NATIONAL SECURITY PROJECT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

October 4, 2010

Via E-mail

Clerk of the Court
Foreign Intelligence Surveillance Court
Washington, DC

Re: Comments on Proposed Rules of Procedure

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
WWW.ACLU.ORG

Dear Clerk,

Pursuant to the Court's invitation for public comment on the Court's proposed Rules of Procedure dated August 26, 2010, attached please find the American Civil Liberties Union's comments on proposed Rule 62.

Respectfully,

Melissa Goodman
Staff Attorney
National Security Project
American Civil Liberties Union

Encl.

COMMENTS BY THE AMERICAN CIVIL LIBERTIES UNION ON THE FOREIGN INTELLIGENCE SURVEILLANCE COURT'S PROPOSED RULES OF PROCEDURE
October 4, 2010

The American Civil Liberties Union (ACLU) respectfully submits comments on the Court's proposed rule of procedure pertaining to the public release of its opinions, orders, and records. *See* Proposed FISA Ct. R. P. 62, Aug. 26, 2010.

For the past decade, the government's authority to engage in highly intrusive surveillance of U.S. citizens and residents in the name of national security has been the subject of extraordinary public concern and debate. The debate began with the enactment of the USA PATRIOT Act,[1] which substantially expanded the government's ability to monitor the activities and gain access to the records of innocent U.S. citizens and residents. It intensified after media reports revealed (and executive branch officials confirmed) that then-President Bush had authorized the NSA to conduct warrantless electronic surveillance of Americans in disregard of a law that expressly prohibited the practice, and after media reports revealed that the NSA was compiling vast databases of purely domestic telephone records as well.[2] It continued as Congress expanded the government's statutory authority to conduct dragnet surveillance of Americans' international communications through enactment of the Protect America Act (PAA)[3] in 2007 and then its replacement, the FISA Amendments Act (FAA),[4] in 2008.

This Court sits at the fulcrum of this important national debate. It interprets controversial, complex, and poorly understood federal surveillance statutes. It determines the constitutionality of the government's use of highly intrusive surveillance powers, the procedures the government employs to implement these powers, and sometimes even the constitutionality of the surveillance statutes themselves. It also adjudicates important disputes, including constitutional ones, between the government and corporations from whom the government has demanded access to Americans' highly private communications, records, and property.

As a result, this Court presumably has developed a significant body of law which defines the statutory and constitutional boundaries of the government's most intrusive surveillance powers. This important body of law, however, is almost entirely secret. It is unknown to anyone outside of the executive branch, certain congressional committees, and third parties who

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[1] Pub. L. No. 107-56 (2001).

[2] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005; The President's Radio Address, 41 Weekly Comp. Pres. Doc. 1880 (Dec. 17, 2005); Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today, May 10, 2006.

[3] Pub. L. No. 110-55 (2007).

[4] Pub. L. No. 110-261 (2008).

challenge surveillance directives in secret proceedings. This Court has released some important legal opinions in the past but has done so in an *ad hoc*, inconsistent manner. For example, the Court has released opinions pertaining to the constitutionality of certain physical surveillance and PATRIOT Act amendments to surveillance law.[5] But it has kept other important legal rulings secret, including a ruling that reportedly authorized the NSA's warrantless wiretapping program; a ruling that, months later, reversed that order and spurred the executive branch's successful effort to amend FISA; and every ruling it has issued about the controversial FAA.[6]

The ACLU has long advocated both for more transparency about this Court's rulings on legal matters of public importance and for independent judicial review of the government's national security powers. To the extent Proposed Rule 62 furthers these laudable ends by reaffirming the Court's authority to make its own orders public and by clarifying that the Court may do so without prior executive branch approval or review, we strongly support the proposed rule. We respectfully urge the Court, however, to consider three important changes to the proposed rule that would, without compromising national security, foster greater transparency, increase public confidence in the Court, significantly enhance the quality of public debate on surveillance issues, and preserve this Court's independence. The Court should amend the rule to:

- State that FISC judges should publicly release opinions and orders that address significant or novel legal questions – for example, opinions that address the scope, meaning, or constitutionality of surveillance statutes or procedures that impact Americans' privacy. Released opinions and orders should be redacted only to the extent necessary to protect information the Court determines to be properly classified.

