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

IN RE MOTION OF PROPUBLICA, INC FOR THE RELEASE OF COURT RECORDS	))	Docket No.: Misc. 13-09

REPLY BRIEF IN SUPPORT OF MOTION OF PROPUBLICA, INC. FOR THE RELEASE OF COURT RECORDS

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INTRODUCTION

This Court, like all Article III courts, has control over its files, including the ability to publish its own opinions. That ability is not preempted by the Freedom of the Information Act ("FOIA"). Nor has this Court ceded its Article III power to publish its opinions to the Executive Branch's classification decisions. This Court should exercise its powers here.

ProPublica, Inc. ("ProPublica") has moved this Court to publish its opinions pursuant to a First Amendment right of access, or in the alternative, pursuant to this Court's discretion and its inherent supervisory control over its own records. The opinions sought by ProPublica have, since the filing of the motion, been partially released by the Executive Branch.[1] However, each opinion is heavily redacted because the Executive continues to classify the information withheld. But the Executive's claims of classification have yet to be subject to judicial scrutiny, and therefore they do not moot ProPublica's motion. Before finally withholding any part of its opinions, the Court must make specific findings on the record, even where the information withheld is classified.

Thus, pursuant to the First Amendment or its own discretion, the Court should scrutinize

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[1] The Government states that its voluntary release of a redacted, declassified version of an opinion sought by ProPublica, the "PR/TT Order" by former FISC Judge Kollar-Kotelly, necessitates dismissal of the instant motion. Opp'n at 1. As a preliminary matter, ProPublica believes its motion encompasses, at the least, not only the Kollar-Kotelly opinion but an additional opinion by Judge Bates released for the first time on that same day. ProPublica moved for publication of the opinions that contained specific quotations and were cited in a publisged FISC opinion. Mot. at 1. Several of these quotations appear in the redacted Judge Kollar-Kotelly opinion released on November 18, but at least one does not: "As this Court noted in 2010, the 'finding of relevance most crucially depended on the conclusion that bulk collection is necessary for NSA to employ tools that are likely to generate useful investigative leads to help identify and track terrorists'." Motion at 1. This quotation appears to be contained in the PR/TT order by Judge Bates, which was also released in redacted, classified form on November 18, *see* Mem. Op. at 9, *[Redacted]*, PR/TT [number redacted], ([date redacted]) (containing quote), *available at* http://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

the redacted material and independently determine whether to publish it.

ARGUMENT

I. THIS COURT HAS THE ABILITY AND THE DUTY TO SCRUTINIZE THE EXECUTIVE BRANCH'S CLASSIFICATION DECISIONS

A. The Court's Power to Publish Its Opinions and Review Classification Decisions Is Not Limited By Its Own Rules.

It is settled law that this Court has the power to publish its opinions and, should it see fit, to review the Executive Branch's classification decisions. *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486-87 (FISA Ct. 2007); *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02, 2013 WL 5460064, at *7-8 (FISA Ct. Sep. 13, 2013) ("Misc 13-02"). And this Court has not hesitated to subject classification claims to scrutiny when it determines that an opinion should be published. Just last month, after being directed by Judge Saylor of this Court to conduct a declassification review of a classified FISC opinion, the government responded, without any explanation at all, that it could not declassify the opinion. Order at 1, *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc 13-02 (FISA Ct. Nov. 20, 2013) ("Misc 13-02 November Order").[2] In response, Judge Saylor ordered that the government submit "a detailed explanation of its conclusion," which could be reviewed in camera if necessary to protect classified information, pursuant to FISC Rule 7(j). *Id.* at 2.

The government's arguments that the Court is limited by its own Rules or by prudential concerns should be rejected. The government first claims that FISC Rule 62(a) is a "limitation on the Court's discretion" that empowers the Court "only" to direct a classification review. Opp'n at 4. It further suggests that this limitation is consistent with Rule 3's requirement that Court

[2] *Available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-order-131120.pdf.

staff "comply with security measures." *Id.*

By their plain meaning, these rules do not limit the Court's power to publish its own decisions. Rule 62(a) states:

> The Judge who authored an order, opinion, or other decisions may *sua sponte* . . . request that it be published. . . . [T]he Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion, or other decision be published. Before publication, the Court *may, as appropriate*, direct the Executive Branch to review the order, opinion or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526.[3]

FISC Rule 62(a) (emphasis added). Nor does FISC Rule 3, dealing with how Court judges and staff handle classified information, suggest otherwise. *See* FISC Rule 3 (Court and stuff must possess requisite security clearances and "shall comply" with statutory security measures). It would be odd, to say the least, for the Court, in its own Rules, to subtract from the authority that it ordinarily possesses under Article III. *See In re Motion for Release*, 526 F. Supp. 2d at 486-87 (discussing Court's Article III powers and jurisdiction to entertain a motion for release of court records).

