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The authors of this BNA Insight suggest that the secret nature of FISC opinions may be hindering the debate over how to balance liberty interests and national security. In particular, they look at the operation of the FISC, litigation seeking access to its opinions, proposals to increase its openness, and how those proposals create constitutional concerns. They also contend that while public focus has created some transparency, the court still has not recognized a constitutional right of access to its proceedings.

Developments in Judicial Transparency in National Security Cases: Public Access to FISC Opinions Places Separation of Powers Issues in Stark Relief





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Since leaks have brought to light some details of the previously secret scope of the U.S. government's data collection and surveillance activities, a robust debate has developed over whether the interests of liberty and security have been appropriately balanced. As President Obama stated, ''We're happy to have that debate.''[1] However, concerns have arisen that meaningful debate has been impaired because the decisions of the Foreign Intelligence Surveillance Court (the ''FISC''), on which the government says it has relied for legal justification of its intelligence programs, have been largely withheld from the public. As the Second Circuit has explained, quoting Alexander Hamilton in the Federalist Papers,

> Because the Constitution grants the judiciary ''neither force nor will, but merely judgment,'' courts must impede scrutiny of the exercise of that judgment only in the rarest of circumstances. This is especially so when a judicial decision accedes to the requests of a coordinate branch, lest ignorance of the basis for the decision cause the public to doubt that ''complete independence of the courts of justice [which] is peculiarly essential in a limited Constitution.''[2]

[1] *See* The White House, Statement by the President, June 7, 2013, *available at* http://1.usa.gov/12xerjF.

[2] *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) (quoting The Federalist No. 78 (Alexander Hamilton)).

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These exact concerns have arisen increasingly as public attention has focused on the fact that some of the most far-reaching and consequential constitutional decisions have been made out of public view, with only the government's[3] voice heard in the proceedings and the reasoning of the ultimate decisions often withheld from the public.

In the past several months, the Executive Branch and the FISC have declassified and released numerous previously withheld opinions,[4] but the opinions are often heavily redacted, and they frequently cite and rely for their analysis on other opinions that remain undisclosed. Although there is broad agreement that some classified information must be kept secret to ensure our national security, questions regarding who decides what should properly be kept secret – and the important role the FISC plays as a potential check on the Executive Branch's surveillance activities – persist. Members of Congress and advocacy groups have proposed changes to increase the transparency of the FISC, and groups are currently litigating in the FISC itself, urging the court to release its opinions as a matter of discretion and constitutional law.

A coalition of media entities, which includes Bloomberg L.P., has filed *amicus* briefs in that litigation to emphasize the importance of open access to records of government activity.

This summary provides a brief overview of the operations of the FISC, some of the proposals to increase the openness of its proceedings, and the potential constitutional problems those proposals may present, and explores issues that have arisen in the pending litigation seeking access to the court's opinions.

I. Background Issues

A. Background of the FISC.

The FISC was created pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1885c (''FISA''), to review government applications to conduct surveillance and engage in data collection for foreign intelligence purposes. The court comprises 11 district court judges from at least seven of the judicial circuits, three of whom must reside within 20 miles of Washington, D.C., where the court is located in a secure facility within the federal courthouse. The judges are selected by the Chief Justice of the Supreme Court to serve for up to seven years.[5] The Chief Justice also selects three judges from either district or circuit courts to serve as a FISA Court of Review, with jurisdiction to review denials of the government's applications.[6] Like applications for wiretaps and search warrants in district courts, proceedings are *ex parte*, with only the government appearing. Most submissions are classified and made under seal, as are most of the orders and opinions of the court.[7]

As the government's surveillance activities have expanded since the passage of the Patriot Act and the FISA Amendments Act of 2008, the FISC has been called upon to interpret FISA and assess the constitutionality of the government's proposed surveillance programs. As a result, significant constitutional decisions have been the product of secret, *ex parte* proceedings and the decisions themselves have remained secret.

B. Objections to Secret Ex Parte Judicial Decisions.

The need to keep classified national security information and the operational details of specific surveillance activities secret is clear, but maintaining judicial decisions regarding government surveillance programs behind a veil of secrecy has threatened to undermine public confidence in the credibility and accountability of courts as well as the Executive Branch. As the Supreme Court has observed, ''[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.''[8] In the context of assessing whether the public has a constitutional right to attend pretrial proceedings, Justice Blackmun, quoting the Third Circuit, explained that

> ''Secret hearings—though they be scrupulously fair in reality—are suspect by nature. Public confidence 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.'' The ability of the courts to administer the . . . laws depends in no small part on the confidence of the public in judicial remedies, and on respect for and acquaintance with the processes and deliberations of those courts. Anything that impairs the open nature of judicial proceedings threatens to undermine this confidence and to impede the ability of the courts to function.[9]

The closed-door nature of the FISC has already contributed to an erosion of public confidence in the fairness of the FISC and the FISA review process generally.[10] Many observers have pointed to statistics re-

[3] References to the ''government'' are to the Executive Branch, unless otherwise noted.

[4] *See* United States' Opposition to the Motion of the American Civil Liberties Union, et al., for the Release of Court Records, No. Misc. 13-08 (F.I.S.C. Dec. 6, 2013) at 2, *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-08-motion-131206.pdf (listing four key FISC opinions that were declassified and released September through November 2013).

[5] 50 U.S.C. § 1803(a)(1).

[6] 50 U.S.C. § 1803(b).

[7] *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 490 (F.I.S.C. 2007) (''The collective effect of these provisions is that applications, orders, and other records relating to electronic surveillance proceedings . . . shall, as a rule, be maintained in a secure and nonpublic fashion. It is this highly classified, and fundamentally secret, nature of FISC records that distinguishes them from the records of other courts.''). *See also generally* Letter from Hon. Reggie B. Walton, Presiding Judge of the FISC, to Senate Judiciary Committee (July 29, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/honorable-patrick-leahy.pdf (''Judge Walton July Letter'') (describing generally the day-to-day activities of the FISC).

[8] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

[9] *Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part and dissenting in part) (quoting *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)) (internal citations omitted).

[10] *See, e.g.*, Hon. James G. Carr, Op-Ed., *A Better Secret Court*, N.Y. Times, July 22, 2013 (''Recent disclosures about

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leased to Congress suggesting that the FISC approved government applications over 99 percent of the time, making it appear that the court is a mere ''rubber stamp'' for the Executive Branch's surveillance programs.[11]

Judges on the court have contested that characterization[12] and explained publicly that the 99 percent statistic is misleading because it looks only at final applications and therefore does not take into account the number of cases in which the court suggests modifications to a proposed application or the government withdraws an application entirely.[13] However, it is necessarily difficult to assess the court's characterizations of its activities without access to information about its docket and the reasoning of its opinions. Broad, out-of-court explanations have not satisfied the desire for transparency with respect to the court's actual legal analysis. Perhaps recognizing this reality, some of the court's judges have quietly expressed frustration that their opinions were not publicly available.[14]

Politicians from across the political spectrum have called for increased public access to the opinions and orders of the FISC that assessed the constitutionality of the government surveillance programs revealed in the Snowden leaks. For example, Sen. Ron Wyden (D-Ore.) said last October: ''The original legal interpretation that said that the Patriot Act could be used to collect Americans' records in bulk should never have been kept secret and should be declassified and released. . . . This collection has been ongoing for years and the public should be able to compare the legal interpretation under which it was originally authorized with more recent documents.''[15]

