Judge, which shall issue only in response to a request from the judge who authored the decision or a party to the proceeding that produced the decision, and only after any Executive Branch review that may be "necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor)." FISC Rule of Procedure 62(a).

Given the special nature of this Court and the secrecy that necessarily surrounds its proceedings, Congress limited this Court's jurisdiction to two classes of cases in which secrecy is essential to the protection of national security. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 487 (FISA Ct. 2007) ("The FISC is a unique court. Its entire docket relates to the collection of foreign intelligence by the federal government."). Despite Congress's careful design, in recent years, this Court's docket has swollen to include a new category of cases in which it is being asked by private parties to adjudicate "request[s] for the release of records." *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, Misc. No. 08-01, 2008 WL 9487946, at *2 (FISA Ct. Aug. 27, 2008). By the government's count, there have been eight such record-request cases filed in this court, five of which are currently pending:

| Case | Records Requested | Claimed Basis | Outcome |
|---|---|---|---|
| Misc. No. 07-01 | Court orders and government pleadings regarding the President's Surveillance Program | First Amendment Common Law | Denied[2] |
| Misc. No. 08-01 | legal briefs and Court opinions regarding FISA § 702 | First Amendment | Denied[3] |
| Misc. No. 13-02 | "opinions evaluating the meaning, scope, and constitutionality of Section 215 of the Patriot Act" | First Amendment FISC Rule 62 | Granted in Part[4] |
| Misc. No. 13-08 | "opinions addressing the legal basis for the 'bulk collection' of data" | First Amendment FISC Rule 62 | Pending |
| Misc. No. 13-09 | a "specific opinion or opinions . . . referenced on" specified pages of a 2013 opinion | First Amendment Supervisory Powers | Pending |
| Misc. No. 16-01 | "opinions and orders containing novel or significant interpretations of law issued between September 11, 2001 and . . . June 2, 2015" | First Amendment FISC Rule 62 | Pending |
| Misc. No. 18-01 | "orders authorizing surveillance of Carter Page" | FISC Rule 62 | Pending |
| Misc. No. 18-02 | "disposition of any . . . proceeding to review whether the Justice Department committed misconduct" related to a FISA application referenced in a congressional memorandum | Inherent Authority | Pending |

The instant case, No. 13-08, is the fourth on the above chart. In it, movants seek "opinions addressing the legal basis for the 'bulk collection' of data" by the government pursuant to FISA. Motion, Misc. No. 13-08, at 1 (Nov. 6, 2013). As the Court is aware, there are four

[2] *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007).

[3] *See In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, Misc. No. 08-01, 2008 WL 9487946 (FISA Ct. Aug. 27, 2008).

[4] *See In re Orders of this Court Interpreting Section 215 of the Patriot Act*, Misc. No. 13-02, 2014 WL 5442058 (FISA Ct. Aug. 7, 2014); *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, Misc. No. 13-02, 2013 WL 5460064 (FISA Ct. Sept. 13, 2013).

responsive documents. All four were publicly released in 2013, with classified information redacted, two by the Court and two by the government.

Movants seek to consolidate this case with Misc. No. 16-01 in which they seek all "opinions and orders containing novel or significant interpretations of law issued between September 11, 2001 and . . . June 2, 2015." Motion, Misc. No. 16-01, at 1 (Oct. 18, 2016). In contrast to this case, where the four responsive records have been released, the number of records responsive to the request in Misc. No. 16-01 is unknown, although the government estimates it to be at least 80.[5] *See generally infra* note 13.

In each case, "Movants want [the Court] to rule that they have a 'right' of access to the information classified by the Executive Branch and that Executive Branch agencies must defend each redaction in the face of Movants' challenges." *In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, Misc. No. 13-08, 2017 WL 5983865, at *9 (FISA Ct. Nov. 9, 2017) (en banc) (Collyer, P.J., dissenting). Movants rely on the First Amendment right of access described by the Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), and this Court's Rule of Procedure 62(a), described above.

