UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, DC

IN RE ORDERS ISSUED BY THIS COURT INTERPRETING SECTION 215 OF THE PATRIOT ACT	Case No. Misc. 13-02

REPLY BRIEF IN SUPPORT OF 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

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PRELIMINARY STATEMENT

Movants' request for access to the legal opinions of this Court evaluating the meaning, scope, and constitutionality of Section 215 of the Patriot Act, 50 U.S.C. § 1861, seeks to vindicate the public's overriding interest in understanding a far-reaching federal statute. The First Amendment guarantees the public a qualified right of access to those opinions, because judicial opinions interpreting constitutional and statutory limits on governmental authorities—including those relevant to foreign-intelligence surveillance—have always been available for inspection by the public and because their release is so manifestly fundamental in a democracy committed to the rule of law.

The government's contrary view—that legal opinions of an Article III court controlling the constitutional rights of millions of Americans may forever be denied to the public, even if any legitimate interest in secrecy has expired or can be accommodated—is wrong. Indeed, if the government succeeds in depriving the public of the tools necessary to understand the laws passed by its elected officials, it will have eroded the foundations of our democracy. The government's theory affects more than the public's right to this Court's opinions; its reasoning would likewise deny the public a right of access to the opinions of courts sitting in review of those opinions, whether issued by the Court of Review or even the Supreme Court of the United States. That result would defeat democratic oversight and undermine public confidence in our legal institutions.

The government arrives at its radical position through a sleight of hand: because this Court has operated in secrecy since it was created in 1978, the government claims the constitutional right of access does not attach to the Court's legal opinions. In other words, the government insists that the Court's opinions should remain secret because they have been secret.

This reasoning is dizzyingly circular. The question is not whether the FISC has, to date, published its opinions, but whether court rulings on the scope of the government's surveillance authorities are immune from the constitutional right of access. Plainly, they are not. And, as explained below, the undeniable value to our nation of public access to this Court's pronouncements on the meaning and scope of surveillance laws is sufficient, on its own, to confirm the existence of a First Amendment right to inspect them. As sixteen U.S. representatives explained as amici curiae, the opinions sought "are essential to the proper functioning of the legislative branch of government and an informed public debate. . . . Without access to this information, Congress and the public cannot have a meaningful debate about how these laws operate in practice." Br. of Rep. Amash et al. 1.

The government's claimed need for blanket secrecy surrounding this Court's interpretation of Section 215 is in significant tension with its own public statements describing how that provision is being applied. Since Movants filed their motion, the government has continued to publicly defend the program of surveillance it is operating under Section 215 with the selective disclosure of additional details. This Court need not and should not sit idly by while administration officials continue to publicly characterize its opinions. Depriving the public of access to those opinions, which clearly should not be sealed in their entirety, undermines faith in government and ultimately jeopardizes the relatively limited information that truly should be kept secret. As Justice Stewart warned in *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring):

> [W]hen everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. . . . [T]he hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.

The Court should recognize a public right of access to its legal opinions concerning Section 215 and publish them as quickly as possible, with only those redactions strictly necessary to preserve a compelling governmental interest. Alternatively, it should exercise its discretion to do so in recognition of the significant importance of public access to this information.[1]

ARGUMENT

I. The Public Has a Constitutional Right of Access to the Legal Opinions of this Court Construing the Constitution and the Scope of the Government's Surveillance Authorities.

A. Judicial Opinions, Including Those Interpreting the Scope of the Government's Surveillance Authorities, Have Historically Been Public.