- State that FISC judges should publicly release legal briefs that address significant or novel legal questions. Released legal briefs should be redacted only to the extent necessary to protect information the Court determines to be properly classified.

- Clarify that the Court, not the executive branch, is the final arbiter of what information in judicial opinions, judicial orders, and legal briefs may be released to the public and what information must be redacted.

We specifically urge the Court to release its opinions concerning the scope, meaning, and constitutionality of the FAA – at least those opinions that relate to the communications of U.S. citizens and residents. The FAA is an extremely controversial, poorly understood law.

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[5] *See In re Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property* (FISA Ct. 1981), *reprinted in* S. Rep. 97-280 at 16-19 (1981); *In re All Matters Submitted to the FISC*, 218 F. Supp. 2d 611 (FISA Ct. 2002). The Foreign Intelligence Surveillance Court of Review has also released some legal rulings. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (PATRIOT Act); *In re Directives Pursuant to Section 105B of FISA*, 551 F.3d 1004 (FISA Ct. Rev. 2008) (PAA).

[6] *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 493 (FISA Ct. 2007) (declining to release January and May 2007 orders and referencing "other legally significant [FISC] decisions that . . . have not been released to the public"); Order, *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01 (FISA Ct. Aug. 27, 2008) (rejecting ACLU's motion for release of future rulings about the scope, meaning, and constitutionality of the FAA).

Importantly, however, the FAA is not permanent; Congress set the law to expire in 2012 so that it – and the public – could evaluate whether the changes the FAA made to the government's electronic spying regime were wise, necessary, working effectively in practice, and sufficiently protective of Americans' privacy rights. But the public currently lacks access to information that is necessary to participate meaningfully in – or even understand – that conversation. Although the FAA has been in operation for more than two years, the public is entirely in the dark about how the law has been interpreted and what its impact has been on Americans' privacy rights. Public release of this Court's significant legal rulings about the FAA would greatly enhance the public's ability to participate in this important debate.

Public Disclosure of Significant Legal Rulings and Legal Analysis

Proposed Rule 62(a) reaffirms that a FISC judge may, *sua sponte* or in response to a motion, make public his or her orders or opinions. The proposed rule maintains the Court's *ad hoc* and seemingly arbitrary approach to judicial transparency: the rule still operates on the presumption that even important legal rulings are kept secret, provides no guidance to judges as to when disclosure of opinions and orders is appropriate, and leaves the public guessing whether the Court has opined on legal issues that directly affect their privacy rights. The Court should replace this *ad hoc* system with one that promotes consistent transparency about the Court's significant legal rulings. To accomplish this, the Court should amend Rule 62(a) to state that FISC judges should publicly release opinions and orders that address significant or novel legal questions, or contain legal analysis about the scope, meaning, or constitutionality of surveillance statutes or the constitutionality of surveillance applications and procedures that impact U.S. citizens and residents. Released opinions and orders should be redacted only to the extent necessary to protect information that the Court determines to be properly classified.

Public access to legal opinions, particularly those that contain legal and constitutional analysis, is a cornerstone of democracy.[7] The existence of "secret law" undermines the very concept of rule of law which requires, at bottom, that citizens know what the law is, the boundaries of government power, and the content of their constitutional rights.[8] Secret judicial decision-making creates a lack of public confidence in the judiciary.[9] The development of

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[7] *See Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n.*, 710 F.2d 1165, 1177 (6th Cir. 1983) ("[T]he American constitutional system, and the concept of the 'consent of the governed' stress the 'public' nature of legal principles and decisions."); *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) ("Redacting portions of opinions is one thing, secret disposition quite another. . . . What happens in the federal courts is presumptively open to public scrutiny.").

[8] *See Huminski v. Corsones*, 396 F.3d 53, 81 (2d Cir. 2005) (in judicial proceedings "the law itself is on trial, quite as much as the cause which is to be decided" and "[h]olding court in public thus assumes a unique significance in a society that commits itself to the rule of law"); *Torres v. INS*, 144 F.3d 472, 474 (7th Cir. 1998) ("The idea of secret laws is repugnant. People cannot comply with laws the existence of which is concealed.").

