Docket No. Misc. 13-08

In the

United States
Foreign Intelligence Surveillance Court

IN RE OPINIONS & ORDERS OF THIS COURT
ADDRESSING BULK COLLECTION OF DATA
UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

BRIEF OF AMICUS CURIAE

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QUESTIONS PRESENTED

1. What is "the basis for the assertion of FISC subject matter jurisdiction over" Movants' claim? Specifically,

   (a) Is there a "statutory grant of subject matter jurisdiction over a constitutional claim for access to judicial opinions"?

   (b) Are there "any other authorities supporting Movants' assertion of FISC subject matter jurisdiction over their claim including, in particular, any case law addressing the inherent authority of a court of limited or specialized jurisdiction to adjudicate claims falling outside the court's subject matter jurisdiction, as explicitly granted by statute"?

2. To what extent do Movants have a qualified First Amendment right of access to judicial opinions?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Laura K. Donohue is the Agnes N. Williams Research Professor of Law at Georgetown University Law Center, Director of the Center on National Security and the Law, Director of the Center on Privacy and Technology, and Senior Scholar at the Center for the Constitution. She holds her Ph.D. in History from the University of Cambridge, England, her J.D. (with Distinction) from Stanford Law School, and her A.B. (with Honors) in Philosophy from Dartmouth College. On November 25, 2015, the Foreign Intelligence Surveillance Court (FISC) designated her as eligible to serve as amicus curiae pursuant to 50 U.S.C. §1803 (i)(1). On January 9, 2018, consistent with 50 U.S.C. §1803(i)(2)(A), the Foreign Intelligence Surveillance Court of Review (FISCR) appointed her as amicus curiae in this case to address the question of standing. Order of Jan. 9, 2018, FISCR 18-01. FISCR held that Movants had met the standing requirements and returned the case to address subject matter jurisdiction and to address the motion on the merits. *In re: Certification of Questions of Law to the FISCR*, FISCR No. 18-01 (FISA Ct. Rev. Mar. 16, 2018), at 7-8 [hereinafter FISCR Op.]. On May 1, 2018, the FISC appointed her as amicus curiae to address the remaining matters before the Court. [hereinafter Br. Order]

INTRODUCTION

Neither Congress nor the executive can preclude Article III courts from fulfilling their constitutional role. The national legislature has broad power to determine whether to establish lower courts and to define, within the categories of the cases defined in Article III, the kinds of cases those courts can entertain. But once Congress has called an Article III court into existence and defined its subject matter jurisdiction, Congress *cannot* prevent it from exercising its core judicial function. The judicial power *is* the power to decide cases. *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 816, 821 (1987) (Scalia, J., concurring). The final determination and the reasoning leading to it are beyond the reach of the other branches. If it were otherwise, then the careful protections built into the U.S. Constitution to create three, co-equal branches would be for naught.

This distinction, between an appropriate statutory assignment of subject matter jurisdiction and the constitutional requirements at the heart of separation of powers, illuminates the questions set by the court. The first query, whether there is a "statutory grant of subject matter jurisdiction over...access to judicial opinions" assumes that Congress *can* preclude public access to the output of the judicial process. Br. Order at 1. It cannot. It is undisputed that FISC is an Article III court. As soon as Congress brought it into being and granted it jurisdiction over domestic electronic surveillance conducted for foreign intelligence purposes, it divested itself

of interference in the court's core powers—including, most particularly, the court's decisions, reasoning, and issuance of opinions on matters properly before it.

The second question requests "any case law addressing the inherent authority of a court of limited or specialized jurisdiction to adjudicate claims falling outside the court's subject matter jurisdiction, as explicitly granted by statute." Br. Order at 2. *All* Article III courts are courts of limited jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). There are three Article III courts, aside from FISC and FISCR, with specialized subject matter. *See* App. A 10-17, 32-36. But specialization says nothing about the inherent powers of lower federal courts *qua* Article III bodies. Congress *cannot* control matters central to the administration of justice. "Certain implied powers…necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). It would be hard to imagine a more fundamental violation of that constitutional principle than efforts by the executive, or Congress, to claim that the Court has no jurisdiction over questions concerning public access to its own opinions, and that the other branches have the right to regulate the court's decisions and to prevent citizens from seeing the results of the judicial process.

The final matter on which the Court invites discussion goes to the merits. Movants seek access to judicial opinions that carry the force of law. They involve

complex constitutional and statutory interpretations which daily impact millions of citizens' lives. The cases reveal illegal government behavior. The opinions, of which there are now more than 60 in the public domain, serve as precedent. Movants therefore have a common law and a First Amendment right of access to them. Brief of Amicus Curiae, *In re: Certification of Questions of Law to the FISCR*, FISCR Docket No. 18-01 (Feb. 23, 2018), at 3-24. This brief advances the conversation by urging the court to adopt the test followed by other Article III courts which routinely subject classification claims to scrutiny.

SUMMARY OF THE ARGUMENT

Under separation of powers doctrine, Congress lacks the authority to pass statutes to grant, or deny, the FISC jurisdiction over its opinions. All three branches agree that FISC is an Article III court. Constitutional courts are vested with "the judicial power" of the United States, which is insulated from the other two branches. It includes the power to issue opinions disposing of cases. If the other branches could strip the courts of authority over their judgments, they would be able to manipulate the law, undermining the protections for judicial independence. The "least dangerous branch" would lose all power. All it *has* is its judgments on matters of law.