The Constitution guarantees the public a qualified right of access to the legal opinions of this Court, because opinions interpreting the constitutionality and scope of congressional enactments, including surveillance laws, have always been available for public inspection and because disclosure is of obvious and overwhelming public importance. *See* Movants' Br. 6–15. The core of the government's response is the argument that the secrecy of this Court's opinions justifies the secrecy of this Court's opinions. *See* Gov't Br. 6–7. But that begs the question. The question is not whether the forum has, to date, published its orders and opinions, but whether the rulings it issues on the scope of the government's surveillance authorities are immune from the constitutional commitment to judicial transparency. They are not, because the *types* of opinions

[1] The government repeatedly characterizes this motion as an attempt to relitigate a motion filed by the American Civil Liberties Union in 2007. But the facts have changed, as the government itself acknowledges. *See* Gov't Br. 12. As explained below, this Court's role in overseeing the government's surveillance has shifted, requiring it to issue opinions adjudicating more than merely the validity of the government's selection of particular surveillance targets. *See, e.g.*, FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436. Movants now argue for a constitutional right of access tethered to the Court's expanded role in construing the Constitution and the nation's surveillance laws.

sought by Movants—Article III legal opinions interpreting the country's surveillance laws and the Constitution's application to those laws—have historically been public.

This is true even of opinions about FISA and the government's other foreign-intelligence surveillance powers. In *United States v. U.S. District Court*, 407 U.S. 297 (1972), for example, the Supreme Court publicly considered the constitutionality of a warrantless-wiretapping program conducted by the government "to protect the national security." *Id.* at 301. And in dozens of other cases, the lower courts have publicly heard suits related to other national-security surveillance activities—whether conducted pursuant to FISA,[2] the government's claimed inherent authority,[3] or more recent enactments[4]—all while protecting properly sealed information about intelligence sources and methods. Public handling of these cases has been the norm, and indeed, outside of this Court's decision in 2007, Movants are not aware of a single case in which a court has rejected the public's qualified right of access to legal opinions interpreting public surveillance laws. Indeed, even more generally, the legal opinions of Article

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[2] *See, e.g.*, *United States v. Duggan*, 743 F.2d 59, 72–74, 77 (2d Cir. 1984) (analyzing FISA's original "purpose" requirement, and holding that "FISA does not violate the probable cause requirement of the Fourth Amendment"); *United States v. Abu-Jihaad*, 630 F.3d 102, 118–29 (2d Cir. 2010) (analyzing FISA's "significant purpose" requirement in light of Patriot Act amendments and Fourth Amendment requirements, and collecting other cases); *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1039–40 (D. Or. 2007) (same), *rev'd and remanded*, 599 F.3d 964 (9th Cir. 2010); *United States v. Belfield*, 692 F.2d 141, 148–49 (D.C. Cir. 1982) (considering the constitutionality of FISA's discovery and suppression procedures).

[3] *See, e.g.*, *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 905 (9th Cir. 2011) (reversing dismissal of lawsuit challenging "widespread warrantless eavesdropping in the United States"); Order, *Jewel v. Nat'l Sec. Agency*, No. C 08-0437, 2013 WL 3388503 (N.D. Cal. July 8, 2013) (rejecting government's assertion of state-secrets defense after remand); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (adjudicating the constitutionality of the National Security Agency's warrantless wiretapping of Americans under the President's Terrorist Surveillance Program), *rev'd on other grounds*, 493 F.3d 644 (6th Cir. 2007).

[4] *See, e.g.*, Defs.' Mem. in Opp. at 32–59, *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633 (S.D.N.Y. 2009) (defending the constitutionality of the FISA Amendments Act on Fourth Amendment and Article III grounds).

III courts interpreting public laws and the Constitution's application to those laws have always been public. *See, e.g.*, Movants' Br. 7–8. The contrary proposition has no historical foundation and is anathema to our democracy.

Nonetheless, the government embraces the view that the public is not entitled to know how this Court has interpreted the law and construed the Constitution. Its arguments in support of that proposition all hinge on its characterization of the FISC as a unique court that oversees classified matters. *See* Gov't Br. 6 ("Indeed, proceedings before the FISC involve highly sensitive and classified matters involving national security, relating, for example, to efforts by the United States to foil acts of international terrorism. By their very nature, such proceedings need to be conducted in secrecy.").

There are two fundamental flaws with this view.

