In the

# United States Foreign Intelligence Surveillance Court of Review

IN RE: CERTIFICATION OF QUESTIONS OF LAW TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

Upon Certification for Review by the United States Foreign Intelligence Surveillance Court

AMICUS APPENDIX

PROFESSOR LAURA K. DONOHUE
AGNES N. WILLIAMS RESEARCH PROFESSOR
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, D.C. 20001
Tel: (202) 662-9455
Fax: (202) 662-9444
lkdonohue@law.georgetown.edu

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# Summary Chart: Declassified & Redacted FISC/FISCR Opinions with Holdings, Findings, and Matters of Law

| Index No. | Doc. Date | Release Date | Document Name and Location Online | Holding, Findings, and Matters of Law |
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| 1. | Nov. 9, 2017 | Nov. 9, 2017 | Opinion, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08 (FISA Ct. Nov. 9, 2017) (En Banc Op.), http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20November%209%202017.pdf. | Holding that ACLU and Media Freedom and Information Access Clinic have standing, having sufficiently alleged the invasion of a legally cognizable interest as necessary to establish an injury-in-fact |
| 2. | Apr. 26, 2017 | May 11, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Apr. 26, 2017), https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf. | Holding that 2016 certifications, as amended by 2017 amendments, comply with 50 U.S.C. §§1881a(d)-(e) and are consistent with the Fourth Amendment |
| 3. | Jan. 25, 2017 | Jan. 25, 2017 | Opinion and Order, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08 (FISA Ct. Jan. 25, 2017) (Collyer, J.), http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20and%20Order_0.pdf. | Dismissing motion of ACLU and Media Freedom and Access Clinic to release court records on grounds of a lack of jurisdiction |
| 4. | Apr. 14, 2016 | Aug. 22, 2016 | Opinion, *In re Certified Question of Law*, No. 16-01 (FISA Ct. Rev. Apr. 14, 2016), https://www.dni.gov/files/icotr/FISCR%20Opinion%2016-01.pdf. | Authorizing collection of post-cut-through digits under a PR/TT order in the absence of reasonably available technology to distinguish between content and non-content DRAS, subject to a prohibition on the affirmative investigative use of content |

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| 5. | Dec. 31, 2015 | Apr. 19, 2016 | Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for Orders Requiring the Production of Call Detail Records*, No. [REDACTED] (FISA Ct. Dec. 31, 2015), https://www.dni.gov/files/documents/12312015BR_Memo_Opinion_for_Public_Release.pdf. | Concluding that the Verified Application for Orders Requiring the Production of Call Detail Records meets the requirements of subsection (a) and (b) of §501 of FISA, and that minimization procedures submitted in accordance with §501(b)(2)(D) meet the definition of minimization procedures adopted pursuant to §501(g) |
| 6. | Nov. 24, 2015 | Dec. 2, 2015 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 15-99 (FISA Ct. Nov. 24, 2015), http://www.fisc.uscourts.gov/sites/default/files/BR 15-99 Opinion and Order.pdf. | Authorizing (a) continued collection of bulk telephony metadata under §215 as amended by the USA Freedom Act until Nov. 28, 2015, and (b) retention of certain BR metadata for litigation |
| 7. | Nov. 6, 2015 | Apr. 19, 2016 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Nov. 6, 2015), https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf. | Approving NSA §702 certifications, amended certifications, and accompanying targeting and minimization procedures, and rejecting amicus curiae Amy Jeffress's constitutional concerns regarding the querying of data using U.S. persons' information |
| 8. | June 29, 2015 | July 2, 2015 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, Nos. BR 15-75 / Misc. 15-01 (FISA Ct. June 29, 2015), http://www.fisc.uscourts.gov/sites/default/files/BR 15-75 Misc 15-01 Opinion and Order_0.pdf. | Authorizing continued collection of bulk telephone metadata under §215 for 180 days until the USA Freedom Act takes effect |
| 9. | June 18, 2015 | Apr. 19, 2016 | Memorandum Opinion, *In re [REDACTED] a U.S. Person*, No. PR/TT 15-52 (FISA Ct. June 18, 2015), | Finding "notwithstanding the novel question presented by the application," the appointment of amicus curiae was not |

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| | | | https://www.dni.gov/files/documents/06182015_PR-TT_Opinion_for_Public_Release.pdf. | appropriate as (a) amici had not yet been designated; and (b) there was not enough time for meaningful participation |
| 10. | June 17, 2015 | June 19, 2015 | Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, Nos. BR 15-77, 15-78 (FISA Ct. June 17, 2015), http://www.fisc.uscourts.gov/sites/default/files/BR 15-77 15-78 Memorandum Opinion.pdf. | Finding it unnecessary to appoint an amicus curiae, as the question before the court is a matter of statutory interpretation for which "only a single reasonable or rational outcome" exists; and determining that the USA FREEDOM Act reinstated the §215 BR provision of the PATRIOT Act that had lapsed on June 1, 2015 |
| 11. | Aug. 26, 2014 | Sept. 29, 2015 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Aug. 26, 2014), https://www.dni.gov/files/documents/0928/FISC Memorandum Opinion and Order 26 August 2014.pdf. | Approving §702 certifications |
| 12. | Aug. 11, 2014 | Apr. 11, 2017 | Opinion and Order, *In Re Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act*, Nos. Multiple including [REDACTED] (FISA Ct. Aug. 11, 2014), https://www.dni.gov/files/documents/icotr/51117/Doc%202%20%E2%80%93%20Aug.%202014%20FISC%20Opinion%20&%20Order%20re%20FBI%E2%80%99s%20Minimization%20Procedures.pdf. | Granting government motion to amend the standard minimization procedures for the purpose of disseminating information to the National Center for Missing and Exploited Children (NCMEC) for a law enforcement purpose, and to amend the retention provisions to exempt information retained for litigation-related reasons |
| 13. | Aug. 7, 2014 | Aug. 8, 2014 | Opinion and Order, *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02 (FISA Ct. Aug. 7, 2014), http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-7.pdf. | Ordering declassification of a redacted version of the Feb. 19, 2013 FISC opinion in No. BR-25 and finding that the second redaction proposal passes muster |

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| 14. | June 19, 2014 | June 27, 2014 | Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 14-96 (FISA Ct. June 19, 2014) (Zagel, J.), http://www.fisc.uscourts.gov/sites/default/files/BR%2014-96%20Opinion-1.pdf. | Approving new minimization procedures, "fully agree[ing] with and adopt[ing] the constitutional and statutory analyses contained in" previous court opinions, and authorizing collection of bulk telephone metadata under §215 |
| 15. | Mar. 21, 2014 | Apr. 15, 2014 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things*, No. BR 14-01 (FISA Ct. Mar. 21, 2014), http://www.fisc.uscourts.gov/sites/default/files/BR 14-01 Opinion-3.pdf. | Granting the motion of the plaintiffs in *Jewel v. NSA* and *First Unitarian Church v. NSA* for leave to correct the record, and ordering the government to make a filing explaining its failure to notify FISC of the March 10, 2014 preservation orders in *Jewel* and *First Unitarian* and the plaintiffs' understanding of the scope of the orders, upon learning that counsel considered them relevant to the §215 telephony metadata at issue in FISC's Feb. 25 Opinion and Order (which had denied extended preservation of §215 records for litigation purposes) |
| 16. | Mar. 20, 2014 | Apr. 28, 2014 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things*, No. BR 14-01 (FISA Ct. Mar. 20, 2014), http://www.fisc.uscourts.gov/sites/default/files/BR 14-01 Opinion and Order-1.pdf. | Declining a petition filed by [REDACTED] "to vacate, modify, or reaffirm" a Jan. 3, 2014 production order |
| 17. | Mar. 12, 2014 | Apr. 15, 2014 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things*, No. BR 14-01 (FISA Ct. Mar. 12, 2014), | Granting Mar. 11, 2014 motion for temporary relief from five-year data destruction rule pending resolution of |

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| | | | http://www.fisc.uscourts.gov/sites/default/files/BR 14-01 Opinion-2.pdf. | preservation issues raised in *Jewel v. NSA* and *First Unitarian Church v. NSA* |
| 18. | Mar. 7, 2014 | Apr. 15, 2014 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things*, No. BR 14-01 (FISA Ct. Mar. 7, 2014), http://www.fisc.uscourts.gov/sites/default/files/BR 14-01 Opinion-1.pdf. | Denying government motion for a second amendment to the Jan. 3, 2014 primary order approving §215 collection, seeking to retain telephony metadata beyond five years for purposes of pending civil litigation |
| 19. | [REDACTED] (2014) | June 13, 2017 | Opinion on Motion for Disclosure of Prior Decisions, *[REDACTED]* (FISA Ct. 2014), https://www.dni.gov/files/documents/icotr/702/EFF%2016--CV--02041(HSG)%20Doc%2012%2006.13.17%20--%20REDACTED.PDF. | Denying motion for disclosure of prior FISC decisions on the grounds that "neither FISA nor the …[FISC] Rules of Procedure…require, or provide for discretionary, disclosure of the Requested Opinions in the circumstances of this case," and determining that the Due Process Clause of the Fifth Amendment "does not compel the requested disclosure." |
| 20. | [REDACTED] (2014) | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2014), https://www.dni.gov/files/documents/icotr/702/Bates%20510-548.pdf. | Holding that the 2014 Directives meet the requirements of §702 and are otherwise lawful, including inter alia, that they are consistent with the Fourth Amendment as there is no "distinctive or heightened risk of the government acquiring any greater volume of communications of or concerning United States persons"; comparing context to *In re Directives* |
| 21. | Dec. 18, 2013 | Apr. 15, 2014 | Memorandum Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things*, No. BR 13-158 (FISA Ct. Dec. 18, 2013), | Granting motion by the Center for National Security Studies to file an amicus brief on why §215 does not authorize bulk collection of telephony metadata records, |

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| | | | http://www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-2.pdf. | and denying motions for reconsideration or en banc review, access to the government's application or the FISC docket, and declassification of relevant legal arguments on the grounds that "information already made available to the public, including opinions of his Court, provides sufficient context for the Center to brief the issue specified herein." |
| 22. | Dec. 13, 2013 | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Dec. 13, 2013), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2015%2006.13.17%20--%20REDACTED.PDF. | Holding that the Nov. 15, 2013 amended minimization procedures are consistent with the requirements of 50 U.S.C. §§1881a(d)-(e) and the Fourth Amendment |
| 23. | Oct. 11, 2013 | Apr. 15, 2014 | Memorandum Opinion and Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-158 (FISA Ct. Oct. 11, 2013) (McLaughlin, J.), http://www.fisc.uscourts.gov/sites/default/files/BR 13-158 Memorandum-1.pdf. | Authorizing bulk metadata collection and agreeing with Judge Eagan's July 2013 Mem. Op. in BR 13-109 that collection of bulk telephone metadata meets the §215 relevance standard; holding, under *Smith v. Maryland*, that the Fourth Amendment is inapplicable |
| 24. | Sept. 13, 2013 | Apr. 16, 2014 | Opinion and Order, *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02 (FISA Ct. Sept. 13, 2013), http://www.fisc.uscourts.gov/sites/default/files/Misc 13-02 Order-2.pdf. | Ruling on ACLU motion to release FISC opinions: motion denied with respect to records that are part of ongoing FOIA litigation; government ordered to conduct declassification review of other opinions |
| 25. | Aug. 30, 2013 | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Aug. 30, 2013), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2003%2006.13.17%20--%20REDACTED.PDF. | Holding that the certifications included as part of the July 31, 2012 submission contain the required statutory elements and that the targeting and minimization procedures adopted for use in connection |

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| | | | | with those certifications are consistent with the applicable statutory requirements and the Fourth Amendment, but, because of a recently-disclosed compliance incident under investigation by the government, suspending its review of amendments to previously-approved certifications also part of the July 31 submission |
| 26. | Aug. 29, 2013 | Sept. 17, 2013 | Amended Memorandum Opinion and Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-109 (FISA Ct. Aug. 29, 2013), http://www.fisc.uscourts.gov/sites/default/files/BR 13-109 Order-1.pdf. | Granting the application for bulk telephony metadata collection, holding that "*Smith v. Maryland* compels the conclusion that there is no Fourth Amendment impediment to the collection," comparing §215 to the Stored Communications Act, and determining that bulk collection meets the "relevance" standard under 50 U.S.C. §1842(c)(2) as relevant records would be contained in the bulk data |
| 27. | June 12, 2013 | Apr. 15, 2014 | Opinion and Order, *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*, No. 13-01 (FISA Ct. June 12, 2013), http://www.fisc.uscourts.gov/sites/default/files/Misc 13-01 Opinion-1.pdf. | Finding, contrary to the Government's argument in District Court that FISC rules prevent the District Court from ordering disclosure of a FISC opinion if it is found to be subject to FOIA, that the District Court has the authority to do so |
| 28. | Feb. 19, 2013; redacted version filed Aug. 27, 2014 | Aug. 28, 2014 | Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-25 (FISA Ct. Feb. 19, 2013), http://www.fisc.uscourts.gov/sites/default/files/BR 13-25 Opinion-1.pdf. | Finding that the application submitted by the government in support of an FBI investigation of a USP meets the statutory First Amendment requirement as well as the language requiring that the tangible things sought are relevant to an authorized |

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| | | | | investigation to protect against international terrorism |
| 29. | Sept. 25, 2012 | Aug. 21, 2013 | Memorandum Opinion, *[REDACTED]* (FISA Ct. Sept. 25, 2012), http://www.dni.gov/files/documents/September 2012 Bates Opinion and Order.pdf. | Noting that in 2011 "the government made a series of submissions to the Court disclosing that it had materially misrepresented the scope of NSA's 'upstream collection' under §702 (and prior authorities including the Protect America Act)," and determining that new measures adopted by the NSA to purge data from past overcollection were sufficient to make the program legal |
| 30. | [REDACTED] (2012) | June 13, 2017 | Memorandum Order and Opinion, *[REDACTED]* (FISA Ct. 2012), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2007%2006.13.17%20--%20REDACTED%20w%20replacemnt%20page.pdf. | Holding that the NSA's amended minimization procedures used in this case, permitting the sharing of certain unminimized communications, are consistent with the requirements of 50 U.S.C. §§1881a(d)-(e) and with the Fourth Amendment |
| 31. | Nov. 30, 2011 | Aug. 21, 2013 | Memorandum Opinion, *[REDACTED]* (FISA Ct. Nov. 30, 2011), http://www.dni.gov/files/documents/November 2011 Bates Opinion and Order Part 1.pdf (Part 1) and http://www.dni.gov/files/documents/November 2011 Bates Opinion and Order Part 2.pdf (Part 2). | Approving amended minimization procedures adopted to correct the statutory and constitutional deficiencies identified by the Court in its Oct. 3, 2011 Mem. Op. and restarting §702 upstream collection |
| 32. | Oct. 3, 2011 | Aug. 21, 2013 | Memorandum Opinion, *[REDACTED]*, 2011 WL 10945618 (FISA Ct. Oct. 3, 2011), https://www.dni.gov/files/documents/0716/October-2011-Bates-Opinion-and Order-20140716.pdf. | Holding that the NSA misled the Court on the nature of §702 upstream collection, acquiring tens of thousands entirely domestic communications of USPs and that the minimization procedures failed on |

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| | | | | statutory and constitutional (Fourth Amendment) grounds (Bates, J.) |
| 33. | May 13, 2011 | Jan. 31, 2018 | Opinion and Order, *[REDACTED]*, Nos. [REDACTED] (FISA Ct. May 13, 2011), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-10.pdf. | Directing the government to destroy information obtained by unauthorized electronic surveillance |
| 34. | Dec. 10, 2010 | Jan. 31, 2018 | Opinion and Order, *[REDACTED]*, Nos. [REDACTED] (FISA Ct. Dec. 10, 2010), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-11.pdf. | Ordering the government to submit further information regarding its proposed retention and use of the results of unauthorized surveillance |
| 35. | [REDACTED] (2010) | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2010), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2013%2006.13.17%20--%20REDACTED.PDF. | Holding that the targeting and minimization procedures used in this case are consistent with the requirements of 50 U.S.C. §§1881a(d)-(e) and with the Fourth Amendment; noting government noncompliance in relation to purging domestic U.S. communications and subsequent NSA dissemination of intelligence reports containing the data that should have been purged; and finding that the NSA's process for purging §702 communications is consistent with its targeting and minimization procedures |
| 36. | [REDACTED] (2010) | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2010), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2004%2006.13.17%20--%20REDACTED_updatedf.pdf. | Holding that the targeting and minimization procedures used in this case are consistent with the requirements of 50 U.S.C. §§1881a(d)-(e) and the Fourth Amendment |

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| 37. | [REDACTED] (2010) | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2010), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2002%2006.13.17%20--%20REDACTED_updated.pdf. | Holding that the targeting and minimization procedures used in this case are consistent with the requirements of 50 U.S.C. §§1881a(d)-(e) and the Fourth Amendment |
| 38. | [REDACTED] | Nov. 18, 2013 | Memorandum Opinion, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.) (Bates, J.), https://www.dni.gov/files/documents/1118/CLEANEDPRTT 2.pdf. | Granting in part and denying in part an application to engage in bulk Internet metadata collection and to query and use information previously obtained by NSA and noting, "the government acknowledges that NSA exceeded the scope of authorized acquisition continuously during the more than [REDACTED] years of acquisition under these orders." (Bates Mem. Op.) |
| 39. | Nov. 5, 2009 | Sept. 10, 2013 | Supplemental Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 09-15 (FISA Ct. Nov. 5, 2009), http://www.dni.gov/files/documents/section/pub_Nov 5 2009 Supplemental Opinion and Order.pdf. | Noting noncompliance of NSA sharing of information requirements (NSA had created an email distribution list with 189 analysts, only 53 of whom had the adequate training and guidance and to whom BR metadata query results were sent); reiterating the manner in which query results may be shared within NSA; and elaborating on the reporting requirement imposed by the Court's Oct. 30, 2009 order (Walton, J.) |
| 40. | Apr. 7, 2009 | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Apr. 7, 2009), https://www.dni.gov/files/documents/icotr/702/Bates%20549-579.pdf. | Holding §702 targeting and minimization procedures used in this case are consistent with the requirements of 50 U.S.C. §§1881a(d)-(e) and with the Fourth Amendment, noting that in 2008 the government reported overcollection, and determining that preventative and remedial |

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| | | | | measures to limit overcollection incidents adequately protects Fourth Amendment interests |
| 41. | [REDACTED] (2009) | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2009), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2011%2006.13.17%20--%20REDACTED.PDF. | Holding that the targeting and minimization procedures used in this case are consistent with the requirements of 50 U.S.C. §§1881a(d)-(e) and with the Fourth Amendment, recognizing that continued NSA noncompliance problems "principally involve analysts improperly acquiring the communications of U.S. persons, suggesting that the CIA problem is "arguably more troubling because it reflects a profound misunderstanding of minimization procedures," recognizing that the government's practice (unbeknownst to the Court) had been to report only certain noncompliance incidents and not others (such as failure to de-task accounts even after NSA learned that the targets entered the U.S.); and noting that the government must report to the Court every compliance incident that relates to the operation of the targeting or minimization procedures [NB: similar to No. 42, below, with slightly different language and redactions] |
| 42. | [REDACTED] (2009) | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2009), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2005%2006.13.17%20--%20REDACTED.PDF. | [Almost entirely consistent language and redactions to item 41, but with some slight differences] |

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| 43. | Dec. 12, 2008 | Sept. 10, 2013 | Supplemental Opinion, *In re Production of Tangible Things From [REDACTED]*, No. BR 08-13 (FISA Ct. Dec. 12, 2008), https://www.dni.gov/files/documents/section/pub_Dec 12 2008 Supplemental Opinions from the FISC.pdf. | Concluding that call detail records are subject to production under 50 U.S.C.§1861; addressing tension with 18 U.S.C.§§2702-2703 (relevant provisions of Electronic Communications Privacy Act) |
| 44. | [REDACTED] (2008) | June 13, 2017 | Memorandum Order and Opinion, *[REDACTED]* (FISA Ct. 2008), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2001%2006.13.17%20--%20REDACTED%20w%20replacemnt%20page.pdf. | Holding §702 targeting and minimization procedures used in this case are consistent with the requirements of 50 U.S.C. §§1881a(d)-(e) and with the Fourth Amendment; referencing a Sept. 4, 2008 Memorandum Opinion and accompanying Order [which has not been released] |
| 45. | Aug. 27, 2008 | Aug. 27, 2008 | Order and Memorandum Opinion, *In re Proceedings Required by Section 702(i) of the FISA Amendments Act of 2008*, No. Misc 08-01 (FISA Ct. Aug. 27, 2008), http://www.fas.org/irp/agency/doj/fisa/fisc082708.pdf. | Denying ACLU's motion (a) to be notified of the caption and briefing schedule for any proceedings under §702(i) in which the Court would consider legal questions relating to the scope, meaning, and constitutionality of the FAA; (b) that the Government be required to file public versions of its legal briefs with selective redactions; (c) that the ACLU be granted leave to file a legal brief addressing the constitutionality of the FAA and to participate in oral argument before the Court; and (d) that any legal opinions issued by the Court be made available to the public, with only the redactions necessary to protect information properly classified; and citing the Aug. 9, 2007 determination that (1) the common law and (2) the First Amendment provide no public |