[9] *See Press-Enter. Co. v. Superior Court of Cal. for Riverside County*, 478 U.S. 1, 13 (1986) ("People 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."); *Hicklin Eng'g, L.C.*, 439 F.3d at 348 ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat."); *United States v. Rosen*, 487 F. Supp. 2d 703, 715-16 (E.D. Va. 2007) (noting that "requiring a

"secret law" also undermines the democratic process. When the public does not understand the scope or meaning of federal statutes, or how courts have interpreted them, they cannot assess for themselves whether the statutes are necessary, wise, constitutional, or in need of reform.

A rule that promoted the public release of this Court's significant legal rulings would serve the public interest and further important democratic values. One judge of this Court has acknowledged that "certain benefits could be expected from public access" to this Court's legal rulings, such as "greater understanding of the FISC's decisionmaking," "an additional safeguard against mistakes, overreaching or abuse," and "better-informed" public participation in legislative debates about FISA.[10] Members of Congress and editorial pages of major newspapers have also recognized the need for greater transparency about this Court's significant rulings.[11]

A rule that promoted release of this Court's significant legal rulings would help citizens understand the law and their rights. Because of the near-blanket secrecy that surrounds even this Court's rulings that are primarily legal in nature, citizens do not understand when surveillance statutes or the Constitution permit their own government to spy on them. As J. William Leonard, former Director of the Information Security Oversight Office, has stated in testimony about this Court's secret rulings: "When you think about the significant surveillance capability that this government has . . . it's [of] profound interest [to] any American to know to what extent, and under what circumstances, he or she may in fact be subject to government surveillance."[12]

A rule that promoted release of this Court's significant legal rulings would also enhance public confidence in the Court. Under our foreign intelligence surveillance system, the Court is a citizen's only line of defense against privacy invasions. Those who are monitored for foreign intelligence purposes – whether lawfully or unlawfully – rarely become aware of the surveillance. Accordingly, public confidence that the Court is protecting Americans' privacy, and that its decisions and legal reasoning are sound, is particularly important.

More consistent disclosure of this Court's legal rulings could also improve the quality of the Court's decision-making process. When members of the public – including privacy advocates – know the Court has rendered or plans to render a decision on a novel or complicated legal issue, they can seek the opportunity to present their views on the subject so that the Court

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judge's rulings to be made in public deters partiality and bias" and that "justice must not only be done, it must be seen to be done").

[10] *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 494.

[11] *See* Editorial, *The Court That May Not Be Heard*, N.Y. Times, Dec. 15, 2007; *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the S. Judiciary Comm.*, 110th Cong. 2 (2008) (statement of Sen. Russ Feingold) ("Without access to [the FISA Court's legal rulings] it is impossible for Congress or the public to have an informed debate on matters that deeply affect the privacy and civil liberties of all Americans. While some aspects of the FISA Court's work involve operational details and should not be publicly disclosed, I do not believe that same presumption must apply to the Court's purely legal interpretations of what the statute means.").

[12] *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the S. Judiciary Comm.*, 110th Cong. (2008).

can have the benefit of perspectives other than the government's. Indeed, public participation has helped inform this Court's and the Court of Review's decision-making in the past.[13]

Perhaps most importantly, a rule that promoted release of this Court's significant legal rulings would improve the quality of public debate about government surveillance powers. The lack of public access to this Court's legal rulings concretely hindered informed public debate about changes the PAA and FAA made to FISA. Secret legal rulings issued by this Court were, according to government officials, a major impetus for those legislative reforms, yet the public had no access to them. In January 2007, then-Attorney General Gonzales announced that the NSA's warrantless wiretapping program would, from then on, "be conducted subject to approval of" this Court because of "complex" and "innovative" orders a judge had issued that had "pushed the envelope," and had taken "some time for a judge to get comfortable" with.[14] Little else was publicly known about these orders except that they likely granted the government some kind of programmatic or dragnet surveillance authority that did not require individualized warrants.[15] Then, in May 2007, then-Director of National Intelligence (DNI) McConnell began to advocate aggressively for FISA reform due to "critical gaps" in the law that needed to be closed.[16] The push for reform was mysterious given the orders the government had obtained from this Court four months earlier. It was not until August 2007 that the public learned that this Court had withdrawn the authority it had granted the government in January; and the public learned this fact only because DNI McConnell and Rep. John Boehner discussed this Court's sealed legal rulings with the media.[17] The administration's advocacy succeeded and Congress passed the Protect America Act, after minimal debate which occurred largely behind closed doors.[18]