First, by focusing on the FISC as a unique *forum*, the government begins from an improper premise. The relevant question is whether the *type* of records at issue—legal interpretations of public laws, including the government's surveillance authorities—have historically been public. In emphasizing instead the practice of this Court, the government advances the same logic rejected in *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) ("The Puerto Rico Supreme Court's reliance on Puerto Rican tradition is also misplaced."). Moreover, in assessing the "experience" of access, it is inappropriate to analyze the history of a *new* forum whose secrecy is being challenged. Because there will never be a tradition of public access in new forums, the government's logic would permit Congress to circumvent the constitutional right of access—even as to, say, criminal trials—by providing that such trials henceforth be heard in some new forum.

The government argues that the FISC has no historical analogues. *See* Gov't Br. 6 (characterizing this Court's proceedings as "unlike the operations of any other court"). The FISC is unusual in that all of its cases concern foreign intelligence, but this fact, to which the government returns repeatedly, is neither here nor there. While this Court may be unique in the composition of its caseload, it has no monopoly on cases concerning foreign intelligence. In any event, to determine whether the right of access attaches, the important question is not the general nature of the FISC's docket but whether there is a history of openness with respect to the particular type of judicial records sought. Were the government's contrary argument correct, *U.S. District Court* and the dozens of public opinions concerning FISA and other foreign-intelligence collection would not just be secret—they would not be subject to a constitutional right of access.

The government's focus on the bulk of the Court's early history, as evidence of its tradition of secrecy, is similarly misplaced. Thirty years ago, one could have argued that the nature of the Court's primary task—determining whether the government had demonstrated probable cause to believe a specific surveillance target was an agent of a foreign power, 50 U.S.C. § 1805(a)(2)—was analogous to proceedings not always subject to a right of access. In recent years, however, the FISC's responsibilities have changed dramatically. No longer is this Court confined to making individualized assessments of probable cause. Today, the FISC oversees broad surveillance programs, makes programmatic determinations regarding the implementation of these programs, and apparently decides the extent to which such programs are constitutional. *See, e.g.*, Secondary Order, *In re Application of the FBI for an Order Requiring the Production of Tangible Things from Verizon Bus. Network Servs., Inc.*, No. BR 13-80 (FISA Ct. Apr. 25, 2013), *available at* http://bit.ly/11FY393; 50 U.S.C. § 1881a.

In carrying out those new responsibilities, the Court reportedly issues broad legal opinions essential to the public's understanding of the laws that regulate government surveillance and that define the limits of their privacy.[5] That is not the kind of role the FISC has traditionally played. As Judge James Robertson, a former judge of this Court, explained:

> The FISA approval process works just fine when it deals with individual applications for surveillance warrants, because approving search warrants and wiretap orders and trap and trace orders and foreign intelligence surveillance warrants one at a time is familiar ground for judges. . . . But what happened after the revelations in late 2005 about NSA circumventing the FISA process was that Congress passed the FISA Amendments Act of 2008 and introduced a new role for the FISC, which was to approve surveillance programs. That change, in my view, turned the FISA court into something like an administrative agency, which makes and approves rules for others to follow.

Hearing of the Privacy and Civil Liberties Oversight Board on Legal Perspectives at 31:27–32:28 (July 9, 2013), http://cs.pn/177IpII.

Second, the government's implicit suggestion that courts must reject the right of access for all cases about "highly sensitive and classified matters involving national security" is simply wrong. Gov't Br. 6. Courts regularly entertain such suits in public, sealing only those portions that must be sealed to preserve higher values. *See, e.g.*, *supra* notes 2–4; *In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d 1, 11 (D.D.C. 2009) (recognizing right of public access to Guantanamo Bay habeas corpus proceedings); Gov't Response 1–2, *Am. Civil Liberties Union v. United States*, No. 13-003 (U.S.C.M.C.R. Mar. 7, 2013) (acknowledging that Article II military-commission proceedings are subject to the First Amendment right of public access and its strict-scrutiny test), *available at* http://bit.ly/10Rw3DL; *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965 (9th Cir. 2012) (publicly addressing constitutionality of the

[5] *See, e.g.*, Jennifer Valentino-Devries & Siobhan Gorman, *Secret Court's Redefinition of 'Relevant' Empowered Vast NSA Data-Gathering*, Wall St. J., July 8, 2013, http://on.wsj.com/13x8QKU; Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. Times, July 6, 2013, http://nyti.ms/12beiA3.

freezing of the assets of an alleged "specially designated global terrorist," based in part on classified evidence); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009) (similar).