This Court's previous statement that "[u]nder FISA and the applicable Security Procedures, there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions," Opp'n at 5 (quoting *In re Motion for Release*, 526 F. Supp. 2d at 491), should not be read as a blanket prohibition on scrutinizing classification decisions. Rather, that statement was made in the context of defeating a proposed common law

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[3] The ordinary meaning of the word "may" as well as the larger context of the Rule indicates an additional power in the Court's discretion, not, as the government suggests, a constraint. *See Alvarez v. Longboy*, 697 F. 2d 1333, 1341 (9th Cir. 1983) (citing *United States v. Cook*, 432 F. 2d 1093, 1098 (7th Cir. 1970)) ("That word [may] has been interpreted, depending on its context, to vest discretionary power in the court"). The government's brief omits the words "may, as appropriate" from its recitation of the rule. Opp'n at 4.

right of access. *In re Motion for Release,* 526 F. Supp. 2d at 491. Although a statutory scheme like FISA may preempt a common law right of access, it cannot divest an Article III court of its power to publish its own opinions pursuant to the First Amendment or its own constitutional authority, and if necessary, to scrutinize classification decisions in the process. *See In re Motion for Release*, 526 F. Supp. 2d at 486-87 (FISA does not displace Court's supervisory powers) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("certain implied powers must necessarily result to our [c]ourts of justice from the nature of their institution") (internal quotations and citations omitted). Moreover, construing FISA to preclude the Court's ability to exercise its Article III duties, particularly pursuant to a First Amendment claim, would raise a "serious constitutional question." *Klayman v. Obama*, No. 13-0851, 2013 WL 6571596, at *13 (D.D.C. Dec 16, 2013) (finding that FISA does not foreclose judicial review of constitutional claims) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)).

Above all, the Court cannot lack the ability to independently examine the Executive Branch's classification decisions in all cases and simultaneously retain the inherent authority to publish its own decisions.

B. FOIA Does Not Preempt This Court's Ability to Publish Its Own Opinions.

Nor, as the government claims, is ProPublica's only recourse for publication of the opinions through FOIA.[4] *See* Opp'n at 5 n. 3. As this Court has made clear, "Nothing in FOIA divests federal courts of supervisory power over their own records, nor would an agency record's exemption from disclosure under FOIA necessarily displace a right of access to a copy of the

[4] FOIA requests are directed to the Executive Branch, *see* 5 U.S.C. § 552(f)(1), whereas ProPublica seeks opinions from the Court itself.

same document in a court's files, *especially* if that right is grounded in the First Amendment." *In re Motion for Release*, 526 F. Supp. 2d at 491 n. 19 (emphasis added). More generally, "[i]t is clear that [FOIA] was not intended to restrict the federal courts—either by mandating disclosure or by requiring non-disclosure under the [FOIA] § 552 exemptions." *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983) (finding court is not bound by FOIA in sealing decisions but it is bound by the First Amendment).

C. The Court Should Review and Scrutinize the Government's Classification Decisions Here.

This Court should thus scrutinize the government's classification decisions and redactions and make its own independent determination as to whether that material should remain unpublished. To date, the government has made no showing at all as to why the redacted information in the released opinions is properly classified, and the Executive Branch's voluntary classification review in releasing the redacted opinions to the public has not been reviewed by this or any other Court.

Even in the area of national security, courts do not give unquestioned deference to the Executive Branch. "A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse." *In re Wash. Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986). Where deference is due, "that deference must be based on a reasoned explanation from an official that directly supports the assertion of national security interests." *In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064, 1078 (N.D. Cal. 2013). To take the government up on its invitation and avoid review entirely would risk violating the separation of powers and allow the "the Judiciary [to] become

the handmaiden of the Executive." *United States v. Smith*, 899 F.2d 564, 569 (6th Cir. 1990).[5]

In this specific context, the government has not *earned* deference. As this Court has now repeatedly been at pains to document, past pleas for deference in surveillance oversight have resulted in the Court being misled:

- "The Court is troubled that the government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program."[6]
- "[I]t has come to light that the FISC's authorizations of this vast collection program have been premised on a flawed depiction of how the NSA uses BR metadata. . . . buttressed by repeated inaccurate statements made in the government's submissions, and despite a government-devised and Court-mandated oversight regime."[7]