Because the public did not have access to this Court's rulings, it had no way of evaluating the administration's claim that the PAA was necessary to close a surveillance "gap" that was created, in part, by this Court's orders. Nor could the public evaluate whether this "gap" was a

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[13] *See In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002) (referring to *amicus brief* submitted by privacy advocates including the ACLU); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007) (ordering public briefing on ACLU's motion for release of certain legal opinions).

[14] Letter from Att'y Gen. Alberto R. Gonzales to Hon. Patrick Leahy & Hon. Arlen Specter (Jan. 17, 2007), available at http://www.fas.org/irp/agency/doj/fisa/ag011707.pdf; *Dep't of Justice Oversight: Hearing before the S. Judiciary Comm.*, 110th Cong. (2007) (testimony of Att'y Gen. Gonzales).

[15] *See* Seth Stern, *Justice Officials Leave Lawmakers Confused About New Surveillance Program*, CQ, Jan. 18, 2007; Greg Miller, *Panel Chairman Wants Strict New Wiretap Rules*, L.A. Times, Jan. 24, 2007; Interview by Sabrina Fang with President Bush, Tribune Broadcasting (Jan. 18, 2007); Background Briefing by Senior Justice Dep't Officials on FISA Authority of Electronic Surveillance, Jan. 17, 2007.

[16] *Foreign Intelligence Surveillance Modernization Act of 2007: Hearing before the S. Intelligence Comm.*,110th Cong. (2007).

[17] *Transcript, Debate on Foreign Intelligence Surveillance Act*, El Paso Times, Aug. 22, 2007 (McConnell); Greg Miller, *New Limits Put on Overseas Surveillance*, L.A. Times, Aug. 2, 2007 (Rep. John Boehner); *see also* Michael Isikoff & Mark Hosenball, *Terror Watch: Behind the Surveillance Debate*, Newsweek, Aug. 1, 2007.

[18] Ellen Nakashima, *A Push to Rewrite Wiretap Law*, Wash. Post, Aug. 1, 2007; Editorial, *Stampeding Congress, Again*, N.Y. Times, Aug. 3, 2007; Editorial, *Fixing FISA*, L.A. Times, Aug. 3, 2007; Editorial, *Stop the Stampede*, Wash. Post, Aug. 2, 2007.

significant problem, and whether the PAA was tailored to fixing that problem. The law was so poorly understood that even government officials admitted that they were not entirely sure what it authorized.[19] When Congress began debating whether the temporary PAA should be replaced with a similar law – the FAA – lack of knowledge continued to compromise the debate. Congress ultimately passed the FAA but the public still had no way of assessing the problem it was purportedly fixing, whether it was tailored to fixing that problem, or whether it granted the government more surveillance authority than it required, with less restraints than were necessary to protect Americans' privacy rights. Like the PAA, the FAA was a poorly understood law that seemed to permit dragnet monitoring of American's international communications and, perhaps, some domestic communications as well. Even members of Congress complained that few people understood what the law authorized or whether its safeguards sufficiently protected Americans' privacy rights.[20] Secrecy about this Court's rulings concerning its interpretation of the FAA threatens to similarly impede the upcoming legislative debate about whether the FAA should be repealed, amended, or extended upon its sunset in 2012.