For these reasons, there is a tradition of public access to Article III opinions generally and, specifically, to those interpreting the scope and constitutionality of the nation's surveillance laws.

Even if there were no history of openness, however, that would not defeat the existence of the First Amendment right where the policy reasons supporting access are clear. Courts have often found the First Amendment right of access to attach even where there is no tradition of openness. In *New York Civil Liberties Union v. New York City Transit Authority*, 684 F.3d 286, 298 (2d Cir. 2012), for example, the Second Circuit found a First Amendment right of access to administrative hearings conducted by New York City's Transit Authority Bureau, which was created in 1986. Looking to "the reasoning of the public access cases," the court found that a proper application of the experience and logic test should "focus not on formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake." *Id.* at 299. As a result, the Bureau's scant history was not dispositive—a point that the court made clear:

> If . . . government institutions that did not exist at the time of the Framers were insulated from the principles of accountability and public participation that the Framers inscribed in the First Amendment, legislatures could easily avoid constitutional strictures by moving an old governmental function to a new institutional location. Immunizing government proceedings from public scrutiny by placing them in institutions the Framers could not have imagined . . . would make avoidance of constitutional protections all too easy.

Id.; *see also In re Copley Press, Inc.*, 518 F.3d 1022, 1027 (9th Cir. 2008) ("Even without historical experience, logic requires that at least *part* of these [plea-related] hearings be open to

the public" despite the lack of "historical experience of public access to these hearings . . . because the hearings didn't exist until quite recently.").[6]

B. "Logic" Supports the Release of the Judicial Opinions Sought.

The public's First Amendment interest—and the logic supporting access—is at its zenith when it comes to judicial opinions that interpret our laws. The long history and practice set forth in the motion is an expression of that logic, and it speaks to the special importance of this category of judicial records. *See* Movants' Br. 7–8. The government is badly mistaken when it argues that Movants assert nothing more than a generic interest in more information. Gov't Br. 9. That claim is belied both by the limited subset of FISC records that Movants seek and by the particular value of those records to the proper functioning of our democracy. As courts have repeatedly recognized, public access to judicial opinions serves an exceptionally vital function:

> The decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices. *Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the legislature*. It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and

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[6] *See also Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701 (6th Cir. 2002) (finding that even brief historical tradition can be "sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted"); *United States v. Simone*, 14 F.3d 833, 840, 838 (3d Cir. 1994) (finding right of access to post-trial hearings on juror misconduct because "logic counsels" that openness will "have a positive effect" and the "'experience' prong . . . provides little guidance"); *United States v. Suarez*, 880 F.2d 626, 631 (2d Cir. 1989) (finding First Amendment right of access to Criminal Justice Act forms despite a "lack of 'tradition' with respect to the CJA forms" because of the "public's strong interest in how its funds are being spent"); *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1516 17 (9th Cir. 1988) (finding First Amendment right because "public scrutiny" would "benefit" the proceedings, despite lack of an "unbroken history of public access"); *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (noting that "lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access to such hearings").

> opinions should not be made known to the public . . . . The policy of the state always has been that the opinions of the justices, after they are delivered, belong to the public.

Nash v. Lathrop, 142 Mass. 29, 35–36 (1886) (emphasis added) (cited by *Banks v. Manchester*, 128 U.S. 244, 253–54 (1888) (Blatchford, J.)); *see also Lowenschuss v. W. Pub. Co.*, 542 F.2d 180, 185 (3d Cir. 1976). The public's right to judicial opinions is, in reality, the sum of 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 is—the public interest in access to judicial opinions could not run deeper. As amici emphasize, these opinions enable the public to engage their elected representatives on matters of grave importance. *See* Br. of Rep. Amash et al. 9–10. The FISC's interpretations of our surveillance laws are part and parcel of this dialogue, but without open access to those interpretations, the conversation cannot move forward.[7] The ongoing public debate is one about the lawful limits of government power, and those limits can and should be made known without revealing the targets of the underlying investigations. This is the specific and compelling logic for allowing the public access to the