In 2007 this Court correctly held that it has inherent authority over its own records. *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486-87 (FISA Ct. 2007). Congress has broad authority to set the court's subject matter

jurisdiction. While specialized, FISC is an Article III court. Article III courts have essential inherent powers that stem from their responsibility to administer justice. Hundreds of cases recognize such authorities. *See* App. B 52-70. To the extent that inherent powers may be merely *useful* or *beneficial*, courts can take the initiative but then must give way to legislative direction. Insofar as inherent powers are *essential* or *necessary* to the execution of core judicial power, then Congress *cannot* interfere. *ACLU v. Holder*, 673 F.3d 245, 255-56 (4th Cir. 2011); *In re Stone*, 986 F.2d 898, 901-902 (5th Cir. 1993); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562-63 (3d Cir. 1985) (en banc). Issuance of opinions is a core judicial power. Control over them is an essential inherent authority. Article III courts thus have authority over their own records. *Nixon v. Warner Commc'ns Inc.,* 435 U.S. 589, 598 (1978). Courts routinely exercise jurisdiction over third party requests. They continue to exercise this authority, without any statutory authorization, even decades after the underlying action ends. *See, e.g.*, *United States v. Bus. of Custer Battlefield Museum & Stores*, 658 F.3d 1188, 1192-96 (9th Cir. 2011); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310-1313 (11th Cir. 2001); *In re Petition of American Historical Association*, 49 F.Supp.2d 274, 295 (1999). The court in which the matter first occurred exercises jurisdiction.

The FISC has a critical role to play in determining which parts of its opinions should be withheld from the public. The court is not unique in dealing with classified

matters. Article III courts confront, scrutinize and reject Executive Branch claims. *See* App. C 76-96. To the extent that the executive attempts to masque matters of law, it grossly overreaches. For matters of fact, the FISC should apply the test used by other Article III courts, taking into account reasonableness, good faith, specificity, and plausibility.

ARGUMENT

I. CONGRESS CAN NEITHER GRANT NOR DENY THE FISC JURISDICTION OVER ITS OWN OPINIONS.

A. The FISC is an Article III court.

Congress created the FISC as an Article III constitutional court.[1] Congress continues to regard it as an Article III court.[2] Every court, including this one, to confront the question of whether the FISC is an Article III court has answered in the affirmative.[3]

B. Article III courts are vested with "the judicial power" of the United States.

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[1] *Foreign Intelligence Electronic Surveillance: Hearings Before the H. Subcomm. on Legis. of the Permanent Select Comm. on Intell.*, 95th Cong. 26-31, 116, (1978).
[2] *See* 154 Cong. Rec. 804 (Jan. 24, 2008). *See also* Andrew Nolan & Richard M. Thompson II, Cong. Research Serv., R43746, Congressional Power to Create Federal Courts: A Legal Overview (2014).
[3] FISCR Op. at 8; *In re Sealed Case*, 310 F.3d 717, 731-32 (FISA Ct. Rev. 2002) (per curiam); *United States v. Cavanaugh*, 807 F.2d 787, 792 (9th Cir. 1987); *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, 2017 WL 427591, at *3 (FISA Ct. Jan. 25, 2017); *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486; *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985), *aff'd*, 788 F.2d 566 (9th Cir. 1986).

The Constitution provides for "the judicial power of the United States" to "be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, §1. Congress, in turn, may "constitute Tribunals inferior to the supreme Court." Art. I, §8. According to the Supreme Court, courts

> established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise.

Ex parte Bakelite Corp., 279 U.S. 438, 449 (1929). Whether a court is Article III turns, first, on whether it satisfies the structural requirements of unity, supremacy, and inferiority within the judicial branch. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 Harv. L. Rev. 643, 649 (2004). *See* App. A 2-4. Second, the statute creating it must comply with the requirements of good behavior, compensation, and case-or-controversy. *Glidden Co. v. Zdanok*, 370 U.S. 530, 552 (1962) (Harlan, J., plurality opinion); App. A 4-6.

Certain courts that do not meet these requirements are considered alternately "non-constitutional," "legislative," or "Article I" courts. App. A 6-7. They are

> created by Congress in the exertion of other powers....Their functions always are directed to the execution of one or more of such powers, and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.

Ex parte Bakelite Corp., 279 U.S. at 449. Such courts

are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited...They are legislative courts....The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d Article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses.

Am. Ins. Co. v. 365 Bales of Cotton (Canter), 26 U.S. (1 Pet.) 511, 546 (1828).[4] This distinction matters: non-constitutional courts do not exercise the judicial power of the United States. Article III constitutional courts do. *Stern v. Marshall*, 564 U.S. 462, 494-95 (2011).

C. The judicial power cannot be exercised by the political branches.

The U.S. Constitution, which does not elaborate on "the judicial power," reflects English history and common law and augments it in important ways. Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in "inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1017 (1924). In England, the judicial power was subservient to the Crown, but distinct.[5] The Courts of the Exchequer, Common Pleas, King's Bench, and Chancery were imbued with the powers of the sovereign.[6] Despite being rooted

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[4] *See also The City of Panama*, 101 U.S. 453, 460 (1879); *Good v. Martin*, 95 U.S. 90, 98 (1877); *Hornbuckle v. Toombs*, 85 U.S. 648, 655-56 (1873); *Clinton v. Englebrecht*, 80 U.S. 434, 447 (1871); *Benner v. Porter*, 50 U.S. 235, 242 (1850).

[5] *See* J.H. Baker, *An Introduction to English Legal History* (2d ed. 1979); L.B. Curzon, *English Legal History* (1968); 1 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* (2d ed. 1968).