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| | | | | right of access because the records being sought, although different from the earlier case, are subject to the same comprehensive statutory scheme |
| 46. | Aug. 22, 2008 | Jan. 15, 2009 | *In re Directives to Yahoo! Inc. Pursuant to Section 105B of Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008), http://www.fas.org/irp/agency/doj/fisa/fiscr082208.pdf. | FISCR holding that petitioner easily exceeded the threshold for standing; determining that the directives issued to communications service providers under the PAA, requiring production of customers' data, were consistent with the statutory framing and the Fourth Amendment (as applied); and finding a Warrant Clause exception akin to the "special needs" exception for domestic foreign intelligence collection targeted at FPs/AFPs outside the United States |
| 47. | Apr. 25, 2008 | Sept. 11, 2014 | Memorandum Opinion, *In re Directives to Yahoo!, Inc. Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 105B(g): 07-01 (Walton, J.), https://cdt.org/files/2014/09/38-yahoo702-memorandum-opinion-unredacted.pdf | Holding that the court retained jurisdiction despite the lapse of the PAA; determining that the directives served on Yahoo! met the PAA statutory requirements and the Fourth Amendment; and finding that service providers can bring Fourth |

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| | | | | Amendment challenges on behalf of their customers |
| 48. | Jan. 15, 2008 | Sept. 11, 2014 | Memorandum Opinion and Order, *[REDACTED]*, (FISA Ct. 2008), https://www.dni.gov/files/documents/0909/Memorandum%20Opinion%20and%20Order%2020080115.pdf | Considering DNI/AG certification related to Yahoo! PRISM case under a "clearly erroneous" standard of review; discussing PAA |
| 49. | Dec. 11, 2007 | Dec. 11, 2007 | Memorandum Opinion, *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007), https://www.aclu.org/sites/default/files/pdfs/safefree/fisc_order_2007_1211.pdf. | Finding ACLU motion within FISC's jurisdiction; denying motion for release of Court orders and government pleadings regarding §702 on common law and First Amendment right of access grounds because FISC proceedings traditionally have been closed |
| 50. | Aug. 2, 2007 | Dec. 12, 2014 | Order and Memorandum Opinion, *In re [REDACTED]*, No. [REDACTED] (FISA Ct. Aug. 2, 2007), https://www.documentcloud.org/documents/1379006-large-content-fisa-order-documents.html. | Responding to an application to establish an early warning system to alert the government to the presence of FPs/AFPs in the United States; noting that the new procedures "would enable the Government to direct electronic surveillance with a much higher degree of speed and agility than would be possible through the filing of individual FISA applications,"; establishing probable cause that the targets are FPs/AFPs and using/about to use the facilities; clarifying at what point the NSA is deemed to have obtained knowledge of a facility for the purposes of the May 31, 2007 order |
| 51. | Apr. 3, 2007 | Dec. 12, 2014 | Order and Memorandum Opinion, *In re [REDACTED]*, No. [REDACTED] (FISA Ct. Apr. | Rejecting the definition of "facility" from the Jan. 10, 2007 foreign content order; |

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| | | | 3, 2007), https://www.dni.gov/files/documents/1212/CERTIFIED COPY - Order and Memorandum Opinion 04 03 07 12-11 Redacted.pdf. | finding that probable cause findings for selectors must be made by FISC, not the NSA |
| 52. | [REDACTED] | Nov. 18, 2013 | Opinion and Order, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.) (Kollar-Cotelly, J.), https://www.odni.gov/files/documents/1118/CLEANEDPRTT 1.pdf. | Holding bulk Internet metadata collection is consistent with 50 U.S.C. §§1841-1846, that the restrictions on retention, accessing, use, and dissemination of the information satisfies the requirements of 50 U.S.C.§1842, and that the installation and use of the PR/TT devices for bulk email and Internet metadata collection is consistent with the First and Fourth Amendments, despite the acknowledgment that "The raw volume of the proposed collection is enormous," and will result in the collection of USPs inside the country "who are not the subject of any FBI investigation" (internal quotations omitted) (Kollar-Kotelly Op.) |
| 53. | Nov. 18, 2002 | N/A | *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002), https://scholar.google.com/scholar_case?case=14926646895729978023&q=310+F.3d+717+&hl=en&as_sdt=20006. | Bringing down the wall; overturning the FISA Ct. ruling (below); allowing foreign intelligence searches to be used even when the primary purpose of the collection is a criminal investigation |
| 54. | May 17, 2002 | N/A | *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611 (FISA Ct. 2002) (reversed by *In re Sealed Case*), https://scholar.google.com/scholar_case?case=16515626632671842776&q=218+F.+Supp.+2d+611+&hl=en&as_sdt=20006. | Holding that minimization procedures must prevent prosecutors from directing foreign intelligence searches (re-building the wall) |

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| 55. | June 11, 1981 | June 11, 1981 | *In re Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property* (FISC Ct. June 11, 1981), *reprinted in* S. Rep. No. 97-280 at 16-19 (1981) | Holding that the electronic search provisions of the 1978 FISA do not authorize FISC to issue orders for search of real property |
| 56. | [REDACTED] | Sept. 25, 2017 | Supplemental Opinion and Amendment to Primary Order, *[REDACTED]* (FISA Ct.) (Bates, J.), https://www.dni.gov/files/documents/icotr/EFF%20FOIA%20Sep%2025%20Doc%209.pdf. | Responding to government request for clarification in previous Mem. Op., which limited collection authority for several categories of metadata collection under PR/TT |
| 57. | [REDACTED] | Jan. 31, 2018 | Memorandum Opinion, *[REDACTED]* (FISA Ct.) (Hogan, J.), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-13.pdf. | Holding that the particular type of surveillance requested constitutes "electronic surveillance" as defined in FISA |
| 58. | [REDACTED] | Jan. 31, 2018 | Opinion, *[REDACTED]* (FISA Ct.) (Broomfield, J.), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-8.pdf. | [Labeled as an opinion but almost entirely redacted] |
| 59. | [REDACTED] | Jan. 31, 2018 | Memorandum Opinion as to Electronic Surveillance Pursuant to *[REDACTED]* (FISA Ct.) (Kollar-Kotelly, J.), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-4.pdf. | Heavily redacted; appears to be reporting noncompliance ("For the first time, on the evening of [REDACTED] [DOJ] orally informed this Judge that for weeks [REDACTED]." *2; noting "The Court is without jurisdiction [REDACTED]." *3; authorizing some sort of electronic surveillance |

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| 60. | [REDACTED] | Jan.31, 2018 | Opinion and Order, *[REDACTED]* (FISA Ct.) (Baker, J.) https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-2.pdf. | Denying in part and granting in part the government's Motion for Reconsideration; [procedural history almost entirely redacted]; holding that the practices at issue are not moot, thus presenting the court with a live issue; citing to classified *In Re Electronic and Data Communications Surveillance Definitions, Memorandum of Law and Fact Regarding Electronic and Data Communications Surveillance under the Foreign Intelligence Surveillance Act* (Nov. 5, 2003); evaluating Fourth Amendment implications; holding that the FBI marking procedures violated the statutory minimization requirements |

## Summary Chart: Declassified & Redacted FISC Orders

| Index No. | Doc Date | Release Date | Document Name and Location |
|---|---|---|---|
| 1. | Jan. 9, 2018 | Jan. 9, 2018 | Order, *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. 18-01 (FISA Ct. Rev. Jan. 9, 2018), http://www.fisc.uscourts.gov/sites/default/files/FISCR%2018%2001%20WCB%20Order%20180109_0.pdf. |
| 2. | Jan. 5, 2018 | Jan. 7, 2018 | Certified Question of Law, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08 (FISA Ct. Jan. 5, 2018), http://www.fisc.uscourts.gov/sites/default/files/Misc%2013%2008%20Certification%20Order%20with%20Attached%20En%20Banc%20Decision.pdf. |
| 3. | Apr. 26, 2017 | May 11, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Apr. 26, 2017), https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf. |
| 4. | Apr. 25, 2017 | Apr. 26, 2017 | Order, *In re Unknown Foreign Intelligence Surveillance Court Orders*, Not Docketed (FISA Ct. Apr. 25, 2017), http://www.fisc.uscourts.gov/sites/default/files/APR%2025%20Order.pdf. |
| 5. | Mar. 22, 2017 | Mar. 22, 2017 | Order, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08 (FISA Ct. Mar. 22, 2017), http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Order.pdf. |
| 6. | Jan. 25, 2017 | Jan. 25, 2017 | Opinion and Order, *In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08 (FISA Ct. Jan. 25, 2017), http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20and%20Order_0.pdf. |
| 7. | Oct. 26, 2016 | May 10, 2017 | Order, *[REDACTED]* (FISA Ct. Oct. 26, 2016), https://www.dni.gov/files/documents/icotr/51117/2016_Certification_FISC_Extension_Order_Oct_26_2016.pdf. |
| 8. | Apr. 27, 2016 | Apr. 27, 2016 | Order, *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 105B(g) 07-01 (FISA Ct. Apr. 27, 2016), http://www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01.pdf. |

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| 9. | Feb. 12, 2016 | Aug. 22, 2016 | Certified Question of Law, *In [REDACTED] A U.S. Person*, No. PR/TT 2016-[REDACTED] (FISA Ct. Feb. 12, 2016), https://www.dni.gov/files/icotr/PCTD%20FISC-R%20Certification%2020160818%20pdf.pdf. |
| 10. | Nov. 24, 2015 | Dec. 2, 2015 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 15-99 (FISA Ct. Nov. 24, 2015), http://www.fisc.uscourts.gov/sites/default/files/BR 15-99 Opinion and Order.pdf. |
| 11. | Nov. 6, 2015 | Apr. 19, 2016 | Memorandum Opinion and Order, *[Redacted]*, No. [Redacted] (FISA Ct. Nov. 6, 2015), https://www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf. |
| 12. | Sept. 17, 2015 | Sept. 24, 2015 | Order Appointing an Amicus Curiae, *Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 15-99 (FISA Ct. Nov. 24, 2015), http://www.fisc.uscourts.gov/sites/default/files/BR 15-99 Order Appointing Amicus Curiae.pdf. |
| 13. | Aug. 27, 2015 | Aug. 28, 2015 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted]*, No. BR 15-99 (FISA Ct. Aug. 27, 2015), https://www.dni.gov/files/documents/BR 15-99 Primary Order.pdf. |
| 14. | Aug. 13, 2015 | Apr. 11, 2017 | Order Appointing an Amicus Curiae, *[REDACTED]*, No. [REDACTED] (FISA Ct. Aug. 13, 2015), https://www.dni.gov/files/documents/icotr/51117/Doc%204%20%E2%80%93%20Aug.%202015%20FISC%20Order%20Appointing%20an%20Amicus%20Curiae.pdf. |
| 15. | June 29, 2015 | July 2, 2015 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, Nos. BR 15-75 / Misc. 15-01 (FISA Ct. June 29, 2015), http://www.fisc.uscourts.gov/sites/default/files/BR 15-75 Misc 15-01 Opinion and Order_0.pdf. |
| 16. | June 29, 2015 | July 2, 2015 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 15-75 (FISA Ct. June 29, 2015), http://www.fisc.uscourts.gov/sites/default/files/BR 15-75 Primary Order %28redacted%29 .pdf. |
| 17. | Feb. 26, 2015 | Approved for public release, | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 15-24 (FISA Ct. Feb. 26, 2015), https://www.dni.gov/files/documents/0311/BR 15-24 Primary Order - Redacted.pdf. |

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| | | Mar. 9, 2015; Posted, Mar. 11, 2015 | |
| 18. | Dec. 4, 2014 | Declassified Dec. 24, 2014; posted Jan. 12, 2015 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 14-166 (FISA Ct. Dec. 4, 2014), https://www.dni.gov/files/documents/0112/BR 14-166 Primary Order FINAL.pdf. |
| 19. | Sept. 11, 2014 | Declassified Oct. 17, 2013; posted Nov. 6, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 14-125 (FISA Ct. Sept. 11, 2014), https://www.dni.gov/files/documents/1106/BR 14-125 Primary Order.pdf. |
| 20. | Aug. 26, 2014 | Sept. 29, 2015 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Aug. 26, 2014), https://www.dni.gov/files/documents/0928/FISC Memorandum Opinion and Order 26 August 2014.pdf. |
| 21. | Aug. 11, 2014 | Apr. 11, 2017 | Opinion and Order, *In Re Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act*, Nos. Multiple including [REDACTED] (FISA Ct. Aug. 11, 2014), https://www.dni.gov/files/documents/icotr/51117/Doc%202%20%E2%80%93%20Aug.%202014%20FISC%20Opinion%20&%20Order%20re%20FBI%E2%80%99s%20Minimization%20Procedures.pdf. |
| 22. | Aug. 7, 2014 | Aug. 8, 2014 | Opinion and Order, *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02 (FISA Ct. Aug. 7, 2014), http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-7.pdf. |
| 23. | June 19, 2014 | June 27, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 14-96 (FISA Ct. June 19, 2014), https://www.dni.gov/files/documents/0627/BR 14-96_Primary_Order.pdf. |
| 24. | Mar. 28, 2014 | June 27, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 14-67 (FISA |

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| | | | Ct. Mar. 28, 2014), https://www.dni.gov/files/documents/0627/BR_14-67_Primary_Order.pdf. |
| 25. | Mar. 21, 2014 | Apr. 15, 2014 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things*, No. BR 14-01 (FISA Ct. Mar. 21, 2014), http://www.fisc.uscourts.gov/sites/default/files/BR 14-01 Opinion-3.pdf. |
| 26. | Mar. 20, 2014 | Apr. 28, 2014 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things*, No. BR 14-01 (FISA Ct. Mar. 20, 2014), http://www.fisc.uscourts.gov/sites/default/files/BR 14-01 Opinion and Order-1.pdf. |
| 27. | Mar. 12, 2014 | Apr. 15, 2014 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things*, No. BR 14-01 (FISA Ct. Mar. 12, 2014), http://www.fisc.uscourts.gov/sites/default/files/BR 14-01 Opinion-2.pdf. |
| 28. | Mar. 7, 2014 | Apr. 15, 2014 | Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things*, No. BR 14-01 (FISA Ct. Mar. 7, 2014), http://www.fisc.uscourts.gov/sites/default/files/BR 14-01 Opinion-1.pdf. |
| 29. | Feb. 5, 2014 | Feb. 12, 2014 | Order Granting the Government's Motion to Amend the Court's Primary Order Dated January 3, 2014, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things*, No. BR 14-01 (FISA Ct. Feb. 5, 2014), https://www.dni.gov/files/documents/BR 14-01 MTA and Order with redactions (Final).pdf. |
| 30. | Jan. 3, 2014 | Apr. 15, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 14-01 (FISA Ct. Jan. 3, 2014), http://www.fisc.uscourts.gov/sites/default/files/BR 14-02 Order-2.pdf. |
| 31. | [REDACTED] (2014) | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2014), https://www.dni.gov/files/documents/icotr/702/Bates%20510-548.pdf. |
| 32. | Dec. 18, 2013 | Apr. 15, 2014 | Memorandum Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things*, No. BR 13-158 (FISA Ct. Dec. 18, 2013), http://www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-2.pdf. |
| 33. | Dec. 13, 2013 | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Dec. 13, 2013), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2015%2006.13.17%20--%20REDACTED.PDF. |

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| 34. | Oct. 11, 2013 | Apr. 15, 2014 | Memorandum Opinion and Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-158 (FISA Ct. Oct. 11, 2013), http://www.fisc.uscourts.gov/sites/default/files/BR 13-158 Memorandum-1.pdf. |
| 35. | Sept. 13, 2013 | Apr. 16, 2014 | Opinion and Order, *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02 (FISA Ct. Sept. 13, 2013), http://www.fisc.uscourts.gov/sites/default/files/Misc 13-02 Order-2.pdf. |
| 36. | Aug. 30, 2013 | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Aug. 30, 2013), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2003%2006.13.17%20--%20REDACTED.PDF. |
| 37. | Aug. 29, 2013 | Sept. 17, 2013 | Amended Memorandum Opinion and Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring Production of Tangible Things from [REDACTED]*, No. BR 13-109 (FISA Ct. Aug. 29, 2013), http://www.fisc.uscourts.gov/sites/default/files/BR 13-109 Order-1.pdf. |
| 38. | June 12, 2013 | Apr. 15, 2014 | Opinion and Order, *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*, No. 13-01 (FISA Ct. June 12, 2013), http://www.fisc.uscourts.gov/sites/default/files/Misc 13-01 Opinion-1.pdf. |
| 39. | Apr. 25, 2013 | June 5, 2013 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 13-80 (FISA Ct. Apr. 25, 2013), https://www.aclu.org/files/natsec/nsa/20130816/Section 215 - Primary Order.pdf. |
| 40. | [REDACTED] (2012) | June 13, 2017 | Memorandum Order and Opinion, *[REDACTED]* (FISA Ct. 2012), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2007%2006.13.17%20--%20REDACTED%20w%20replacemnt%20page.pdf. |
| 41. | June 22, 2011 | Jan. 17, 2014 | Supplemental Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 11-107 (FISA Ct. June 22, 2011), https://www.aclu.org/files/section215/20140123/FISC Supplemental Order BR 11-107.pdf. |
| 42. | June 22, 2011 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 11-107 (FISA Ct. June 22, 2011), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 11-107.pdf. |

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| 43. | May 13, 2011 | Jan. 31, 2018 | Opinion and Order, *[REDACTED]*, Nos. [REDACTED] (FISA Ct. May 13, 2011), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-10.pdf. |
| 44. | Apr. 13, 2011 | Jan. 17, 2014 | Supplemental Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 11-57 (FISA Ct. April 13, 2011), https://www.aclu.org/files/section215/20140123/FISC Supplemental Order BR 11-57.pdf. |
| 45. | Apr. 13, 2011 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 11-57 (FISA Ct. April 13, 2011), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 11-57.pdf. |
| 46. | Feb. 10, 2011 | Jan. 17, 2014 | Amendment to Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 11-07 (FISA Ct. Feb. 10, 2011), https://www.aclu.org/files/section215/20140123/FISC Amended Order BR 11-07.pdf. |
| 47. | Jan. 20, 2011 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 11-07 (FISA Ct. Jan. 20, 2011), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 11-07.pdf. |
| 48. | Dec. 10, 2010 | Jan. 31, 2018 | Opinion and Order, *[REDACTED]*, Nos. [REDACTED] (FISA Ct. Dec. 10, 2010), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-11.pdf. |
| 49. | [REDACTED] | Aug. 11, 2014 | Primary Order, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.)(Bates, J.), https://www.dni.gov/files/0808/Final 009.FISC Primary Order.pdf. |
| 50. | Nov. 23, 2010 | Mar. 28, 2014 | Supplemental Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 10-82 (FISA Ct. Nov. 23, 2010), https://www.dni.gov/files/documents/0328/104. BR 10-82 supplemental opinion - Redacted 20140328.pdf. |
| 51. | Aug. 19, 2010 | June 30, 2014 | Order, *In re DNI / AG Certification 2010-A*, No. 702(i)-10-02 (FISA Ct. Aug. 19, 2010), https://snowdenarchive.cjfe.org/greenstone/collect/snowden1/index/assoc/HASH0194/5073f0cb.dir/doc.pdf. |
| 52. | Oct. 29, 2010 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 10-70 |

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| | | | (FISA Ct. Oct. 29, 2010), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 10-70.pdf. |
| 53. | Aug. 4, 2010 | Ja. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 10-49 (FISA Ct. Aug. 4, 2010), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 10-49.pdf. |
| 54. | May 14, 2010 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 10-17 (FISA Ct. May 14, 2010), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 10-17.pdf. |
| 55. | Feb. 26, 2010 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 10-10 (FISA Ct. Feb. 26, 2010), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 10-10.pdf. |
| 56. | [REDACTED] (2010) | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2010), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2013%2006.13.17%20--%20REDACTED.PDF. |
| 57. | [REDACTED] (2010) | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2010), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2004%2006.13.17%20--%20REDACTED_updatedf.pdf. |
| 58. | [REDACTED] (2010) | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2010), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2002%2006.13.17%20--%20REDACTED_updated.pdf. |
| 59. | Dec. 16, 2009 | July 8, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 09-19 (FISA Ct. Dec. 16, 2009), https://www.dni.gov/files/documents/0708/BR 09-19 Primary Order.pdf. |
| 60. | Nov. 5, 2009 | Sept. 10, 2013 | Supplemental Opinion and Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 09-15 (FISA Ct. Nov. 5, 2009), http://www.dni.gov/files/documents/section/pub_Nov 5 2009 Supplemental Opinion and Order.pdf. |