[7] That conversation should also include the courts themselves, to allow our tradition of common-law decisionmaking to function. *California v. Carney*, 471 U.S. 386, 400–01 (1985) (Stevens, J., dissenting) ("The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication. Consideration of this matter by the lower courts in a series of litigated cases would surely have facilitated a reasoned accommodation of the conflicting interests. To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law. Deliberation on the question over time winnows out the unnecessary and discordant elements of doctrine and preserves 'whatever is pure and sound and fine.'" (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 179 (1921))).

FISC's significant legal opinions—which is all Movants seek—even while the Court's day-to-day review of individual surveillance applications remains protected from disclosure.

Access to the FISC's significant legal interpretations will also serve other public virtues, which the government neglects but which may be of great institutional importance to the Court. In particular, access "enhances the quality and safeguards the integrity" of courts, while at the same time "foster[ing] an appearance of fairness, thereby heightening public respect for the judicial process." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Release of significant FISC opinions will have these salutary effects, potentially even more here than in other tribunals. Precisely because adjudications before the FISC are generally *not* adversarial, public access to the resulting legal opinions will promote the performance of all involved and facilitate an important form of accountability after the fact. *See United States v. Ressam*, 221 F. Supp. 2d 1252, 1263 (W.D. Wash. 2002) ("The benefits of access to court orders do not accrue merely in those members of the public that read or hear of them. The court itself, knowing that its determinations will be scrutinized by others, is further encouraged to coherently explain the reasoning behind its decision."); *Littlejohn v. Bic Corp.*, 851 F.2d 673, 683 (3d Cir. 1988). This transparency, in turn, promises to ground the FISC's reputation for fairness, heightening public confidence in the Court's otherwise secret legal processes. *See, e.g., United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). Finally, release of these FISC opinions would allow the Court to speak for itself, with the weight of its considered legal reasoning, at a time when those opinions are being characterized in leaks by current and former executive officials. *See supra* note 5.

In its effort to keep the FISC's opinions officially hidden from view, the government mischaracterizes Movants' request to conjure a threat of harm where none exists. The government writes as if Movants seek access to individual surveillance applications—something

Movants have repeatedly made clear they do *not* seek. Movants' Br. 1, 5, 14. Likewise, the cases marshaled by the government concern records that are, on close inspection, different in kind from the opinions sought here. Gov't Br. 10 n.2; *see, e.g.*, *In re Bos. Herald, Inc.*, 321 F.3d 174, 188 (1st Cir. 2003) (weighing privacy interest in personal financial details). All these cases involve categories of court records that would necessarily expose ongoing investigations, confidential sources, or personal information—in contexts in which there was no way of protecting this material short of sealing the records themselves. *See, e.g.*, *In re Balt. Sun Co.*, 886 F.2d 60, 64 (4th Cir. 1989) (access to search-warrant affidavits related to ongoing investigation); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1215–16 (9th Cir. 1989) (same); *United States v. Smith*, 123 F.3d 140, 148 (3d Cir. 1997) (grand-jury proceedings related to ongoing investigation); *United States v. Corbitt*, 879 F.2d 224, 229–35 (7th Cir. 1989) (access to presentence reports). The same is not true of FISC opinions, where such information can and should be evaluated on a case-by-case basis and protected as appropriate. Unlike search-warrant affidavits, grand-jury proceedings, and presentence reports, the FISC's judicial opinions contain legal reasoning that, in many instances, can be segregated from sensitive information.[8] *Cf. In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, 396 F. Supp. 2d 747, 748–49 (S.D. Tex. 2005).