[6] *See* 3 William Blackstone, *Commentaries* *23-24 ("[A]ll courts of justice, which are the medium by which [the king] administers the laws, are derived from the power of the crown.... [Judicial power] is only an emanation of the royal prerogative.")

in the Crown's prerogative, judicial power became increasingly independent. The Act of Settlement guaranteed tenure during good behavior and fixed salaries for judges, who exercised their power through a judicial function: applying law to fact and issuing judgments. Act of Settlement, 12 & 13 Will. III, c. 2, §3 (1701); 1 W.S. Holdsworth, *A History of English Law* 195 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956); 1 Blackstone, *supra*, at *267-70. The courts had the authority to regulate proceedings, decide cases, provide for business, punish misconduct, and supervise inferior tribunals. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 809-16 (2001). No statute was required for judges to undertake these tasks, or to adjudicate cases and issue opinions detailing their reasoning. It was part and parcel of the judicial power.

The United States adopted some aspects of the judicial power and introduced new authorities and protections. Colonists saw access to common law as a right. *See* U.S. Declaration of Rights, §5 (1774) ("That the respective colonies are entitled to the common law of England.") The inclusion of the terms "law" and "equity" into the Constitution became "links in a chain binding out American courts to the institutions of Blackstone, Mansfield, Hale, Roll, Ellsmere, Coke, Bracton, Glanvil, and the barons at Runnymead." Tyrrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 Wash. U. L.Q. 459, 490 (1937). The Founders transferred common law to the nascent institutions. John Jay, as Chief Justice, announced,

"[T]his court consider[s] the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary." 5 U.S. (1 Cranch) xvi, 2 L. ed. 11 (1791).

Americans also departed from their English heritage by instituting a fully independent, co-equal judicial branch. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219-23 (1995). The grant of power flowed directly from the people, strengthening the courts' core powers.[7] "This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital; namely, to preclude a commingling of...essentially different powers of government in the same hands." *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933) (citation omitted). The Framers specifically directed that the courts "should be free from the remotest

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[7] Alexander Hamilton looked to separation of powers as a "wholly new discover[y]" in the "science of politics" that enabled self-government. *The Federalist No. 9*, at 72 (Clinton Rossiter ed. 1961). *See also id., No. 51* (James Madison); *id., No. 78* (Alexander Hamilton). Madison ruminated: "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." *Id. No. 47*, at 301. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands...may justly be pronounced the very definition of tyranny." *Id.* Accordingly, "The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts...[N]either department may invade the province of the other, and neither may control, direct or restrain the action of the other." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). *See also Miller v. French*, 530 U.S. 327, 341 (2000).

influence, direct or indirect, of either of the other two powers." 1 James De Witt Andrews, *The Works of James Wilson* 299 (Robert Green McCloskey ed., 1967) (1804). They rejected the idea that the legislature could control the judicial power in any way. Delegates at the convention voted down the proposal to add a clause: "In all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct." 2 *The Records of the Federal Convention of 1787* 425, 431 (Max Farrand ed., rev. ed. 1966). "A clearer rejection of congressional authority over judicial powers is hard to imagine." Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 Pa. L. Rev. 741, 791 (1984). The founders further ensured judicial independence with the good behavior and compensation clauses. There would have been no reason to do this if there were no powers reserved for the courts, conveyed through the grant of the judicial power. "[W]here Art. III does apply, all of the legislative powers specified in Art. I and elsewhere are subject to it." *N. Pipeline v. Marathon Pipe Line*, 458 U.S. 50, 73 (1982) (Brennan, J.).

D. The judicial power includes the power to dispose of cases.

As recognized from the earliest days of the Republic, it is within the purview of the judiciary to dispose of cases. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity, expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1

Cranch) 137, 177 (1803). Adjudication entails applying law to the facts of the case, before rendering a final, binding judgment. Once this process is put into motion, Congress and the executive cannot interfere. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). Nor can they insert themselves into the process after the fact. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1892). *See also Plaut,* 514 U.S. at 217-18. If the political branches *could* interfere, not just by overturning the court's final judgment but by stripping the court of authority over its own opinions, it would render the independence of the judiciary of no consequence. It would not matter what the Court said or did. All the courts *have* is their judgment as to matters of law. If their determinations could be seized and buried, they would cease to have the force of law, undermining the courts' basic adjudicatory function. The legislature cannot, as a constitutional matter, use a statutory provision to interfere with an Article III court's control over its own opinions. The source of the court's power is constitutional. *See Marbury*, 5 U.S. (1 Cranch) at 176-77, 180. "[I]f a case involved an executive effort to extend a law beyond its meaning, judges would have a duty to adhere to the law that had been properly promulgated under the Constitution." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1220 (2015).

II. THE FISC HAS ESSENTIAL INHERENT AUTHORITY OVER ITS OWN RECORDS.

The FISC has asked us to provide "any case law addressing the inherent authority of a court of limited or specialized jurisdiction to adjudicate claims falling outside the

court's subject matter jurisdiction." Br. Order at 2. *All* federal courts are courts of limited jurisdiction.[8] "[T]he power which congress possess to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects." *Hudson*, 11 U.S. (7 Cranch) at 33. Specialization does nothing to alter the FISC's status as an Article III court. As such, upon its creation, Congress vested the FISC with certain inherent powers. *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486-87. In reviewing applications, "The FISA court retains all of the inherent powers that any court has when considering a warrant. There is no delegation of judicial power to the Executive Branch." *In re Kevork*, 634 F. Supp. at 1014. In drafting opinions, an action contemplated by Congress, the FISC has the inherent power of any Article III court. *See* 50 U.S.C. §§1803(a)(1), 1803(b) (2012). "Every court has supervisory power over its own records and files." *Nixon,* 435 U.S. at 598. *Accord Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004); *Brown & Williamson Tobacco Corp.. v. Federal Trade Comm'n*, 710 F.2d 1165, 1177 (6th Cir. 1983). "[FISC's] inherent power over its records [therefore] supplies the authority to consider a claim of legal right to release of those records." *In re Motion for Release of Court Records,* 526 F.Supp.2d

[8] *See Patchak v. Zinke*, 138 S. Ct. 897, 906-07 (2018); *Gunn v. Minton*, 568 U.S. 251, 256-58 (2013); *Bender*, 475 U.S. at 541; *Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978); *Owen Equip. & Kline v. Burke Constr. Co.,* 260 U.S. 226, 234 (1922); *Marbury*, 5 U.S. (1 Cranch) at 173-80; *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 (1799).

at 487. "Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen v. United States*, 517 U.S. 820, 823 (1996). The FISC had subject matter jurisdiction over the four cases in which the opinions were issued. *See* 50 U.S.C. §§1841-46, 1861-64. It therefore has the authority to hear motions seeking their disclosure.