In a recent *amicus* brief filed in the FISC in support of applications to release the court's opinions, a bipartisan coalition of members of Congress argued that the secret nature of the FISC's opinions prevented Congress from being able to legislate effectively: ''Congress and the public cannot know how their laws operate in practice unless they have access to relevant information, such as court opinions, that interpret and construe those laws. Americans' need to know about this Court's actions has grown in tandem with the significance of the operations this Court approves.''[16] The *amicus* brief pointed out that some of the provisions of the Patriot Act that authorize the recently revealed surveillance programs are set to expire in 2015—particularly Section 215, the ''business records'' provision, which was the basis for the bulk telephone metadata collection program. As the brief argued, ''[w]hether and to what extent Congress will reauthorize Section 215 depends directly on Congress's—and its constituents'—knowledge about how Section 215 currently operates. . . . Without full access to this Court's opinions interpreting and construing the law, Congress and the public cannot have a meaningful reauthorization debate, frustrating Congress's constitutional responsibility to make rules for the Executive Branch of government.''[17]

Members of the public have also been frustrated by the lack of access to the court's legal analysis. As the American Civil Liberties Union (''ACLU''), for example, has argued,

> [t]he importance of public access to judicial opinions flows from two bedrock principles: (1) the public's right to know what the law is, as a condition of democratic governance; and (2) the founding recognition that, in our political system, it is ''emphatically the province and duty of the judicial department to say what the law is.'' *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Because courts determine what the law means—and therefore what the law

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vast data-gathering by the government have raised concerns about the legitimacy of the court's actions.''), *available at* http://nyti.ms/17A4iRf; Carol D. Leonnig, et al., *Secret-court judges upset at portrayal of 'collaboration' with government*, Wash. Post, June 30, 2013, at A1, *available at* http://wapo.st/17KTAeS (quoting a government official ''close to the court'' explaining that ''[t]he court is a neutral party, not a collaborator or arm of the government. . . . But the information out there now leaves people wondering how and why the court endorsed these programs.''); Editorial, *FISA Court Missing Checks and Balances*, Bloomberg, Jul. 9, 2013, http://www.bloombergview.com/articles/2013-07-09/fisa-court-missing-checks-and-balances; Editorial, *Bloomberg View: The Case for Oversight of the FISA Court*, Bloomberg Businessweek, Jul. 11, 2013, http://buswk.co/1awaKhh.

[11] *Leonnig*, supra note 10. *See also* Ezra Klein, Chief Justice Roberts Is Awesome Power Behind FISA Court, BloombergView, Jul. 2, 2013, http://www.bloombergview.com/articles/2013-07-02/chief-justice-roberts-is-awesome-power-behind-fisa-court (''Whether [the court] actually checks government surveillance power or acts as a rubber stamp is up to whichever FISA judge presides that day.'').

[12] *See id.*; *see also* John Shiffman & Kristina Cooke, *The Judges Who Preside Over America's Secret Court*, Reuters, June 21, 2013, *available at* http://reut.rs/19mopUi (statement by Presiding Judge Walton: ''The perception that the court is a rubber stamp is absolutely false. There is a rigorous review process of applications submitted by the executive branch, spearheaded initially by five judicial branch lawyers who are national security experts, and then by the judges, to ensure that the court's authorizations comport with what the applicable statutes authorize.'').

[13] *See* Judge Walton July Letter, *supra* note 7, at 3. In October 2013, Judge Walton submitted a follow-up letter reporting that, after a further review of the court's records, the percentage of matters that ultimately involved substantive changes was 24.4%. Letter from Hon. Reggie B. Walton, Presiding Judge of the FISC, to Senate Judiciary Committee (Oct. 11, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/chairman-leahy-letter-131011.pdf. *See also* Andrew Zajac, *Secret Court's Judge Says It Alters 24% of Data Requests*, Bloomberg, Oct. 15, 2013, http://bloom.bg/167XWfF.

[14] *See* Ellen Nakashima & Carol D. Leonnig, *Effort underway to declassify document that is legal foundation for NSA phone program*, Wash. Post, Oct. 12, 2013, *available at* http://wapo.st/19uPFzn (reporting that Judge Colleen Kollar-Kotelly, who authored the opinion most commentators have cited as the legal basis for the NSA's telephone surveillance program ''told associates this summer that she wanted her legal argument out,'' and that ''[s]everal members of the intelligence court want more transparency about the court's role to dispel what they consider a misperception that the court acted as rubber stamp for the administration's top-secret spying program.''); Charlie Savage, *Nation Will Gain by Discussing Surveillance, Expert Tells Privacy Board*, N.Y. Times, July 9, 2013 (quoting former FISC Judge James Robertson's criticisms of the closed, ex parte nature of FISC proceedings), *available at* http://nyti.ms/151AQSp.

[15] Nakashima & Leonnig, *supra* note 14.

[16] Brief of Amici Curiae U.S. Representatives Amash, et al., No. Misc. 13-02 (June 28, 2013), at 6, *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-brief-of-amici-curiae.pdf (''Congress Brief'').

[17] *Id.* at 13.

is—the societal need for access to judicial opinions is paramount.[18]

C. Reform Proposals and Separation of Powers.

To address public concerns about the lack of transparency of the FISC's operations, various parties in and out of the government have made proposals to reform the court's procedures. Because each branch of government can legitimately assert some authority to determine whether a particular FISA opinion should be released (and, if released, in what form), the proposals raise potential separation of powers questions that may be difficult to resolve. The judicial branch issues the opinions. Congress enacted the statutes authorizing the surveillance programs under review, regulating access to classified information, and granting the court its jurisdiction in the first place. And the Executive Branch is responsible for national security and maintaining the secrecy of classified information. In addition, what is sometimes called the fourth branch of government, the press, is tasked with keeping the citizenry informed about ''what the government is up to.'' *Department of Justice v. Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). Although a full analysis is beyond the scope of this overview, we review below some of the major proposals for reform and briefly highlight potential issues that may arise.

In the wake of the public controversy resulting from the Snowden revelations, President Obama appointed a panel to review and make recommendations regarding the government's surveillance activities. The panel's report – issued in December 2013 – included proposals to reform the operations of the FISC.[19] Among other recommendations – such as the creation of a ''Public Interest Advocate'' to ''represent privacy and civil liberties interests'' before the court to create more of an adversarial process – the panel recommended generally increasing the transparency of FISC decisions. The panel recognized the ''genuine need for confidentiality, especially when classified material is involved,'' but concluded that, ''in order to further the rule of law, FISC opinions or, when appropriate, redacted versions of FISC opinions, should be made public in a timely manner, unless secrecy of the opinion is essential to the effectiveness of a properly classified program.''[20] The panel did not make specific recommendations to achieve this end, instead urging the ''US government [to] re-examine the process by which decisions issued by the FISC . . . are reviewed for declassification and determine whether it ought to implement a more robust and regimented process of declassification of decisions to improve transparency.''[21]

Some in Congress have proposed legislation to mandate the release of FISC opinions in some form.[22] In February 2014, the Congressional Research Service (''CRS'') issued a report examining the separation of powers issues that would arise from such legislation.[23] The report explained that ''Congress and the President . . . share power over access to national security information. Congress enjoys power to regulate access to classified information; however, the President generally makes the specific determination about what particular information is classified.''[24] The report concluded that proposals mandating the release of FISA opinions that allow the executive branch to redact classified information before public release would likely pass constitutional muster. These proposals – like the Freedom of Information Act (''FOIA'') (with its various exemptions) – provide for disclosure, but allow the executive branch to protect sensitive information. However,

> a proposal that mandated all past FISA opinions be released in their entirety—without any redactions by the executive branch—might raise a separation of powers issue. The executive branch has historically enjoyed some protection from releasing properly classified information—via statutory exemptions and the common law. Legislation ignoring these protections would likely invite constitutional objections from the executive branch.[25]

The CRS report did not address separation of powers issues vis-à-vis the judicial branch. Judge John D. Bates, former presiding judge of the FISC, acting, at the Chief Justice's request, as a liaison for the judiciary on matters concerning FISA, wrote this past January to the Senate Select Committee on Intelligence to present comments from the judiciary in response to various proposals to reform the FISC, including the proposals of the President's panel.[26] The comments focus primarily on the practical difficulties that would result from many of the proposals, and the burdens the proposals would place on an already overworked court. As to proposals to make the FISC more transparent, because litigation is pending in the courts regarding declassification, the comments do not purport to address the substantive merits of the transparency proposals, but urge that two key points that should be kept in mind as the proposals are considered:

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[18] Motion of the American Civil Liberties Union, The American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic for the Release of Court Records, No. Misc. 13-08 (F.I.S.C. Nov. 7, 2013), at 16, *available at* http://www.uscourts.gov/uscourts/courts/fisc/aclu-misc-13-08.pdf (''Second ACLU Motion'').