A rule that promoted release of this Court's significant legal rulings would also serve constitutional values.[21] That the judicial process should be as open as possible is a principle enshrined in the Constitution and common law.[22] Under the First Amendment and common law there is a presumption of access to judicial documents and proceedings, which serves to "safeguard the integrity, quality and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies."[23] This presumption of access applies with particular force to judicial rulings.[24] The presumption of access, moreover, does not dissipate in the national security context.[25] Even when judicial decisions concern sensitive national security matters, courts routinely release them publicly.[26]

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[19] *See, e.g.*, James Risen & Eric Lichtblau, *Concerns Raised on Wider Spying Under New Law*, Aug. 19, 2007 (reporting that "[a]dministration officials acknowledged . . . that there was a continuing debate over the meaning of the legislative language" and that Congress "passed legislation [it] may not have fully understood and may have given the administration more surveillance powers than it sought").

[20] *See Management Issues in the Intelligence Community: Hearing Before the Subcomm. on Intelligence Community Management of the H. Select Comm. on Intelligence*, 111th Cong. 27 (2009) (statement of Rep. Alcee Hastings); 154 Cong. Rec. H5740 (2008) (statement of Rep. Sheila Jackson Lee).

[21] Indeed, the ACLU believes that the First Amendment presumption of access to judicial records applies to this Court's legal rulings. We acknowledge, however, that two judges of this Court have disagreed. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 491-97; Order, *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01, at 5-7.

[22] *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978).

[23] *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) (internal citations omitted).

[24] *See Hicklin Eng'g., L.C.*, 439 F.3d at 348-49; *United States v. Turner*, 206 F. App'x 572, 574 n.1 (7th Cir. 2006); *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (refusing to seal opinion because "decisions of the court are a matter of public record").

[25] *See, e.g.*, *United States v. Ressam*, 221 F. Supp. 2d 1252, 1262-63 (W.D. Wash. 2002).

[26] *See, e.g.*, *In re NSA Telecomms. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010) (warrantless wiretapping); *Am. Civil Liberties Union v. NSA*, 493 F.3d 644 (6th Cir. 2007) (same);

A rule that promoted release of this Court's significant legal rulings would not undermine national security. Legal analysis usually can be segregated from operational, investigatory, or technological information. Sensitive information can be redacted.[27] Federal courts routinely release judicial opinions in redacted form in cases that involve classified or sensitive information.[28] That this Court and the Court of Review have released important legal opinions in the past confirms that disclosure of this Court's legal analysis sometimes can be accomplished without harm to national security.[29] Indeed, the Court's own rules suggest that legal argument not only can, but sometimes must, be made in unclassified form.[30] Moreover, the government's release of information about some of this Court's sealed legal rulings suggests that the government has classified some information that should not have been classified.[31]

Public Disclosure of Legal Briefs that Address Significant or Novel Legal Questions

Proposed Rule 62(b) states that a FISC judge may, in his or her discretion, order the release of "other records," which presumably includes legal briefs submitted to the Court. As discussed above, however, a rule that promoted consistent transparency about the legal reasoning that informs this Court's important legal rulings would be preferable to an *ad hoc* approach to transparency. Accordingly, we respectfully urge the Court to amend Rule 62 to state that FISC judges should presumptively order the public release of legal briefs that inform the Court's decision-making on significant legal matters. The briefs should be redacted only to the extent necessary to protect information the Court determines is properly classified.

The Court's own proposed rules make clear that the government and third parties who appear before the Court sometimes file legal briefs that consist principally of legal argument. Proposed Rule 11 requires the government to submit legal briefs whenever a surveillance application raises "an issue of law not previously considered by the Court." Proposed Rule 7(j) requires the government to make legal arguments in an unclassified fashion in adversarial FAA proceedings. Just as the public has an interest in understanding this Court's decisions on

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Mohamed v. Jeppesen Dataplan, Inc., --- F.3d ---, No. 08-15693, 2010 WL 3489913 (9th Cir. Sept. 8, 2010) (rendition and state secrets); *Awad v. Obama*, 646 F. Supp. 2d 20 (D.D.C. 2009) (Guantánamo); *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008) (national security letters); *Rosen*, 487 F. Supp. 2d at 715-16 (criminal prosecution for disclosure of classified information).

[27] *See Hicklin Eng'g, L.C.*, 439 F.3d at 348 ("judicial opinions and litigants' briefs must be in the public record, if necessary in parallel versions – one full version . . . and another redacted version").