[5] Because of the different postures of the two cases, the government submits that consolidation is not appropriate at this time. Rather, the most efficient way to proceed would be to litigate Misc. No. 13-08 to completion and then apply its holdings to other pending cases as applicable.

## ARGUMENT

### I. This Court Lacks Subject Matter Jurisdiction over This Case

Subject matter jurisdiction is distinct from judicial power. While "the judicial power of the United States" is vested in the courts by Article III of the Constitution, the scope of an inferior Article III court's subject matter jurisdiction is entirely within the control of Congress.[6] Congress possesses "the sole power of creating the tribunals (inferior to the Supreme Court) and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (quoting *Cary v. Curtis*, 44 U.S. 236, 245 (1845)). That this Court has *power* regarding its records says nothing about whether it has *jurisdiction* over the claims brought by movants in this case. The latter question is determined based on a review of "the relevant jurisdictional statutes." *Id.*

This Court's subject matter jurisdiction is set forth in FISA. Congress has assigned the Court two related categories of cases: (1) adjudications of certain applications and certifications related to the collection of foreign intelligence that may be filed by the government, *see* 50 U.S.C. §§ 1804, 1823, 1842, 1861, 1881b, 1881c, 1881d, and (2) adjudications of certain claims brought by recipients of FISA process concerning that process, *see* 50 U.S.C. §§ 1861(f), 1881a. Nowhere does FISA (or any other statute) provide this Court with subject matter jurisdiction over legal claims brought by non-recipients of FISA process seeking records or, for that matter, over any legal claims brought by private parties who have not received FISA process. Indeed, even the targets of electronic surveillance authorized by this Court, as well as other aggrieved

[6] It is undisputed that "the FISC is an inferior federal court established by Congress under Article III." *In re Motion for Release*, 526 F. Supp. 2d at 486.

persons, can challenge that surveillance only in a "United States district court." 50 U.S.C. § 1806(f).

As movants do not dispute, 50 U.S.C. § 1803(g)(1) does not provide subject matter jurisdiction. That provision sets forth, but is not intended to expand or diminish, this Court's inherent powers to establish rules and procedures and to "take such actions, as are reasonably necessary to administer [its] responsibilities under [FISA]." *Id.* This provision was added in 2006 as part of a larger section entitled "Enhanced Congressional Oversight." *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 109, 120 Stat. 192, 205 (2006). The statement of the Court's authority to promulgate rules and procedures (an authority that the Court clearly had prior to the enactment of the 2006 Act)[7] served as a reference for the following provision, which required the rules and procedures to "be recorded" and "transmitted" to certain congressional committees. *See id.*; H.R. Rep. No. 109-333, at 93 (2005) (Conf. Rep.) ("Section 109 of the conference report . . . requires . . . the FISA court to publish its rules."). Section 1803(g)(1) provides only for powers "necessary to administer" the responsibilities vested in the Court by other provisions of FISA. It does not create subject matter jurisdiction over a new class of cases involving private parties who do not claim to have received FISA process. Indeed, neither movants nor amicus contend that this case falls within any statutory provision providing subject matter jurisdiction to this Court.

Apart from explicit statutory authorization, the only basis on which an Article III court (other than the Supreme Court) may exercise subject matter jurisdiction is the narrow doctrine of

[7] The 2006 Act was signed into law on March 9, 2006. This Court published its (since-superseded) rules on February 17, 2006, after the 2006 Act had passed the House of Representatives but before it had passed the Senate. This Court published (also since-superseded) Procedures for Review of Petitions Filed Pursuant to Section 501(f) of FISA on May 5, 2006.

ancillary jurisdiction. *See Kokkonen*, 511 U.S. at 379-80 (reversing district court order based on "inherent power" because case was outside district court's subject matter jurisdiction). Ancillary jurisdiction exists only "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent" or "(2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* The former allows overlapping claims, such as state and federal causes of action based on the same events, to be adjudicated together, while the latter applies only when jurisdiction is "essential to the conduct of federal-court business," *id.* at 381, and permits, for example, contempt proceedings relating to conduct before the court, *id.* at 380.