A. Article III courts have essential inherent powers.

All three branches have what are variously called "inherent," "implied," "essential," or "incidental" powers, which are authorities necessary to the performance of express constitutional powers. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (1952) (Jackson, J., concurring). They adhere to an office by nature of its function. The Founders universally agreed on their existence. Hamilton ruminated on the "striking absurdity" of a government unable to exercise its necessary implied authority. *The Federalist No. 21*, at 139 (Clinton Rossiter ed. 1961). *See also id.*, *No. 44* (James Madison); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819).

1. Inherent judicial powers stem from the courts' role of administering justice.

Early on, the Supreme Court recognized the existence of inherent judicial powers that lie beyond the reach of Congress. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 433 (1793) (Iredell, J., dissenting). In 1812, the Court held that "[c]ertain implied powers must necessarily

result to our Courts of justice from the nature of their institution." *Hudson*, 11 U.S. (7 Cranch) at 34. "[N]ot immediately derived from statute," such powers also could not "be dispensed with in a Court, because they are necessary to the exercise of all others." *Id.* Jurisdiction stemmed from "[the] creation" of a court. *Id.* at 33.

> [U]pon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it....[T]hat is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited Government, belongs to a system of universal law.

Id. at 33-34. The Court has since repeatedly recognized its inherent powers.[9] As a matter of longstanding common law, they stem from the administration of justice.[10] The Supreme Court has not articulated a test for what constitutes an inherent power. Nevertheless, hundreds of cases illuminate the range of inherent authorities acknowledged by the courts. App. B 52-70. They divide into three categories: the power to (a) ensure fairness, (b) facilitate efficient processes, and (c) protect the integrity, independence, and reputation of the judiciary. *Id.* On their own authority, courts, for instance, can appoint auditors, special masters, and commissioners; order discovery procedures; require production of witness statements; and issue *in limine*

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[9] *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962). *See also* App. B.

[10] *See Michaelson v. United States*, 266 U.S. 42, 65-66 (1924); *In re Peterson*, 253 U.S. 300, 312 (1920); *In re Stone*, 986 F.2d at 902; *Clark v. Austin*, 101 S.W. 2d 977, 997 (Mo. 1937); *In re Richards*, 63 S.W.2d 672, 675 (Mo. 1933); *App. B 52, n.16.*

rulings.[11] Courts can seal, unseal, revoke, or rescind orders.[12] They can consolidate cases and stay actions pending completion of a related action in another court.[13] And they can prevent fraud on the court and sanction contumacious behavior.[14]

Not all of the judiciary's inherent powers are limited to matters still in dispute. Courts allow post-trial depositions. *See United States ex rel. Consol. Elec. Distribs., Inc. v. Altech, Inc.*, 929 F.2d 1089, 1091-92 (5th Cir. 1991). Similarly, "[A] protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, even after judgment." *Poliquin v. Garden Way*, Inc. 989 F.2d 527, 535 (1st Cir. 1993).[15] A court "can modify a protective order when a third-party requests judicial documents after the parties have filed a stipulation of dismissal." *Gambale*, 377 F.3d at 141. A "court may order that a filing be made under seal...[and] may later unseal the filing." Fed. R. Civ. P.

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[11] *See, e.g., Luce v. United States*, 469 U.S. 38, 41 n.4 (1984); *Harris v. Nelson*, 394 U.S. 286, 290 (1969); *Jencks v. United States*, 353 U.S. 657, 668-69 (1957); *In re Peterson*, 253 U.S. at 312-14 (1920); *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123, 127-29 (1864).

[12] *See, e.g., Fernandez v. United States*, 81 S. Ct. 642, 644 (1961) (Mem.).

[13] *See, e.g., Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Bowen v. Chase*, 94 U.S. 812, 824 (1876).

[14] *See, e.g., Goodyear Tire & Rubber Co. v. Haegar*, 137 S. Ct. 1178 (2017); *Chambers*, 501 U.S. at 45; *Roadway Express*, 447 U.S. at 765-66; *Link*, 370 U.S. at 633; *Universal Oil Products Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946).

[15] *See also United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991) ("As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed.").

5.2(d); *United States v. Seugasala*, 670 F. App'x 641, 641 (9th Cir. 2016) (Mem.). Courts can rescind jury discharge orders. *Dietz v. Bouldin*, 136 S. Ct. 1885 (2016). Courts retain the power to punish for contempt. *Young*, 481 U.S. at 798. "There can be no question that courts have inherent power to enforce compliance" after the conclusion of a case. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). Courts also have inherent powers over matters that have never been before them. For instance, they can answer letters rogatory. *In re Letter Rogatory*, 523 F.2d 562, 564 (6th Cir. 1975); *United States v. Reagan*, 453 F.2d 165, 173 (6th Cir. 1971); *United States v. Staples*, 256 F.2d 290, 292 (9th Cir. 1958). They can bind and be bound by decisions of other courts, ensuring stare decisis as a matter of vertical and horizontal parity. *Agostini v. Felton*, 521 U.S. 203, 235 (1997). Courts have inherent power to regulate bar admission and the practice of law. *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824). *Cf. Chambers*, 501 U.S. at 42-43; *Roadway Express*, 447 U.S. at 764. And the judiciary can sanction individuals for unauthorized legal practice. *See United States v. Johnson*, 327 F.3d 554, 560 (7th Cir. 2003).