[28] *See, e.g.*, *United States v. Ghailani*, --- F. Supp. 2d ---, No. 10-98-Crim.-1023, 2010 WL 3430514 (S.D.N.Y. Aug. 17, 2010) (criminal terrorism case); *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (same); *Awad*, 646 F. Supp. 2d 20 (Guantánamo case); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005) (national security letter case).

[29] *See supra* note 5; Order, *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01 (FISA Ct. Aug. 27, 2008); Order, *In re Motion for Release of Court Records*, No. 07-01 (FISA Ct. Feb. 8, 2008); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484.

[30] *See* Proposed Rule 7(j) (in adversarial proceedings where "the government files *ex parte* a submission that contains classified information" it must provide the other party with an unclassified or redacted version" that "at a minimum, must clearly articulate the government's legal arguments").

[31] *See, e.g.*, *Transcript, Debate on the Foreign Intelligence Surveillance Act*, El Paso Times, Aug. 22, 2007 (DNI McConnell describing sealed orders issued by this Court).

important matters of law, it has an interest in understanding the arguments the Court considered in reaching those conclusions.

There is no question that this Court has the authority to order disclosure of legal briefs that reside on its docket, even when those briefs contain sealed information. "Every court has supervisory power over its own records and files,"[32] and this Court is no exception, as one judge of this Court has recognized.[33] One aspect of the Court's inherent authority over its own docket is the power to unseal materials on that docket.[34] Indeed, this Court has ordered the government to file public versions of its legal briefs in the past.[35]

Preserving the Court's Independent, Final Authority Over its Own Records

Proposed Rule 62(a) improves upon its prior version in that it clarifies that the Court may, but need not, direct the executive branch to review and redact any opinion or order the Court wishes to release publicly. *Compare* Proposed Rule 62(a) (before publication of an opinion 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 classified information is appropriately protected") *with* Rule 5(c) (before publication of an opinion it "must be reviewed by the Executive Branch and redacted, as necessary, to ensure that properly classified information is appropriately protected"). The proposed rule, however, does not make sufficiently clear that it is the Court and not the executive branch that has ultimate authority to determine whether redactions are appropriate. The ACLU urges the Court to amend the rule to make clear that it will independently assess whether redactions proposed by the government are appropriate.[36]

The question of what information in judicial opinions and legal briefs submitted to the Court may be released to the public is a question for the Court, not the executive branch, to decide. A rule that permits the executive branch to decide whether – and to what extent – such records should be made public abdicates an important judicial power to another branch of government. When the government asserts that information in judicial documents cannot be released because it is classified, this Court has not only the authority but the obligation to ensure that the information is properly classified. As the Fourth Circuit has stated, "[a] blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse."[37] Indeed,

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[32] *Nixon*, 435 U.S. at 598.

[33] *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486.

[34] *See, e.g.*, *United States v. Wecht*, 484 F.3d 194, 211-12 (3d Cir. 2007); *Nixon*, 435 U.S. at 598; *In re Matter of Sealed Affidavit(s)*, 600 F.2d 1256, 1257-58 (9th Cir. 1979); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004) ("[i]t is undisputed that a district court retains the power to modify or lift protective orders that it has entered" (internal quotation marks omitted)).

[35] *See, e.g.*, Scheduling Order, *In re Motion for Release of Court Records*, No. Misc. 07-01 (FISA Ct. Aug. 16, 2007) (ordering public briefing); Scheduling Order, *In re Proceedings Required by §702(i) of the FISA Amendments Act of 2008*, No. Misc. 08-01 (FISA Ct. July 17, 2008) (same).

[36] At a minimum, the Court should amend Proposed Rule 62(a) so that it states that the government can redact only *properly* classified information, not just "classified information."