The claims brought by movants are not at all factually interdependent with the FISC's earlier cases considering whether FISA process should be authorized. It is not apparent that any fact-finding at all is necessary in this action, and any such fact-finding would not be the type the FISC ordinarily engages in, such as determining whether there is probable cause to believe a target is an agent of a foreign power or a facility is used by a target. Nor is the adjudication of this case or similar cases essential to the proper functioning of the FISC or the effectuation of its orders. To the contrary, the adjudication sought here "is quite remote from what [the FISC] require[s] in order to perform [its] functions." *Id.* at 380.[8]

[8] This Court does have ancillary jurisdiction over certain cases, unlike this one, that concern application of its own orders. For example, this Court had jurisdiction over several actions brought by internet service providers in 2013 that sought clarification and/or alteration of orders issued by this Court. *See* Misc. Nos. 13-03, 13-04, 13-05, 13-06, & 13-07. In the government's view, a similar case filed by Twitter, Inc. in the Northern District of California should be adjudicated in this Court since it involves interpretation of and/or a challenge to nondisclosure provisions in FISA orders and directives that Twitter may have received. *See* Def's Mot. to Dismiss Am. Compl. at 10-16, *Twitter v. Sessions*, No. 14-cv-4480-YGR (N.D. Cal. Jan. 15, 2016), ECF No. 94. The district court disagreed with the government's suggestion that the doctrine of comity applied, holding that Twitter's claims do not call on that court "to interpret, review, or grant relief from any particular FISC order or directive." *Twitter v.*

Movants rely on only two cases discussing ancillary jurisdiction, and they have no application here. Both involve parties that alleged that their legal rights were about to be violated by unlawful disclosures of information in ongoing government enforcement actions pending in district court. *See United States v. Hubbard*, 650 F.2d 293, 307 (D.C. Cir. 1980) (owner of "seized property," which in that case was private papers, could bring a claim to prevent the court from publicizing those papers); *In re Sealed Case*, 237 F.3d 657, 664 (D.C. Cir. 2001) (targets of Federal Election Commission investigation could bring claim to prevent court from unsealing their identities in violation of statute). Neither of those cases involved a request for documents from other cases; they concerned the district courts' imminent unlawful disclosure of private, protected information in ongoing judicial proceedings.

The cases that movants cite that address records-request claims also provide no support to movants here. The basis for subject matter jurisdiction in those cases, brought in district courts, is no mystery. In such a case, the district court has "federal-question jurisdiction under 28 U.S.C. § 1331 because [the case] is an action 'arising under the Constitution, laws, or treaties of the United States.'" *Carlson v. United States*, 837 F.3d 753, 761 (7th Cir. 2016). Unlike district courts, however, this Court has not been granted Section 1331 federal question jurisdiction. *See* 28 U.S.C. § 1331.

Movants are left with several cases from non-Article III bankruptcy courts applying "Rule 2018(a) of the Federal Rules of Bankruptcy Procedure" to the question whether a third-party may intervene in a bankruptcy proceeding to challenge a bankruptcy court's sealing or protective orders. *In re Alterra Healthcare Corp.*, 353 B.R. 66, 70 (Bankr. D. Del. 2006); *see*

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*Holder*, 183 F. Supp. 3d 1007, 1013 (N.D. Cal. 2016). That case remains in litigation before the district court.

*also In re Bennett Funding Group, Inc.*, 226 B.R. 331 (Bankr. N.D.N.Y. 1998); *In re J. Fife Symington, III*, 209 B.R. 678 (Bankr. D. Md. 1997). Those cases have no application in this Court where the Federal Rules of Bankruptcy Procedure do not apply. In the FISC, third parties have no right to intervene, *see In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, 2008 WL 9487946, at *4-5, and the orders and opinions at issue here are not under any court sealing or protective order, *see In re Motion for Consent to Disclosure of Court Records*, Misc. No. 13-01, 2013 WL 5460051, at *3-4 (FISA Ct. June 12, 2013). Moreover, unlike the ACLU motion that was rejected by this court in 2008 in *In re Proceedings*, movants' present motions do not remotely resemble a motion to intervene. No court would allow simultaneous intervention in all cases "addressing the legal basis for the 'bulk collection' of data," let alone all cases in which the court has issued an opinion or order "containing novel or significant interpretations of law" during a 14-year period. These are not efforts to intervene in an extant case; they are broad requests for records that seek to challenge the government's classification decisions.