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| 61. | [REDACTED] | Aug. 11, 2014 | Supplemental Order, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.), https://www.dni.gov/files/0808/Final 006.FISC Supplemental Order.pdf. |
| 62. | Oct. 30, 2009 | July 8, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 09-15 (FISA Ct. Oct. 30, 2009), http://www.dni.gov/files/documents/0708/BR 09-15 Primary Order.pdf. |
| 63. | Sept. 25, 2009 | Sept. 10, 2013 | Order Regarding Further Compliance Incidents, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 09-13 (FISA Ct. Sept. 25, 2009), http://www.documentcloud.org/documents/785211-pub-sept-25-2009-order-regarding-further.html. |
| 64. | Sept. 3, 2009 | Sept. 10, 2013 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 09-13, (FISA Ct. Sept. 3, 2009), http://www.dni.gov/files/documents/section/pub_Sep 3 2009 Primary Order from FISC.pdf. |
| 65. | July 22, 2009 | Nov. 18, 2013 | Order, *[REDACTED]*, No. BR 06-05 (FISA Ct. July 20, 2009), https://www.odni.gov/files/documents/1118/CLEANED089.T.BR 06-05 Motions and Or...Unseal 16AUGU-1-17-Sealed.pdf. |
| 66. | July 9, 2009 | July 8, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 09-09 (FISA Ct. July 9, 2009), http://www.dni.gov/files/documents/0708/BR 09-09 Primary Order.pdf. |
| 67. | June 22, 2009 | Sept. 10, 2013; also Nov. 18, 2013 with different redactions | Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 09-06, PR/TT [REDACTED] (FISA Ct. June 22, 2009), http://www.dni.gov/files/documents/section/pub_Jun 22 2009 Order.pdf and https://www.odni.gov/files/documents/1118/CLEANED101. Order and Supplemental Order (6-22-09)-sealed.pdf. |
| 68. | [REDACTED] | Aug. 11, 2014 (provided to Congress | Supplemental Order, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.), https://www.dni.gov/files/0808/Final 004.FISC Primary Order.pdf. |

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| | | Aug. 31, 2009) | |
| 69. | May 29, 2009 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 09-06 (FISA Ct. May 29, 2009), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 09-06.pdf. |
| 70. | Mar. 5, 2009 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 09-01 (FISA Ct. Mar. 5, 2009), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 09-01.pdf. |
| 71. | Apr. 7, 2009 | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. Apr. 7, 2009), https://www.dni.gov/files/documents/icotr/702/Bates%20549-579.pdf. |
| 72. | Mar. 2, 2009 | Sept. 10, 2013 | Order, *In re Production of Tangible Things from [REDACTED]*, No. BR 08-13 (FISA Ct. Mar. 2, 2009), https://www.dni.gov/files/documents/section/pub_March 2 2009 Order from FISC.pdf. |
| 73. | Jan. 28, 2009 | Sept. 10, 2013 | Order Regarding Preliminary Notice of Compliance Incident Dated January 15, 2009, *In re Production of Tangible Things from [REDACTED]*, No. BR 08-13 (FISA Ct. Jan. 28, 2009), http://www.dni.gov/files/documents/section/pub_Jan 28 2009 Order Regarding Prelim Notice of Compliance.pdf. |
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| 75. | [REDACTED] (2009) | June 13, 2017 | Memorandum Opinion and Order, *[REDACTED]* (FISA Ct. 2009), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2005%2006.13.17%20--%20REDACTED.PDF. |
| 76. | [REDACTED] | Aug. 11, 2014 (provided to Congress Mar. 13, 2009) | Primary Order, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.) (Walton, J.), https://www.dni.gov/files/0808/Final 003.FISC Primary Order.pdf. |
| 77. | Dec. 12, 2008 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 08-13 |

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| | | | (FISA Ct. Dec. 12, 2008), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 08-13.pdf. |
| 78. | [REDACTED] (2008) | June 13, 2017 | Memorandum Order and Opinion, *[REDACTED]* (FISA Ct. 2008), https://www.dni.gov/files/documents/icotr/702/EFF%2016-CV-02041(HSG)%20Doc%2001%2006.13.17%20--%20REDACTED%20w%20replacemnt%20page.pdf. |
| 79. | Aug. 19, 2008 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 08-08 (FISA Ct. Aug. 19, 2008), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 08-08.pdf. |
| 80. | Aug. 27, 2008 | Aug. 27, 2008 | Order and Memorandum Opinion, *In re Proceedings Required by Section 702(i) of the FISA Amendments Act of 2008*, No. Misc 08-01 (FISA Ct. Aug. 27, 2008), http://www.fas.org/irp/agency/doj/fisa/fisc082708.pdf. |
| 81. | June 26, 2008 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 08-07 (FISA Ct. June 26, 2008), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 08-07.pdf. |
| 82. | Apr. 3, 2008 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 08-04 (FISA Ct. Apr. 3, 2008), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 08-04.pdf. |
| 83. | Illegible (possibly Jan. 2008) | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 08-01 (FISA Ct. [Illegible]), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 08-01.pdf. |
| 84. | Oct. 18, 2007 | Jan. 17, 2014 | Primary Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 07-016 (FISA Ct. Oct. 18, 2007), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 07-16.pdf. |
| 85. | Oct. 11, 2007 | | Order, *[REDACTED]*, (FISA Ct. Oct. 11, 2007), https://cdt.org/files/2014/09/49-yahoo702-memorandum-opinion-and-order-dni-ag-certification.pdf |
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| 87. | July 25, 2007 | Jan. 17, 2014 | Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 07-14 (FISA Ct. July 25, 2007), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 07-14.pdf. |
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| 89. | May 31, 2007 | Jan. 17, 2014 | Amendment to Order for Purposes of Querying the Metadata Archive [REDACTED], *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 07-10 (FISA Ct. May 31, 2007), https://www.aclu.org/files/section215/20140123/FISC Amended Order BR 07-10.pdf. |
| 90. | May 3, 2007 | Jan. 17, 2014 | Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 07-10 (FISA Ct. May 3, 2007), http://www.dni.gov/files/documents/11714/FISC Order%2C BR 07-10.pdf. |
| 91. | Apr. 5, 2007 | Dec. 12, 2014 | Order, *In re [REDACTED]*, No. [REDACTED] (FISA Ct. Apr. 5, 2007), https://www.dni.gov/files/documents/1212/Signed Primary Order - 04 05 07 - 12-11 - Redacted.pdf. |
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| 95. | Jan. 10, 2007 | Dec. 12, 2014 | Order, *In re [REDACTED]*, No. [REDACTED] (FISA Ct. Jan. 10, 2007), https://www.dni.gov/files/documents/1212/FISC Order 01 10 07 12-11 - Redacted.pdf. |
| 96. | Nov. 15, 2006 | Jan. 17, 2014 | Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 06-12 (FISA Ct Nov. 15, 2006), https://www.aclu.org/files/section215/20140123/FISC%20Order%20BR%2006-12.pdf. |

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| 97. | Aug. 18, 2006 | Jan. 17, 2014 | Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 06-08, (FISA Ct. Aug. 18, 2006), https://www.aclu.org/files/section215/20140123/FISC%20Order%20BR%2006-08.pdf. |
| 98. | May 24, 2006 | Sept. 10, 2013 | Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [REDACTED]*, No. BR 06-05 (FISA Ct. May 24, 2006), http://www.dni.gov/files/documents/section/pub_May 24 2006 Order from FISC.pdf. |
| 99. | [REDACTED] | Nov. 18, 2013 | Opinion and Order, *[REDACTED]*, No. PR/TT [REDACTED] (FISA Ct.), https://www.odni.gov/files/documents/1118/CLEANEDPRTT 1.pdf. |
| 100. | [REDACTED] | Jan. 31, 2018 | Supplemental Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-1.pdf. |
| 101. | [REDACTED] | Jan.31, 2018 | Opinion and Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-2.pdf. |
| 102. | [REDACTED] | Jan. 31, 2018 | Supplemental Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-5.pdf. |
| 103. | [REDACTED] | Jan. 31, 2018 | Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-6.pdf. |
| 104. | [REDACTED] | Jan. 31, 2018 | Supplemental Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-9.pdf. |
| 105. | [REDACTED] | Jan. 31, 2018 | Supplemental Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF-FOIA-Jan-31-Doc-12.pdf. |
| 106. | [REDACTED] | Sept. 25, 2017 | Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF%20FOIA%20Sep%2025%20Doc%201.pdf. |
| 107. | [REDACTED] | Sept. 25, 2017 | Supplemental Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF%20FOIA%20Sep%2025%20Doc%203.pdf. |
| 108. | [REDACTED] | Sept. 25, 2017 | Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF%20FOIA%20Sep%2025%20Doc%206.pdf. |
| 109. | [REDACTED] | Sept. 25, 2017 | Primary Order for Pen Register and Trap and Trace Device(s), *[REDACTED]* (FISA Ct.), |

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| 110. | [REDACTED] | Sept. 25, 2017 | Primary Order for Pen Register and Trap and Trace Device(s), *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF%20FOIA%20Sep%2025%20Doc%208.pdf. |
| 111. | [REDACTED] | Sept. 25, 2017 | Supplemental Opinion and Amendment to Primary Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF%20FOIA%20Sep%2025%20Doc%209.pdf. |
| 112. | [REDACTED] | Sept. 25, 2017 | Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF%20FOIA%20Sep%2025%20%20Doc%2010.pdf. |
| 113. | [READACTED] | Sept. 25, 2017 | Order, *[REDACTED]* (FISA Ct.), https://www.dni.gov/files/documents/icotr/EFF%20FOIA%20Sep%2025%20Doc%2011.pdf. |

# United States Foreign Intelligence Surveillance Court of Review

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## IN RE: CERTIFICATION OF QUESTIONS OF LAW TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

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Docket No. FISCR 18-01

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Upon Certification for Review by the United States Foreign Intelligence Surveillance Court.

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Before BRYSON, CABRANES, AND TALLMAN, *Judges.*

In Docket No. Misc. 13-08, the Foreign Intelligence Surveillance Court ("FISC") has certified a question of law to this court pursuant to 50 U.S.C. § 1803(j). The certified question is whether the American Civil Liberties Union, the American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic have adequately established Article III standing to assert their claim of a qualified First Amendment right of public access to FISC judicial opinions.

This court accepts the certification and directs as follows:

(1) The parties to the proceeding before the FISC are invited to file supplemental briefs in this matter. The

briefs should be no more than 30 pages in length and should be filed by February 23, 2018.

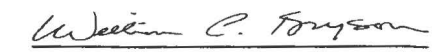
(2) Pursuant to 50 U.S.C. § 1803(i), this court appoints Professor Laura Donohue, one of the courts' designated statutory amici, to serve as amicus curiae in this matter. The amicus curiae is invited to file a brief of no more than 30 pages within 45 days of the date of this order.

(3) Within 10 days of the date that the last opening brief is filed by the parties and the amicus curiae, the parties and the amicus curiae may each file a reply brief of no more than 10 pages.

(4) The Clerk is directed to provide each member of this court with copies of all of the briefs filed with the FISC in this matter.

IT IS SO ORDERED.

SIGNED this 9th day of January, 2018.



WILLIAM C. BRYSON
Presiding Judge
United States Foreign Intelligence
Surveillance Court of Review

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

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| IN RE OPINIONS & ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. | Docket No. Misc. 13-08 |

**BOASBERG, J., writing for the Court and joined by JJ. SAYLOR, DEARIE, RUSSELL, JONES, and CONTRERAS:**

Figuring out whether a plaintiff has standing to bring a novel legal claim can feel a bit like trying to distinguish a black cat in a coal cellar. "Although the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing. Standing is a prerequisite to filing suit, while the underlying merits of a claim . . . determine whether the plaintiff is entitled to relief." Arreola v. Godinez, 546 F.3d 788, 794-95 (7th Cir. 2008). The Initial Opinion in this action decided that Movants – the American Civil Liberties Union and Yale Law School's Media Freedom and Information Access Clinic – had suffered no injury-in-fact and thus lacked standing to bring their First Amendment claim for access to redacted portions of certain of this Court's opinions. Sitting *en banc* for the first time in our history, we now vacate that decision. Whatever the merits of Movants' suit, we conclude that they have asserted a sufficient injury-in-fact to pursue it.

## I. Background

By necessity, this Court conducts much of its work in secrecy. But it does so within a judicial system wedded to transparency and deeply rooted in the ideal that "justice must satisfy the appearance of justice." Levine v. United States, 362 U.S. 610, 616 (1960).

It comes as no surprise, then, that members of the public may at times seek to challenge whether certain controversies merit our continued secrecy or, instead, require some degree of transparency. The matter before us was born from two such challenges. On June 6, 2013, two newspapers released certain classified information about a surveillance program run by the Government since 2006. Within a day, the Director of National Intelligence declassified further details about this bulk-data-collection program, acknowledging for the first time that this Court had approved much of it under Section 215 – the "business records" provision – of the Patriot Act, 50 U.S.C. § 1861.

Very shortly thereafter, Movants filed a motion in this Court asking that we unseal our "opinions evaluating the meaning, scope, and constitutionality of Section 215." FISC No. Misc. 13-02, Motion of June 2, 2013. They argued that, because officials had now "revealed the essential details of the program," there was no legitimate interest in continuing to withhold its legal justification. Id. at 18. Movants thus contended that their First Amendment right of access to court proceedings and documents, as recognized by the Supreme Court in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), now compelled the release of these rulings. Id. at 6-15. They alternatively asked that we invoke FISC Rule of Procedure 62(a) to request that the Government review the opinions' classification and publish any declassified portions. Id. at 15-18.

Judge Saylor opted for the latter discretionary route in this first action. In re Orders of this Court Interpreting Sec. 215 of the Patriot Act, No. Misc. 13-02, 2013 WL 5460064 (Foreign Intel. Surv. Ct. Sept. 13, 2013). Before doing so, however, he concluded that Movant ACLU had established Article III standing to pursue its First Amendment challenge, as its asserted injury satisfied the familiar tripartite standing requirement – *i.e.*, it was "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Id. at *2 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013)). More specifically, he reasoned that, because the ACLU had alleged that the continued withholding of our opinions violated its First Amendment right of access to them, its claimed injury was 1) "actual," as the opinions were not available, 2) "traceable" to the Government's decision not to make them public, and 3) redressable by "this Court's directing that those opinions be published." Id. Judge Saylor also determined that the injury was sufficiently particularized because Movants were "active particip[ants] in the legislative and public debates about the proper scope of Section 215," and the withheld information would assist them in these conversations. Id. at *4. Ultimately, however, he did not reach the merits of their First Amendment claim, choosing instead to order the Executive Branch under Rule 62(a) to conduct a declassification review of certain of our prior opinions. Id. at *8.

Around the same time, the Government released more details about the bulk-data-collection program, including a white paper that explained how FISC Judges had periodically approved the directives to telecommunications providers to produce bulk telephonic metadata for use in the Government's counterterrorism efforts. See Administration White Paper: Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act (Aug. 9, 2013). This Court, too, took steps to make more information available to the public. In particular, we

asked the Executive Branch to review several of our opinions, and we released redacted versions of two about the collection of bulk telephony metadata under Section 215. 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 *2-3 (FISC Jan. 25, 2017).

While these revelations may have slaked some of Movants' thirst for information, they also opened up new lines of inquiry. Movants thus filed another motion – which kicked off the current action – on November 7, 2013, asking us to unseal classified sections of our opinions laying out the legal basis for the data collection. See Movants' Motion of Nov. 7, 2013, available at http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Motion-2.pdf. Here, again, they claimed that these passages were "subject to the public's First Amendment right of access" and should be released because "no proper basis exists to keep the legal discussions in [them] secret." Id. at 1. They further contended that we should once more exercise our discretion under Rule 62(a) to ask for a second classification review by the Government and then verify that its response complied with the dictates of the First Amendment. Id. at 24-27.

On November 18, 2013, however, while briefing was ongoing on this issue, the Government published two more redacted opinions by this Court. In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *3. Including the previous pair we had already released, these four opinions constituted all of our rulings that were responsive to Movants' second Motion. In other words, before the Government had even filed an Opposition, the relevant opinions had been "subjected to classification review and the unclassified portions released" with – according to the Government – "as much information . . . as possible consistent with national security." Opp. of Dec. 6, 2013, at 2.

Given such release, the Government's subsequent Opposition argued that the Court should now dismiss Movants' second action. Any further review, it maintained, would merely "duplicate the[se] result[s]," and there was "no basis for th[is] Court to order [it]." Id. The Government also contended that Movants lacked standing to seek such relief because Rule 62(a) allowed only a party to the proceeding that generated the opinion to move for publication, and Movants had not been involved in the underlying actions. Id. at 2-3. Finally, the Government urged this Court not to order yet another review since Movants could challenge the classification decisions through a Freedom of Information Act case in federal district court. Id. at 3-4.

On January 25, 2017, in a lengthy and thoughtful Opinion, Presiding Judge Collyer determined that Movants had no standing to press their case, and she thus dismissed it. See In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *1. Her Opinion focused in particular on a potential standing problem that the parties had not previously identified – namely, whether Movants had alleged the invasion of a "legally and judicially cognizable" interest sufficient to establish the injury-in-fact prong of the standing analysis. Id. at *7. The Court first took the position that an interest was not legally protected "when its asserted legal source – whether constitutional, statutory, common law or otherwise – does not apply or does not exist." Id. at *8.

On this basis, the Court then engaged in a lengthy merits analysis of Movants' claim under the Richmond Newspapers "experience and logic" test to determine whether such a First Amendment right existed in the unique context of FISC judicial proceedings. Id. at *16-21. Although the Constitution does not expressly provide for access to judicial records, in Richmond Newspapers, the Supreme Court "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials." Globe Newspaper Co. v. Superior

Court, 457 U.S. 596, 603 (1982). Since then, it has extended this right to other judicial processes, but has also recognized that such a First Amendment right of access is not absolute. Id. at 607. Rather, to determine whether the public has a right of access to particular judicial proceedings, courts must ask two questions: "whether the place and process have historically been open to the press and general public" (the experience inquiry) and "whether public access plays a significant positive role in the functioning of the particular process in question" (the logic inquiry). Press-Enterprise Co. v. Superior Court (Press Enterprise II), 478 U.S. 1, 8 (1986). Applying this test, Judge Collyer in this case ultimately answered both prongs in the negative, and she therefore concluded that the right of access did not extend to FISC judicial proceedings. In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *16-21. For this reason alone, the Court then held that Movants had not alleged a sufficient injury-in-fact and thus lacked standing to bring their claim. Id. at *21.

Movants quickly moved for reconsideration. As the resolution of the first and second actions had created an intra-court split on the standing issue, we *sua sponte* granted *en banc* review to reconsider the narrow question of whether Movants have asserted a sufficient injury-in-fact for standing purposes. See 50 U.S.C. § 1803(a)(2)(A); FISC R. P. 45 (allowing the Court to order a hearing or rehearing *en banc* if "necessary to secure and maintain uniformity of the Court's decisions"). After substantial and reasoned debate and discussion among all eleven judges of this Court, we now answer that inquiry in the affirmative.

## II. Analysis

Article III of the Constitution limits the jurisdiction of federal courts to actual "Cases" and "Controversies." U.S. Const., art. III, § 2. But not just any dispute will do. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 559-61 (1992). The Constitution instead confines the judiciary to deciding

contests that are "appropriately resolved through the judicial process," as distinguished from those better left to the legislative or executive branches in a democratic government. Id. at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). Standing doctrine helps police this boundary by requiring, as an "irreducible constitutional minimum," that a plaintiff establish three elements to proceed with a claim: 1) an injury-in-fact that is 2) caused by the conduct complained of and 3) "likely" to be "redressed by a favorable decision." Id. at 560-61 (quotations omitted).

The focus here is on the first prong. A term of art, an injury-in-fact is the "invasion of a legally protected interest which is both (a) concrete and particularized; and (b) actual or imminent, not conjectural, or hypothetical." Id. at 560 (footnote, internal citations, and quotation omitted). For the purposes of evaluating whether a plaintiff has made this showing, though, "we must assume [Movants'] claim has legal validity." Cooksey v. Futrell, 721 F.3d 226, 239 (4th Cir. 2013) (quotation omitted). Put another way, in deciding whether Movants have alleged a sufficient injury-in-fact for standing purposes, we "must be careful not to decide the question on the merits for or against [Movants], and must therefore assume that on the merits the [Movants] would be successful in their claims." City of Waukesha v. EPA, 320 F.3d 228, 235 (D.C. Cir. 2003); see also Citizen Ctr. v. Gessler, 770 F.3d 900, 910 (10th Cir. 2014) (same); Parker v. District of Columbia, 478 F.3d 370, 377 (D.C. Cir. 2007) ("The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim."), aff'd sub nom. District of Columbia v. Heller, 554 U.S. 570 (2008); see also Warth v. Seldin, 422 U.S. 490, 501-02 (1975) (assuming validity of legal theory for purposes of standing analysis).

Starting from the premise that Movants' claim is meritorious means that we must assume that withholding our classified opinions violates their First Amendment right of access to judicial

proceedings under the Richmond Newspapers test. From this base, we can readily conclude that this injury is "concrete," as well as "actual," because the opinions are currently not available to them. For at least the reasons articulated by Judge Saylor, moreover, it is sufficiently "particularized" from that of the public because of Movants' active participation in ongoing debates about the legal validity of the bulk-data-collection program.

The Initial Opinion, of course, did not quibble with these conclusions, but instead homed in on the prefatory language of the definition of what constitutes an injury-in-fact. While not every Supreme Court decision even specifies that an alleged injury-in-fact must be to a "legally protected interest," see, e.g., Clapper, 568 U.S. at 409, the Opinion correctly pointed out that some cases have treated this as an independent requirement to establish standing in appropriate circumstances. But from this starting point, the Initial Opinion faltered in concluding that Movants had alleged no legally protected interest because the First Amendment's right of access to court proceedings "did not apply" to FISC Opinions. In re Opinions & Orders of this Court Addressing Bulk Collection of Data under FISA, 2017 WL 427591, at *21.