[37] *In re Wash. Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986).

courts routinely conduct independent assessments of executive branch decisions involving classified information. Courts determine whether information is properly classified or whether its disclosure is likely to harm national security in the context of pre-publication review determinations,[38] Freedom of Information Act,[39] and state secrets privilege claims.[40] As one court recently stated, "the authority to protect national security information is neither exclusive nor absolute in the executive branch."[41]

When the government asserts that information cannot be made public because its release would harm national security, the Court must conduct an independent review of whether the government's claim for secrecy is sufficiently justified and whether its actions are consistent with the Executive Order governing classification.[42] Although the government's national security claims are traditionally afforded deference, "deference is not equivalent to acquiescence."[43]

This judicial check on the government's classification power is necessary to prevent abuse. The rampant over-classification of government information is well-documented.[44] Where the executive's classification decisions effectively deprive the public of information about the judicial process and about the law itself, the Courts' oversight role is all the more critical.

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[38] *See Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980); *Wilson v. CIA*, 586 F.3d 171, 185 (2d Cir. 2009) (agency must prove "good reason to classify" information); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (requiring *de novo* review of pre-publication classification determinations).

[39] *See Halpern v. FBI*, 181 F.3d 279 (2d Cir. 1999) (rejecting Exemption 1 claim); *Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59, 77 (2d Cir. 2008) (Exemption 1 *de novo* review requires courts to decide if information is "properly classified"); *Hayden v. NSA*, 608 F.2d 1381, 1384 (D.C. Cir. 1979) (in FOIA case the "court must make a De novo review of the agency's classification decision").

[40] *See United States v. Reynolds*, 345 U.S. 1, 10 (1953).

[41] *In re NSA Telecomms. Records Litig.*, 564 F. Supp. 2d 1109, 1121 (N.D. Cal. 2008); *see also Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (noting "judges c[an] be trusted to approach . . . national security determinations with common sense, and without jeopardy to national security").

[42] *See John Doe, Inc.*, 549 F.3d at 879-82 (in context of assessing a national security surveillance gag order, stating that "some demonstration [to a court] from the Executive Branch of the need for secrecy is required" and that any other rule would "cast Article III judges in the role of petty functionaries"); *Rosen*, 487 F. Supp. 2d at 717 ("[A] generalized assertion . . . of the information's classified status . . . is not alone sufficient to overcome the presumption in favor of" open judicial proceedings).

[43] *Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998).

[44] *See Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 1007 n.7 (9th Cir. 2009) ("Abuse of the Nation's information classification system is not unheard of."), *rev'd on other grounds*, 614 F.3d 1070 (9th Cir. 2010) (*en banc*); *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) (there is "an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory"); Walter Pincus, *Intelligence Pick Calls Torture Immoral, Ineffective*, Wash. Post, Jan. 23, 2009 (reporting Ret. Admiral Dennis C. Blair's stating that: "There is a great deal of overclassification, some of it . . . done for the wrong reasons."); National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 417 (G.P.O. 2004) ("Current security requirements nurture overclassification").

Release of Significant Rulings Related to the FISA Amendments Act

Whether or not the Court adopts the amendments the ACLU proposes, the ACLU respectfully urges the Court to release any significant legal opinions and orders concerning (1) the scope, meaning, and constitutionality of the FAA; (2) the legality of FAA surveillance applications that implicate the rights of U.S. citizens and residents; and (3) the constitutionality of FAA targeting and minimization procedures. The ACLU also urges the Court to release the legal opinions that reportedly spurred enactment of the PAA and the FAA. The release of these opinions is urgently needed to inform the debate about the FAA's scheduled sunset in 2012.

The FAA substantially altered the foreign intelligence electronic surveillance scheme that had been in place for over thirty years. As the Court is aware, the FAA allows the government to seek orders from this Court authorizing surveillance targeted at people reasonably believed to be located outside the United States.[45] The government's application need not identify particular surveillance targets to demonstrate probable cause or any form of suspicion.[46] The surveillance may include the mass acquisition of U.S. citizens' and residents' communications with people abroad; indeed, this was one of the central purposes of the FAA.[47]

The FAA has been a matter of significant public concern since it was first proposed.[48] It has been criticized in many of the nation's leading editorial pages.[49] Although the law has now been in effect for more than two years, however, the public knows little about how it has been interpreted and used; what impact the law has had on Americans' privacy; and what safeguards are in place to prevent abuse. The little that is known does not inspire public confidence. In

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[45] 50 U.S.C. §§ 1881a(a), 1801(h)(4).