2. Essential inherent powers are distinguishable from those that are merely beneficial.

The Supreme Court, which recognizes the judiciary's inherent powers, treats each case individually. Lower courts, looking to the Court's holdings in each context and to decisions of other courts, divide inherent powers into three categories: irreducible inherent authority, "essential" inherent powers, and authorities merely "useful" or

"beneficial" to the administration of justice. *See Holder*, 673 F.3d at 255-56; *In re Stone*, 986 F.2d at 901-02; *Eash*, 757 F.2d at 562-63; *United States v. Brainer*, 691 F.2d 691, 695-96 (4th Cir. 1982). Powers in the first two categories are beyond the reach of Congress.

The first category delineates powers that are "so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms 'court' and 'judicial power.'" *Eash*, 757 F.2d at 562. Once a court has been brought into being, Article III vests it with certain authorities. "Within the scope of these powers, the other branches of government may not interfere; any legislation purporting to regulate these inherent powers would be invalid as an unconstitutional violation of the doctrine of separation of powers." *In re Stone*, 986 F.2d at 901.[16]

For the second category, essential inherent powers, the standard set by *Hudson* is one of indispensable necessity—i.e., those powers "necessary to the exercise of all others." 11 U.S. (7 Cranch) at 34.[17] Contempt provides a good example. Since the founding, there has been extensive legislation governing it. *See* Judiciary Act of 1789, ch. 20, §17, 1 Stat. 73, 83. Nevertheless, there are early and repeated

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[16] *See United States v. Klein*, 80 U.S. at 146-47.

[17] *See also Roadway Express,* 447 U.S. at 764; *In re Terry*, 128 U.S. 289, 303 (1888).

discussion of the court's contempt powers.[18] Whatever the legislature may try to do, it cannot divest the judiciary of this power. Because essential inherent powers flow from necessity, they can "neither be abrogated nor rendered practically inoperative" by Congress. *Michaelson*, 266 U.S. at 66.[19]

The third category "implicates powers necessary only in the practical sense of being useful." *Eash*, 757 F.2d at 562. It derives from the fact that Congress cannot envision every tool that the courts might need to undertake their tasks; therefore, the judiciary can act until the legislature decides to invalidate such actions.[20] "This third category of inherent power has sometimes been said to be 'rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion.' *Eash*, 757 F.2d at 562 (quoting *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978)."

B. Authority over judicial records is an essential inherent power.

The Constitution does not expressly assign the power to issue opinions to any department. In the absence of an express grant of authority, control must be exercised

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[18] *See, e.g., Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821); *Hudson*, 11 U.S. (7 Cranch) at 34. *See also United States v. Duane*, 25 F. Cas. 920, 922 (C.C.D. Pa. 1801) (No. 14,997).

[19] *See also Eash*, 757 F.2d at 562; *Levine v. United States*, 362 U.S. 610, 615 (1959); *Cooke v. United States*, 267 U.S. 517, 539 (1925); *Michaelson*, 266 U.S. at 65; *Myers v. United States*, 264 U.S. 95 (1924); *Anderson*, 19 U.S. (6 Wheat.) at 226.

[20] *See, e.g., United States v. Hasting*, 461 U.S. 499, 505 (1983); *Alyeska Pipeline Service v. Wilderness Society*, 421 U.S. 240, 259 (1975)

by the department to which it naturally belongs. "The judicial department is invested with jurisdiction in certain specified cases, in all of which it has the power to render judgment." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 11 (1825). "Courts have recognized that a judicial opinion deciding a case lies at the heart of the exercise of Article III powers." *Doe v. Apfel*, No. 98-CV-182, 1999 WL 182669, at *3 (E.D.N.Y. Mar. 22, 1999). "The whole work done by the judges constitutes the authentic exposition and interpretation of the law." *Banks v. Manchester*, 128 U.S. 244, 253 (1888). Congress cannot dictate to the Courts how to decide cases, and it can neither require a court to issue, nor forbid the court from issuing, a decision.

Perhaps the most famous case comes from Justice Stephen Field, with whom Chief Justice Terry (on this occasion) agreed. California had adopted a statute saying, "that all opinions given upon an appeal in any Appellate Court of this State, shall be in writing, with the reason therefor, and filed with the Clerk of the Court." 1854 Cal. Stats. 72. The state Supreme Court ruled it unconstitutional:

> The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are rendered.

Houston v. Williams, 13 Cal. 24, 25 (1859) (Field, J.). The legislature was trying to usurp judicial power: "To accede to it any obligatory force would be to sanction a most palpable encroachment upon the independence of this department." *Id.*

> If the power of the Legislature to prescribe the mode and manner in which the Judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the Legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted? **The truth is, no such power can exist in the Legislative Department, or be sanctioned by any Court which has the least respect for its own dignity and independence**.

Id. (emphasis added). The constitutional duty of the Court was "discharged by the rendition of decisions." *Id.* While the legislature might have the right to regulate jurisdiction, "it cannot destroy" the court's authority to "exercise the jurisdiction conferred." *Carter v. Commonwealth*, 32 S.E. 780, 785 (Va. 1899).

If the issuance of judicial opinions is a core judicial power, then control over those opinions must be an essential inherent power. Should it be otherwise, it would undermine the role of the courts in adjudicating cases. "Courts of record can speak only by or through their records, and what does not so appear does not exist in law." 20 *Am. Jur. 2d Courts* §22 (2018). "The court record is the permanent account of that court's proceedings in particular cases, as well as the court's opinion or decision." *Id.* If the other branches could divest the courts of ownership over their records, they could alter the principles of law according to their own interests. Accordingly, courts recognize their inherent authority "to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen v. United States*, 517 U.S. at 823. They have the power "to protect the efficient and

orderly administration of justice and those necessary to command respect for the court's orders, judgments, procedures, and authorities." *In re Stone*, 986 F.2d at 902.