[19] *See* Richard A. Clarke, et al., *Liberty and Security in a Changing World: Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies* (Dec. 12, 2013) (Recommendation Number 28: Reforming the FISA Court), *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.

[20] *Id.* at 207.

[21] *Id.* at 205-06.

[22] *See* Jared P. Cole, Congressional Research Service, *Disclosure of FISA Opinions—Select Legal Issues* (Feb. 24, 2014), *available at* http://www.fas.org/sgp/crs/secrecy/R43404.pdf (''CRS Report''), at 1 and n.9 (citing Ending Secret Law Act, H.R. 2475, 113th Cong. (2013); Ending Secret Law Act, S. 1130, 113th Cong. (2013); FISA Court in the Sunshine Act of 2013, H.R. 2440, 113th Cong. (2013); FISA Court Reform Act of 2013, S. 1467, 113th Cong. (2013)).

[23] *Id.*

[24] *Id.* at 15.

[25] *Id.*

[26] Letter from Hon. John D. Bates, Director, Administrative Office of the United States Courts, to Senate Select Committee on Intelligence (Jan. 13, 2014), *available at* http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=3bcc8fbc-d13c-4f95-8aa9-09887d6e90ed, and Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act (Jan. 10, 2014), *available at* http://www.judiciary.senate.gov/imo/media/doc/011413RecordSub-Grassley.pdf (''Judiciary Comments'').

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(1) Classification of information to protect national security has been considered an Executive Branch responsibility, and court review of classification decisions is typically deferential. ''[T]o the extent that the Courts may be assigned a new role in declassification and release of information, that role should accord with the constitutional allocation of functions in that sphere.''[27]

(2) There are ''practical limitations'' to what can be achieved by disclosure of opinions in a manner that would not harm national security:

> Significant FISC opinions frequently involve the application of law to a complex set of facts . . . . The government may often believe it necessary to withhold from the public details about how a surveillance [program] is conducted, so that valid intelligence targets are not given a lesson in how to evade it. But a redacted opinion that does not contain this factual information may merely recite statutory provisions or provide a partial discussion of how those provisions were applied, without the factual context necessary to understand the opinion's reasoning and result. In such cases, *partial releases of opinions run the risk of distorting, rather than illuminating, the reasoning and result of Court opinions*. That risk is probably even greater for summaries of opinions that are offered as public substitutes for withheld opinions, rather than as guides to opinions that are published.[28]

Notwithstanding these concerns, judges on the FISC have three times now, of their own accord, requested that the court release particular opinions that they authored, including most recently in April 2014.[29] Although the opinions that were ultimately released were heavily redacted, their release appears to have enhanced – and not hindered – public understanding of the court's legal analysis, and enriched debate on these issues.[30]

II. Litigating Access to FISC Opinions

In the months after the scope of the National Security Agency's (''NSA'') telephone and internet surveillance came to light, several organizations filed motions with the FISC asking the court to release the opinions that approved those surveillance programs, relying on the First Amendment and the FISC Rules of Procedure. Some of those same organizations have also filed FOIA requests seeking the copies of FISC opinions that are in the Executive Branch's possession.

On June 12, 2013, the ACLU and the Yale Law School Media Freedom and Information Access Clinic (the ''MFIAC'') moved for the release of FISC opinions ''evaluating the meaning, scope, and constitutionality of Section 215 of the Patriot Act.''[31] In November 2013, the same parties filed an additional motion after it had ''become clear that other critical opinions of [the FISC] approving the bulk collection of Americans' information remain secret.''[32] That same month, the nonprofit news organization, ProPublica, represented by the Electronic Frontier Foundation (''EFF''), moved for the publication of FISC opinions that ''appear to underlie the government's collection of telephone metadata.''[33]

This section of this overview reviews the framework for the court's assessment of these motions and the considerations that have been presented by the parties in the course of their arguments.

A. Framework for Analysis.

1. FISC Rules of Procedure.

The FISC's rules of procedure, which were amended in 2010, set forth specific procedures for the release of the court's opinions:

> Rule 62. Release of Court Records.
>
> (a) Publication of Opinions. The Judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).
>
> (b) Other Records. Except when an order, opinion, or other decision is published or provided to a party upon issuance, the Clerk may not release it, or other related record, without a Court order. Such records must be released in conformance with the security measures referenced in Rule 3.
>
> (c) Provision of Court Records to Congress.
>
> (1) By the Government. The government may provide copies of Court orders, opinions, decisions, or other Court records, to Congress, pursuant to 50 U.S.C. §§ 1871(a)(5), 1871(c), or 1881f(b)(l)(D), or any other statutory require-

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[27] Judiciary Comments at 14.

[28] *Id.* (emphasis added)

[29] *See In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 13-109 (F.I.S.C. Aug. 23, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-130823.pdf; *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR-13-158 (F.I.S.C. Oct. 11, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-158-memo-131018.pdf; *In re Application of Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 14-01 (F.I.S.C. Apr. 25, 2014), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Order%20Regarding%20Unsealing%20and%20Publication.pdf (ordering unsealing of, *inter alia*, Opinion and Order dated March 20, 2014).

[30] *See, e.g.*, Charlie Savage, *N.S.A. Plan to Log Calls Is Renewed by Court*, N.Y. Times, Oct. 18, 2013, *available at* http://nyti.ms/17T7xRH; Mike Masnick, *FISA Court Tries, Once Again, To Justify Allowing Bulk Collection Of Data On All Your Phone Calls*, Techdirt (Oct. 18, 2013), http://www.techdirt.com/articles/20131018/11412124927/fisa-court-tries-once-again-to-justify-allowing-bulk-collection-data-all-your-phone-calls.shtml; Charlie Savage, *Phone Company Bid to Keep Data From N.S.A. Is Rejected*, N.Y. Times, Apr. 25, 2014, *available at* http://nyti.ms/1tMjC9D; Chris Strohm, *Phone Company Denied in Court Challenge Over Giving NSA Records*, Bloomberg Businessweek, Apr. 26, 2014, http://buswk.co/QKC7vZ.

[31] *See* Motion of the American Civil Liberties Union, The American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic for the Release of Court Records, No. Misc. 13-02 (F.I.S.C. June 12, 2013), at 1, *available at* http://www.uscourts.gov/uscourts/courts/fisc/aclu-misc-13-02.pdf (''First ACLU Motion'').

[32] Second ACLU Motion at 2.

[33] Motion of ProPublica, Inc. for the Release of Court Records, No. Misc. 13-09 (F.I.S.C. Nov. 12, 2013) at 1, *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-motion-131112.pdf (''ProPublica Motion'').

ment, without prior motion to and order by the Court. The government, however, must contemporaneously notify the Court in writing whenever it provides copies of Court records to Congress and must include in the notice a list of the documents provided.