As courts have repeatedly affirmed, "For purposes of standing, the question [simply] cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest." Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1092 (10th Cir. 2006) (*en banc*) (emphasis added). "If that were the test, every losing claim would be dismissed for want of standing." Id.; see also Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 & n.1 (2003) (admonishing against use of "legal interest" test as part of standing analysis when it goes to merits of claim). We must instead assume that Movants are correct that they have a constitutional right of access, Waukesha, 320 F.3d at 235 – so long as that right is cognizable. That is, we ask only whether courts are capable of knowing or recognizing such an

interest. See Black's Law Dictionary (10th ed. 2014) (defining "cognizable" as "[c]apable of being known or recognized"); see also Judicial Watch, Inc. v. U.S. Senate, 432 F.3d 359, 364 (D.C. Cir. 2005) (Williams, J., concurring) (explaining Supreme Court uses terms "legally protected" and "judicially cognizable" interchangeably "(1) to encompass the other conventionally stated requirements (that the injury be concrete and particularized, and actual or imminent) and (2) possibly to serve as a screen (perhaps open-ended) against interests that it would make little sense to treat as adequate").

A plaintiff, for instance, might lack standing "to complain about his inability to commit crimes because no one has a right to a commit a crime," and no Court could recognize such an interest. Citizen Ctr. v. Gessler, 770 F.3d 900, 910 (10th Cir. 2014). On the other hand, he would have standing to bring colorable First Amendment claims, even if he would ultimately lose on the merits. Take the seminal example of Buckley v. Valeo, 424 U.S. 1 (1976). There, the Supreme Court allowed plaintiffs to attack campaign-finance laws as unconstitutional, even though, as it turned out, there is no specific "First Amendment right to make unlimited campaign contributions." Initiative & Referendum Inst., 450 F.3d at 1092-93 (citing Buckley, 424 U.S. at 96). As the Tenth Circuit noted, "We could use any unsuccessful constitutional claim to illustrate the point." Id. at 1092. Indeed, were we to define rights with any greater level of specificity, no plaintiff would have standing to challenge established First Amendment precedent. This is certainly not the case. See, e.g., Citizens United v. FEC, 558 U.S. 310, 365-66 (2010) (overturning precedent that upheld restrictions on corporate independent expenditures).

At bottom, the legally-protected-interest test is not concerned with determining the proper scope of the First Amendment right or whether a plaintiff is correct that such right has in fact been invaded; that is a merits inquiry. Waukesha, 320 F.3d at 235. The test instead seeks only to assess

whether the interest asserted by the plaintiff is of the type that "deserve[s] protection against injury." 13 Charles Alan Wright, Arthur R. Miller, *et al.*, Federal Practice & Procedure § 3531.4 (3d ed. 2008).

Against this backdrop, the sufficiency of Movants' allegation of such a legally protected interest appears clear. They identify the invasion of an interest – the First Amendment right to access judicial proceedings – that courts have repeatedly held is capable of "being known or recognized." The Supreme Court first acknowledged that this interest is one the Constitution protects against wrongful invasion in Richmond Newspapers, 448 U.S. 555, when a plurality held that the public's "right to attend criminal trials is implicit in the guarantees of the First Amendment." Id. at 580 (footnote omitted). Since then, that Court has also held that this right safeguards the public's qualified access to other criminal proceedings, including witness testimony, Globe Newspaper, 457 U.S. at 603-11, *voir dire*, Press-Enterprise Co. v. Superior Court (Press Enterprise I), 464 U.S. 501, 505-10 (1984), and preliminary hearings. Press Enterprise II, 478 U.S. at 10-15.

Many federal Courts of Appeals have likewise held this legally protected interest invaded when the public is walled off from other aspects of criminal trials, such as bail, plea, or sentencing hearings. See, e.g., N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 297-98 (2d Cir. 2012) (collecting cases); In re Wash. Post Co., 807 F.2d 383, 388-89 (4th Cir. 1986) (plea and sentencing hearings); In re Hearst Newspapers, LLC, 641 F.3d 168, 175-86 (5th Cir. 2011) (sentencing). Finally, at least six Circuits have concluded that the First Amendment qualified right of access also extends to "civil trials and to their related proceedings and records." N.Y. Civil Liberties Union, 684 F.3d at 298 (emphasis added) (so holding and collecting cases from the Third, Fourth, Seventh, Eighth, and Eleventh Circuits).

These cases all demonstrate that Movants, in asserting a First Amendment right of access to judicial processes, are seeking to vindicate "the sort of interest that the law protects when it is wrongfully invaded." Aurora Loan Servs., Inc. v. Craddieth, 442 F.3d 1018, 1024 (7th Cir. 2006) (emphases modified). No more than this is necessary for standing purposes, even if Movants ultimately fail to prove that the precise scope of the First Amendment right extends to redacted portions of our judicial opinions under the Richmond Newspapers test. The dissent, by contrast, would require Plaintiffs to make that more specific showing at the standing stage – an inquiry that would swallow any merits determination on the First Amendment's contours. It is erroneous to understand the cognizable-interest requirement as "beg[ging] the question of the legal validity of the[ir] claim." Initiative & Referendum Inst., 450 F.3d at 1093 n.3. Rather, as the Tenth Circuit sitting *en banc* has instructed, courts must avoid any such "mischief" inherent in "us[ing] standing concepts to address the question whether the plaintiff has stated a claim." Id. (quoting 13 Wright & Miller, § 3531.4 (2d ed. Supp. 2005)).

Our conclusion that Movants have met this cognizable-interest requirement is also consistent with the approach adopted by every Circuit to consider a similar claim. As far as we can tell, courts have uniformly found standing to bring a First Amendment right-of-access suit so long as plaintiffs allege an invasion related to judicial proceedings. That is so no matter how novel or meritless the claim may be. Some courts have stretched the right-of-access even farther for standing purposes. In Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004), for example, journalists creatively contended that they had a First Amendment right of access to travel with military-combat units to cover the war in Afghanistan. Id. at 698. Although the D.C. Circuit ultimately held that "no such constitutional right exists" – in fact, having deemed Richmond Newspapers entirely inapplicable – it nevertheless easily concluded that plaintiffs had standing to bring their

suit. Id. at 698, 702-04. This was the case even though the journalists' desire to embed with troops was much farther afield from the core Richmond Newspapers right than the one Movants hope to establish today. Here, they ask only to extend the public's right of access to another Article III context – *i.e.*, FISC judicial proceedings.

The dissent criticizes the Court of Appeals' analysis in Flynt, see *post* at 20, but its dislike of the decision does not diminish its import. In any event, the D.C. Circuit does not stand alone in its approach. The Seventh Circuit, for example, has considered a historian's standing to bring a common-law right-of-access claim to sealed grand-jury materials. See Carlson v. United States, 837 F.3d 753, 757-61 (7th Cir. 2016). The plaintiff, it reasoned, "need[ed] only a 'colorable claim' to a right to access these documents, because '[w]ere we to require more than a colorable claim, we would decide the merits of the case before satisfying ourselves of standing.'" Id. at 758 (internal citation omitted); see also Okla. Observer v. Patton, 73 F. Supp. 3d 1318, 1321-22, 1325 (W.D. Okla. 2014) (holding plaintiffs had standing to bring First Amendment right-of-access claim to view executions, but dismissing suit as right did "not extend to the circumstances existing here"); United States v. Ring, 47 F. Supp. 3d 38, 41-42 (D.D.C. 2014) (holding criminal defendant had standing to sue for public access to PowerPoint presentation used during proffer session despite holding on merits that "neither a common law nor First Amendment right of access" attached to the record).

Many courts – including the Supreme Court – have not even felt it necessary to address standing in dealing with tenuous right-of-access claims, despite judges' obligation to raise *sua sponte* any jurisdictional defects. Indeed, courts have routinely ignored what the dissent would believe is a serious question, even while expressly addressing their jurisdiction in other respects. For example, the Fourth and Sixth Circuits rejected mootness challenges to suits asserting a First

Amendment right of access to search-warrant proceedings, despite ultimately deciding that the plaintiffs had no such right to these sealed records under the Richmond Newspapers test. See In re Search of Fair Finance, 692 F.3d 424, 428-29, 433 (6th Cir. 2012) (finding claim not moot); Balt. Sun Co. v. Goetz, 886 F.2d 60, 63-65 (4th Cir. 1989) (same). Mootness, of course, shares a common undergirding with standing: "[T]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997)). To survive a mootness challenge, then, the plaintiffs must have necessarily demonstrated that the requisite personal injury existed at least in the first instance. Even more recently, in Phillips v. DeWine, 841 F.3d 405 (6th Cir. 2016), the Sixth Circuit rejected a much more farfetched challenge by inmates to the constitutionality of Ohio's "statutory scheme concerning the confidentiality of information related to lethal injection." Id. at 410, 419-20. At the outset, the court concluded that the plaintiffs lacked standing to bring their free-speech and prior-restraint causes of action, as their asserted injuries were too hypothetical. But it apparently had no similar concern as to their First Amendment right-of-access claim, holding instead on the merits that no such right existed. Id. at 417-20.

A long list of courts have acted in this fashion. See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 7-15 (1978) (holding First Amendment provides the media no right of access to county jail, but never questioning standing); Dhiab v. Trump, 852 F.3d 1087, 1096 (D.C. Cir. 2017) (holding plaintiffs have no "right under the First Amendment to receive properly classified national security information filed" in habeas action, but not questioning standing); Wood v. Ryan, 759 F.3d 1076, 1088 (9th Cir. 2014) (Bybee, J., dissenting) (criticizing "majority's newfound right of access" for

death row inmate seeking information on method of his execution as "dramatic extension of anything" previously recognized, but never questioning standing), vacated, 135 S. Ct. 21 (mem.) (summarily vacated on merits, not standing); In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 291-92 (4th Cir. 2013) (holding no First Amendment right under Richmond Newspapers to court orders and proceedings pursuant to Stored Communications Act, but never questioning standing); In re N.Y. Times Co. to Unseal Wiretap, 577 F.3d 401, 409-11 (2d Cir. 2009) (rejecting, under Richmond Newspapers, newspaper's request to unseal wiretap applications and related materials, but not questioning standing to bring novel claim); Calder v. IRS, 890 F.2d 781, 783-84 (5th Cir. 1989) (applying Richmond Newspapers and holding plaintiff had no First Amendment or statutory right of access to IRS records, but never questioning standing). Although we do not directly rely on any of these cases, we find the uniformity is telling.

Similarly, two former judges of this Court also found it unnecessary to call standing into doubt when rejecting claims premised on the public's right of access to FISC records, see In re Proceedings Required by § 702(i) of FISA Amendments Act of 2008, No. 08-01, 2008 WL 9487946 (FISC Aug. 27, 2008) (McLaughlin, J.); In re Motion for Release of Court Records, 526 F. Supp. 2d 484 (FISC 2007) (Bates, J.), and, as explained above, Judge Saylor expressly held that plaintiffs did have standing to bring such claims under the First Amendment in Movants' first action. See In re Orders of this Court Interpreting Section 215 of the Patriot Act, No. 13-02, 2013 WL 5460064, at *2-4 (FISC Sept. 13, 2013).

The Initial Opinion, by contrast, relies on no case that concludes that a plaintiff lacks a legally cognizable interest, and thus standing, simply because that party cannot show a First Amendment right of access applies or exists in the context of the judicial proceeding at issue. The best it could muster is a single case where the plaintiff sought a common-law right of access to

discovery materials. Bond v. Utreras, 585 F.3d 1061, 1074 (7th Cir. 2009). The Seventh Circuit held that these discovery files – exchanged between parties – "had never been filed with the court and [had] never influenced the outcome of a judicial proceeding." Id. Whatever the merits of that decision, it provides no guidance here, where Plaintiffs seek material far more rooted in judicial proceedings: our opinions. Perhaps recognizing Bond as thin support, the dissent relegates that case to a footnote. Otherwise, no case appears throughout its 25 pages in which any court declined to find standing in like circumstances. This lack of precedential support speaks volumes.

At times, the dissent suggests a variant justification for dismissing the suit: it sees "no legal basis to find that Movants present a colorable claim." *Post* at 13 (emphasis added); see also id. at 17 n.16 ("In the instant matter, the question is whether Movants have a colorable right under the First Amendment to access information in FISC opinions that the Executive Branch determined was classified."). This alternative argument seems decidedly weaker to us. Courts have repeatedly set an exceedingly low bar to establish colorability. See Kennedy v. Conn. Gen. Life Ins. Co., 924 F.2d 698, 700 (7th Cir. 1991) (holding only if claim is "frivolous is jurisdiction lacking"); Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 790 (7th Cir. 1996) (describing the requirement as "not . . . stringent"). Under this colorability standard, only "a plaintiff whose claimed legal right is so preposterous as to be legally frivolous may lack standing on the ground that the right is not 'legally protected.'" Initiative & Referendum Inst., 450 F.3d at 1093. Whatever the merits of Movants' First Amendment right-of-access claim, it finds its basis in well-established law. The right to access, even in its more narrow formulation, at least covers "a right of access to certain criminal [and civil] proceedings and the documents filed in those proceedings." Phillips, 841 F.3d at 418. Movants merely allege that those "certain" documents include our FISC opinions – *i.e.*, opinions filed in an Article III judicial proceeding. This asserted right is certainly more analogous

to the historical right than – for example – a claim that the First Amendment also grants access to travel with troop battalions on a foreign battlefield. Yet, in Flynt, 355 F.3d 697, the D.C. Circuit never mentioned that it might be frivolous to consider such an extension. In fact, the dissent points to no federal court that has ever dismissed as frivolous a novel claim seeking to extend the First Amendment right of access to a new judicial process. We decline to be the first.

The dissent also suggests our analysis should differ because Plaintiffs seek "classified information." *Post* at 24 (internal quotation marks omitted). It is true that courts rarely presume to review the Executive Branch's decisionmaking, at least without a statutory hook. See Dep't of Navy v. Egan, 484 U.S. 518, 538 (1988). Yet the classified information here is not housed in the Executive Branch; instead, it arises within an Article III proceeding, and Plaintiffs seek access to portions of judicial opinions. As explained above, the right to access judicial proceedings is well established. Courts have thus not hesitated to review claims involving secret court proceedings, even when they ultimately find good reason to deny them. See In re Search of Fair Finance, 692 F.3d at 428-29, 433 (sealed search warrants); Goetz, 886 F.2d at 63-65 (same); In re N.Y. Times Co. to Unseal Wiretap, 577 F.3d at 409-11 (sealed wiretap applications).

Nor do we agree with the dissent that we should change our conclusion simply because we consider a constitutional challenge involving the Executive Branch. See *post* at 23-25. Even if the Supreme Court applies an "especially rigorous" standing analysis in this context, Raines v. Byrd, 521 U.S. 811, 819-20 (1997), it has never suggested such an analysis would involve jumping to the merits of the dispute. More to the point, the dissent cites Clapper v. Amnesty International, 568 U.S. 398 (2013), which noted that courts have declined to find standing when reviewing "actions of the political branches in the fields of intelligence gathering and foreign affairs." *Post*

at 23-24 (quoting Clapper, 568 U.S. at 469). Although that decision admittedly contains some broad language, none offers much insight into the standing question posed here.

In Clapper, the Supreme Court considered a separate facet of the injury-in-fact test – namely, whether the plaintiffs' theory of future injury was too speculative to be "certainly impending." Id. at 409. In fact, Clapper's definition of what constitutes an injury-in-fact did not even include the requirement of a "legally protected" interest upon which the Initial Opinion relies here. Id. at 409 ("To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'") (citation omitted). Clapper, then, does not impose any special standing requirement on this score; in fact, it might be better read to impose no such showing at all. Schuchardt v. President of the United States, 839 F.3d 336, 348 n.8 (3d Cir. 2016) ("Despite Clapper's observation that the standing inquiry is especially rigorous in matters touching on intelligence gathering and foreign affairs," no court has held that "'Article III imposes [a] heightened standing requirement for the often difficult cases that involve constitutional claims against the executive involving surveillance.'") (quoting Jewel v. NSA, 673 F.3d 902, 913 (9th Cir. 2011)) (internal quotations from Clapper omitted)). In any event, the claim presented here survives because the injury is a lack of access to the proceedings of a court, rather than one directly traceable to the activities of the political branches in intelligence gathering or foreign affairs.

* * *

At the end of the day, the question that the Initial Opinion asked and answered is not one of standing. It instead goes to the merits of Movants' legal claim – *i.e.*, whether they have a qualified right of access under the First Amendment to portions of our opinions redacted by the Executive Branch under its classification authority. See Arreola, 546 F.3d at 794-95 ("Although

the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing."). As that is not what concerns us today, we hold that Movants have sufficiently alleged the invasion of a legally cognizable interest as necessary to establish an injury-in-fact. Whether or not they will ultimately succeed in establishing that the Richmond Newspapers experience-and-logic test entitles them to relief, we believe that they should not be barred at this threshold procedural stage. We further offer no opinion on whether other jurisdictional impediments exist to this challenge, but hold only that Movants have established a sufficient injury-in-fact.

## III. Conclusion

Because we hold that Movants have the requisite cognizable interest to pursue their constitutional claim, we vacate the Initial Opinion in this action and remand the matter to Judge Collyer for further consideration of Movants' Motion.

**COLLYER, *Presiding Judge*, joined by EAGAN, MOSMAN, CONWAY and KUGLER, *Judges*, dissenting:**

In law as in life, the answer depends upon the question. Only by framing the question before us in its most general terms can the Majority answer with the unremarkable proposition that some courts – but not the Supreme Court – have found a First Amendment right of access to some federal court proceedings in civil cases when the place and process historically have been public. But the question the Majority poses is not the one presented by the motion in this case. I respectfully dissent and would affirm the decision in In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the FISA [hereinafter In re Opinions of This Court], No. Misc. 13-08, 2017 WL 427591 (FISA Ct. 2017).

The Foreign Intelligence Surveillance Court ("FISC") is a special court with a special and discreet mission: to protect the rights of U.S. persons while reviewing surveillance measures to protect national security. FISC proceedings are classified and the Court operates under specific congressional direction that everything it does must respect and protect the secrecy of those classifications. No member of the public would have any "right" under the First Amendment to ask to observe a hearing in the FISC courtroom. Still less should we be inventing such a "right" in the present circumstances.

To be precise, what Movants seek is not "access to judicial proceedings," as the Majority would have it. Rather, their current request is more limited and specific: having already received this Court's opinions and orders addressing bulk collection of data with classified material redacted, Movants want us to rule that they have a "right" of access to the information classified by the Executive Branch and that Executive Branch agencies must defend each redaction in the face of Movants' challenges.

The effect of the Court's decision today is to displace Congress's judgment that access to classified and ex parte FISC judicial opinions shall be resolved through the procedures set forth in Section 402 of the USA FREEDOM Act, which, as relevantly titled, governs the "[d]eclassification of significant decisions, orders, and opinions" of the FISC. Just as in the days of John Marshall, it is imperative that the Judiciary avoid the appearance of eroding the very principles intended to maintain the careful balance of powers set forth in the Constitution.[1] The Court's decision today unfortunately fails in that effort.

One last introductory comment is due. FISC judges come from district courts around the country. Few of us knew each other before our appointments to the FISC. In our work on the FISC, as with our work in our home courts, we decide alone. The occasion of this en banc review of the In re Opinions of This Court decision has given us a rare and wonderful opportunity to wrestle together over some weighty legal principles and issues. This dissent is written in the same spirit.

## I.

The question pending before the en banc Court is whether Movants have shown an injury in fact sufficient to establish constitutional standing and this Court's jurisdiction. There is no dispute between the parties or the members of the Court that Article III of the Constitution limits the judicial power to the adjudication of cases or controversies in which a party seeking relief demonstrates standing for each asserted claim. There likewise is no dispute that the prevailing

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[1] "Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998).

legal standard is set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), and requires that Movants "must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. at 560 (internal quotation marks and citations omitted).

The Supreme Court has never abandoned the requirement of a "legally protected interest" for the purpose of establishing Article III standing.[2] See Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (confirming that "a plaintiff must show that he or she suffered an 'invasion of a legally protected interest'" (quoting Lujan, 504 U.S. at 560)); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2663 (2015) (same); United States v. Windsor, 133 S. Ct. 2675, 2685 (2013) (same). Furthermore, the Supreme Court has signaled that the phrase "legally protected interest" has meaning independent of the requirement that the alleged invasion be concrete and particularized as well as actual or imminent. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995) (stating "Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, *and* it does so in a manner that is 'particularized' as to Adarand" (emphasis added)).

To determine whether Movants asserted a legally protected interest, "we do not consider the merits in connection with standing, [but] we do consider whether the plaintiffs have a legal right to do what is allegedly being impeded." Citizen Ctr. v. Gessler, 770 F.3d 900, 910 (10th

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[2] Even when the Supreme Court used the phrase "cognizable interests" for the purpose of evaluating standing it "stressed" that the injury must be both "*legally* and judicially cognizable." Raines v. Byrd, 521 U.S. 811, 819 (1997) (emphasis added). Movants agree that "[t]he injury alleged must also be one that is 'legally and judicially cognizable.'" Movants' En Banc Opening Br. 6, available at http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Movants%27%20En%20 Banc%20Opening%20Brief.pdf.