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[5] Indeed, there are many contexts in which Article III courts scrutinize information that is classified or otherwise withheld from the public or litigants for reasons of national security. *See, e.g.*, 50 U.S.C. § 1806(f) (upon application of an "aggrieved person" subject to surveillance, court shall review "materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawful[]" and may disclose such materials to the aggrieved person under appropriate security procedures where "necessary to make an accurate determination of the legality of the surveillance"); 18 U.S.C. App III §§ 6(a), (f) (upon motion by the United States, after hearing, court may make determination "concerning the use, relevance, or admissibility of classified information," and may determine that classified information "be disclosed in connection with a trial").

[6] Mem. Op. at 16 n. 14, *[Redacted]*, [Docket Redacted], (FISA Ct. Oct. 3, 2011), a*vailable at* http://www.dni.gov/files/documents/October%202011%20Bates%20Opinion%20and%20Order%20Part%202.pdf.

[7] Order at 10-11, *In re Production of Tangible Things from [Redacted]*, BR 08-13 (FISA Ct. Mar. 2, 2009), a*vailable at* http://www.dni.gov/files/documents/section/pub_March%202%202009%20Order%20from%20FISC.pdf.

- "To approve such a program [of bulk collection], the Court must have every confidence that the government is doing its utmost to ensure that those responsible for implementation fully comply with the Court's orders. The Court no longer has such confidence."[8]

Additionally, there is a growing recognition that the classification system itself is in drastic need of oversight. Former head of the Office Of Legal Counsel Jack Goldsmith has pointed to the problem of "massive, massive overclassification." Leonard Downie, Jr., *The Obama Administration and the Press*, Comm. to Protect Journalists (Oct. 10, 2013).[9] A recent report to Congress noted that in 2011 alone, 4 million people had access to classified information, and there were 92 million decisions to declassify information. *Id.* In fact, the very sentence describing the government's ongoing misrepresentations about its collection programs, quoted *supra* from a footnote in a 2011 FISC opinion, was itself originally classified then subsequently released pursuant to the Executive Branch's voluntary November 18 declassification review.[10] The problems with this system are broad and are usually a matter best suited for the Legislative Branch. However, where this Court's own decisions are subject to unilateral, unexplained classification decisions, the Court should at a minimum conduct its own independent review.

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[8] *Id.* at 12.

[9] *Available at* https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php.

[10] *See* Reply Mem. in Supp. of Pl.'s Mot. for Summ. J. at 1-2, *Elec. Frontier Found. v. DOJ*, No. 12-cv-1441 (D.D.C. Dec. 6, 2013) (describing government's classification claims regarding footnote and subsequent release of opinion with unredacted footnote).

II. THE GOVERNMENT'S VOLUNTARY RELEASE OF DECLASSIFIED OPINIONS SUBSEQUENT TO THE FILING OF PROPUBLICA'S MOTION DOES NOT SUPPORT DISMISSAL

This motion is not moot because each opinion ProPublica sought for publication has been only partially published: each contains extensive redactions, including the types of Internet metadata the FISC authorized the government to collect under the FISA PR/TT provisions.[11] *See, e.g.,* Opinion and Order at 7-11, *[Redacted]*, No. PR/TT [redacted], ([date redacted])[12] (FISC authorizes collection of certain redacted categories of Internet metadata from an over three-page list of categories metadata that is itself almost completely redacted). Thus ProPublica's request that this Court fully publish its own opinions to the extent it, not the Executive Branch, deems appropriate, has not been fulfilled.

III. THE COURT SHOULD PUBLISH THE OPINIONS PURSUANT TO PROPUBLICA'S FIRST AMENDMENT RIGHT OF ACCESS OR THE COURT'S INHERENT AUTHORITY

A. ProPublica Has Standing to Seek the Records Sought.

Here, movants have undisputed constitutional standing and seek publication pursuant to a First Amendment right of access. The government argues that because ProPublica was not a "party" to the proceedings that produced the opinions sought, it is precluded by FISA and FISC Rule 62(a) from moving for their publication. But that is incorrect. As stated in a recent opinion of this Court:

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[11] Even the date of the opinions is redacted despite website description accompanying the public release of these opinions noting that the PR/TT program discussed by the opinions was discontinued in 2011. *See* Office of the Dir. Of Nat'l Intelligence, IC on the Record, *DNI Clapper Declassifies Additional Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act* (Nov. 18, 2013), http://icontherecord.tumblr.com/post/67419963949/dni-clapper-declassifies-additional-intelligence.