(2) By the Court. The Presiding Judge may provide copies of Court orders, opinions, decisions, or other Court records to Congress. Such disclosures must be made in conformance with the security measures referenced in Rule 3.[34]

This rule notably does not bar the court from releasing its opinions without seeking the approval of the Executive Branch. The judge who authored an opinion may request that it be published, and the presiding judge – in consultation with the other judges on the court – may then direct that the opinion be published. The court ''may, as appropriate, direct the Executive Branch'' to review and redact the document as necessary to prevent the release of classified information, but the rule does not require the court to give the government that opportunity.[35]

The FISC has consistently rejected arguments by the government that the rules limit its ability to entertain applications to release its records and opinions. For example, the court has rejected arguments that Rule 62 would bar the court from hearing a motion made by a non-party (who nevertheless had Article III standing) urging the court to exercise its discretion to direct publication of its opinions.[36]

The court has also held that Rule 62 does not bar another branch from releasing FISC opinions in its possession pursuant to FOIA.[37] In litigation brought by the EFF regarding the release of FISC opinions in the possession of the Executive Branch, the government argued that the FISC's rules – Rule 62 in particular – prohibited the disclosure of the government's copies of FISC opinions in response to a FOIA request. On EFF's motion, the FISC concluded that nothing in Rule 62 prohibited another branch from disclosing FISC opinions in its possession. Because it is the Executive's responsibility to safeguard national security information, the court concluded, it would be redundant for the court's rules to impose additional restrictions on the Executive's ability to disclose information in its own possession. The court's rules control only when and how the *court* can release information. The government subsequently declassified and released (in redacted form) several of the opinions sought in that litigation.[38]

2. FISC Precedent Regarding Release of Opinions.

Until recently, the FISC was not particularly receptive to petitions to release its records. In 2007, the ACLU filed a motion in the FISC seeking the release of court orders and government pleadings regarding particular NSA surveillance programs that had then recently come to light. The court denied the motion.

The court first squarely rejected the application of the qualified common law ''right to inspect and copy public records and documents, including judicial records and documents.''[39] The court observed that the right does not apply to documents that have traditionally been kept secret for policy reasons, which was undoubtedly the case with respect to the records of the FISC.[40] The court rejected the argument that the common law right could apply even to information that the court had determined was improperly classified: ''Under FISA and the applicable Security Procedures, there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions.''[41]

The court also rejected the ACLU's argument that the First Amendment right of public access to judicial proceedings mandated release of the court's opinions. The court applied the Supreme Court's ''experience and logic'' tests narrowly to reach this result. The ''experience'' prong looks to ''whether the place and process have historically been open to the press and general public.''[42] The court concluded that, because the FISC ''has no such tradition of openness,'' the experience prong did not weigh in favor of access.[43]

For the ''logic'' prong, a court looks to ''whether public access plays a significant positive role in the functioning of the particular process in question.''[44] The court first readily concluded that ''broad public access'' to FISC proceedings would harm national security, but acknowledged that the ACLU was seeking the release only of material that the court would determine was not properly classified. However, the court still found that even limited release would cause more harm than good. For one thing, consistent with the admonition that Judge Bates would later include in his letter to the Senate Intelligence Committee,[45] the court stated that ''[t]he benefits from a partial release of declassified portions of the requested materials would be diminished, insofar as release with redactions may confuse or ob-

[34] Rule 3 provides: ''In all matters, the Court and its staff shall comply with the security measures established pursuant to 50 U.S.C. §§ 1803(c), 1822(e), 1861(f)(4), and 1881a(k)(1), as well as Executive Order 13526, 'Classified National Security Information' (or its successor). Each member of the Court's staff must possess security clearances at a level commensurate to the individual's responsibilities.''

[35] The government has argued that the rules' reference to Executive Order 13,526, which sets forth the uniform system for the classification and declassification of information by the Executive, mandates Executive Branch approval before any FISC document can be publicly released. *See* United States' Opposition to the Motion of American Civil Liberties Union, et al., for the Release of Court Records, No. Misc. 13-02 (F.I.S.C. July 5, 2013), at 13-14, *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-us-opposition-130705.pdf.

[36] *See In re Orders of this Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02 (F.I.S.C. Sept. 13, 2013), at 10-12, *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-order-130813.pdf (hereinafter ''September 2013 Opinion'').

[37] *See In re Motion for Consent to Disclosure of Court Records or, In the Alternative, A Determination of the Effect of the Court's Rules on Statutory Access Rights*, No. Misc. 13-01 (F.I.S.C. June 12, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-01-opinion-order.pdf. *See also* Tom Schoenberg, *U.S. Surveillance Court Won't Stop Release of Secret Ruling*, Bloomberg Businessweek, June 14, 2013, http://buswk.co/JspYsf.

[38] *See infra* Section II.D.2.

[39] *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 490 (F.I.S.C. 2007) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)).

[40] *Id.* at 490-91.

[41] *Id.* at 491.

[42] *Id.* at 492 (quoting *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 8 (1986) (''*Press-Enterprise II*'').

[43] *Id.*

[44] *Id.* at 491 (quoting *Press-Enterprise II*, 478 U.S. at 8).

[45] *See supra* Section I.A.

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scure, rather than illuminate, the decision in question.''[46] The court expressed the practical concern that openness could indirectly inhibit the Executive Branch's counter-terrorist activities:

> In addition, however, 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. The greater risk of declassification and disclosure over Executive Branch objections would chill the government's interactions with the Court. That chilling effect could damage national security interests, if, for example, the government opted to forgo surveillance or search of legitimate targets in order to retain control of sensitive information that a FISA application would contain.[47]

The court also posited the notion that greater openness somehow could motivate the Executive Branch to bypass the prescribed FISA process entirely: ''Moreover, government officials might choose to conduct a search or surveillance without FISC approval where the need for such approval is unclear; creating such an incentive for government officials to avoid judicial review is not preferable.''[48]

The parties seeking access to FISC decisions now have argued that, whether or not those concerns were warranted in 2007, they are no longer relevant now that much more is known about previously secret data collection programs. As ProPublica has argued, citing this passage, ''at this point, it can hardly be contended that the benefits of disclosure are outweighed by the harm of a decreased flow of information and an avoidance of judicial review. After widespread reporting of unauthorized disclosures and repeated discussion by public officials of the government's legal authority for bulk collection of metadata, the cat is out of the bag.''[49]

B. Arguments in the Current Cases.[50]

The movants in the 2013 cases have argued that, contrary to the FISC's conclusion in 2007, the experience and logic tests weigh strongly in favor of a First Amendment right of access here. As the ACLU asserts, the proper focus of the ''experience'' analysis is not the practice of the specific forum, but rather the type of governmental process or record to which a petitioner seeks access. The type of record here – judicial opinions interpreting the Constitution – ''enjoys a[n] uninterrupted [] history of presumptive openness.''[51] As to the ''logic prong,'' the ACLU has argued that the role of public judicial decisionmaking in a democracy ''is so essential that it is hardly ever questioned'' – particularly where the opinions concern the power of the executive branch and the constitutional rights of citizens.[52]

In its briefs, the ACLU sets forth several ways that public disclosure of FISC opinions would play a ''significant positive role'' in the functioning of the relevant governmental process: (1) ''public access to the opinions of this Court will promote public confidence in the integrity, reliability, and independence of the FISC and the FISA system. Access to the reasoning and actions of [the FISC] will allow the public to evaluate for itself the operation of the FISA system and the legal bases for the government's actions''; (2) ''allowing the public to review and assess the reasoning of the opinions of [the FISC] will support more refined decisionmaking in future cases''; (3) ''publishing [the FISC's] opinions of broad legal significance will contribute to the body of decisional law essential to the functioning of our common-law system''; and (4) ''access to [the FISC's] opinions will educate citizens about the functioning of the FISA system and improve democratic oversight.''[53]

Because the First Amendment right of access applies, the movants argue, any withholding of information must survive strict scrutiny. In other words, there must be a substantial probability of prejudice to a compelling interest as a result of disclosure, there must be no adequate alternative, and any restriction on access must be narrowly tailored.