Cir. 2014). In other words, we consider whether there is some law that at least arguably could be deemed to protect Movants' legal interest such that they can be said to have advanced a colorable claim *to the asserted right*. Aurora Loan Servs., Inc. v. Craddieth, 442 F.3d 1018, 1024 (7th Cir. 2006). As the Seventh Circuit has explained:

> The point is not that to establish standing a plaintiff must establish that a right of his has been infringed; that would conflate the issue of standing with the merits of the suit. It is that he must have a colorable claim to such a right. It is not enough that he claims to have been injured by the defendant's conduct. "The alleged injury must be legally and judicially cognizable. This requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest.'"

Id. (quoting Raines, supra note 2, at 819 (quoting Lujan, 504 U.S. at 560)). To be clear, "[w]hile standing does not depend on the merits of the party's contention that certain conduct is illegal, standing does require an injury to the party arising out of a violation of a constitutional or statutory provision or other legal right." Fed. Deposit Ins. Corp. v. Grella, 553 F.2d 258, 261 (2d Cir. 1977). Accord Cox Cable Commc'ns, Inc. v. United States, 992 F.2d 1178, 1182 (11th Cir. 1993) ("No legally cognizable injury arises unless an interest is protected by statute or otherwise."). "The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." Vermont Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 772 (2000).

**II.**

**A.**

Applying these legal standards, the Supreme Court has directed that "[a]lthough standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." Warth v. Seldin, 422 U.S. 490, 500 (1975). Indeed, the Supreme Court has agreed unanimously that "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." Int'l Primate Prot.

League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 77 (1991). "Typically . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to adjudication *of the particular claims asserted.*'" Id. (internal quotation marks omitted, emphasis in original).

Accordingly, to determine whether Movants have a legally protected interest the first step is to examine the specific constitutional claims Movants present. Id. Movants assert a First Amendment-protected interest to access information in certain FISC judicial opinions that the Executive Branch determined is classified national security information. Movants further assert a First Amendment-protected interest to require the Executive Branch to explain its rationale for classification and respond to Movants' challenges to their constitutionality, and for the FISC to decide between them.[3] Movants' Mot. 1, 24. They invoke no other source of right for their claims.

The Majority Opinion strays from Movants' "particular claims" and recasts their legal interest as broadly as possible into "access to judicial proceedings," Majority Op. 10. By doing so, the Majority scrambles the scope of an interest recognized under the qualified First Amendment right of public access and the scope of an interest recognized under the common law

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[3] Specifically, Movants seek access to classified information that was redacted from four FISC judicial opinions that were declassified, in part, and made public in 2013. Now that the opinions are public, Movants ask the Court to compel the Executive Branch to conduct a second declassification review and "require the government to justify its proposed redactions, permit Movants an opportunity to respond, and then make findings on the record about whether the proposed redactions are narrowly tailored to avert a substantial risk of harm to a compelling governmental interest." Movants' Reply Br. 2, available at http://www.fisc.uscourts.gov/sites/default/files/ Misc%2013-08%20Reply-1.pdf. Movants claim the qualified First Amendment right of public access mandates these procedures as a matter of right, although they concede that "much of this Court's work may not be subject to a constitutional right of access . . . ." Movants' Reply Br. 1.

right of access. The result is a legal analysis that ignores the Supreme Court's direction to examine the nature and source of Movants' claims and gauge their standing by the specific constitutional claims they present. This confusion has consequences because the First Amendment and the common law are analyzed differently.

The First Amendment provides no general right of access to government proceedings. Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) (plurality) ("The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act" and "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."). Accord Phillips v. DeWine, 841 F.3d 405, 419 (6th Cir. 2016) (rejecting a broad assertion of a First Amendment right to government information that pertains to a government proceeding and noting that "[n]either this court nor the Supreme Court has ever recognized a right so broad"). Nor does the First Amendment provide a presumptive[4] or general right of access to "judicial proceedings" as a subset of government proceedings. See, e.g., id. (noting that Houchins "sets the baseline principle for First Amendment claims seeking access to information held by the government"). Richmond Newspapers and its progeny offer an "exception" to the Houchins rule that there is no First Amendment right to access government proceedings, id. at 418, but that exception is limited to judicial proceedings that satisfy what has come to be known as the "experience" and "logic" tests

[4] When courts refer to a "presumptive First Amendment right of access," see, e.g., N.Y. Civil Liberties Union v. New York City Transit Auth., 684 F.3d 286, 296 (2d Cir. 2012), that "presumption" only comes into play after the First Amendment actually applies or attaches. There is, however, no "presumption" that the First Amendment applies or attaches to any particular judicial proceeding or document; instead, the Supreme Court established the non-presumptive test set forth in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion), and its progeny.

set forth by the Supreme Court to determine when the First Amendment applies to a particular judicial proceeding to which access is sought, see Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986) ("Press-Enterprise II") ("If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.").

The D.C. Circuit observed in Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004), that the Supreme Court has found that a qualified First Amendment right of public access applies to *criminal* judicial proceedings only when the place and process historically have been open to the public and public access plays a significant positive role in the functioning of the particular process in question. 355 F.3d at 704. Lower courts have extended the Richmond Newspapers exception to certain trial-like civil proceedings found to satisfy the same experience and logic tests, but the Supreme Court has never ratified that approach. Id.

Again, standing must be "gauged by the specific . . . constitutional claims that a party presents." Int'l Primate Prot. League, 500 U.S. at 77. The "specific" constitutional claims Movants present are claims under the First Amendment to access information in FISC judicial opinions that the Executive Branch has determined is classified national security information. The FISC issued those opinions in ex parte proceedings that are unique to its jurisdiction under 50 U.S.C. §§ 1842(b) and 1861(b)(1). Movants also assert a concomitant right to challenge the constitutionality of each of those classification decisions, to require the Executive Branch to defend them, and to obtain FISC rulings on it all. Because the unclassified portions of the FISC opinions at issue have already been made public, Movants' alleged interest can only be described as accessing "classified information in FISC judicial opinions"[5] and not the broader universe of

[5] This framing of the interest is consistent with the Court's prior precedent addressing whether the qualified First Amendment right of public access applies to classified FISC judicial proceedings. See In re Motion for Release of Court Records, 526 F. Supp. 2d 484, 491-97 (FISA

"access to judicial proceedings" generally, as perceived by the Majority Opinion.[6] See, e.g., Doe, 749 at 266 (limiting the First Amendment to "secur[ing] a right of access only to *particular* judicial records and documents" and not to "all judicial documents and records").

To be sure, one can find broad statements about a right of the public to access judicial proceedings more generally. But those statements concern the common law right of access, which is a right that was not invoked by Movants and is analytically distinct from the First Amendment right they claimed. As the Fourth Circuit cogently explained, "[t]he common-law presumptive right of access extends to all judicial documents and records" whereas "[b]y *contrast*, the First Amendment secures a right of access only to *particular* judicial records and documents" when it applies. See Doe v. Pub. Citizen, 749 F.3d 246, 265-66 (4th Cir. 2014) (internal quotation marks and citation omitted, emphases added).[7] The Sixth Circuit echoed this

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Ct. 2007) (concluding that the First Amendment provides no public right of access to FISC judicial records).

[6] Movants contend their interest is in "opinions containing significant legal interpretation of the Constitution and statutory law" and they argue that "[f]or those sorts of opinions, at least, the First Amendment has always required courts to operate openly . . . ." Movants' Reply Br. 1. This argument is clearly erroneous. For example, the Supreme Court has implied, and federal circuit courts of appeal have expressly held, that the qualified First Amendment right of public access does not apply to grand jury proceedings where significant opinions are frequently made. See, e.g., Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 218-21 (1979) (making clear that grand jury proceedings historically have been closed to the public and public access would hinder the efficient functioning of those proceedings so such proceedings impliedly would not satisfy the test of experience and logic set forth in Richmond Newspapers); In re Motions of Dow Jones & Co., 142 F.3d 496, 499 (D.C. Cir. 1998) ("A settled proposition, one the press does not contest, is this: there is no First Amendment right of access to grand jury proceedings."); United States v. Smith, 123 F.3d 140, 148 (3d Cir. 1997) ("Not only are grand jury proceedings not subject to any First Amendment right of access, but third parties can gain access to grand jury matters only under limited circumstances.").

[7] Accord In re U.S. for an Order Pursuant to 18 U.S.C. § 2703(D), 707 F.3d 283, 291 n.8 (4th Cir. 2013) (rejecting plaintiffs' contention that the First Amendment protects a general right to access judicial orders and proceedings because "[t]his interpretation of the First Amendment

sentiment when it stated that the First Amendment covers only "*certain* proceedings and documents filed therein and nothing more." Phillips, 841 F.3d at 419 (internal quotation marks omitted, emphasis added).

In describing the right of access to judicial records under the common law, the Supreme Court has stated that "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978). That right, however, is not sacrosanct and yields when, for example, "Congress has created an administrative procedure for processing and releasing to the public" the material sought by a litigant, id. at 603, which arguably is the case here. Section 402 of the USA FREEDOM Act of 2015[8]—fittingly titled "Declassification of significant decisions, orders, and opinions"—now provides procedures for making FISC judicial opinions publicly available. In addition, the Freedom of Information Act ("FOIA") dictates what "[e]ach agency shall make available to the public . . . ." 5 U.S.C. § 552(a). Moreover, this Court previously held that, with respect to FISC proceedings, the common law right of access is preempted by the Foreign Intelligence Surveillance Act of 1978, codified as amended at 50 U.S.C. §§ 1801-1885c (West 2015) ("FISA"). In re Motion for Release of Court Records, 526 F. Supp. 2d at 490-91 (rejecting the ACLU's claim of a common law right of access because, among other reasons, "[t]he requested records are being maintained under a comprehensive statutory scheme designed to protect FISC records from routine public

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right of access is too broad, and directly contrary to our holding that this right extends only to particular judicial records and documents").

[8] Pub. L. No. 114-23, 129 Stat. 268 (2015), as codified at 50 U.S.C. § 1872.

disclosure"). The essential point, however, is that Movants have not claimed a violation of the common law right of access.

**B.**

After properly framing Movants' interest as an interest in accessing classified information in FISC judicial opinions rather than the expansion adopted by the Majority, it is necessary to decide whether that interest is protected by law. Movants cite the qualified First Amendment right of public access as their only legally protected interest.[9] The only interest protected by the qualified First Amendment right of public access, however, is an interest in access to trial-like judicial proceedings[10] and related documents when the place and process historically have been open to the public and public access plays a significant positive role in the functioning of the particular process in question. See, e.g., Press-Enterprise II, 478 U.S. at 9 (stating that the "particular proceeding" in question must pass the tests of experience and logic for the qualified First Amendment right of access to attach); Cincinnati Gas & Electric Co. v.

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[9] In re Opinions of This Court, No. Misc. 13-08, 2017 WL 427591, at *21.

[10] As discussed supra page 7, the Supreme Court has never extended the qualified First Amendment right of public access to non-criminal proceedings and the D.C. Circuit continues to adhere to the Supreme Court's application. See, e.g., Flynt, 355 F.3d 697 at 704 ("To summarize, neither this Court nor the Supreme Court has ever applied Richmond Newspapers outside the context of criminal proceedings, and we will not do so today."). Other courts, though, have extended the right to certain trial-like civil and administrative proceedings. See, e.g., N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 298 (2d Cir. 2012). While we all recognize this contrary authority, it remains true that, "[b]olstered by the Sixth Amendment's express right for a 'public trial' in 'all criminal prosecutions,' public access to criminal trials forms the core of this First Amendment constitutional right." In re Application of WP Co. LLC, 201 F. Supp. 3d 109, 117 (D.D.C. 2016) (internal citations omitted). See also United States v. Doe, 63 F.3d 121, 127 (2d Cir. 1995) (reciting history of open criminal trials and noting "[i]n Gannett [Co., Inc. v. DePasquale], 443 U.S. 368] 379-81, the Supreme Court, striking the balance in favor of the criminal defendant, determined that the Sixth Amendment guarantee of a public trial was personal to the accused and did not grant the press and general public an independent right of access, at least to pretrial suppression hearings").

Gen. Electric Co., 854 F.2d 900, 903 (6th Cir. 1988) (applying the same tests to a civil proceeding). To distill this point to its essence for our purposes, it is fair to say that the qualified First Amendment right of public access protects only an interest in judicial proceedings and related documents involving places and processes that have been historically public.[11] That rubric patently does not apply to the FISC, FISC proceedings or FISC judicial opinions, or to information classified by the Executive Branch and redacted in declassified versions of FISC judicial opinions.

Working in secrecy at the FISC is not simply a matter of "necessity." Majority Op. 2. It is a legislative imperative under FISA. See, e.g., 50 U.S.C. §§ 1803(c) (stating that "[t]he record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security procedures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence"), 1805(a) (mandating that, "[u]pon an application made pursuant to section 1804 of this title, the judge shall enter an ex parte order as requested or as modified" if certain specified findings are made), 1842(d)(1) (same), 1861(c)(1) (same). The FISC has twice emphasized this congressional mandate. See In re Opinions & Orders of This Court, No. Misc. 13-08, 2017 WL 427591, at *15; In re Motion for Release of Court Records, 526 F. Supp. 2d at 488-90. And at least twice the FISC has emphasized that its proceedings have never been public, it has never held a public hearing, and the number of opinions released to the public is statistically minor relative to the thousands of classified decisions it has issued. See In re Opinions & Orders of This Court, 2017 WL 427591,

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[11] The Majority agrees. Majority Op. 6 (admitting that "to determine whether the public has a right of access to particular judicial proceedings, courts must ask . . . whether the place and process historically have been open to the press and general public" (internal quotation marks omitted)).

at *17-20; In re Motion for Release of Court Records, 526 F. Supp. 2d at 487-88, 492-93. Notably, too, in this matter no sealing order or other discretionary action has been taken by the Court to impede public access to its classified opinions or the classified information redacted from its declassified and public opinions.[12] The point is not just that FISC proceedings and judicial documents have never been historically public, but, importantly, the FISC does not exercise discretionary decision making about whether to conduct its proceedings in a non-public fashion—it is required to do so by statute.

This history of non-public proceedings weighs heavily against Movant's asserted First Amendment right of access to information classified by the Executive Branch. Even "[m]ore significant is that from the beginning of the republic to the present day, there is no tradition of publicizing secret national security information . . . ." Dhiab v. Trump, 852 F.3d 1087, 1094 (D.C. Cir. 2017). "The tradition is exactly the opposite." Id.

Movants argue that this Court should not defer to the Executive Branch's classification decisions but should review and potentially reject those decisions. Movants' Reply Br. 2. This argument is considered only to determine whether Movants have identified a right that the First Amendment protects, not to rule on its merits. They have not identified such a First Amendment right to FISC review of Executive Branch classification decisions. Furthermore, this Court has

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[12] In Bond v. Utreras, 585 F.3d 1061, 1073 (7th Cir. 2009), the Seventh Circuit noted that the common law offers a presumptive right of access to most documents filed in court based on the principle that courts "are public institutions that operate openly" and "judicially imposed limitations on this right are subject to the First Amendment." Because the FISC issued no sealing order or protective order preventing Movants' access to the classified information they seek, there has been no "judicially imposed limitation" that would be subject to the First Amendment. Furthermore, contrary to the Majority Opinion's assertion that Bond is "thin support," Majority Op. 15, it stands for the very proposition asserted in the January 25, 2017 Opinion, 2017 WL 427591, at *10, which is that when there is no law that applies to protect a plaintiff's asserted interest, there is no legally protected interest sufficient to establish Article III standing.

previously said 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" and, even "if the FISC were to assume the role of independently making declassification and release decisions in the probing manner requested by the ACLU, there would be a real risk of harm to national security interests and ultimately to the FISA process itself." In re Motion for Release of Court Records, 526 F. Supp. 2d at 491.

The Majority Opinion fails to accord these principles the governing weight to which they are entitled. Richmond Newspapers specifically established a two-part test for determining when the qualified First Amendment right of access applies – and that standard requires both the place and the process to have been historically public.[13] The Majority Opinion appears to accept this principle,[14] even as it fails to apply it. There is no legal basis to find that Movants present a colorable claim the First Amendment protects their asserted interest in accessing a place and process that is distinctly not public and required by law to *not* be public.

**III.**

The Majority Opinion most strenuously decries the January 25, 2017 decision in In re Opinions of This Court because the Majority believes that deciding Movants have no legally protected interest necessarily, and improperly, involved deciding the merits of Movants' cause of action. The Majority Opinion chastises the decision for having "engaged in a lengthy merits analysis of Movants' claim under the Richmond Newspapers 'experience and logic' test,"

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[13] "The First Amendment guarantees the press and the public access to aspects of court proceedings, including documents, 'if such access has historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct.'" United States v. El-Sayegh, 131 F.3d 158, 161 (D.C. Cir. 1997). Accord Press-Enterprise II, 478 U.S. at 9.

[14] See note 11, supra.

Majority Op. 5. But the Majority fails to explain why it believes that addressing Richmond Newspapers constituted deciding the merits of the motion. Plainly an examination of the law invoked by Movants may be part of—even essential to—a proper analysis of standing. See Warth, 422 U.S. at 500 ("[S]tanding . . . often turns on the nature and source of the claim asserted."); Int'l Primate Prot. League, 500 U.S. at 77 ("[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents."). Because application of the experience and logic tests revealed that Movants have no right of public access to classified FISC judicial documents or proceedings, they failed to identify an interest that is legally protected and, thus, have no standing.

The Majority takes the mistaken and circular view that, because the Court must assume that on the merits Movants would be successful in their claims when it evaluates standing, it therefore follows that, "[f]rom this base," the Court can conclude that Movants satisfy the requirements of Article III standing. Majority Op. 8. The Majority misinterprets the Supreme Court's edict that consideration of Article III standing does not involve consideration of the merits. "Because a review of standing does not review the merits of a claim, but the parties and forum involved, our assumption during the standing inquiry that the plaintiff will eventually win the relief he seeks does not, on its own, assure that the litigant has satisfied *any element* of standing." Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 664 n.1 (D.C. Cir. 1996) (internal citations omitted, emphasis added). "Any assumption as to the outcome of the litigation simply does not resolve the issues critical to a standing inquiry." Id. That is because, as the Second Circuit has noted, "[t]he standing question is distinct from whether [a litigant] *has a cause of action!*" Carver v. New York, 621 F.3d 221, 226 (2d Cir. 2010) (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (emphasis added). Cf. Libertad v. Welch, 53 F.3d 428, 439 (1st Cir.

1995) ("Appellants need not establish the elements of their cause of action in order to sue, only to succeed on the merits.").

"[W]hat has been traditionally referred to as the question of standing . . . involves analysis of 'whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy . . . .'"[15] DaCosta v. Laird, 471 F.2d 1146, 1152 (2d Cir. 1973) (quoting Sierra Club v. Morton, 405 U.S. 727, 731-732 (1972)) (emphasis omitted). The "merits analysis . . . determines whether a claim is one for which relief can be granted if factually true." Catholic League for Religious & Civil Rights v. City and Cnty. of San Francisco, 624 F.3d 1043, 1049 (9th Cir. 2010) (en banc). "A party's injury in fact is distinct from its potential causes of action." Am. Farm Bureau Fed'n v. U.S. Envtl. Prot. Agency, 836 F.3d 963, 968 (8th Cir. 2016). As demonstrated below, whether Movants can establish the elements of their cause of action alleging that the Court improperly withheld information that the Executive Branch improperly determined was classified national security information requires consideration of factual and legal issues separate from the question of whether the First Amendment applies at all to certain FISC judicial opinions and proceedings. The Majority overlooks this important nuance in the Supreme Court's legal standard that otherwise prohibits consideration of standing from reaching the merits of the cause of action.

The Majority's error also represents a misreading of Richmond Newspapers and its progeny, as well as cases that find no standing when a plaintiff fails to identify a legally protected interest. The Majority Opinion notes the Tenth Circuit's statement in Initiative &

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[15] "Although the standing question is often dressed in the dazzling robe of legal jargon, its essence is simple—what kind of injuries are courts empowered to remedy and what kind are they powerless to address?" Schaffer v. Clinton, 240 F.3d 878, 883 (10th Cir. 2001).