1. Courts routinely exercise jurisdiction over third party requests for records.

Courts control their own records. *Nixon*, 435 U.S. at 597-98; *Gambale*, 377 F.3d at 140; *Brown*, 710 F.2d at 1177. They routinely exercise jurisdiction over third party motions for common law or First Amendment right of access to court documents—ranging from applications for warrants to judicial opinions.[21] The tipping point is whether the records are "judicial documents," understood as materials that go to "the exercise of Article III judicial power." *United States v. Amodeo (Amodeo II)*, 71 F.3d 1044, 1047-48 (2d Cir. 1995). The moment at which they become so, the public has a presumptive right of access through the court in which they were filed. *See, e.g.*, *Lugosch*, 435 F.3d at 119; *Amodeo II*, 71 F.3d at 1048-52; *Stern v. Cosby*, 529 F.Supp.2d 417 (S.D.N.Y. 2007). In none of the cases in which the Courts have entertained requests for their records has Congress made a statutory grant of power to the courts over the records in question. Nevertheless, the Courts consider such

[21] *See, e.g., Doe v. Pub. Citizen*, 749 F.3d 246, 265-68 (4th Cir. 2014); *Nixon,* 435 U.S. 589; *United States v. Kravetz*, 706 F.3d 47, 56-59 (1st Cir. 2013); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-124, 126 (2d Cir. 2006); *In re Providence Journal Co.*, 293 F.3d 1, 9-13 (1st Cir. 2002); *United States v. Corbitt,* 879 F.2d 224, 228 (7th Cir. 1989); *In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986); *United States v. Smith*, 776 F.2d 1104, 1107-1113 (3d Cir. 1985); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 429-30 (5th Cir. 1981); *United States v. Myers (In re Nat'l Broad. Co.)*, 635 F.2d 945, 947-48 (2d Cir. 1980).

requests well within their power. These cases include materials deep in litigation[22]—to say nothing of the final judgment of the court.

2. Courts continue to exercise jurisdiction after the conclusion of the matter before the court.

Courts continue to exercise jurisdiction over their records and opinions *after the conclusion of the matter before the court.*[23] They have "the inherent power to correct errors, remedy omissions, and correct clerical errors in its records." 20 *Am. Jur. 2d Courts* §25 (2018). They have the "power to modify or lift protective orders that [have been] entered." *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987). They can unseal records after the fact. *See Doe*, 749 F.3d at 252-53; *Oregonion Pub. Co. v. U.S. District Court*, 920 F.2d 1462, 1468 (9th Cir. 1990). They can re-open a case. *See United States v. Alcantara*, 396 F.3d 189, 201 (2d Cir. 2005). "The jurisdiction of a Court is not exhausted by the rendition of its judgment, but continues." *Wayman*, 23 U.S. (10 Wheat.) at 23-24. Courts can punish those who might "disregard...the *product* of their functioning, their judgments." *Young*, 481

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[22] *See, e.g., United States v. Sealed Search Warrants*, 868 F.3d 385, 390 (5th Cir. 2017) (holding that the district court had jurisdiction to determine whether a common law qualified right of access extended to pre-indictment search materials).
[23] *See, e.g., Doe v. United States*, 853 F.3d 792 (5th Cir. 2017) (A court "has the power to manage its records, even though the proceeding that generated those records has concluded."); *Qureshi v. United States*, 600 F.3d 523, 525 (5th Cir. 2010) ("That the court loses jurisdiction over the litigation does not, however, deprive the district court of its inherent supervisory powers." (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990)).

U.S. at 787, 821 (Scalia, J., concurring) (emphasis in original). Third parties seek and are granted access to judicial documents after the underlying matter concludes.[24]

None of these cases rely on statutory authorities. They rely on Article III inherent powers. Some go so far as to recognize it even when it conflicts with the statutorily-derived rules. *See, e.g., In re Petition of Craig*, 131 F.3d 99, 103 (2d Cir. 1997). In one case, historians filed a motion requesting that a court unseal grand jury transcripts from an Espionage Act case seventy years prior. *Carlson v. United States*, 837 F.3d 753, 757-61 (7th Cir. 2016). The district court regarded the request as well within its power. *Id.* On appeal, the court noted that "Every federal court to consider the issue" has determined that "a district court's limited inherent power to supervise a grand jury includes the power to unseal grand-jury materials when appropriate." *Id.* at 755-56. The plaintiff chose the Northern District of Illinois,

> *because it was the court that originally had supervisory jurisdiction over the grand jury in question.* He argued that this same court has continuing common-law authority over matters pertaining to that grand jury.

Id. at 757 (emphasis added). It did not matter that Carlson had no connection to the underlying action. *Id.* at 759. "Representatives of the press and general public must be given an opportunity to be heard on the question of...access to documents. *Id.*

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[24] *See, e.g., Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *Custer*, 658 F.3d at 1192-96; *Chicago,* 263 F.3d at 1310-13; *In re Nat'l Sec. Archive*, No. 08 Civ. 6599, 2008 WL 8985358, at *1 (S.D.N.Y. Aug. 26, 2008); *In re Petition of Am. Historical Ass'n*, 49 F. Supp. at 295. *See also* App. B.

(quoting *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000). "To hold otherwise would raise First Amendment concerns." *Id. Cf. United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982). The line is the point at which the documents become part of the judicial record.