[46] 50 U.S.C. § 1881a(g)(2)(A)(iii)-(vii) (laying out required elements of application).

[47] *See* Letter from Att'y Gen. Michael Mukasey and Nat'l Intel. Dir. John Michael McConnell to Sen. Harry Reid (Feb. 5, 2008) at 3-4 (opposing amendments that would have required a FISA warrant to intercept communications between a person in the United States and a person abroad because those were "precisely the communication[s] [the government] generally care[s] most about").

[48] *See, e.g.*, Peter Grier, *White House Scores Key Victory on Government Eavesdropping*, Christian Sci. Monitor, July 10, 2008; Antonio Vargas, *Obama Defends Compromise on New FISA Bill*, Wash. Post, July 4, 2008; Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, Apr. 15, 2009; Pamela Heiss, *Senate Panel to Probe Wiretapping Violations*, Assoc. Press, Apr. 16, 2009; James Risen & Eric Lichtblau, *E-Mail Surveillance Renews Concerns in Congress*, N.Y. Times, June 16, 2009; James Bamford, *The NSA is Still Listening to You*, Salon, July 22, 2009; *NSA to Build Secretive Data Center in Utah*, Assoc. Press, Oct. 23, 2009; James Bamford, *Big Brother is Listening*, The Atlantic, Mar. 24, 2010; Ellen Nakashima, *Group Challenging Enhanced Surveillance Law Faces Uphill Climb*, Wash. Post, Apr. 19, 2010; Julian Sanchez, *FISA Applications Are Down But is Surveillance?*, Cato Institute, May 11, 2010.

[49] *See* Editorial, *Mr. Bush v. the Bill of Rights*, N.Y. Times, June 18, 2008; Editorial, *Election-Year Spying Deal is Flawed, Overly Broad*, USA Today, June 25, 2008; Editorial, *Compromising the Constitution*, N.Y. Times, July 8, 2008; Editorial, *FISA Follies*, Wash. Post, July 3, 2008; Editorial, *The Day of the New Surveillance Law*, N.Y. Times, July 11, 2008; Editorial, *The Eavesdropping Continues*, N.Y. Times, June 17, 2009; Editorial, *When it Comes to Terror, We Can't Tell You*, N.Y. Times, Apr. 3, 2010; Editorial, *Spying, Civil Liberties, and the Courts*, N.Y. Times, Apr. 15, 2010.

April 2009, *The New York Times* reported that the NSA was using its FAA powers to vacuum up U.S. communications by the millions and that it was possibly "overcollecting" purely domestic communications in a systematic manner.[50] A few months later, *The New York Times* again reported that the NSA was "over-collecting" Americans' personal e-mails.[51]

Although the FAA does not sunset until 2012, bills already have been introduced in Congress to amend the law.[52] The debate about whether the FAA should be repealed, amended, or extended will soon begin in earnest. Without more information about how this Court has interpreted and policed implementation of the law, that debate will take place in an informational vacuum. The lack of public access to this Court's significant legal rulings on the subject threatens to render the upcoming legislative debate about the FAA just as uninformed as the first.

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The ACLU is grateful to the Court for the opportunity to submit these comments.

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[50] Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. Times, Apr. 15, 2009; *see also* Pamela Hess, *Senate Panel to Probe Wiretapping Violations*, Assoc. Press, Apr. 16, 2009; Glenn Greenwald, *The NYT's Predictable Revelation: New FISA Law Enabled Massive Abuses*, Salon, Apr. 16, 2009.

[51] James Risen & Eric Lichtblau, *E-Mail Surveillance Renews Concerns in Congress*, N.Y. Times, June 16, 2009.

[52] *See* FISA Amendments Act of 2009, H.R. 3846, 111th Cong. (2009); Judicious Use of Surveillance Tools in Counterterrorism Efforts Act of 2009, H.R. 4005, 111th Cong. (2009); Judicious Use of Surveillance Tools in Counterterrorism Efforts Act of 2009, S. 1686, 111th Cong. (2009).