Referendum Inst. v. Walker, 450 F.3d 1082, 1092 (10th Cir. 2006) that, "'[f]or purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest.'" Majority Op. 8 (quoting Walker, 450 F.3d at 1092). But the Majority misunderstands the import of the statement: its principle applies when, unlike this matter, there is an *applicable* constitutional provision and both standing and the merits involve the same question about the *scope* of that applicable constitutional provision. See Day v. Bond, 500 F.3d 1127, 1136-1138 (10th Cir. 2007) ("Critically, however, in Walker, the plaintiffs' asserted injury and their claimed constitutional violation were one and the same."). When standing and the merits require different legal analyses, standing can be, and must be, decided first and independently. Id. The Tenth Circuit explained:

> [W]e did note [in Walker] that "the term 'legally protected interest' must do some work in the standing analysis . . . [and] has independent force and meaning without any need to open the door to merits considerations at the jurisdictional stage." Id. at 1093. . . .
>
> Practically speaking, Walker mandates that we assume, during the evaluation of the plaintiff's standing, that the plaintiff will prevail on his merits argument—that is, that the defendant has violated the law. See id. ("For purposes of standing, we must assume the [p]laintiffs' claim has legal validity."). But there is still work to be done by the standing requirement, and Supreme Court precedent bars us from assuming jurisdiction based upon a hypothetical legal injury. See Lujan, 504 U.S. at 560, 112 S. Ct. 2130. While Walker addressed an instance in which the merits of the plaintiffs' claims mirrored the alleged standing injury, that is not always the case. *There are cases, such as the one before us here, where the alleged injury upon which the plaintiffs rely to establish standing is distinct from the merits of claims they assert.* E.g., In re Special Grand Jury 89–2, 450 F.3d 1159, 1172–73 (10th Cir.2006) ("[A] plaintiff can have standing despite losing on the merits—that is, even though the [asserted legally protected] interest would not be protected by the law in that case."); see also Duke Power Co. v. Carolina Envt'l Study Grp., Inc., 438 U.S. 59, 78–79, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).
>
> Here, the issue of standing is not necessarily determined by the merits determination. The merits issue is whether K.S.A. § 76–731a is preempted by 8 U.S.C. § 1623. The standing question is whether § 1623 creates a private cause of action. Each of these issues is separate and independent,

> and we may determine whether the Plaintiffs here have standing to assert a private cause of action under § 1623 without reaching the merits of whether § 1623 preempts § 76–731a. See DH2, Inc. v. U.S. Sec. & Exchange Comm'n, 422 F.3d 591, 592 (7th Cir. 2005) (determining that the plaintiff lacked standing because its injury was speculative, without addressing the merits of the underlying claim).
>
> Under these conditions, Walker simply does not apply. Accordingly, we now turn to the pure standing question whether § 1623 confers a private cause of action upon the Plaintiffs.

Id. (emphases added).[16] Day makes a useful distinction that is helpful to the immediate discussion.

According to the Tenth Circuit, decisions on standing and the merits remain independent legal inquiries whenever a decision on the merits would *not* necessarily decide standing. Only when both merits and standing require a decision on the same legal question does that Circuit find them conjoined so that standing cannot be separately decided first.[17] That is not the case here.

In Press-Enterprise II the Supreme Court made clear that, when the qualified First Amendment right of public access applies (which is an antecedent inquiry Movants failed to

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[16] To be clear, Walker itself involved a recognized First Amendment right because plaintiffs were asserting a free-speech interest expressly protected by the First Amendment. 450 F.3d at 1088. In the instant matter, the immediate question is whether Movants have a colorable right under the First Amendment to access information in FISC opinions that the Executive Branch determined was classified.

[17] The Tenth Circuit has also recounted "instances in which courts have examined the merits of the underlying claim and concluded that the plaintiffs lacked a legally protected interest and therefore lacked standing." Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1236 (10th Cir. 2004). The D.C. Circuit has clearly held that when "plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue." Claybrook v. Slater, 111 F.3d 904, 907 (D.C. Cir. 1979) (citations omitted). Deciding standing can often come close to the merits without violating legal principles. See Arjay Assocs., Inc. v. Bush, 891 F.2d 894, 898 (Fed. Cir. 1989) (stating that "[b]ecause appellants have no right to conduct foreign commerce in products excluded by Congress, they have in this case no right capable of judicial enforcement and have thus suffered no injury capable of judicial redress").

surmount in this case), a cause of action arises if (1) access was denied (2) without specific, on-the-record findings (3) demonstrating that "'closure [was] essential to preserve higher values'" and (4) closure was "narrowly tailored to serve that interest.'" 478 U.S. at 13-14 (quoting Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 510 (1984) ("Press-Enterprise I")). Movants contend that their cause of action also includes as an element a right to challenge the government's classification decisions. Movants' Reply In Support of Their Mot. for the Release of Court Records 4, available at http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Reply-1.pdf. These elements form Movants' cause of action, the merits of which were never discussed in In re Opinions of This Court.

As to standing, however, the question focuses on whether classified FISC judicial opinions and proceedings have been historically open to the public and arise from a trial-like setting, see Richmond Newspapers, so that Movants have a colorable legally protected interest. This latter question does not run to the merits of their cause of action but, instead, to "whether the plaintiffs have a legal right to do what is allegedly being impeded." Citizen Ctr., 770 F.3d at 910; see also Grella, 553 F.2d at 261 ("standing does require an injury to the party arising out of a legal right"); Cox Cable Commc'ns, Inc., 992 F.2d at 1182 (there is no injury "unless an interest is protected").

The Majority ignores this directly-applicable precedent in opining that the January 25, 2017 decision ruled improperly on the merits in deciding that Movants had not asserted a legally

protected interest under the First Amendment.[18] The Majority confuses proper application of the Article III requirement that a litigant present a cognizable legal interest with a merits decision on whether that legal interest was unlawfully impaired.

## IV.

The Majority Opinion raises other considerations that, in my estimation, are not persuasive and do not detract from the foregoing analysis. From the outset, the Majority Opinion not only confuses the scope of the qualified First Amendment right of public access with the common law presumptive right of access, but the Majority also characterizes as "novel" Movants' theory that a qualified First Amendment right of public access applies to classified and ex parte FISC judicial proceedings that historically never have been public. However, it is not novel. Movants initially presented their First Amendment theory to the FISC more than a decade ago, at which time it was considered and decisively rejected. See In re Motion for Release of Court Records, 526 F. Supp. 2d 484. This same theory has been re-litigated without success multiple times since.[19]

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[18] See In re Opinions of This Court, 2017 WL 427591, at *9-13 (listing cases). The Majority Opinion fails to distinguish these cases and cites no applicable precedent to the contrary. Each of the cases cited in In re Opinions of This Court involved dismissal for lack of subject matter jurisdiction, which is not a decision on the merits. See, e.g., Havens v. Mabus, 759 F.3d 91, 98 (D.C. Cir. 2014) (stating that "[w]e have previously held that dismissals for lack of jurisdiction are not decisions on the merits").

[19] See In re Orders of This Court Interpreting S. 215 of the Patriot Act, No. Misc. 13-02, 2013 WL 5460064, at *1 (FISA Ct. 2013) (stating that the ACLU "assert[ed] a qualified First Amendment right of access to the opinions in question"); In re Proceedings Required by 702(i) of FISA Amendments Act of 2008, Misc. No. 08-01, 2008 WL 9487946, at *3 (FISA Ct. 2008) (observing that the ACLU's request for release under the First Amendment "is similar to a request it made on August 9, 2007"); In re Motion for Release of Court Records, Misc. No. 07-01 (FISA Ct. Feb. 8, 2008) (rejecting on reconsideration the ACLU's First Amendment theory).

More importantly, the Majority suggests that novelty might have legal significance to the real issue, i.e., whether Movants' claims involve injury to a legally protected interest. For example, the Majority Opinion states, "[a]s far as we can tell, courts have uniformly found standing to bring a First Amendment right-of-access suit so long as plaintiffs allege an invasion related to judicial proceedings" and "[t]hat is so no matter how novel or meritless the claims may be." Majority Op. 11. The Majority Opinion cites no case to support this claim of "uniform" judicial "findings." At best, the Majority Opinion goes on to assert that "[s]ome courts have stretched the right-of-access even farther for standing purposes," Majority Op. 11, then cites a single D.C. Circuit decision, namely Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004).

The Flynt decision does not do the work the Majority asks of it. Contrary to the Majority's characterization, the Flynt court found that appellants "asserted no *cognizable* First Amendment claim." 355 F.3d at 703 (emphasis added). Nonetheless, the Flynt court found that they had standing to bring (at best some of) their claims alleging a press right to embed with combat troops, which was advanced based on the First Amendment's express guarantees of free press and speech, not the qualified First Amendment right of public access. Id. The Flynt court discussed standing in a single paragraph that omits without explanation Lujan's definition of "injury in fact" as "an invasion of a *legally protected interest* which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[20] 504 U.S. at 560 (internal quotation marks and citations omitted, emphasis added). Since Flynt, the Supreme Court has repeatedly reiterated that required element of an injury-in-fact, see supra page 3, calling into question the perfunctory discussion of standing in Flynt. Finally, the Flynt court's

[20] Flynt also makes no mention of the alternative formulation that an "injury in fact" must be legally and judicially cognizable. See Raines, 521 U.S. at 819.

standing analysis did not give any consideration to the novelty of the appellants' claim of a right to embed with troops and did not involve a request for access to judicial proceedings.

The Majority Opinion adds that "many courts—including the Supreme Court—have not even felt it necessary to address standing in dealing with tenuous right-of-access claims," Majority Op. 12, and "[a] long list of courts have acted in this fashion," Majority Op. 13. The Majority Opinion then cites eight decisions from six courts: (1) Houchins v. KQED, Inc., 438 U.S. 1 (1978); (2) Dhiab, 852 F.3d 1087; (3) Phillips, 841 F.3d 405; (4) In re United States for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283; (5) In re Search of Fair Finance, 692 F.3d 424 (6th Cir. 2012); (6) In re New York Times Company to Unseal Wiretap and Search Warrant Materials, 577 F.3d 401 (2d Cir. 2009); (7) Baltimore Sun Company v. Goetz, 886 F.2d 60 (4th Cir. 1989); (8) Calder v. Internal Revenue Service, 890 F.2d 781, 783-84 (5th Cir. 1989)). All of these cases collapse upon examination.

Three of the cases cited by the Majority—Dhiab, In re New York Times Company and Baltimore Sun—did not address standing because they involved permissive intervenors.[21] The federal circuits are split about whether third-parties moving to intervene permissively under Rule 24(b) of the Federal Rules of Civil Procedure in ongoing litigation in which a case or controversy already exists must themselves demonstrate Article III standing. See Mangual v. Rotger-Sabat, 317 F.3d 45, 61 (1st Cir. 2003) (stating that "the circuits are split on the question of whether standing is required to intervene if the original parties are still pursuing the case and thus maintaining a case or controversy"). Cf. In re Endangered Species Act § 4 Deadline Litig., 704

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[21] See Dhiab, 852 F.3d at 1090 (stating that the district court "granted the [press] organizations' motion to intervene"); In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials, 577 F.3d at 401 (stating in background section that newspaper moved to intervene and citing the district court case confirming that fact); Baltimore Sun, 886 F.2d at 62 (stating that the Baltimore Sun had petitioned the district court to intervene).

F.3d 972, 980 (D.C. Cir. 2013) ("It remains, however, an open question in this circuit whether Article III standing is required for permissive intervention.").

Houchins involved news media organizations that sought to expand the *scope* of the First Amendment's express protections for a free press into an "implied special right of access to government-controlled sources of information." 438 U.S. at 7-8. It is not surprising that the Supreme Court did not discuss standing given that the question was not whether the First Amendment's right of a free press applied but, rather, whether, properly interpreted, the scope of that right mandated the access sought by the news media organizations. Id.

Because the remaining cases, Phillips, In re United States for an Order Pursuant to 18 U.S.C. Section 2703(D), In re Search of Fair Finance and Calder were silent about the question of standing[22] it is inappropriate to draw any conclusion about what they "felt" about standing. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 144 (2011) ("The Court would risk error if it relied on assumptions that have gone unstated and unexamined."). At best, it might be argued that the absence of any relevant discussion of standing by these courts *implies* that they thought there was standing, except that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." Id.[23] "There is no such thing as a precedential sub silentio jurisdictional holding[.]" Cuba v. Pylant, 814 F.3d 701, 709 (5th Cir. 2016).

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[22] Although the Sixth Circuit in Phillips addressed standing with respect to other constitutional claims asserted by the plaintiffs, it failed to do so for the so-called "right-of-access-to-government-proceedings" claim. 841 F.3d at 414-20.

[23] See also United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio.").

## V.

The Majority Opinion fails to persuade. It confuses the scope of a legally protected interest under the qualified First Amendment right of public access with the scope of such an interest under the common law. It further confuses the standing requirement under Article III that a litigant present an injury to a protected legal interest with the merits decision on whether the litigant can actually prove that the asserted legal interest was impaired. Under Richmond Newspapers, the qualified First Amendment right of public access patently does not apply to non-trial-like judicial proceedings that are not public and never have been. The errors in the Majority Opinion effectively relax the requirements for Article III standing when members of the public ask to review and comment on redacted classified information in FISC judicial opinions. As a result, anyone in the United States apparently has a legally protected First Amendment interest in accessing information in FISC judicial opinions that the Executive Branch determined is classified and may invoke this Court's statutorily-limited and specialized jurisdiction to challenge those classification decisions as unconstitutional. I cannot agree. For these reasons I would conclude that Movants lack standing to assert their claims as Article III standing requirements are understood and applied in any case. But the Court should apply those requirements with particular rigor in *this* case.

The Supreme Court has instructed the lower courts to apply a more rigorous analysis of standing when a party seeks to challenge actions by the Executive or Legislative Branches on constitutional grounds. See, e.g., Raines, 521 U.S. at 819-20. To be precise, the Supreme Court has stated that "our standing inquiry has been *especially rigorous* when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Id. (emphasis added). Accord Crawford v. United States Dep't of the Treasury, 868 F.3d 438, 457 (6th Cir. 2017). Layered onto this

"especially rigorous" analysis is the Supreme Court's observation that "we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs," as also is the case here. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).[24]

Intelligence gathering is one of the "vital aspects of national security." Gen. Dynamics Corp. v. United States, 563 U.S. 478, 486 (2011). "Matters intimately related to . . . national security are rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. 280, 292 (1981). Accordingly, "unless Congress specifically has provided otherwise, courts traditionally

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[24] The Majority disagrees that "we should change our conclusion simply because we consider a constitutional challenge involving the Executive Branch." Majority Op. 16. The Majority's position is difficult to follow; one cannot avoid a Raines analysis here. An especially rigorous standing analysis is required—without reference to the merits—whenever the merits of the dispute would force a court to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional. Raines, 521 U.S. at 819-20. Movants are asking the FISC to do exactly that. Critically, there has been no sealing, closure, or protective order issued by the FISC to impede Movants' access to the classified information they seek, so there is no discretionary judicial action being challenged by Movants, unlike cases in which the qualified First Amendment right of access was found to apply. See, e.g., Press-Enter. II, 478 U.S. at 4 (judicial closure order); Press-Enter. I, 464 U.S. at 503-504 (same); Globe Newspaper Co. v. Superior Court for Norfolk Cnty., 457 U.S. 596, 598 (1982) (same); Richmond Newspapers, 448 US. at 559-60 (same).

The Majority Opinion also seizes on the dissent's quotation from Clapper to insist that there is no "special standing requirement" for plaintiffs seeking review of acts by the political branches in the fields of intelligence gathering and foreign affairs. Majority Op. 17 (claiming that the dissent is reading Clapper to impose such a requirement and citing Schuchardt v. President of the United States, 839 F.3d 336 (3d Cir. 2016)). But Schuchardt addressed a heightened standing requirement in line with the analysis in Jewel v. Nat'l Sec. Agency, 673 F.3d 902, 913 (9th Cir. 2011), in which the Ninth Circuit rejected a district court's requirement that plaintiffs demonstrate a "strong" and "persuasive" claim to Article III standing when suing NSA. This dissent quotes Clapper to caution against *relaxing* standing requirements and expanding judicial power, 568 U.S. at 408-409, not to advocate for special standing requirements. Like this dissent, Clapper made no mention of a "special" or "heightened" requirement to establish standing in the national security realm or otherwise. Rather, in combination, Raines and Clapper require courts to ensure the vigor of the principles of separation of powers by giving close attention and exacting consideration to the elements of standing when asked to review actions of the political branches involving intelligence gathering.

have been reluctant to intrude upon the authority of the Executive in . . . national security affairs," Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988), including "the protection of classified information," which the Supreme Court has directed "must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it," id. at 529.

"'Relaxation of standing requirements is directly related to the expansion of judicial power[.]'" Clapper, 568 U.S. at 408-409 (quoting United States v. Richardson, 418 U.S. 166 (1974) (Powell, J., concurring)). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." Id. Importantly, "decision-making in the field[] of . . . national security is textually committed to the political branches of government." Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005). In the exercise of that textually-committed decision-making, Congress has already provided two avenues for any member of the public to obtain access to FISC judicial opinions (Section 402 of the USA FREEDOM Act and FOIA), subject to Executive Branch classification decisions which, under FOIA, are subject to examination in federal district courts insofar as specifically provided by statute.

The Majority Opinion provides no basis in law for the FISC to expand its jurisdiction contrary to Supreme Court guidance, statutory provisions that limit its jurisdiction to a specialized area of national concern, and the evident congressional mandate that the Court conduct its proceedings ex parte and in accord with prescribed security procedures. Applying

well-established principles of Article III standing with the rigor appropriate to a constitutional challenge to Executive Branch determinations in the national security sphere, I continue to conclude that Movants lack standing to assert the constitutional claim in question.

For all these reasons, I respectfully dissent.

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

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| IN RE OPINIONS & ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. | Docket No. Misc. 13-08 |

## OPINION

Pending before the Court is the 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,[1] which, as is evident from the motion's title, was filed jointly by the American Civil Liberties Union ("ACLU"), the American Civil Liberties Union of the Nation's Capital ("ACLU-NC"), and the Media Freedom and Information Access Clinic ("MFIAC") (collectively "the Movants"). The Movants ask the Court to "unseal its opinions addressing the legal basis for the 'bulk collection' of data" on the asserted ground that "these opinions are subject to the public's First Amendment right of access, and no proper basis exists to keep the legal discussion in these opinions secret." Mot. for Release of Ct. Records 1. As will be explained, however, the four opinions the Movants seek were never under seal and were declassified by the Executive Branch and made public with redactions in 2014. Consequently, although characterized as a request for the release of certain

[1] Hereinafter, this motion will be referred to as the "Motion for the Release of Court Records" and cited as "Mot. for Release of Ct. Records." Documents submitted by the parties are available on the Court's public website at http://www.fisc.uscourts.gov/public-filings.

of this Court's judicial opinions, what the Movants actually seek is access to the redacted material that remains classified pursuant to the Executive Branch's independent classification authority.

As explained in Parts I and II of the following Discussion, this Court has jurisdiction over the Motion for Release of Court Records only if it presents a case or controversy under Article III of the Constitution, which in turn requires among other things that the Movants assert an injury to a legally protected interest. The Movants claim that withholding the opinions in question contravenes a qualified right of access to those opinions under the First Amendment. If, contrary to the Movants' interpretation of the law, the First Amendment does not afford a qualified right of access to those opinions, they have failed to claim an injury to a legally protected interest. For reasons explained in Part III of the Discussion, the First Amendment does not apply pursuant to controlling Supreme Court precedent so there is no qualified right of access to those opinions. Accordingly, the Court holds that the Movants lack standing under Article III and the Court therefore must dismiss the Motion for Release of Court Records for lack of jurisdiction.

By no means does this result mean that the opinions at issue, or others like them, will never see the light of day. First, the opinions at issue have already been publicly released, subject to Executive Branch declassification review and redactions that withhold portions of those opinions found to contain information that remains classified. Members of the public seeking release of other opinions (or further release of redacted text in the opinions at issue in this matter) may submit requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and seek review of the Executive Branch's responses to those requests in a federal district court. Finally, as noted *infra* Part V, Congress has charged Executive Branch officials—not this

Court—with releasing certain significant Court opinions to the public, subject to declassification review. Those statutory mechanisms for public release are unaffected by the determination that the Court lacks jurisdiction over the instant motion.

## BACKGROUND AND PROCEDURAL POSTURE

The Movants filed the pending motion in the wake of unauthorized but widely-publicized disclosures about National Security Agency ("NSA") programs involving the bulk collection of data under the Foreign Intelligence Surveillance Act of 1978, codified as amended at 50 U.S.C. §§ 1801-1885c (West 2015) ("FISA"). The motion urges the Court to unseal its judicial opinions addressing the legality of bulk data collection on the ground that the First Amendment to the United States Constitution guarantees that the public shall have a qualified right of access to judicial opinions. Mot. for Release of Ct. Records 1, 2, 12-21. The Movants contend that this right of access applies even when national security interests are at stake. *Id.* at 17. According to the Movants, the right of access can be overcome only if the United States of America (the "Government") satisfies a "strict" test requiring evidence of a substantial probability of harm to a compelling interest and no alternative means to protect that interest. *Id.* at 3, 21-24, 25, 28. Even if the Government demonstrates a substantial probability of harm to a compelling interest, the Movants maintain that "[a]ny limits on the public's right of access must . . . be narrowly tailored and demonstrably effective in avoiding that harm." *Id.* at 3. The Movants therefore insist that the First Amendment obligates the Court to review independently any portions of the Court's judicial opinions that are being withheld from public disclosure via redaction and assess whether the redaction is sufficiently narrowly tailored to protect only a compelling interest and nothing more. *Id.* at 23.

To conduct this independent review, the Movants suggest that the Court should first invoke Rule 62 of the United States Foreign Intelligence Surveillance Court ("FISC") Rules of Procedure and order the Government to perform a classification review of all judicial opinions addressing the legality of bulk data collection.[2] *Id.* at 24. If the ordered classification review results in the Government withholding any contents of the Court's opinions by redaction, the Movants assert that the Court should schedule the filing of legal briefs to allow the Government to set forth the rationale for "its sealing request" and to accommodate the Movants' presentation of countervailing arguments regarding "any sealing they believe to be unjustified," *id.*, after which the Court should "test any sealing proposed by the government against the standard required by the First Amendment," *id.* at 27. *See also* Movants' Reply in Supp. of Their Mot. for Release of Ct. Records 2, 4. The Movants further request that the Court exercise its discretion to order a classification review pursuant to FISC Rule 62 even if the Court ultimately concludes that a First Amendment right of access does not apply in this matter. *Id.* at 27.