III. THE FISC HAS A CRITICAL ROLE TO PLAY IN DETERMINING WHAT INFORMATION CONTAINED IN ITS OPINIONS SHOULD BE MADE PUBLICLY AVAILABLE.

In 1971, the executive tried to assert absolute power over classified material essential to the administration of justice. The court rejected the government's argument:

> The government's position...is that this determination by the executive official is conclusive upon the court, and the court has no judicial authority to require the production of the documents in the possession of an executive department, once the head of that department has filed this formal claim of privilege. Government counsel further asserts that this executive determination is conclusive...even where the document is such that the court may readily separate factual material to be disclosed to the other party from the kind of recommendations and discussion that would be an integral part of the decision-making process.

Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F. 2d 788, 792 (D.C. Cir. 1971). The D.C. Circuit stated, "*In our view, this claim of absolute immunity for documents in possession of an executive department or agency, upon the bald assertion of its head, is not sound law.*" *Seaborg*, 463 F. 2d at 792 (emphasis added).

Once again, the executive is attempting to convince the court that it has no role to play in scrutinizing executive assertions of power over materials central to the judicial function. To support its claim, the government misconstrues *Department of the Navy v. Egan*, 484 U.S. 518 (1988), as standing for the proposition that the

executive has complete control of classified information, and that the judiciary is ill-suited to make national security judgments.[25] *See* App. C 72-76. That is not what the court held. "The narrow question presented" was whether a statute gave a *non-Article III tribunal* control over security clearance decisions *within the executive branch. Egan*, 484 U.S. at 520. The holding did not reach the power of Article III courts. The executive further states that the "claim of unilateral FISC power to override the Executive's classification decisions is completely devoid of merit." U.S. Reply Br. at 6. *Cf* U.S. Opening Br. at 20-22. This statement ignores the actual role that the judiciary regularly plays in scrutinizing classification determinations.

A. The FISC is not unique in dealing with classified matters.

Article III courts routinely confront classified material in the context of litigation. Hundreds of cases give rise to state secrets assertions, Exemption 1 claims under the Freedom of Information Act (FOIA), use of the Classified Information Procedures Act, and other efforts to keep the material from reaching the public domain. App. C

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[25] *See* United States' Reply Brief at 6-7, *In re: Certification of Questions of Law to the FISCR*, No. 18-01 (FISA Ct. Rev. Mar. 5, 2018) (hereinafter U.S. Reply Br.); Opening Brief for the United States at 20-22, *In re: Certification of Questions of Law to the FISCR*, No. 18-01 (FISA Ct. Rev. Feb. 23, 2018) (hereinafter U.S. Opening Br.); United States' Opposition to the Motion of the ACLU for the Release of Court Records at 11-12, *In re Opinions and Orders of this Court Containing Novel or Significant Interpretations of Law*, No. Misc. 16-01 (FISA Ct. June 8, 2017); United States' Legal Brief to the En Banc Court in Response to the Court's Order of March 22, 2017 at 11 n.4, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc 13-08 (FISA Ct. No. Apr. 17, 2017).

76-80. Between 2001 and 2009 alone, more than 100 cases involved state secrets privilege. App. C 77-78. They addressed a wide range of matters: breach of contract; patent disputes; trade secrets; fraud; employment termination; wrongful death and personal injury; negligence; allegations of torture; environmental degradation; breach of espionage contracts; defamation; criminal conduct; and constitutional violations. *Id.* Since 2009, courts have disposed of another 74 cases, dealing with everything from defamation, discrimination, personal injury, and wrongful death, to constitutional claims related to the First, Fourth, Fifth, and Eighth Amendments. *Id.* The government also makes broad use of Exemption 1. *Id* at 79. Since 1977, it has asserted it in at least 377 FOIA cases in the Courts of Appeals and the D.C. District Court. *Id.* This number is just a fraction of the total. *Id.* at n.27. In more than 50 criminal cases, the courts have noted the discovery of classified information by defendants and in 89 cases procedures involving classified information. *Id.* at 79-80.

B. Article III courts routinely scrutinize and at times reject Executive Branch classification determinations.

Article III courts routinely scrutinize classified material to determine whether it should be made publicly available.[26] In *Al-Haramain Islamic Found., Inc. v. Bush*, the court conducted a thorough "independent determination whether the information is privileged," explaining, "We take very seriously our obligation to review the

[26] *See, e.g., Mohamed v. Jeppensen DataPlan*, 614 F.3d 1070 (9th Cir. 2010); *United States v. Moussaoui*, 65 Fed. App'x. 881, 888 (4th Cir. 2003); App. C.

documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." 507 F. 3d 1190, 1202-03 (9th Cir. 2007). In *Hepting v. AT&T Corp.*, the executive had publicly discussed the program—similar to the current matter, where the government has acknowledged §215 metadata collection. "Because the government contends that the primary reasons for rejecting Plaintiffs' arguments are set forth in the Government's *in camera, ex parte* materials," the *Hepting* court noted, "the court would be remiss not to consider those classified documents in determining whether this action is barred by the privilege." *Hepting v. AT&T Corp.,* No. C-06-672 VRW, 2006 WL 1581965, at *1 (N.D. Cal. June 6, 2006) (internal quotation and citation omitted).