In opposition, the government argues that, even if portions of opinions were to be declassified, ''the Court does not interfere with the Government's classification process and classification decisions.''[54] The movants, on the other hand, argue that the court must *independently* assess any classification decisions to determine whether the public's constitutional right of access has been overcome. As the Fourth Circuit explained decades ago:

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to ''national security'' may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.[55]

C. Current Status of the Cases.

The FISC has not yet ruled on the First Amendment arguments in the recent cases. The Second ACLU Motion and ProPublica Motion are fully briefed, but, as of this writing in April 2014, the court has not yet issued an opinion or order.[56] In the First ACLU Motion, the court found that most of the records that the ACLU was seeking were also being sought in FOIA litigation brought by the ACLU in the Southern District of New York. As a matter of comity, because that litigation was

[46] *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 495.

[47] *Id.* at 496.

[48] *Id.*

[49] ProPublica Motion at 13 (citing *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 496) (internal citation omitted)).

[50] The ''dockets'' for these cases are all publicly available on the FISC's webpage at http://www.uscourts.gov/uscourts/courts/fisc/index.html.

[51] First ACLU Motion at 8.

[52] Second ACLU Motion at 16.

[53] *Id.* at 17-19.

[54] United States' Opposition to the Motion of the American Civil Liberties Union, et al., for the Release of Court Records, No. Misc. 13-08 (F.I.S.C. Dec. 6, 2013), at 5, *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-08-motion-131206.pdf.

[55] *In re Washington Post Co.*, 807 F.2d 383, 391-92 (4th Cir. 1986).

[56] *See* http://www.uscourts.gov/uscourts/courts/fisc/index.html.

filed first, the FISC dismissed claims pertaining to those records.[57]

Although the court did not directly address the First Amendment arguments in connection with the First ACLU Motion, the court did not completely reject the ACLU's and the *amici's* arguments. The court explained that there could be Section 215 opinions that were not part of the separate FOIA litigation, and

> movants and *amici* have presented several substantial reasons why the public interest might be served by their publication. The unauthorized disclosure in June 2013 of a Section 215 order, and government statements in response to that disclosure, have engendered considerable public interest and debate about Section 215. Publication of FISC opinions relating to this provision would contribute to an informed debate. Congressional *amici* emphasize the value of *public* information and debate in representing their constituents and discharging their legislative responsibilities. Publication would also assure citizens of the integrity of this Court's proceedings.[58]

Accordingly, in a fairly dramatic turnaround from its approach in the 2007 case, the court ordered the parties (and the government in particular) to determine which, if any, responsive FISC opinions were not already part of the ongoing FOIA litigation and propose a timetable for declassification review.

After that order, the government determined that there was one FISC opinion that was not part of the FOIA litigation and was not already scheduled for declassification. The government advised simply that ''[a]fter careful review of the Opinion by senior intelligence officials and the U.S. Department of Justice, the Executive Branch has determined that the Opinion should be withheld in full and a public version of the Opinion cannot be provided.''[59]

Two days later, stating that ''[t]he government has provided no explanation of this conclusion,'' the court ordered the government to ''submit a detailed explanation of its conclusion that the Opinion is classified in full and cannot be made public, even in a redacted form.''[60] The government subsequently determined that, in fact, portions of the opinion could be made public after all, and expressed consent for the court to release the opinion with the classified portions redacted. The movants filed a response reiterating their argument that any redactions must be assessed independently by the court, and any redactions must meet strict scrutiny. That application, filed February 19, 2014, remains pending.

D. Other Considerations.

1. Sensitive National Security Information in Other Federal Courts.

The ACLU and others have argued that the FISC should approach public access issues no differently from other federal courts. As the Seventh Circuit has observed, ''[e]ven disputes about claims of national security are litigated in the open'' in Article III courts.[61]

Although the FISC's mandate certainly makes its role somewhat different, district courts also deal frequently with classified and highly sensitive information related to national security, but do so with significantly more transparency and openness than the FISC. In these cases, the burden rests squarely on the party seeking to close off proceedings and shield information to show exactly what information must be protected, and why. Otherwise, proceedings are presumptively open to the public.[62]

For example, the D.C. District Court and D.C. Circuit have handled all of the habeas petitions from Guantanamo inmates. Much of the information involved in those petitions is highly sensitive, albeit not necessarily classified, so the courts have implemented a protective order covering both classified and unclassified information that permits the government to ask a court to designate certain unclassified information as ''protected'' and maintain it under seal. The D.C. Circuit roundly rejected the government's proposal that the government unilaterally determine whether information is protected, explaining that ''[i]t is the court, not the Government, that has discretion to seal a judicial record, which the public ordinarily has the right to inspect and copy.''[63] Later, when the government proposed protecting broad categories of information in all cases, the court again denied the motion, holding that ''spare, generic assertions [by the government] of the need to protect information'' would not suffice.[64] The government must provide an ''explanation tailored to the specific information at issue,'' otherwise the court would be ''left with no way to determine whether [information] warrants protection—other than to accept the government's own designation,'' which the court already held would be inappropriate.[65]

More recently, the D.C. District Court, in accordance with the framework laid out by the D.C. Circuit, rejected the government's proposal to designate as protected all of the Guantanamo inmates' ''factual returns'' – the documents containing the factual basis upon which the government was detaining the particular prisoner.[66] In the court's view, this would ''usurp the Court's discretion to seal judicial records.''[67] The court ordered that in each case, the government must pub-

[57] *See* September 2013 Opinion, *supra* note 36, at 12-13. *See infra* Section II.D.2.

[58] September 2013 Opinion at 16-17.

[59] Second Submission of United States in Response to the Court's October 8, 2013 Order, No. Misc. 13-02 (Nov. 18, 2013), at 2, *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-order-response-131008.pdf.

[60] *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, Order, No. Misc. 13-02 (F.I.S.C. Nov. 20, 2013), http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-order-131120.pdf.

[61] *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (collecting cases)

[62] *See, e.g.*, *Company Doe v. Public Citizen*, No. 12-2209, 2014 BL 106323 (4th Cir. Apr. 16, 2014).

[63] *Bismullah v. Gates*, 501 F.3d 178, 188 (D.C. Cir. 2007) (internal citation omitted), *judgment vacated on other grounds*, 554 U.S. 913 (2008), and *on reconsideration*, 551 F.3d 1068 (D.C. Cir. 2009).

[64] *Parhat v. Gates*, 532 F.3d 834, 853 (D.C. Cir. 2008).

[65] *Id.*

[66] *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d 27, 32-33 (D.D.C. 2009).

[67] *Id.* at 39.