The Government opposes the Movants' motion principally because the four opinions that address the legal bases for bulk collection were made public in 2014 after classification reviews conducted by the Executive Branch. Gov't's Opp'n Br. 1-2. Two opinions were published by the Court:

- Memorandum, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, Docket No. BR 13-158 (Oct. 11, 2013) (McLaughlin, J.), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-1.pdf; and

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[2] Rule 62 provides in relevant part that, after consultation with other judges of the court, the Presiding Judge of the FISC may direct that an opinion be published and may order the Executive Branch to review such opinion and "redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor)." FISC Rule 62(a).

- Amended Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, Docket No. BR 13-109 (Aug. 29, 2013) (Eagan, J.), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf.

Gov't's Opp'n Br. 2. The other two opinions were released by the Executive Branch:

- Opinion and Order, [Redacted], Docket No. PR/TT [Redacted] (Kollar-Kotelly, J.), *available at* https://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf; and

- Memorandum Opinion, [Redacted], Docket No. PR/TT [Redacted] (Bates, J.), *available at* https://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

*Id.* The Government submits that, because the Executive Branch already conducted thorough classification reviews of all four opinions before their publication and release, there is no reason for the Court to order the Government to repeat that process.[3] *Id.* The Government further argues that the motion should be dismissed for lack of the Movants' standing to advance FISC Rule 62 as a vehicle for publication because that rule permits only a "party" to move for publication of the Court's opinions. *Id.* at 3. In support, the Government cites the Court's decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02, 2013 WL 5460064 (FISA Ct. Sept. 13, 2013), for the proposition that the term "party" in Rule 62 refers to a "party" to the proceeding that resulted in the opinion. Gov't's Opp'n Br. 3. The Government points out that the Movants were not such "parties" to any of the proceedings that begot the four opinions discussing the legality of bulk collection. *Id.* Finally, the Government contends that the Court should decline to exercise its own discretion to require the Executive Branch to conduct another classification review of the relevant opinions under Rule 62—or to permit the Movants to challenge the redaction of classified material—because FOIA

[3] The Movants argue that the Executive Branch's classification reviews were insufficient and resulted in the four declassified opinions being "redacted to shreds." Movants' Reply In Supp. of Their Mot. for Release of Ct. Records 8.

supplies the proper legal mechanism to seek access to classified material withheld by the Executive Branch. *Id.* at 3-4. According to the Government, the FISC is not empowered to review independently and/or override Executive Branch classification decisions, *id.* at 4-6, nor should the FISC serve as an alternate forum to duplicate the judicial review afforded by FOIA, *id.* at 3-4.

## DISCUSSION

Before proceeding to consider the merits of the pending motion the Court must first establish with certainty that it has jurisdiction. Because the FISC is an Article III court,[4] it cannot exercise the judicial power to resolve the Movants' motion unless there is an actual "case or controversy" in which the Movants have standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (May 16, 2016) (discussing the constitutional limits on the exercise of judicial power). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies" as set forth in Article III of the Constitution. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). By framing the exercise of judicial power in terms of "cases or controversies," Article III recognizes:

> [T]wo complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

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[4] *See In re Sealed Case*, 310 F.3d 717, 731 (FISA Ct. Rev. 2002) (per curiam) (indicating that "the constitutional bounds that restrict an Article III court" apply to the FISC); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985) (rejecting the assertion that the FISC "is not a proper Article III court"), *aff'd*, 788 F.2d 566 (9th Cir. 1986).

*Flast v. Cohen*, 392 U.S. 83, 95 (1968). As will be discussed, the separation-of-powers concern poses particular unease in this case.

"From Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation, [the Supreme Court has] deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). This doctrine of standing is an "essential and unchanging part of the case-or-controversy requirement of Article III . . . ." *Lujan*, 504 U.S. at 560. "In fact, standing is perhaps the most important jurisdictional doctrine, and, as with any jurisdictional requisite, we are powerless to hear a case when it is lacking." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005) (internal citations and quotation marks omitted). As the Supreme Court has observed:

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.
>
> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit.

*Warth v. Seldin*, 422 U.S. 490, 498 (1975) (internal quotation marks and citations omitted).

I.

Accordingly, at the outset, the Court is obligated to ensure that it can properly entertain the Movants' motion because they have met their burden of establishing standing sufficient to satisfy the Article III requirement of a case or controversy. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). To do so, the Movants "must clearly and specifically set forth facts sufficient to satisfy . . . Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990). Moreover, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), the Movants "must demonstrate standing for each claim [they] seek[] to press" as well as "'for each form of relief sought,'" *DaimlerChrysler*, 547 U.S. at 352 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). Ultimately, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 547 U.S. at 341. Absent standing, the Court's exercise of judicial power "would be gratuitous and thus inconsistent with the Art. III limitation." *Simon*, 426 U.S. at 38.

Anticipating that standing might be an issue, the Movants commenced their legal arguments by first claiming that they established standing by virtue of the fact that they were denied access to judicial opinions. Mot. for Release of Ct. Records 10. The Movants assert that "[d]enial of access to court opinions alone constitutes an injury sufficient to satisfy Article III." *Id.* By footnote, the Movants also question in part the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, to the extent that it held that a party claiming the denial of public access to judicial opinions must further show either (1) that the lack of public access impeded the party's own activities in a concrete and particular way or

(2) that access would afford concrete and particular assistance to the party in the conduct of its own activities, although the Movants alternatively argue that "even if those showings are necessary to establish standing, [they] satisfy the additional requirements." *Id.* at 11 n.27.

It appears that *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* was the first and only occasion on which a FISC Judge expressly addressed the question of a third party's standing for the purpose of asserting a First Amendment right to access this Court's judicial opinions.[5] That was a case championed by these same Movants on the same ground that the First Amendment guarantees a qualified right of public access to judicial opinions, although in that case the Movants sought access to opinions analyzing Section 215 of the USA PATRIOT Act (as codified at 50 U.S.C. § 1861). *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, at *1. There, the parties neglected to address standing so the Court was obliged to consider it sua sponte based on the existing record, *id.*, after impliedly taking judicial notice of public matters, *id.* at *4 (stating that "[t]he Court ordinarily would not look beyond information presented by the parties to find that a claimant has Article III standing" but "[i]n this case . . . the ACLU's active participation in the legislative and public debates about the proper scope of Section 215 and the advisability of amending that provision is obvious from the public record and not reasonably in dispute"). The Court found that the ACLU and the ACLU-NC had standing but MFIAC did not, *id.* at *4, albeit the Court later reinstated MFIAC as a party upon granting MFIAC's motion seeking reconsideration of its standing on the strength of

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[5] *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007), also involved a motion filed by the ACLU seeking the release of court documents. In that case, part of which is discussed at length *infra* Part IV, the ACLU's standing was not addressed and the cited basis for the exercise of jurisdiction was the Court's inherent supervisory power over its own records and files. *Id.* at 486-87 (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)).

additional information regarding MFIAC's activities, Opinion & Order Granting Mot. for Recons., *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02 (Aug. 7, 2014), *available at* http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-6_0.pdf. The Court never reached the question of whether the First Amendment applied, however, and, instead, dismissed for comity the Movants' motion to the extent it sought opinions that were the subject of ongoing FOIA litigation in another federal jurisdiction. *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, at *6-7. The Court then exercised its own discretion to initiate declassification review proceedings for a single opinion pursuant to Rule 62. *Id.* at *8.

Recognizing that the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* involved the same Movants asserting, in essence, the same type of legal claim, the question of standing nevertheless must be independently examined in this case because "[t]his court, as a matter of constitutional duty, must assure itself of its jurisdiction to act in every case." *CTS Corp. v. EPA*, 759 F.3d 52, 57 (D.C. Cir. 2014). Significantly, the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* is distinguishable because it did not reach the question of whether the First Amendment applied and, if not, whether the Movants could establish standing in the absence of an interest protected by the First Amendment. This case also is in a unique posture because the Movants seek access to judicial documents that already have been made public and declassified by the Executive Branch, unlike the documents sought in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act.* An independent assessment of standing also is warranted in light of Article III's necessary function to circumscribe the Federal Judiciary's exercise of power, *Spokeo*, 136 S. Ct. at 1547, and given

the "highly case-specific" nature of jurisdictional standing inquiries, *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003).

Embarking on an analysis of standing in this matter, the Court is mindful that, because "[s]tanding is an aspect of justiciability," "the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability." *Flast*, 392 U.S. at 98. Indeed, "[s]tanding has been called one of 'the most amorphous (concepts) in the entire domain of public law.'" *Id.* at 99 (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm.*, 89th Cong. 498 (2d Sess. 1966) (statement of Prof. Paul A. Freund)). The United States Court of Appeals for the Second Circuit has referred to standing as a "labyrinthine doctrine," *Fin. Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 146 (2d Cir. 1992), and even the Supreme Court has admitted that "'the concept of Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it," *Whitmore*, 495 U.S. at 155 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)).

Despite its nebulousness, there are several fundamental guideposts that offer direction and a general framework to evaluate standing in any given case. To begin with, while it has long been the rule that standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," it nonetheless "often turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. Supreme Court precedent "makes clear that Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue[.]" *Diamond v. Charles*, 476 U.S. 54, 70 (1986) (citing *Valley Forge Christian Coll.*, 454 U.S. at 472). Thus, "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72,

77 (1991). "In essence, the standing question is determined by 'whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.'" *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014) (quoting *Warth*, 422 U.S. at 500). "[A]lthough standing is an anterior question of jurisdiction, the grist and elements of [the Court's] jurisdictional analysis require a peek at the substance of [the Movants'] arguments." *Transp. Workers Union of Am., AFL-CIO v. Transp. Sec. Admin.*, 492 F.3d 471, 474-75 (D.C. Cir. 2007).

It also is well established that the doctrine of standing consists of three elements, the first of which requires the Movants to show that they suffered an "injury in fact." *Lujan*, 504 U.S. at 560. The second element requires that the injury in fact be "fairly traceable" to the defending party's challenged conduct and the third element requires that there be a likelihood (versus mere speculation) that the injury will be redressed by a favorable judicial decision. *Id.*

II.

Recently, the Supreme Court emphasized that "injury in fact" is the "'[f]irst and foremost' of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). Importantly for the purpose of resolving the pending motion, the Supreme Court has "stressed that the alleged injury must be legally and judicially cognizable." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). "This requires, among other things, that the plaintiff have suffered an invasion of a *legally protected interest* which is . . . concrete and particularized, and that the dispute is traditionally thought to be capable of resolution through the judicial process[.]" *Id.* (internal quotation marks and citations omitted, emphasis added). "[A]n injury refers to the invasion of some 'legally protected interest' arising

from constitutional, statutory, or common law." *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 366 (4th Cir. 2015) (quoting *Lujan*, 504 U.S. at 578).

The meaning of the phrase "legally protected interest" has been a source of perplexity in the case law as a result, at least in part, of the Supreme Court's pronouncement that a party can have standing even if he loses on the merits. *See Warth*, 422 U.S. at 500 (stating that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"); *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172 (10th Cir. 2006) ("The term *legally protected interest* has generated some confusion because the Court has made clear that a plaintiff can have standing despite losing on the merits . . . ." (emphasis in original)); *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 363 (D.C. Cir. 2005) (Williams, J., concurring) (expressing "puzzlement" over the Supreme Court's use of the phrase "legally protected" as a "modifier" and examining the discordant state of the case law's treatment of the phrase); *United States v. Richardson*, 418 U.S. 166, 180-81 (1974) (Powell, J., concurring) (questioning the Supreme Court's approach in *Flast*, 392 U.S. at 99-101, on the ground that "[t]he opinion purports to separate the question of standing from the merits . . . yet it abruptly returns to the substantive issues raised by a plaintiff for the purpose of determining whether there is a logical nexus between the status asserted and the claim sought to be adjudicated" (internal quotation marks omitted)); *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 951 n.23 (9th Cir. 2013) ("The exact requirements for a 'legally protected interest' are far from clear."). The confusion is compounded by the fact that the Supreme Court has occasionally resorted to using the phrase "judicially cognizable interest" rather than, or interchangeably with, the phrase "legally protected interest." *Judicial Watch*, 432 F.3d at 364 (Williams, J., concurring) ("[T]he [Supreme] Court appears to use the 'legally protected' and 'judicially cognizable' language

interchangeably."); *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 959 (8th Cir. 2011) (citing *Lujan* for the proposition that "[a] 'legally protected interest' requires only a 'judicially cognizable interest'"); *Lujan*, 504 U.S. at 561-63, 575, 578 (initially stating that a plaintiff must have suffered "an invasion of a legally protected interest" to satisfy Article III but then reverting to use of the term "cognizable" to characterize the viability of that interest to establish standing); *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (stating that "standing requires: (1) that the plaintiff have suffered an 'injury in fact'—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"); *Warth*, 422 U.S. at 514 (referring to a "judicially cognizable injury" in the context of discussing the legality of Congress expanding by statute the interests that may establish standing). Adding to the uncertainty, in some cases the Supreme Court makes no mention whatsoever of the requirement that an injury entail the invasion of either a "legally protected" or "judicially cognizable" interest. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) ("To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("To ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.").

Deciphering the meaning of the phrase "legally protected interest" also is muddled by the varying approaches courts use to identify the relevant "interest" at stake. In at least one case the United States Court of Appeals for the Fourth Circuit suggested that the interest at issue could be

considered subjectively from the perspective of the party asserting standing. *Doe v. Pub. Citizen*, 749 F.3d 246, 262 (4th Cir. 2014) (intimating that litigants need only assert an interest that "in their view" was protected by the common law or the Constitution). Other courts focus objectively on whether the Constitution, a statute or the common law actually recognizes the asserted interest. *See, e.g., Sargeant v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997) (stating that "[a] legally cognizable interest means an interest recognized at common law or specifically recognized as such by the Congress").

Still other courts have examined whether the type or form of the injury is traditionally deemed to be a legal harm, such as an economic injury or an invasion of property rights, although such an inquiry can blend into the question of whether the injury is concrete and particularized. *See, e.g., Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (stating that "[m]onetary harm is a classic form of injury-in-fact" that "is often assumed without discussion" and an invasion of property rights, "whether it sounds in tort . . . or contract . . . undoubtedly 'affect[s] the plaintiff in a personal and individual way'" (quoting *Lujan*, 504 U.S. at 560 n.1)). At least one court has found standing by analogizing to interests that were never advanced by the party asserting standing.[6] *See In re Special Grand Jury 89-2*, 450 F.3d at

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[6] It is unclear how this approach can be reconciled with the Supreme Court's admonitions that standing "is gauged by the specific common-law, statutory or constitutional claims *that a party presents*," *Int'l Primate Prot. League*, 500 U.S. at 77 (emphasis added), and a "federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing," *Whitmore*, 495 U.S. at 155-56. The Tenth Circuit opined that the Supreme Court's decision in *Bennett*, 520 U.S. at 167, presented a "new locution" according to which the substitution of the phrase "judicially cognizable interest" for "legally protected interest" signaled that the Supreme Court had abandoned *Lujan's* requirement of a "legally protected interest" in favor of a formulation that provides that "an interest can support standing even if it is not protected by law (at least, not protected in the particular case at issue) so long as it is the sort of interest that courts think to be of sufficient moment to justify judicial intervention." *In re Special Grand Jury 89-2*, 450 F.3d at 1172. The question of whether the Supreme Court intended to abandon the requirement for a "legally protected interest" seems to have been

1172-1173 (characterizing former grand jurors' requests to lift the secrecy obligation imposed by Rule 6(e) of the Federal Rules of Criminal Procedure as an interest in "stating what they know" that mirrors the First Amendment claims of litigants challenging speech restrictions and commenting that "there is no requirement that the legal basis for the interest of a plaintiff that is 'injured in fact' be the same as, or even related to, the legal basis for the plaintiff's claim, at least outside the taxpayer-standing context").

Although no universal definition of the phrase "legally protected interest" has been developed by the case law,[7] the Supreme Court and a majority of federal jurisdictions have concluded that an interest is not "legally protected" or cognizable for the purpose of establishing standing when its asserted legal source—whether constitutional, statutory, common law or

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resolved in the negative by the Supreme Court's decision in *Raines*, which was decided shortly after *Bennett* and was joined by Justice Antonin Scalia, the author of the Court's unanimous decision in *Bennett*. In *Raines*, as stated *supra*, the Supreme Court "stressed that the alleged injury must be legally and judicially cognizable" and went on to state that "[t]his requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized.'" 521 U.S. at 819 (quoting *Lujan*, 504 U.S. at 560). The Supreme Court's recent decision in *Spokeo* also employs the locution requiring that, "[t]o establish injury in fact, a plaintiff must show that he or she suffered '*an invasion of a legally protected interest*' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560) (emphasis added).

[7] The bewildering state of the law might explain in part why one commentator has referred to the "injury in fact" requirement as "a singularly unhelpful, even incoherent, addition to the law of standing," William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 231 (1988), and another has taken what the United States Court of Appeals for the Tenth Circuit described as the "somewhat cynical view" that "'[t]he only conclusion [regarding what injuries are sufficient for standing] is that in addition to injuries to common law, constitutional, and statutory rights, a plaintiff has standing if he or she asserts an injury that the Court deems sufficient for standing purposes.'" *In re Special Grand Jury 89-2*, 450 F.3d at 1172 (second alteration in original) (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.2 at 74 (4th ed.2003)).

otherwise—does not apply or does not exist. The United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit")[8] has offered the following explanation:

> Whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits. Otherwise, every unsuccessful plaintiff will have lacked standing in the first place. Thus, for example, one can have a legal interest in receiving government benefits and consequently standing to sue because of a refusal to grant them even though the court eventually rejects the claim. *See generally Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d 377 (1989) (plaintiffs had standing to bring suit under [Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. §§ 1-15] although claim failed). Indeed, in *Lujan* the Court characterized the "legally protected interest" element of an injury in fact simply as a "cognizable interest" and, without addressing whether the claimants had a statutory right to use or observe an animal species, concluded that the desire to do so "undeniably" was a cognizable interest. *Lujan*, 504 U.S. at 562–63, 112 S. Ct. at 2137–38.
>
> On the other hand, if the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue. *See, e.g., Arjay Assocs. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989) ("We hold that appellants lack standing because the injury they assert is to a nonexistent right . . . ."); *ACLU v. FCC*, 523 F.2d 1344, 1348 (9th Cir. 1975) ("If ACLU's claim is meritorious, standing exists; if not, standing not only fails but also ceases to be relevant."); *United Jewish Org. of Williamsburgh v. Wilson*, 510 F.2d 512, 521 (2d Cir. 1975) ("Whether our decision on this point is cast on the merits or as a matter of standing is probably immaterial."), *aff'd*, 430 U.S. 144, 97 S. Ct. 996, 51 L.Ed.2d 229 (1977).

*Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997). Furthermore, although the question of whether a litigant's interest is "legally protected" does not depend on the merits of the claim, it nevertheless is the case that "there are instances in which courts have examined the merits of the underlying claim and concluded that the plaintiffs lacked a legally protected interest and therefore lacked standing." *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1236 (10th Cir. 2004) (citing *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232, 1240–41 (D. Utah 2002) (discussing cases), *Claybrook*, 111 F.3d at 907, and *Arjay Assocs.*

[8] For brevity and convenience, this opinion hereinafter will omit the phrase "United States Court of Appeals for the" from the identification of federal circuit courts of appeal.

*Inc. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989)). *Accord Martin v. S.E.C.*, 734 F.3d 169, 173 (2d Cir. 2013) (per curiam) (declining to reach the merits of a litigant's claims when standing was lacking "except to the extent that the merits overlap with the jurisdictional question").