In short, judicial opinions—as a category—present a different logic: the public's First Amendment interest can be vindicated without automatically jeopardizing the underlying investigations. *See, e.g.*, *In re United States*, 872 F.2d 472 (D.C. Cir. 1989) (redacting portion of

[8] The FISC's own rules acknowledge the feasibility of segregating sensitive information. In particular, FISC Rule 7(j) provides, in part:

> Except as otherwise ordered, if the government files *ex parte* a submission that contains classified information, the government must file and serve on the non-governmental party an unclassified or redacted version. The unclassified or redacted version, at a minimum, must clearly articulate the government's legal arguments.

judicial opinion to protect national-security interests). Recent disclosures by executive and congressional officials speak directly to this capacity. For instance, officials have publicly discussed the legal standard that the Court has imposed on the government's searches of telephony metadata, the Court's development of the special-needs doctrine, its interpretation of "relevance" within Section 215, and the extension of the third-party doctrine to bulk metadata. *See* James R. Clapper, DNI Statement on Recent Unauthorized Disclosures of Classified Information (June 6, 2013), http://1.usa.gov/13jwuFc; How Disclosed NSA Programs Protect Americans, and Why Disclosure Aids Our Adversaries: Hearing Before the H. Permanent Select Intelligence Comm. (June 18, 2013), http://1.usa.gov/128XsNp (testimony of Deputy Attorney General James Cole) ("[T]he Fourth Amendment does not apply to these records."); *see also supra* note 5. All of these public explanations suggest that the FISC's opinions contain consequential legal holdings and interpretations and that they can be disclosed without risk to specific targets or methods.

In this way, the factors identified by the government belong to the case-by-case sealing analysis—they do not determine whether a qualified First Amendment right attaches to FISC opinions in the first place. *See, e.g.*, *United States v. Rosen*, 487 F. Supp. 2d 703, 715–16 (E.D. Va. 2007); *United States v. Pelton*, 696 F. Supp. 156, 159 (D. Md. 1986). Pressing for blanket secrecy, the government conflates these separate issues. The *existence* of the right flows from the combined history and logic of publishing judicial opinions, including those interpreting our national-security and surveillance laws. *Accord Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (citing cases) ("[D]isputes about claims of national security are litigated in the open."). Yet because the right is qualified, it may be overcome in specific instances—in particular, where the government demonstrates a "compelling governmental interest" and where

the restriction is "narrowly tailored to serve that interest." *Globe Newspaper Co.*, 457 U.S. at 607. Thus, in *Detroit Free Press v. Ashcroft*, the Sixth Circuit rejected the argument that national-security concerns precluded recognition of a constitutional right of access to "special interest" deportation proceedings, but acknowledged that those same concerns could justify abridging the constitutional right in specific cases. 303 F.3d 681, 692–93 (6th Cir. 2002). In other words, national-security concerns may demonstrate a "compelling interest" sufficient to *overcome* the qualified right of access on a case-by-case basis, but they do not defeat the right's *attachment* in the first instance. Much the same, in this case, the Court would evaluate whether a particular opinion discusses intelligence sources or methods that have not been previously disclosed, and whether targeted redactions could protect the government's interests while providing public access to the FISC's legal reasoning. *Cf. supra* note 8 (discussing FISA Ct. R.P. 7(j)). It is possible, too, that over time the FISC's opinions would evolve to anticipate this process and the interest in disclosure, by adopting a format or structure that readily separates sensitive, investigation-specific information from the Court's broader legal conclusions.

The government's suggestion that recognizing a qualified right of access would chill its relationship with the FISC is implausible. Gov't Br. 10–11. Movants do not seek access to all the FISC's operations, and they do not contend that the right of access attaches to all FISC opinions—only to those that interpret the Constitution and the scope of the government's surveillance authorities. Nor does the existence of the right imply blanket disclosure of FISC opinions. The Court would continue to evaluate publication requests individually, with direct input from the government in every case and the opportunity to redact sensitive information or to maintain specific opinions under seal. If the government's interests are as compelling as it claims, this test should not be a daunting one. Indeed, there is some irony in the government's

effort to recast the familiar First Amendment standard as a chilling device. Most importantly, recognizing a qualified right of access would not dramatically remake the government's relationship to the Court: as the government acknowledges, the current Rules permit the Court to publish its opinions while redacting "properly classified information." FISA Ct. R.P. 62(a); *see* Gov't Br. 1, 12–16. Thus, the logic of disclosure is already suggested by the FISC's own procedures, as well as the prior publication of FISC and Foreign Intelligence Surveillance Court of Review ("FISCR") opinions in the public interest. *See, e.g.*, Order, *In re Directives [Redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 08-01 at 1 (FISA Ct. Rev. Jan. 12, 2009), http://bit.ly/r32r2W (observing that "[i]t would serve the public interest and the orderly administration of justice to publish" the FISCR opinion).