A case that "is more than just a continuation or renewal of" an earlier case "requires its own basis for jurisdiction." *Kokkonen*, 511 U.S. at 378. There is no such jurisdictional basis for the records-request claims movants seek to bring in this Court. This Court should decline movants' invitation to "expand its jurisdiction" contrary to "statutory provisions that limit its jurisdiction to a specialized area of national concern, and the evident congressional mandate that the Court conduct its proceedings *ex parte* and in accord with prescribed security procedures." *In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, 2017 WL 5983865, at 21 (Collyer, P.J., dissenting).

## II. The Exercise of This Court's Inherent Power over Its Records Neither Requires Nor Permits the Court To Assume Jurisdiction over Cases Brought by Third Parties

Movants' principal argument and amicus's entire argument are premised on this Court's inherent supervisory power over its records, including opinions and orders. That power must be exercised in a manner that is consistent with the Executive Branch's constitutional power to control access to national security information,[9] Congress's intent that this Court operate in a secure manner to protect classified information, and the statutorily required Security Procedures promulgated by the Chief Justice.[10] In the 40 years since this Court was created, it has unfailingly exercised its inherent powers in a manner consistent with Congress's decision to protect sensitive intelligence, the Executive Branch's constitutional power and responsibility to protect national security information, and the requirements imposed by the Chief Justice. This case thus does not involve any conflict between the branches.

The statutory provisions of FISA, the Security Procedures issued by the Chief Justice, and the Court's own rules provide "a comprehensive scheme for the safeguarding and handling of FISC proceedings and records." *In re Motion for Release of Court Records*, 526 F. Supp. 2d

[9] The Executive Branch shares classified national security information with courts and Congress as appropriate to facilitate those branches' exercises of their respective constitutional responsibilities. This does not place the information outside the scope of the Executive Branch's protection. *See In re Motion for Release*, 526 F. Supp. 2d at 496 (observing that "the proper functioning of the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification to a heightened form of judicial review"). Indeed, such a rule would create a "chilling effect" that would interfere with all three branches' ability to exercise their constitutional functions in a manner consistent with national security. *Id.*

[10] *See, e.g.*, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, Misc. No. 13-08, 2017 WL 427591, at *14 (FISA Ct. Jan. 25, 2017) (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988)), *vacated on other grounds*, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017) (en banc), *aff'd*, 2018 WL 2709456 (FISA Ct. Rev. Mar. 16, 2018).

484, 488 (FISA Ct. 2007). Under both the Security Procedures and the Court's Rules of Procedure, this Court does not release information classified by the Executive Branch. Security Procedures ¶ 7 (requiring that "all court records" be "maintained according to applicable Executive Branch security standards"); FISC Rule of Procedure 3 (requiring that in "all matters, the Court and its staff shall comply with . . . Executive Order 13526," or its successor). These requirements, imposed by the judicial branch (the Chief Justice and this Court), represent a decision to exercise the Court's powers over its records in an appropriate manner consistent with the national security concerns that led Congress to create this specialized Court.