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licly file a declassified or unclassified factual return, or file under seal with the appropriate judge for a given case ''an unclassified factual return highlighting with a colored marker the exact words or lines the government seeks to be deemed protected, as well as a memorandum explaining why each word or line should be protected.''[68]

The court went further still. In response to an opposition to the government's motion filed by a coalition of media organization intervenors, the court found that there was a qualified First Amendment right of access to the filings in the habeas proceedings. Although there was a dearth of case law analyzing whether these habeas proceedings had historically been publicly available, the court had little trouble finding—in accordance with most Circuit courts – that there was a historical right of access to civil proceedings, which include habeas proceedings.[69] The court also readily found that public access could play a significant role in the functioning of the proceedings. As a general matter, the court echoed the Supreme Court's conclusion that ''opening the judicial process ensures actual fairness as well as the appearance of fairness.''[70] The court recognized that ''[p]ublic interest in Guantanamo Bay generally and these [habeas] proceedings specifically has been unwavering,'' but the ''public's understanding of the proceedings . . . is incomplete without the factual returns. Publicly disclosing the factual returns would enlighten the citizenry and improve perceptions of the proceedings' fairness.''[71]

Having recognized a First Amendment right of access to the filings in the Guantanamo habeas proceedings, the court emphasized that the right was not absolute: if the government could show in a particular case that keeping certain information sealed was ''essential to preserve higher values,'' and the proposed sealing was ''narrowly tailored,'' then the information could be protected.

The ACLU has also pointed out that the Classified Information Procedures Act, 18 U.S.C. app. 3 (''CIPA'') establishes a framework that has worked for the handling of classified information in criminal proceedings in district courts.[72] For example, Section 4 of that statute authorizes a district court ''upon a sufficient showing'' by the government to allow the government to ''delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove.''[73] CIPA also allows certain proceedings to be held *in camera* when classified information will be divulged and discussed in the hearing.[74]

In these cases, the court begins from the premise that the public has a presumptive common law and First Amendment right to access proceedings.[75] The courts still perform an ''independent review'' to ensure that closure of proceedings ''was narrowly tailored to protect national security.''[76] In the context of the trial of the so-called ''twentieth 9/11 hijacker,'' Zacarias Moussaoui – proceedings that would no doubt involve extensive discussion of highly sensitive classified and other national security information – the Fourth Circuit noted that ''CIPA alone cannot justify the sealing of oral argument and pleadings.''[77] Emphasizing the court's essential role in independently checking the Executive's assertions of classification, the court explained, ''Indeed, even in the absence of CIPA, the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents. Rather, we must independently determine whether, and to what extent, the proceedings and documents must be kept under seal.''[78]

Echoing these principles, the District Court for the Eastern District of Virginia, in the context of an Espionage Act prosecution, explained further that courts should not simply defer to the Executive Branch's determination that information is classified when the First Amendment and common law rights of access are at stake:

> While it is true, as an abstract proposition, that the government's interest in protecting classified information can be a qualifying compelling and overriding interest, it is also true that the government must make a specific showing of harm to national security in specific cases to carry its burden in this regard. The government's *ipse dixit* that information is damaging to national security is not sufficient to close the courtroom doors . . . . [The case law] require[s] a judicial inquiry into the legitimacy of the asserted national security interest, and specific findings, sealed if necessary, about the harm to national security that would ensue if the request to close the trial is not granted. Moreover, the government's *ipse dixit* is insufficient whether it appears by way of classified status, or the bald assertion of counsel that information is damaging to national security.[79]

Of course, balancing these constitutional and national security concerns in Article III courts is not seamless. For example, in one Guantanamo habeas case, the district judge's opinion (granting the petition) was issued, and then a day later, withdrawn and replaced by a different opinion that reached the same result. Apparently, the Department of Justice had failed to review the original opinion for classified information, and the opinion (containing extensive classified information) was released. After what was described by witnesses as a ''contentious exchange'' between the government and

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[68] *Id.* at 34.

[69] *Id.* at 35-36 (collecting cases).

[70] *Id.* at 36-37 (citing *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984) (''*Press-Enterprise I*'')).

[71] *Id.* at 37. The court also held that there was a common law right of public access to the habeas proceedings: ''Providing the public with access to the charges levied against these detainees, as detailed in the factual returns, ensures greater oversight of the detentions and these proceedings. As long as public access does not come at the expense of the litigation interests of petitioners or national security, the Court believes the public has a common law right to access the returns.'' *Id.* at 39.

[72] CIPA was passed to ''protect[] and restrict[] the discovery of classified information in a way that does not impair the defendant's right to a fair trial.'' *United States v. Aref*, 533 F.3d 72, 78 (2d Cir. 2008) (quoting *United States v. O'Hara*, 301 F.3d 563 (7th Cir. 2002).

[73] 18 U.S.C. app. 3 § 4.

[74] *Id.* § 6(a).

[75] *See, e.g.*, *Aref*, 533 F.3d at 81-82.

[76] *Id.* at 83.

[77] *United States v. Moussaoui*, 65 F. App'x 881, 887 (4th Cir. 2003).

[78] *Id.* (citations omitted).

[79] *United States v. Rosen*, 487 F. Supp. 2d 703, 716-17 (E.D. Va. 2007) (citations omitted).

the court, the court issued a second, altered opinion.[80] The separation of powers concerns inherent in this process came to the fore, as the judge ''insisted that the reasoning behind his first habeas ruling be made public,'' while the government sought to keep the entire opinion classified.[81] The substitution of the second opinion without public acknowledgment or explanation was considered problematic in its own right, but there clearly was not an ideal solution. And although the court and the government were able to come to an agreement on how to deal with the situation in this instance, it is not clear how the separation of powers questions would be resolved if a court and the government were unable to agree on how much of the court's opinion can be released to the public.

More broadly, the heavily redacted nature of the judicial opinions in national security cases has been the subject of some criticism, with one commentator comparing the released version of a D.C. Circuit Guantanamo habeas decision to the children's fill-in-the-blanks game ''Mad Libs.''[82] At the same time, notwithstanding Judge Bates' concern that a redacted opinion ''run[s] the risk of distorting, rather than illuminating, the reasoning and result'' of the court's decision,[83] critics argue that withholding the opinion from the public in its entirety should rarely, if ever, be the preferable option. To support that point, they can point to the opinion that was compared to ''Mad Libs,'' which was later re-released in considerably less redacted form after further review by the government, which evidently concluded that no harm would result from such disclosure.[84]

Of course, Article III courts regularly deal with ex parte applications by the government that result in court orders issued under seal – wiretap applications, for example. But the movants seeking access to FISC records have emphasized that they do not seek complete access to all proceedings in the FISC, recognizing that disclosure of particular government applications would sometimes plainly jeopardize national security. Rather, they urge the release of judicial opinions that embody significant legal interpretations of the Constitution and statutes with consequences on a larger scale for entire government programs. Even when opinions deal with highly sensitive national security information, non-FISC courts, understanding the importance of public scrutiny of a court's reasoning, issue those decisions publicly.

2. Relevance of FOIA.

The issue of the availability of FOIA to seek access to FISC opinions has floated underneath much of the litigation over access to FISC records. For example, in the 2007 FISC opinion, ruling that the ACLU was not entitled to access FISC documents, the court expressly noted that ''nothing in this decision forecloses the ACLU from pursuing whatever remedies may be available to it in a district court through a FOIA request addressed to the Executive Branch.''[85] The court rejected the government's argument that the ACLU's motion was an ''attempted end run'' around FOIA:

> If the government is arguing generally that FOIA provides the exclusive means for raising claims of access to documents held by any court, whenever copies of those documents are also in the possession of the Executive Branch and therefore subject to FOIA, then that argument is rejected. Nothing in FOIA divests federal courts of supervisory power over their own records, nor would an agency record's exemption from disclosure under FOIA necessarily displace a right of access to a copy of the same document in a court's files, especially if that right is grounded in the First Amendment.[86]

More recently, as noted above, the court nonetheless denied the ACLU's motion for the release of records that were also subject to parallel FOIA litigation in the Southern District of New York as a matter of comity.[87]

The ACLU has strenuously argued that the possibility of making a FOIA request to the government is not a substitute for the constitutional right of public access to the courts. First, FOIA expressly does not apply to courts.[88] Thus, the government could thwart access to FISC documents simply by not retaining those documents and leaving them only in the custody of the court itself. Second, the standards for adjudicating a FOIA request are different from the standards for determining whether the government has met its burden to deny First Amendment access to judicial proceedings. As the ACLU explained in its briefing,

> Whereas *Press-Enterprise II* requires courts to exercise their independent judgment as to whether a compelling need requires some secrecy for information in a court opinion, FOIA directs courts to determine only whether the executive has shown that it ''appears 'logical' or 'plausible' '' that the records sought are properly classified. In both cases appropriate deference is given to the ''expertise of agencies engaged in national security and foreign policy,'' but the ultimate issue for the court to decide is very different where the constitutional right of access attaches.[89]

As would be expected, the parallel FOIA litigation over FISC opinions focuses on the applicability of exemptions to FOIA – such as the national security or investigative procedure exemptions – rather than the constitutional right of access to court records. The government's decision to substantially declassify many of the opinions at issue in those cases has mooted most of the litigation, but the parties have continued to litigate the withholding of some opinions, as well as the appropriateness of the government's redactions.