II. This Court Has the Discretion to Release Its Own Opinions and Need Not Defer Exclusively to the Executive Branch with Respect to Classification.

Movants also properly seek the release of this Court's opinions interpreting Section 215 pursuant to the Court's Rules of Procedure. The crux of the government's argument is that Rule 62(a) forecloses a member of the public who is "not a party to any opinions at issue," Gov't Br. 13, from filing a motion for release of FISC records. To reject that strained reading of Rule 62(a), the Court need look no further than its own dismissal of that same contention six years ago in *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486–87 (FISA Ct. 2007) ("*In re Release*"). Rule 62(a)'s authorization of motions for publication by "a party" permits, rather than prohibits, Movants' request. Nowhere in the text of the Rules is the word "party" cabined to mean solely "a party to any opinions at issue," as the government would have it.[9] Moreover, that

[9] Where the Rules insist on qualifying the term "party," they are clear in doing so. *See, e.g.*, FISA Ct. R.P. 7(h) ("party other than the government"), 46 ("party in a proceeding under" the FISA); *see also* FISA Ct. R.P. 33 (using "petitioner" to refer to "[t]he recipient of a production order").

"[e]very court has supervisory power over its own records and files" is by now axiomatic. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). Thus, even if the applicable Rule were unclear, the Court would undoubtedly have the "inherent power" to consider Movants' request. *In re Release*, 526 F. Supp. 2d at 487.

Moreover, the government's unduly narrow focus on the FISC Rules' executive-branch declassification procedures substantially understates the Court's capacity—indeed, its judicial duty—to *independently* review government claims of classification. The government correctly acknowledges that, even absent a First Amendment right of access, publication of FISC opinions is within the "sound discretion of the judges of this Court." Gov't Br. 13.[10] But it wrongly argues that the FISC "cannot release an opinion that contains (or may contain) classified information without first ordering the Executive Branch to conduct a classification review." Gov't Br. 14. In so arguing, the government attempts to convert a permissive rule into a mandatory one. *See* FISA Ct. R. P. 62(a) ("Before publication, the Court *may*, as appropriate, direct the Executive Branch to review the order, opinion, or other decision" as to classification questions. (emphasis added)). That the FISC "may" enlist the executive branch to assist it in preparing its own opinions for public release merely underscores the Court's authority to prepare them for publication itself.

Furthermore, the government misreads the FISC's deference to the executive branch on particular classification matters in the past. *See* Gov't Br. 14–15 (citing *In re Release*, 526 F. Supp. 2d at 491, 495); *see also* Movants' Br. 16–17 (discussing publicly released FISC and FISCR opinions). What the government elides is that the supervisory power of the FISC over its own records grants it the discretion—like any other Article III court—to determine whether one

[10] The Court exercised that discretion just last month. *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*, Misc. 13-01 (FISA Ct. June 12, 2013).

of its own judicial opinions or a portion thereof warrants public disclosure notwithstanding a claim of classification by the executive branch.