The Court's procedures for publishing its decisions are consistent with this practice. *See* FISC Rule of Procedure 62(a). By the terms of the Court's rules, that process can be commenced only by the judge who authored the decision or a party to the case in which the decision was issued. *Id.*; *see also In re Orders of this Court Interpreting Section 215 of the Patriot Act*, Misc. No. 13-02, 2013 WL 5460064, at *5 (FISA Ct. Sept. 13, 2013) (holding that "the term 'party' in Rule 62(a) refers to a party to the proceeding that resulted in the 'opinion, order, or other decision' being considered for publication").[11] And publication can only occur upon direction of the Presiding Judge after consultation with the other judges on the Court. FISC Rule of Procedure 62(a). Where a decision contains classified information, the Court may direct

[11] Although the Court correctly construed the term "party," the government respectfully submits that the Court misapplied Rule 62(a) in *In re Orders of this Court Interpreting Section 215*. The ruling in that case was not *sua sponte*, as it was based on the suggestion of movants who were not parties to the underlying decision that was ultimately released. And the judge who presided in *In re Orders of this Court Interpreting Section 215* was not the judge who authored the earlier decision. The Court justified its departures from the rule's commands based on "extraordinary circumstances." 2013 WL 5460064, at *5. However extraordinary the circumstances may have been at that time, cases such as the one at bar have since become all too ordinary in this Court.

the Executive Branch to "redact it as necessary to ensure the properly classified information is appropriately protected pursuant" to Executive Order. *Id.* In short, this Court does not release information that has been classified by the Executive Branch.[12]

If the Court has the inherent power to make material public, it has the concomitant power to protect material from public release where, as here, there is a strong public interest in doing so. *Cf. Amicus* Br. 19-20 (discussing *Houston v. Williams*, 13 Cal. 24, 25 (1859)). For 40 years, the Court has exercised these powers without any conflict with the Executive. The Court's inherent powers provide no basis for subject matter jurisdiction over the claims asserted by movants.

## III. The Proper Way for Movants To Assert Any Claimed Legal Entitlement to the Withheld Classified Material Is Through a Suit Against Relevant Government Agencies in District Court

While movants nominally direct their ire at the Court for failing to release to the public classified national security information, the Court has merely exercised its administrative powers in a manner consistent with Congress's mandate for confidentiality and the Executive Branch's constitutional power to protect national security. Movants' actual dispute is with the Executive Branch, whose decisions to classify the material sought are directly and solely responsible for movants' inability to access the material. Movants may put that dispute to judicial adjudication in a suit against the appropriate government agencies in district court.

[12] To the extent that Congress has mandated transparency regarding FISC opinions, it has directed that the government, not the FISC, redact and release opinions, and it has not created a cause of action beyond that provided by FOIA. *See* 50 U.S.C. § 1872. The Director of National Intelligence's obligation to "make publicly available to the greatest extent practicable" FISC decisions was added in June 2015 and does not apply to FISC decisions issued prior to its enactment. *Electronic Privacy Info. Ctr. v. Dep't of Justice*, 296 F. Supp. 3d 109, 127 (D.D.C. 2017).

District courts have subject matter jurisdiction over federal-law claims, 28 U.S.C. § 1331, and Congress has created a cause of action that allows private parties to challenge withholdings based on classification in district court. *See* 5 U.S.C. § 552(a). It has been apparent that records-request cases in this Court (such as this one) are effectively thinly-veiled Freedom of Information Act ("FOIA") requests, since this Court rejected the ACLU's first such request by noting that "there would be no point in this Court's merely duplicating the judicial review that the ACLU, and anyone else, can obtain by submitting a FOIA request to the Department of Justice for these same records." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 496 n.32. Six years later, this Court *sua sponte* partially dismissed another records request case on the grounds that one of the movants was seeking some of the same FISC opinions in a FOIA case:

> The present motion thus asks the FISC to do the same thing that the ACLU is asking the District Court in New York to do in the FOIA litigation: ensure that the opinions are disclosed, with only properly classified information withheld. Having both courts proceed poses the risks of duplication of effort and inconsistent outcomes that the first-to-file rule is intended to avoid.

*In re Orders of this Court Interpreting Section 215 of the Patriot Act*, 2013 WL 5460064, at *7.[13] This Court should not duplicate the work of district courts, and it should not undertake to adjudicate issues that Congress has assigned to those courts.