In the litigation brought by the ACLU in the Southern District of New York, the parties have cross-moved for

[80] *See* Dafna Linzer, *In Gitmo Opinion, Two Versions of Reality*, ProPublica, Oct. 8, 2010, *available at* http://www.propublica.org/article/in-gitmo-opinion-two-versions-of-reality (last updated Apr. 25, 2011).

[81] *Id.*

[82] *See* Adam Liptak, *The 'Fill in the Blanks' Court Game of Indefinite Detention*, N.Y. Times, Dec. 12, 2011, *available at* http://nyti.ms/tqLyvd.

[83] *See* Judiciary Comments, *supra* note 26, at 14.

[84] *See Latif v. Obama*, 677 F.3d 1175 (2012). *See also* D.C. Circuit Review Blog, *D.C. Circuit Fills in Some Blanks in Guantanamo Mad Libs Opinion*, Apr. 27, 2012, http://dccircuitreview.com/2012/04/27/d-c-circuit-fills-in-some-blanks-in-guantanamo-mad-libs-opinion/.

[85] *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 496 (F.I.S.C. 2007).

[86] *Id.* at 491 n.19.

[87] *See* September 2013 Opinion at 12-16.

[88] 5 U.S.C. § 551(1)(B).

[89] Movants' Reply in Support of Their Motion for the Release of Court Records, No. Misc. 13-08 (F.I.S.C. Dec. 20, 2013) (quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) at 14, *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-08-reply-131223.pdf.

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summary judgment with respect to the FISC opinions that are still withheld. That motion is currently pending.[90]

In litigation brought by the Electronic Frontier Foundation in the District of Columbia, the government has complied with the court's order to produce for *in camera* inspection an unredacted copy of the one opinion remaining at issue in the case. The court's decision on whether that opinion may be withheld is forthcoming.[91]

When courts have reached the merits of FOIA requests made by public interest organizations and the media for national security-related information, they have often ruled against access. A sampling of recent FOIA cases reveals that courts almost invariably rule for the government, under a combination of statutory exemptions: 1 (classified national security information), 3 (exempted from disclosure by other statutes), 5 (privileged inter-agency or intra-agency memorandum), and 7(e) (law enforcement techniques or procedures).[92] When a court has ruled against the government, it has typically rejected only of the sufficiency of the government's responses as to the existence or number of relevant documents, and not determined whether the documents themselves may be withheld.[93]

In the Southern District of New York, in granting summary judgment to the government on a FOIA request for information related to the purported legal justification for the overseas killing of American citizens suspected of being affiliated with Al Qaeda, Judge McMahon eloquently expressed frustration at the limitations of FOIA:

> The FOIA requests here in issue implicate serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men. The Administration has engaged in public discussion of the legality of targeted killing, even of citizens, but in cryptic and imprecise ways, generally without citing to any statute or court decision that justifies its conclusions. More fulsome disclosure of the legal reasoning on which the Administration relies to justify the targeted killing of individuals, including United States citizens, far from any recognizable ''hot'' field of battle, would allow for intelligent discussion and assessment of a tactic that (like torture before it) remains hotly debated. It might also help the public understand the scope of the ill-defined yet vast and seemingly ever-growing exercise in which we have been engaged for well over a decade, at great cost in lives, treasure, and (at least in the minds of some) personal liberty.
>
> However, this Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules — a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret.[94]

After the district court decision was issued, government officials made numerous statements about the legal basis for targeting Al Qaeda members overseas, and the government released a ''DOJ White Paper'' titled ''Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force,'' which had been leaked to the press.[95] In light of those developments, the Sec-

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[90] *See ACLU v. FBI*, No. 11-cv-7562 (WHP) (S.D.N.Y.), ECF No. 82 (setting briefing schedule).

[91] *See Electronic Frontier Found. v. DOJ*, No. 12-cv-1441 (ABJ) (D.D.C.), ECF No. 26.

[92] *See* 5 U.S.C. § 552(b). *See, e.g.*: *Legal basis for targeted drone strikes abroad*: *New York Times Co. v. DOJ*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013) (access denied), *rev'd*, No. 13-422-cv, 2014 BL 109427 (2d Cir. Apr. 21, 2014); *First Amendment Coalition v. DOJ*, No. C-12-1013 (CW), 2014 BL 131277 (N.D. Cal. Apr. 11, 2014) (access denied, holding that the fact that the CIA has made public statements sufficient to disclose a general '' 'intelligence interest' in drone strikes'' does not constitute official disclosure that the CIA received DOJ advice regarding the decision to target U.S. citizen accused of being involved in Al Qaeda); *Legal basis for mass surveillance programs*: *Electronic Frontier Found. v. DOJ*, 739 F.3d 1 (D.C. Cir. 2014) (access denied, affirming that memo prepared by FBI regarding legal parameters for access to telephone records was protected under exemption 5, and unclassified portions could not be segregated and released without harming the deliberative process); *Wilner v. NSA*, 592 F.3d 60 (2d Cir. 2009) (holding that *Glomar* response was appropriate even though Executive Branch had generally acknowledged the existence of warrantless Terrorist Surveillance Program); *New York Times Co. v. DOJ*, 872 F. Supp. 2d 309 (S.D.N.Y. 2012) (access denied, holding that report to Congress by Attorney General and Director of National Intelligence was exempt from disclosure under exemptions 1 and 3, and any non-exempt portions of the report were not segregable); *ACLU v. Office of Dir. of Nat'l Intelligence*, No. 10 Civ. 4419 (RJS), 2012 WL 1117114 (S.D.N.Y. Mar. 30, 2012) (access denied, holding that documents regarding overcollection of information under FISA Amendments Act of 2008 were protected by exemptions 1, 3 and 7(e)); *New York Times Co. v. DOD*, 499 F. Supp. 2d 501 (S.D.N.Y. 2007) (access denied, holding that documents related to NSA wiretap surveillance program were protected under exemptions 1, 3 and 5); *Guantanamo Bay records*: *Center for Constitutional Rights v. DOD*, No. 12 Civ. 135 (NRB), 2013 BL 242979 (S.D.N.Y. Sept. 12, 2013) (access denied; images depicting treatment of Guantanamo Bay prisoner were exempt under exemptions 1 and 3, as well as privacy and law enforcement exemptions, and allowing CIA *Glomar* response); *but see Associated Press v. DOD*, 462 F. Supp. 2d 573 (S.D.N.Y. 2006) (holding that government could withhold photos of detainees but must disclose height and weight information about each detainee).