The FISC's inherent authority to publish redacted versions of its own opinions stands independently of its *obligation* to do so when First Amendment interests are at stake. That authority compels the same result when the Court finds that the public's interest in release outweighs the government's interest in continued secrecy. *Cf. Nixon*, 435 U.S. at 602 (describing the "task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts"). No matter the context, "[a] blind acceptance by the courts of the government's insistence" as to its interest's decisive weight "would impermissibly compromise the independence of the judiciary and open the door to possible abuse." *In re Wash. Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986); *accord United States v. Smith*, 899 F.2d 564, 569 (6th Cir. 1990). As a result, courts routinely scrutinize executive-branch classifications, which are never determinative of claims to public access. *See, e.g.*, *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 882–83 (2d Cir. 2009) (applying strict scrutiny to classification decisions in challenge to national-security-letter gag orders) ("The fiat of a governmental official, though senior in rank and doubtless honorable in the execution of official duties, cannot displace the judicial obligation to enforce constitutional requirements."); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) ("[D]eference is not equivalent to acquiescence" when evaluating national-security assertions as to FOIA exemptions.); *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987) (same). This principle is not controversial, and in other forums, the government has expressly accepted it. *See, e.g.*, Final Reply Br. 8 n.1, *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, No. 12-5136 (D.C. Cir. Nov. 27, 2012), 2012 WL 5940305 (clarifying that the government has not "suggested that the Executive's determination that a

document is classified should be conclusive or unreviewable"). Far from an "abuse of discretion," Gov't Br. 15, applying scrutiny to executive-branch claims about the national-security consequences of release of information is a fundamental task of Article III courts, including—indeed, especially—the FISC.[11]

The FISC's fitness to determine that the public interest compels the release of classified information in certain circumstances is not at all preempted by the existence of FOIA. *See* Gov't Br. 15 n.4. If this Court properly determines that the First Amendment right of access applies, strict scrutiny requires the government to present specific and articulable reasons supporting a "compelling governmental interest," and the Court must "narrowly tailor[]" any restriction of access to the Section 215 opinions. *Globe Newspaper Co.*, 457 U.S. at 607. Even if the Court acts upon its own discretion to grant the requested relief, FOIA's availability has no bearing on the Court's ultimate and autonomous assessment of whether a legitimate national-security need merits the opinions' continued secrecy, in total or in part. The FISC has recognized that its judges often have "more expertise in national security matters than a typical district court judge." *In re Release*, 526 F. Supp. 2d at 495 n.31. It would be incongruous, to say the least, to accept the government's assertion that district courts may review classification in cases under FOIA seeking executive-branch documents, but that the FISC may not do the same upon motions for public access to its own legal opinions.

[11] The government's suggestion that Rule 3 of the FISC Rules of Procedure counsels to the contrary is mistaken. *See* Gov't Br. 15. That the judges and staff of this Court must obtain security clearances, and that they "shall comply" with certain statutory security procedures when handling classified information, FISA Ct. R.P. 3, does not speak to the Court's institutional authority as an independent branch of government to publicly release its own opinions interpreting the nation's public laws, or any other of its records, *see In re Release*, 526 F. Supp. 2d at 486–87.

Finally, a considered balancing of the relevant interests plainly warrants the relief sought. *See* Movants' Br. 17–18. The Section 215 opinions of this Court interpret a public law. As that law's democratic source, the public is entitled to understand Section 215's legal contours, particularly in light of the government's public acknowledgments of the broad powers the provision sanctions. And this Court's unique role in monitoring the government's surveillance activities entitles it, as well, to ensure that the public has the necessary information to assess the truth and logic of what is now publicly known about Section 215, rather than only piecemeal disclosures made to the press. *See, e.g.*, *supra* note 5.

Movants do not take lightly the responsibility of both the executive branch and the FISC to prevent the public disclosure of certain information. But as the Court of Review has recognized in the recent past, *see* Order, *In re Directives [Redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 08-01 (FISA Ct. Rev. Jan. 12, 2009), the release of its legal interpretations of broad significance would not call that responsibility into question, while advancing vital public values and furthering ongoing democratic debates.

CONCLUSION

For the foregoing reasons, Movants respectfully request that this Court unseal its opinions evaluating the meaning, scope, and constitutionality of Section 215 of the Patriot Act. Movants request that these materials be released as quickly as possible and with only those redactions essential to protect information that the Court determines, after independent review, to warrant continued sealing.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alex Abdo, certify that on this day, July 12, 2013, a copy of the foregoing certification was served on the following persons by the methods indicated:

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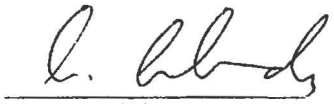

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