Movants complain about the standard of review applied in FOIA cases, but the standard of review for judicial consideration of Executive Branch classification decisions results not from the text of FOIA, but from the Executive Branch's responsibility and competence for

[13] Misc. No. 16-01, which movants ask this Court to consolidate here, is similar to a FOIA case filed in April 2016 by the Electronic Frontier Foundation. *See Electronic Frontier Found. v. Dep't of Justice*, No. 4:16-cv-2041-HSG (N.D. Cal.). Over the subsequent two years, the parties negotiated a narrowed request (one that is somewhat narrower than movants' request in Misc. No. 16-01) that the government processed, finding 80 responsive opinions and orders. *See* Joint Status Report at 1, *Electronic Frontier Found. v. Dep't of Justice*, No. 4:16-cv-2041-HSG (N.D. Cal. June 7, 2018), ECF No. 62. The case remains in litigation.

safeguarding national security information. *Sims*, 471 U.S. at 179 ("The decisions of the [Executive], who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake."). It is the responsibility of the Executive Branch, "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" to national security. *Id.* at 180.

The government would characterize this standard, as the Supreme Court has, as one involving "great deference" to Executive judgments, *id.* at 179, while *amicus* describes it as "scrutinizing" the Executive's determinations, *Amicus* App. C 76. The important point, however, is that the appropriate standard (whether in a FOIA case or otherwise) should be applied in the appropriate forum, the district court. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 491 ("Under FISA and the applicable Security Procedures, there is no role for *this Court* independently to review, and potentially override, Executive Branch classification decisions.") (emphasis added).

## IV. Movants' Legal Claims Lack Merit

In any event, movants' First Amendment claim is meritless for reasons repeatedly explained by this Court. *See In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, Misc. No. 13-08, 2017 WL 427591, at *17-21 (FISA Ct. Jan. 25, 2017), *vacated on other grounds*, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017) (en banc), *aff'd*, 2018 WL 2709456 (FISA Ct. Rev. Mar. 16, 2018); *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, 2008 WL 9487946, at *3-4; Memorandum Opinion, *In re Motion for Release of Court Records*, Misc. No. 07-01, at 6-9 (FISA Ct. Feb. 8, 2008); *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 491-97. As is not disputed, to succeed on their First Amendment claim, movants would need to meet both

the experience and logic tests set forth in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). This Court has correctly and consistently found that neither test is met. The Court of Review's opinion in this case further reinforces both conclusions.

The Court of Review recognized that "the work of the FISC is different from that of other courts in important ways that bear on the First Amendment analysis." *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, FISCR No. 18-01, 2018 WL 2709456, at *1 (FISA Ct. Rev. Mar. 16, 2018). The nature of this "unique court['s]" work, "unlike the work of more conventional courts, requires that it be conducted in secret." *Id.* And "the orders of [the FISC], including orders that entail legal analysis, often contain highly sensitive information, the release of which could be damaging to national security." *Id.* (citing *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 487-90). In addition to "the highly sensitive nature of the work, 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." *Id.*; *accord In re Motion for Release of Court Records*, 526 F. Supp. 2d at 494-97. The Court of Review's analysis thus confirms what has long been plain—that there is no tradition of public access to this Court's proceedings, and it would not be logical for there to be such access. There are thus two independent reasons that movants' First Amendment claim lacks merit.

Movants' Rule 62(a) claim is similarly without merit. That provision provides no rights to movants because they are neither an authoring judge of this Court nor a party to any proceeding in which there is a (partially or entirely) classified opinion of this Court. *See* FISC Rule of Procedure 62(a). Moreover, publication pursuant to Rule 62(a) is discretionary, and it would not be an appropriate use of discretion to entertain movants' records request for classified

information both because of "the serious negative consequences that might ensue" from such review, and because of the alternative remedy "available to [movants] in a district court through a FOIA request to the Executive Branch." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 497.

## CONCLUSION

For the foregoing reasons, this case should be dismissed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served by the Government via Federal Express on this 11th day of July 2018, addressed to counsel of record below, and that, on the same day the foregoing was electronically mailed to ptoomey@aclu.org, bkaufman@aclu.org, and lkdonohue@georgetown.edu:

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