FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE CERTAIN ORDERS ISSUED BY THIS COURT ON JANUARY 10TH, 2007, AND SUBSEQUENTLY EXTENDED, MODIFIED AND/OR VACATED.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR RELEASE OF COURT RECORDS

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PRELIMINARY STATEMENT

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17, 2006 ("2006 FISC Rules"), the American Civil Liberties Union ("ACLU") respectfully moves for the unsealing of (i) orders issued by this Court on January 10th, 2007 (the "January 10th orders"); (ii) any subsequent orders that extended, modified, or

[redacted]

quickly as possible with only those redactions essential to protect information that the Court determines, after independent review, to be properly classified.

The sealed materials are vitally important to the ongoing national debate about government surveillance and the disclosure of the sealed materials would serve the public interest. The Attorney General referenced and characterized certain of the sealed materials in explaining why the President discontinued a warrantless surveillance program that he had inaugurated in late 2001. The House Minority Leader referenced and characterized certain of the sealed materials in advocating that the Foreign Intelligence Surveillance Act ("FISA") be amended for the ninth time since the September 2001 terrorist attacks. Members of Congress referenced and characterized certain of the sealed materials in explaining their support for the amendments. Over the next six months, Congress and the public will consider whether these amendments should

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be made permanent. Publication of the sealed materials will permit members of the public to participate meaningfully in this debate, evaluate the decisions of their elected leaders, and determine for themselves whether the proposed permanent expansion of the executive's surveillance powers is appropriate.

believed that there was "a reasonable basis to conclude that one party to the

organization affiliated with al Qaeda, or working in support of al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Dec. 19, 2005.[3]

Minority Member of the Senate Judiciary Committee that "any surveillance that was

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of the Foreign Intelligence Surveillance Court." Letter from Attorney General Alberto R.

[redacted]

Administration officials have spoken publicly about the January 10th orders on multiple occasions. They have referenced and characterized the January 10th orders in comments to the media, in press briefings, in publicly filed legal papers, and in Congressional testimony. *See, e.g., id.*; Background Briefing by Senior Justice Department Officials, Jan. 17, 2007;[9] Press Briefing by White House Press Secretary Tony Snow, January 17, 2007;[10] Government's Supplemental Submission Discussing the Implications of the Intervening FISA Court Orders of January 10, 2007, *ACLU v. NSA*

surveillance they authorized. The Attorney General has not explained in what way the January 10th orders were "complex" and "innovative." Nor has he explained his

President Bush and some members of Congress have indicated that the January 10th orders granted "programmatic" authority, but they have not explained on what statutory basis this authority was granted or how this authority was delineated by the Court. *See e.g.* President Bush Interview with Sabrina Fang, Tribune Broadcasting, Jan. 18, 2007 (in

multiple suspects"). Thus, the information that is publicly available about the January 10th orders is sufficient to raise serious questions but not to answer them.

The publicly available information about this Court's subsequent orders is even

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before the Senate Judiciary Committee that intelligence agencies were "missing a

to Rewrite Wiretap Law, Wash. Post, Aug. 1, 2007; Letter from Director of National Intelligence McConnell to Congressional Leaders, July 27, 2007.[12] The administration did not explain, however, what the "gap" was or why the gap existed. It was not until a week ago, when House Minority Leader John Boehner referenced an order that this Court

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apparently issued "in the last four or five months," that the public learned that the Court may have withdrawn the authority it extended to the administration in January.[13] Even now, the public does not know what authority was withdrawn or why.

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debate was also minimal. Yet the law's implications are dramatic. It allows the

further. Disclosure of the sealed materials will ensure a more informed debate about what is plainly a matter of pressing national concern.

In addition to informing public debate about recent and proposed legislation, the disclosure of the sealed materials would aid the public in understanding the scope of the government's surveillance activities. The courts have long recognized that "those charged with [the] investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *U.S. v. U.S. Dist. Court for Eastern Dist. of Mich.*, 407 U.S. 297, 317 (1972). As the Church and Pike Committees observed more than thirty years ago, unchecked government surveillance yields all too readily to excess, carrying with it "the possibility of abuses of power which are not always quickly apprehended or understood." *Intelligence Activities and the*

Needless to say, the ACLU does not ask the Court to disclose information about specific investigations or information about intelligence sources or methods. However, this Court's legal interpretations of an important federal statute designed to protect civil liberties while permitting the government to gather foreign intelligence should be made public to the maximum extent possible. The public should know, at least in general terms, how this Court has interpreted FISA. And the public should know how the administration has asked the Court to interpret that statute. Publication of the sealed materials, with redactions necessary to protect properly classified information, would

Judiciary Committee by indicating that there was never any disagreement within the administration about the lawfulness of the NSA Program, the administration defended the

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activities and stating that any disagreement related to *those* activities. And after the administration encountered public and congressional resistance to proposals to amend

Judges of the Court, may direct that an Opinion be published"). This Court would have the authority to grant this Motion even in the absence of these rules, because it is "fundamental that 'every court has supervisory power over its own records and files.'" *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)).

The ACLU recognizes that this Court's docket consists mainly of material that is properly classified. In an August 20th, 2002 letter to leaders of the Senate Judiciary Committee, the Presiding Judge of this Court explained that "[i]n general, the docket reflects all filings with the Court and is comprised almost exclusively of applications for electronic surveillance and/or searches, the orders authorizing the surveillance and the search warrants, and the returns on the warrants. All of these docket entries are classified at the secret and top secret level." *See* Letter from Presiding Judge Colleen Kollar-Kotelly to Hon. Patrick J. Leahy, Hon. Arlen Specter, and Hon. Charles E. Grassley

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Aug. 20, 2002.[15] Some matters that arise in the FISC, however, raise novel and complex

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from Presiding Judge Colleen Kollar-Kotelly to Hon. Patrick J. Leahy, Hon. Arlen Specter, and Hon. Charles E. Grassley, Aug. 20th, 2002.[16]

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Administration officials have stated that the January 10th orders were "innovative" and

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III. COMPELLING FIRST AMENDMENT INTERESTS SUPPORT RELEASE OF THE SEALED MATERIALS.

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of the importance of judicial transparency serves "the citizen's desire to keep a watchful

eye on the workings of public agencies . . . [and] the operation of government." *Nixon,* 435 U.S. at 598.

The public interest in disclosure of judicial opinions is particularly strong. As the Seventh Circuit recently noted:

> Redacting portions of opinions is one thing, secret disposition is quite another . . . . What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the

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[T]here is a venerable tradition of public access to court orders, not only

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meaningful judicial oversight. It is inappropriate, to say the least, that the judicial decisions that led to these major changes in the landscape of U.S. privacy law remain secret. As the Supreme Court has explained, "[p]eople in an open society do not demand

> for the Executive Branch, and the information's classified status must inform an assessment of the government's asserted interests under *Press-Enterprise*. But ultimately, trial judges must make their own judgment about whether the government's asserted interest . . . . is compelling or overriding . . . . [A] generalized assertion ... of the information's classified status . . . . is not alone sufficient to overcome the presumption in favor of open trials.

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assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents"); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 711 (6th Cir. 2002) (refusing government's request to close immigration proceedings

agency to justify nondisclosure"). In determining whether information is properly

be kept from the public in their entirety.[18]

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests that this Court release the sealed materials. The ACLU requests that these materials be released as quickly as