[12] *Available at* http://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf.

> As the government acknowledges and Rule 62(a) explicitly states, the Court has the discretion to direct publication *sua sponte*. Given this discretion to act, it would serve no discernible purpose for the Court, by rule, to be precluded from considering reasoned arguments in favor of publication of certain opinions made by claimants with Article III standing to seek their publication."

Misc. 13-02 at 11. The Court further noted that this argument would also bar non-parties' claims of right (such as First Amendment claims), which it has the indisputable authority to adjudicate. *Id.* at 11-12 (citing *In re Motion for Release*, 526 F. Supp. 2d at 487).

B. ProPublica Has Established a First Amendment Right of Access to the Opinions.

ProPublica's motion demonstrates that it has a First Amendment right of access to the opinions sought. Mot. at 8-15. The government makes no argument in opposition, save the assertion that this Court has "repeatedly" rejected First Amendment claims to its records. Opp'n at 4. But this assertion is incorrect. The Court has only reached the merits of the First Amendment right of access argument in one case. *In re Motion for Release*, 526 F. Supp. 2d at 496-97, *petition for reh'g en banc denied*, No. Misc 07-01 (FISA Ct. Feb. 8, 2008). In its motion, ProPublica noted several reasons why that decision was not controlling. Mot. at 9-11. The government fails to refute any of these arguments.

As set forth in Pro Publica's opening memorandum, the Court should find that a First Amendment right of access applies. As a result, the opinions are presumptively open, and the burden is on the *government* to demonstrate that retention "is essential to preserve higher values," based on a non-conclusory showing of a "substantial probability" of harm to the interests asserted. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13-14, 15 (1986). Before withholding any part of the opinions, even where the information withheld is classified, the Court must make specific findings on the record supporting its decision to not publish in full. *Id.* at 13-14; *United States v. Rosen*, 487 F. Supp. 2d 703, 716 (E.D. Va. 2007).

C. Alternatively, This Court Should Exercise Its Inherent Authority to Publish Its Decisions.

Even if the Court does not reach ProPublica's asserted First Amendment right of access, it should exercise its discretion to publish the records based on an independent decision about the redacted information.

CONCLUSION

For the forgoing reasons, ProPublica respectfully requests that this Court review the government's classification decisions and then, absent specific findings to the contrary, publish the opinions sought in full.

Dated: December 20, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Reply Brief in Support of Motion of Propublica, Inc. for the Release of Court Records have been served on the following counsel this 20th day of December, 2013, in the manner indicated:

By Overnight Delivery:

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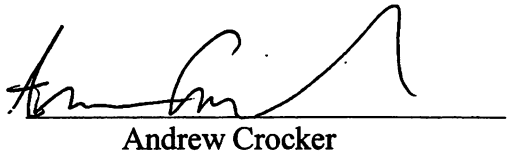

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NOTICE OF APPEARANCE

TO THE CLERK AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the following counsel has been added to the case and will be appearing as additional counsel of record for ProPublica, Inc.:

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CERTIFICATION OF BAR MEMBERSHIP AND SECURITY CLEARANCE STATUS

Pursuant to the United States Foreign Intelligence Surveillance Court Rules of Procedure 7(h)(1), 7(i), and 63, ProPublica, Inc. ("Movant") respectfully submits the following information:

(1) Bar Membership Information

Undersigned counsel for Movant is a licensed attorney, and a member in good standing of the bar of a United States district court. *See* FISC Rule 7(h)(1); FISC Rule 63.

Andrew Crocker is a member, in good standing, of the State Bar of California (Bar No. 291596), and is a member, in good standing, of the bar of the United States District Court for the Northern District of California.

(2) Security Clearance Information

Neither Movant's officers or employees or Movant's counsel hold security clearances. *See* FISC Rule 7(i). Because Movant's motion does not seek the release of legitimately classified information, and because the motion itself does not contain classified information, Movant respectfully submits that Movant and its counsel may participate in proceedings on the motion without access to classified information or security clearances. *See* FISC Rule 63 (requiring counsel only to have "appropriate security clearances").

Dated: December 20, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Notice of Appearance and Certification of Bar Membership and Security Clearance Status have been served on the following counsel this 20th day of December, 2013, in the manner indicated:

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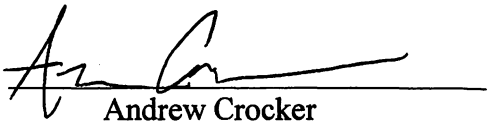

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