Examination of the Government's claim must be done on an item by item basis, as "a court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role." *In re U.S.*, 872 F. 2d 472, 475 (D.C. Cir. 1989). "In addressing challenges under the First Amendment . . . courts must keep in mind that 'debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Wright v. FBI*, 613 F. Supp. 2d 13, 22 (D.D.C. 2009) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Thus, while courts "must take seriously the government's predictions about the security implications of releasing particular

information to the public," ultimately a court "make[s] its own decision" about what material should, and should not, remain classified. *ACLU v. FBI*, 429 F. Supp. 2d 179, 188 (D.D.C. 2006). Sometimes that means releasing information that the government would rather not see light of day.[27] In *New York Times v. United States*, for instance, the Court refused to allow national security claims to override First Amendment rights. 403 U.S. 713, 718-19 (1971). In *Horn v. Huddle*, Judge Royce Lamberth denied the government's assertion of the state secrets privilege. 636 F. Supp. 2d 10, 14-15 (D.D.C. 2009) *vacated on other grounds*, *Horn v. Huddle*, 699 F. Supp. 2d 236 (D.D.C. 2010). The court weighed whether the government had met the procedural requirements, the litigants' need for the information in question, and the plausibility and substantiality of "the government's allegations of danger to the national security." *Horn v. Huddle*, 647 F.Supp. 2d 55, 56-57 (D.D.C. 2009) *vacated on other grounds*, 699 F. Supp. 2d 236. Lamberth concluded, "The deference generally granted the Executive Branch in matters of classification and national security must yield when the Executive attempts to exert control over the courtroom." *Huddle*, 647 F.Supp. 2d at 65-66. These cases are not isolated. In 102 of the 264 Exemption 1 FOIA cases that arose between 1977 and 2012 in the Courts of Appeals and the D.C. District Court, the court conducted in camera review. Forty-

[27] *See, e.g.*, *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985); *Rahman v. Chertoff*, No. 05 C 3761, 2008 WL 4534407, at *11 (N.D. Ill. Apr. 16, 2008); *Hepting*, 2006 WL 1581965 at *1; *Jabra v. Kelly*, 62 F.R.D. 424 (E.D. Mich. 1974).

nine of these cases resulted in partial disclosure. App. C 89. A *thirty-nine percent partial denial rate* for in camera cases suggests that the judiciary *does* scrutinize Executive Branch claims. The burden is on the government to demonstrate that the material must be withheld. *See Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir. 1999); *DOJ v. Landano*, 508 U.S. 165, 171 (1993); App. C 89-90.

C. The FISC should apply a test based on reasonableness, good faith, specificity, and plausibility.

Insofar as the government claims that matters of law must remain hidden, the court should regard such claims as highly suspect. Rule of law requires that the law itself be known. As far as matters of fact are concerned, while the court may want to give the assertion from the government weight, the court is entirely within its rights as an Article III body to scrutinize such claims. *See* FISC Rule 62(a). A helpful standard to apply going forward comes from the D.C. Circuit:

> The test is not whether the court personally agrees in full with the [Executive Branch's] evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the [agency] is expert and given by Congress a special role.

Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982). This test is similar to that adopted in state secrets, prepublication, and CIPA cases, where the court considers whether the government has demonstrated a reasonable danger that disclosure would jeopardize national security and holds in camera, ex parte hearings to satisfy itself on the matter. *See United States v. Abu-Jihaad*, 630 F.3d 102, 140-41 (2d Cir. 2010).

CONCLUSION

Judicial opinions belong to the People. *Banks*, 128 U.S. at 253; *Wheaton v. Peers*, 33 U.S. (8 Pet.) 591, 668 (1834). They are publicly available because *they must be* for our system of government to work. "The existence of the common law right to inspect and copy judicial records is beyond dispute."[28] 635 F.2d at 947-48. It pre-dates the Constitution. *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 (3d Cir. 1993). Such documents "must be relevant to the performance of the judicial function and useful in the judicial process," and bear "on the exercise of Article III judicial power." *United States v. Amodeo* (*Amodeo* I), 44 F.3d 141, 145 (2d Cir. 1995); *Amodeo II*, 71 F.3d at 1048. No document is more central to judicial power than an opinion issued by an Article III court. There are now more than 60 FISC opinions in the public domain. They apply the law. They constitute the law, and they define the common law. Public access to them lies at the heart of rule of law. Movants therefore have a common law and a First Amendment right of access to them. Where certain information cannot be made public *within* opinions, the FISC can withhold it based on reasonableness, good faith specificity, and plausibility.

Respectfully submitted,

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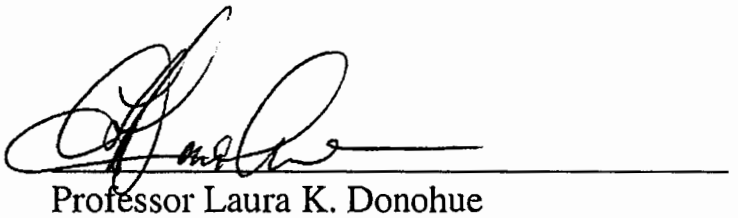
[28] *See also Lugosch*, 435 F.3d at 119-20; *Stern v. Cosby*, 529 F.Supp.2d 417 (2007); *Amodeo II*, 71 F.3d at 1048-52; *Center for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 936 (D.C. Cir. 2003).

CERTIFICATE OF COMPLIANCE

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

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii), this brief includes 8,538 words.
2. This brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count of this word-processing system in preparing this certificate.



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Dated: June 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June 2018, I provided one original and five copies of the amicus brief and appendix to Ms. LeeAnn Hall, Clerk of Court, Foreign Intelligence Surveillance Court of Review, who has informed me that the Litigation Security Group will deliver a copy of the brief to:

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National Security Division
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I also sent one copy of the amicus brief and appendix via Federal Express to each of the following parties:

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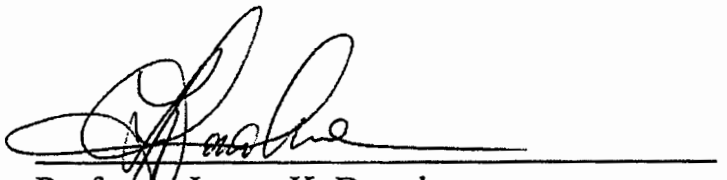

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