[93] *See, e.g.*, *Electronic Frontier Found. v. CIA*, No. C-09-3351, 2013 BL 267567 (N.D. Cal. Sept. 30, 2013) (access tentatively allowed, holding that government's indices of withheld documents regarding official reports of intelligence violations were ''clearly inadequate'' and requiring either disclosure or revised index); *ACLU v. CIA*, 710 F.3d 422, 430 (D.C. Cir. 2013) (holding that government's Glomar response, refusing to confirm or deny existence of documents, was inadequate, and rejecting argument that acknowledging existence of documents or CIA's ''intelligence interest'' in drone strikes would harm national security in light of widespread official acknowledgment that the US had conducted drone strikes, and that it ''strains credulity'' to argue that the CIA's general interest in the strikes was not publicly available).

[94] *New York Times Co. v. DOJ*, 915 F. Supp. 2d 508, 515-16 (S.D.N.Y. 2013).

[95] *See New York Times Co. v. DOJ*, No. 13-422, 2014 BL 109427 (2d Cir. Apr. 21, 2014).

ond Circuit reversed the district court's decision, holding that the government had waived the FOIA exemptions for intra-agency privilege and national security that had protected the legal analysis that served as the basis for the targeted killing operations.[96] Among other things, the court ordered the government to release a redacted version of a particular Office of Legal Counsel – Department of Defense memorandum (the ''OLC-DOD Memorandum'') and revise previous FOIA responses refusing to acknowledge the existence or number of documents responsive to the plaintiffs' FOIA requests.

The Second Circuit's decision was extensively redacted – particularly to shield the content of the OLC-DOD Memorandum – to preserve the government's opportunities for further appellate review of the ruling. The court's approach to the redaction of its opinion could provide a model the FISC could follow in releasing its opinions. First, even though the opinion involved discussion of classified information, the court released as much of the opinion as possible, including the legal analysis. Second, the court's holding recognizes that once information becomes public, documents containing that information can no longer be withheld from the public on the ground that the information is secret. And third, the court tentatively redacted certain portions, but explained that, ''[i]n the event that our ruling requiring disclosure of a redacted version of the Memorandum is not altered in the course of any further appellate review, an unredacted version of this opinion, together with a redacted version of the OLC-DOD Memorandum, will be filed.''[97] Similarly, the FISC could tentatively redact classified information, such as operational details, from its opinions, but could otherwise release its legal analysis. If the underlying information becomes public through other means, or the operation under review concludes, the court could continue to assess whether previously withheld portions of the opinions should be released publicly. And the FISC could also retain redactions pending any appeal of the issues in an opinion, as the Second Circuit did here. Either way, the court at each stage would, as a matter of course, release as much of its own legal analysis as possible, so that the public can benefit from understanding its reasoning.

Although FOIA actions have had some effect – seen in the Second Circuit decision and in recent declassifications of documents by the Executive Branch that are widely understood to have resulted in part from numerous FOIA actions – discretionary government decisions to declassify and release information do not make FOIA an adequate substitute for the constitutional right of access to judicial proceedings.

3. Media Issues.

Although the right of access to the courts is held by the public generally, the media are uniquely affected by denial of access and often uniquely situated to assert the right of access. Courts have recognized that the press often serves as ''surrogate[] for''[98] and ''information-gathering agent of'' the public.[99] As the Supreme Court has spelled out:

> Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.[100]

Exercising that function, a coalition of media organizations, represented by attorneys from the Reporters Committee for Freedom of the Press, filed *amicus* briefs in the FISC in support of the movants.[101] The media *amici* were also troubled by the FISC's application of a heightened standing requirement that found that the ACLU had standing, but the Yale MFIAC did not, because the Yale MFIAC had not shown how disclosure ''would be of concrete, particular assistance to them in their own activities.''[102] The media *amici* argued that this standard could be used to deny access to any media party that could not show a prior track record of covering the particular issue being addressed in a particular judicial proceeding.[103] The media *amici* also pointed out that, in any event, the Supreme Court jurisprudence on access does not impose any heightened standing requirement, because access is based on the right of the general public to know how its courts operate.[104] The FISC has not yet revisited that holding.

In general, the press's information-dissemination function is all the more vital with respect to the records at issue in these cases. The public has received limited, piecemeal information about broad government surveillance programs and the secret legal opinions reportedly authorizing them. Debate on the merits of these programs (and their legality) has been vigorous, but necessarily incomplete, since the public does not have all of the relevant information. The press's ability to fill in the informational gaps for the public depends on access to this material.

III. Conclusion

Although the FISC is as insulated from political pressure as any institution can possibly be (its members already have life tenure, and the court meets in secret), it appears that the intense public scrutiny of the court

[96] *See id.* at *14 (''[I]t is no longer either 'logical' or 'plausible' to maintain that disclosure of the legal analysis in the OLC-DOD Memorandum risks disclosing any aspect of 'military plans, intelligence activities, sources and methods, and foreign relations.' '' (quoting *New York Times Co. v. DOJ*, 915 F. Supp. 2d at 540)).

[97] *Id.* at *1 n.1.

[98] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

[99] *Nixon*, 435 U.S. at 609.

[100] *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975).

[101] Brief of Amici Curiae the Reporters Committee for Freedom of the Press, et al., Nos. Misc. 13-02, 13-03, 13-04 (F.I.S.C. July 15, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-04-brief-of-amici-curiae-130715.pdf.

[102] September 2013 Opinion at 5.

[103] *See* Brief of Amici Curiae the Reporters Committee for Freedom of the Press, et al., Nos. Misc. 13-02, 13-08, 13-09 (F.I.S.C. Nov. 26, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-brief-131127.pdf.

[104] *See id.* at 4-5 (citing *Nixon*, 435 U.S. at 598; *Richmond Newspapers*, 448 U.S. at 564-75).

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(and the additional pressure from the advocacy of the movants in the pending cases) has already caused a slight but unmistakable shift in the court's approach to the transparency of its opinions. Most recently, in April 2014, the Court ordered the publication of (a redacted version of) an opinion assessing the constitutionality of the NSA's telephone metadata collection program only a month after the case was decided.[105] That decision was issued in the wake of disagreement among district courts regarding the same issues,[106] giving the public the closest opportunity it has yet had to assess the FISC's reasoning contemporaneously, and in a broader legal and historical context.

At the same time, the court has continued to resist calls for recognition of a constitutional right of access to the court's proceedings. Proposed reforms of the court may increase transparency but could also create new separation of powers issues. In the meantime, the debate over the legality of the government's surveillance programs continues unabated. The General Counsel of the Office of the Director of National Intelligence recently stated that it might have been beneficial for the government to start a dialogue about these issues earlier, before leaks brought them into the open:

> I wish that we had found a way to bring some of those issues to the public before these leaks started . . . . A lot of these details [that have been disclosed] really don't have anything to do with public policy at all, and are in fact extremely damaging to national security. . . . [The] stories that have [been published have] not distinguished at all between what we have the technical capability to do, and what we're legally authorized to do and actually do.[107]

However, it may remain difficult for the press and the public to distinguish between what the government has the capability to do, what it is legally authorized to do, and what it actually does without greater access to the judicial decisions that the government asserts have authorized it to do what it is doing.

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[105] *See supra note* 29.

[106] *Compare Am. Civil Liberties Union v. Clapper, et al*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (Pauley, J.), *available at* http://s3.documentcloud.org/documents/998200/u-s-district-judge-pauleys-ruling-in-aclu-vs.pdf *with Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013) (Leon, J.), *available at* http://s3.documentcloud.org/documents/901810/klaymanvobama215.pdf.

[107] Remarks of Robert S. Litt, March 21, 2014, ''Sources + Secrets: A Conference on the Press, the Government and National Security,'' *footage available at* http://www.cuny.tv/show/sourcesandsecrets/PR2002974.

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