In *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part on other grounds, Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court concluded that a group of litigants lacked Article III standing because their claims could not be deemed "legally cognizable" when the Court had never previously recognized the broadly-asserted interest and that interest was premised on a mistaken interpretation of inapplicable legal precedent. The litigants in *McConnell* consisted in part of a group of voters, organizations representing voters, and candidates who collectively challenged, among other things, the constitutionality of a particular section of the Bipartisan Campaign Reform Act of 2002 ("BCRA") that amended the Federal Election Campaign Act of 1971 ("FECA") by "increas[ing] and index[ing] for inflation certain FECA contribution limits." 540 U.S. at 226. As relevant here, the litigant group argued that, as a result of the amendments, they suffered an injury they identified as the deprivation of an "equal ability to participate in the election process based on their economic status." *Id.* at 227. The group asserted that this injury was legally cognizable according to voting-rights case law that they viewed as prohibiting "electoral discrimination based on economic status . . . and upholding the right to an equally meaningful vote." *Id.* (internal quotation marks omitted). The Supreme Court, however, disclaimed the notion that it had ever "recognized a legal right comparable to the broad and diffuse injury asserted by the . . . plaintiffs." *Id.* In addition, the group's "reliance on this Court's voting rights cases [was] misplaced" because those cases required only "nondiscriminatory access to the ballot and a single, equal vote for each voter" whereas the group had not claimed that they were denied such equal access or the right to vote. *Id.* The

Court further stated that it had previously "noted that '[p]olitical 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources,'" so the group's "claim of injury . . . is, therefore, not to a legally cognizable right." *Id.* (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

In *Bond v. Utreras*, 585 F.3d 1061, 1065-66 (7th Cir. 2009), the Seventh Circuit reviewed a district court order lifting a protective order and permitting a journalist to intervene in a civil rights case involving allegations that Chicago police officers mentally and physically abused a plaintiff while performing their official duties. The journalist sought to "unseal" police department records relating to citizen complaints against Chicago police officers that the city had produced during pretrial discovery but never filed with the court. *Id.* at 1066. The journalist claimed that no good cause existed to continue the protective order under Rule 26(c) of the Federal Rules of Civil Procedure. *Id.* at 1065. Several months after dismissing the underlying lawsuit, which had settled, *id.*, the district court "reevaluated whether 'good cause' existed to keep the documents confidential, and in so doing applied a 'presumption' of public access to discovery materials," *id.* at 1067. On balance, the district court concluded that the city's interest in keeping the records confidential was outweighed by the public's interest in information about police misconduct; as a result, the court granted the journalist's request to intervene and lifted the protective order. *Id.* On appeal by the city, the Seventh Circuit characterized as a "mistake" the district court's failure to consider whether the journalist had standing in view of the fact that the underlying lawsuit had been dismissed. *Id.* at 1068. The Seventh Circuit held that a third party seeking permissive intervention to challenge a protective order after a case has been dismissed "must meet the standing requirements of Article III in addition to Rule 24(b)'s requirements for permissive intervention." *Id.* at 1072. Discussing Article III's standing requirements, *id.* at

1072-73, the Seventh Circuit noted that, "while a litigant need not definitely 'establish that a right of his has been infringed,' he 'must have a colorable *claim* to such a right' to satisfy Article III," *id.* at 1073 (emphasis in original) (quoting *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1024 (7th Cir. 2006)). Because the district court's decision to lift the protective order was premised on a presumptive right of access to discovery materials, *id.* at 1067, the Seventh Circuit analyzed the legal basis of such a presumptive right and concluded that, while "most documents filed in court are presumptively open to the public," *id.* at 1073, it nevertheless is the case that "[g]enerally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access to *unfiled* discovery," *id.* at 1073 (emphasis in original). The Seventh Circuit also found no support for the notion that Rule 26(c) "creates a freestanding public right of access to unfiled discovery." *Id.* at 1076. It then proceeded to consider and reject whether, alternatively, the First Amendment supplied such a right. *Id.* at 1077-78. Lacking any legal basis to assert a right to unfiled discovery, the Seventh Circuit held that the journalist "has no injury to a legally protected interest and therefore no standing to support intervention." *Id.* at 1078.

*Griswold v. Driscoll*, 616 F.3d 53 (1st Cir. 2010), is another instructive case. The First Circuit held that litigants lacked a legally protected interest because the source of the interest, the First Amendment, did not apply. In *Griswold*, students, parents, teachers, and the Assembly of Turkish American Associations ("ATAA") collectively challenged a decision by the Commissioner of Elementary and Secondary Education of Massachusetts to revise a statutorily-mandated advisory curriculum guide. 616 F.3d at 54-56. The Commissioner's initial revisions were motivated by political pressure to assuage a Turkish cultural organization that objected to the curriculum guide's references to the Armenian genocide as biased for failing to acknowledge an opposing contra-genocide perspective. *Id.* at 54-55. After the revised curriculum guide was

submitted to legislative officials, the Commissioner again modified it – at the request of Armenian descendants – by removing references to all pro-Turkish websites (including websites that presented the contra-genocide perspective) except the Turkish Embassy's website. *Id.* at 55. The plaintiffs sued claiming that the revisions to the curriculum guide were made in violation of their rights under the First Amendment to "inquire, teach and learn free from viewpoint discrimination . . . and to speak." *Id.* at 56. In an opinion notable for its authorship by U.S. Supreme Court Associate Justice David Souter (Ret.), sitting by designation, the First Circuit affirmed the dismissal of the ATAA's First Amendment claim as time barred and then considered whether the remaining plaintiffs had standing to assert a First Amendment right. *Id.* Remarking that "we see this as a case in which the dispositive questions of standing and statement of cognizable claim are difficult to disentangle," the First Circuit found it "prudent to dispose of both standing and merits issues together." *Id.* The First Circuit then evaluated whether the challenged advisory curriculum guide was analogous to a virtual school library—in which case the revisions to the guide would be subject to First Amendment review pursuant to the plurality decision in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982)—or whether the guide was more properly characterized as an element of curriculum over which the State Board of Education may exercise discretion. *Id.* at 56-60. The First Circuit ultimately regarded the complaint as pleading "a curriculum guide claim that should be treated like one about a library, in which case pleading cognizable injury and stating a cognizable claim resist distinction." *Id.* at 56. Declining to extend "the *Pico* plurality's notion of non-interference with school libraries as a constitutional basis for limiting the discretion of state authorities to set curriculum," the First Circuit found that the guide was an element of curriculum, *id.* at 59, so that "revisions to the Guide after its submission to legislative officials,

even if made in response to political pressure, did not implicate the First Amendment," *id.* at 60. The First Circuit therefore affirmed the lower court's judgment that the First Amendment did not apply to the challenged curriculum guide and, as a result, the plaintiffs had failed to establish either a cognizable injury or a cognizable claim. *Id.* at 56, 60.

The D.C. Circuit's decision in *Claybrook*, cited *supra*, also lends authority to the proposition that a party lacks standing when the statutory, constitutional, common law or other source of the asserted legal interest does not apply or does not exist. *Claybrook* involved a lawsuit filed by Joan Claybrook, a co-chair of Citizens for Reliable and Safe Highways ("CRASH"), who sued the Administrator of the Federal Highway Administration ("FHWA") for failing to prevent an agency advisory committee from passing a resolution that criticized CRASH's fund-raising literature. 111 F.3d at 905, 906. Claybrook claimed that the Administrator violated the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. §§ 1-15, by permitting the advisory committee to vote on and pass the challenged resolution, which Claybrook claimed was not on the committee's agenda and not within the committee's authority. *Id.* at 906. The Administrator countered by arguing that Claybrook lacked standing "because the legal duty she claims he violated does not exist." *Id.* at 907. Upon analysis of the relevant provisions of FACA, 5 U.S.C. App. §§ 9(c)(B), 10(a)(1), 10(a)(2), 10(e), 10(f), the D.C. Circuit agreed that the Act did not impose the asserted legal duty that served as a basis for Claybrook's claimed injury, the agency otherwise complied with the Act, and the decision to adjourn the advisory committee meeting was committed to the agency's discretion pursuant to 5 U.S.C. § 701(a)(2). *Id.* at 907-909. Because FACA offered no recourse to Claybrook, the D.C. Circuit held that "[i]n sum, we are left with no law to apply to Claybrook's claim and consequently Claybrook lacks standing." *Id.* at 909.

The Ninth Circuit reached a similar result in *Fleck & Assocs., Inc. v. Phoenix, an Arizona Mun. Corp.*, 471 F.3d 1100 (9th Cir. 2006). The appellant in *Fleck & Assocs.* was a "for-profit corporation that operate[d] . . . a gay men's social club in Phoenix, Arizona" where "[s]exual activities [took] place in the dressing rooms and in other areas of the club." 471 F.3d at 1102. Pursuant to a Phoenix ordinance banning the operation of live sex act businesses, a social club operated by the appellant was subjected to a police search during which two employees were questioned and detained. *Id.* at 1102-1103. The appellant was also "threatened with similar actions." *Id.* at 1103. The appellant sued the city seeking both injunctive and declaratory relief on the ground that the ordinance violated its constitutional privacy rights. *Id.* at 1102. The district court interpreted the appellant's complaint to raise one claim based on the invasion of its customers' privacy rights and a second claim based on the invasion of the appellant's rights as a corporation. *Id.* at 1103. With respect to the claim based on the customers' privacy rights, the district court found that the appellant lacked standing to pursue that claim and, alternatively, the appellants' customers had no privacy rights in the social club so dismissal was further warranted for failure to state a claim for relief. *Id.* The district court held, however, that the appellant had standing to assert its own privacy rights as a corporation, albeit "[t]he court did not . . . identify what those corporate rights might have been" and "immediately proceeded to hold that [the appellant] lacked any cognizable privacy rights and dismissed for failure to state a claim." *Id.* On appeal, the Ninth Circuit agreed with the district court that the appellant lacked associational standing[9] to assert its customers' rights but held that the district court erred by addressing the merits of the customers' privacy rights in the social club when the court lacked subject matter

[9] "Under the doctrine of 'associational' or 'representational' standing an organization may bring suit on behalf of its members whether or not the organization itself has suffered an injury from the challenged action." *Id.* at 1105.

jurisdiction. *Id.* at 1103, 1105, 1106. Discussing the appellant's claim of "traditional" Article III standing based on its asserted privacy rights as a corporation, the Ninth Circuit noted that the appellant "squarely identifie[d] the source of its supposed right as the liberty guarantee described in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)." *Id.* at 1104. The Ninth Circuit determined, however, that no corporate right to privacy emanated from that case, *id.* at 1105, 1106, and, as a result, "[b]ecause the right to privacy described in *Lawrence* is purely personal and unavailable to a corporation, [the appellant corporation] failed to allege an injury in fact sufficient to make out a case or controversy under Article III," *id.* at 1105.

In *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam), the Second Circuit considered a prisoner's complaint challenging New York Election Law section 5–106 on the ground that it denied felons the right to vote in violation of section 2 of the Voting Rights Act "because it 'result[ed] in a denial or abridgement of the right . . . to vote on account of race.'" 449 F.3d at 374 (quoting 42 U.S.C. § 1973(a), transferred to 52 U.S.C. § 10301). Because the prisoner was a resident of California before he was incarcerated, *id.* at 374, and the Second Circuit concluded that "under New York law, [his] involuntary presence in a New York prison [did] not confer residency for purposes of registration and voting," *id.* at 376, the court found that "his inability to vote in New York arises from the fact that he was a resident of California, not because he was a convicted felon subject to the application of New York Election Law section 5–106," *id.* As a result, the Second Circuit held that that the prisoner "suffered no 'invasion of a legally protected interest.'" *Id.* (quoting *Lujan*, 504 U.S. at 560).

Other federal circuits similarly have concluded that, when the source of the legal interest asserted by a litigant does not apply or does not exist, the litigant has not established a colorable claim to a right that is "legally protected" or "cognizable" for the purpose of establishing an

injury in fact that satisfies Article III's standing requirement. *See, e.g., 24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 633 (4th Cir. 2016) (finding that "[b]ecause neither Virginia law nor the Plan [of Organization that governs the Republican Party of Virginia] gives [the litigant] 'a legally protected interest' in determining the nomination method in the first place, he fails to make out 'an *invasion* of a legally protected interest,' i.e. actual injury, in this case" (quoting *Lujan*, 504 U.S. at 560) (emphasis in original)); *Spirit Lake Tribe of Indians ex rel. Comm. of Understanding and Respect v. Nat'l Collegiate Athletic Ass'n*, 715 F.3d 1089, 1092 (8th Cir. 2013) (noting that injury resulting from a college ceasing to use a Native American name, "even if . . . sufficiently concrete and particularized . . . does not result from the invasion of a legally protected interest"); *White v. United States*, 601 F.3d 545, 555 (6th Cir. 2010) (stating that the plaintiffs "must demonstrate an injury-in-fact to a legally protected interest" but failed to do so because "none of the purported 'constitutional' injuries actually implicates the Constitution"); *Pichler v. UNITE*, 542 F.3d 380, 390-92 (3d Cir. 2008) (affirming dismissal on the ground that litigants failed to establish an injury to a "legally protected interest" because the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725, was interpreted to apply only to an individual whose personal information was contained in a motor vehicle record and not to spouses who might share that same personal information but were not the subject of the motor vehicle record); *Bochese*, 405 F.3d at 984 (litigant was not an intended beneficiary of a contract amendment so he "had no 'legally cognizable interest' in that agreement and therefore lack[ed] standing to challenge its rescission"); *Aiken v. Hackett*, 281 F.3d 516, 519-20 (6th Cir. 2002) (appellants who claimed they were denied a benefit in violation of the Equal Protection Clause but did not allege that they would have received the benefit under a race-neutral policy lacked standing because they "failed to allege the invasion of a right that the law

protects"); *Arjay Assocs.*, 891 F.2d at 898 (stating that "[b]ecause appellants have no right to conduct foreign commerce in products excluded by Congress, they have in this case no right capable of judicial enforcement and have thus suffered no injury capable of judicial redress").

III.

Several considerations favor the above-described understanding of the injury in fact requirement, the first of which is its inherent logic. For an interest to be deemed "legally" protected or cognizable it must have some foundation in the law. *Claybrook*, 111 F.3d at 907 (stating, as quoted above, that "if the plaintiff's claim has no foundation in the law, he has no legally protected interest"). Thus, if the interest underlying a litigant's claimed injury is premised on a law that does not apply or does not exist, it directly follows that the litigant does not possess an interest that is "legally protected." *Cf. Pender*, 788 F.3d at 366 (indicating that a legally protected interest "aris[es] from constitutional, statutory, or common law" (citing *Lujan*, 504 U.S. at 578)).

Another consideration is the degree to which the approach taken by the majority of jurisdictions remains faithful to the proper role of standing as an element of Article III's constitutional limit on the exercise of judicial power. As the Supreme Court has said, "the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies'" and the Court "ha[s] always taken this to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. "Such a meaning is fairly implied by the text, since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all." *Id.* Declining to exercise jurisdiction to entertain a litigant's claim for which no law can be properly invoked and, as a result, no legally protected interest can be said to have been wrongfully invaded, comports with standing's role as a limitation on judicial power. A contrary approach to standing would effect an expansion of

judicial power without due regard for the autonomy of co-equal branches of government or the way in which the exercise of judicial power "can so profoundly affect the lives, liberty, and property of those to whom it extends," *Valley Forge Christian Coll.*, 454 U.S at 473.[10]

Most importantly, this matter poses separation-of-powers concerns. The Supreme Court has observed that the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819-20. The Movants bring a constitutional claim that implicates the authorities of co-equal branches of the government. First, the decisions the Movants seek have been classified by the Executive Branch in accordance with its constitutional authorities and the portions of the opinions that the Executive Branch has declassified have already been released. The Supreme Court has stressed that "[t]he President, after all, is the 'Commander in Chief of the Army and Navy of the United States'" and "[h]is authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Accordingly, "[f]or 'reasons . . . too obvious to call for enlarged discussion,' *CIA v. Sims*, 471 U.S. 159, 170, 105 S.Ct. 1881, 1888, 85 L.Ed.2d 173 (1985), the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *Egan*, 484 U.S. at 529.

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[10] Some might object that litigants should have an opportunity to develop the facts before a court assesses the scope or applicability of an asserted right. *E.g.*, *Judicial Watch*, 432 F.3d at 363 (Williams, J., concurring) (stating that "the use of the phrase 'legally protected' to require showing of a substantive right would thwart a major function of standing doctrine—to avoid premature judicial involvement in resolution of issues on the merits"). This case does not implicate those concerns. No amount of factual development would alter the outcome of the question of whether the First Amendment applies and affords a qualified right of access to classified, ex parte FISA proceedings.

"[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* In this case, the Movants seek access to information contained in this Court's opinions that the Executive Branch has determined is classified national security information.

Second, in the exercise of its constitutional authorities to make laws, *see United States v. Kebodeaux*, 133 S. Ct. 2496, 2502 (2013) (discussing Congress's broad authority to make laws pursuant to the Constitution's Necessary and Proper Clause), Congress has directed by statute that "[t]he record of proceedings under [FISA], including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence," 50 U.S.C. § 1803(c). While Congress has also established means by which certain opinions of this Court are to be subject to a declassification review and made public, it has made Executive Branch officials acting independently of the Court responsible for these actions. *See infra* Part V.

To be clear, the classified material the Movants' seek is not subject to sealing orders entered by this Court. *See* Movants' Reply In Supp. of Their Mot. for Release of Ct. Records 16 (requesting that the Court "unseal" the judicial opinions and release them "with only those redactions essential to protect information that the Court determines, after independent review, to warrant continued sealing"). No such orders were imposed in the cases in which the sought-after judicial opinions were issued; consequently, no question about the propriety of a sealing order is at play in this matter. The entirety of the information sought by the Movants is classified information redacted from public FISC opinions that is being withheld by the Executive Branch pursuant to its independent classification authorities and remains subject to the statutory mandate that the FISC maintain its records under the aforementioned security procedures. Adjudication

of the Movants' motion could therefore require the Court to delve into questions about the constitutionality, pursuant to the First Amendment, of the Executive Branch's national security classification decisions or the scope and constitutional validity of the statute's mandate that this Court maintain material under the required security procedures.

Together, these considerations commend the path paved by the majority of jurisdictions, which have held that an interest is not "legally protected" for the purpose of establishing standing when the constitutional, statutory or common-law source of the interest does not apply or does not exist. It bears emphasizing that the only interest the Movants identify to establish standing in this case is a qualified right to access judicial opinions. Mot. for Release of Ct. Records 1, 2, 10. The Movants claim that this interest is legally protected by the First Amendment. *Id.* at 10. The Movants further assert that this legally protected interest—that is, the qualified right to access judicial documents as protected by the First Amendment—was invaded when they were denied access to this Court's judicial opinions addressing the legality of bulk data collection, thereby causing injury. *Id.* Accordingly, the question for the Court is whether the First Amendment applies.

## IV.

Access to judicial records is not expressly contemplated by the First Amendment, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I. The Supreme Court, however, has inferred that, in conjunction with the Fourteenth Amendment, "[t]hese expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion). The Supreme Court has further explained that "[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to these explicit guarantees" and "[w]hat this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id.*

In *Richmond Newspapers*, the Supreme Court "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials." *Globe Newspaper Co v. Superior Court*, 457 U.S. 596, 603 (1982). The Supreme Court has advised, however, that, "[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute," *id.* at 607, but "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," *Press-Enter. Co. v. Superior Court,* 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). The Supreme Court has extended this qualified First Amendment right of public access only to

criminal trials, *Richmond Newspapers*, 448 U.S. at 580, the voir dire examination of jurors in a criminal trial, *Press-Enterprise I*, 464 U.S. at 508-13, and criminal preliminary hearings "as they are conducted in California," *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"). Most circuit courts, though, "have recognized that the First Amendment right of access extends to civil trials and some civil filings." *ACLU v. Holder*, 673 F.3d 245, 252 (4th Cir. 2011). To date, however, the Supreme Court has never "applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings or the transcripts of such proceedings." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003). Nor has "the Supreme Court . . . ever *indicated* that it would apply the *Richmond Newspapers* test to anything other than criminal judicial proceedings." *Id.* (emphasis in original).

"In *Press–Enterprise II*, the Supreme Court first articulated what has come to be known as the *Richmond Newspapers* 'experience and logic' test, by which the Court determines whether the public has a right of access to 'criminal proceedings.'"[11] *Id.* at 934. The "experience" test questions "whether the place and process have historically been open to the press and general public." *Press-Enterprise II*, 478 U.S. at 8. The "logic" test asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

This is not the first occasion on which the Court has confronted the question of whether a qualified First Amendment right of access applies to this Court's judicial records. Nearly a decade ago, the ACLU sought by motion the release of this Court's "orders and government

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[11] In addition to the *Richmond Newspapers* "experience and logic" tests, the Second Circuit has also "endorsed" a "second approach" that holds that "the First Amendment protects access to judicial records that are 'derived from or a necessary corollary of the capacity to attend the relevant proceedings.'" *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004)).

pleadings regarding a program of surveillance of suspected international terrorists by the National Security Agency (NSA) that had previously been conducted without court authorization." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 485. Assuming, for the sake of argument, that a qualified First Amendment right of access might extend to judicial proceedings other than criminal proceedings, the Court applied the requisite "experience" and "logic" tests acknowledged by the Supreme Court in *Press-Enterprise II* to determine whether such a right attached to the FISA electronic surveillance proceedings in which the sought-after orders and pleadings were filed. *Id.* at 491-97.

Considering the "experience" test first, the Court in *In re Motion for Release of Court Records* noted that "[t]he FISC ha[d] no . . . tradition of openness"; it "ha[d] never held a public hearing in its history"; a "total of two opinions ha[d] been released to the public in nearly three decades of operation"; the Court "ha[d] issued literally thousands of classified orders to which the public has had no access"; there was "no tradition of public access to government briefing materials filed with the FISC" or FISC orders; and the publication of two opinions of broad legal significance failed to establish a tradition of public access given the fact that "the FISC ha[d] . . . issued other legally significant decisions that remain classified and ha[d] not been released to the public . . . ." 526 F. Supp. 2d at 492-93. Accordingly, the Court determined that "the FISC is not a court whose place or process has historically been open to the public" and the "experience" test was not satisfied. *Id.* at 493.

As far as the "logic" test was concerned, although the Court in *In re Motion for Release of Court Records* agreed that public access might result in a more informed understanding of the Court's decision-making process, provide a check against "mistakes, overreaching or abuse," and benefit public debate, *id.* at 494, it found that "the detrimental consequences of broad public

access to FISC proceedings or records would greatly outweigh any such benefits" and would actually imperil the functioning of the proceedings:

> The identification of targets and methods of surveillance would permit adversaries to evade surveillance, conceal their activities, and possibly mislead investigators through false information. Public identification of targets, and those in communication with them, would also likely result in harassment of, or more grievous injury to, persons who might be exonerated after full investigation. Disclosures about confidential sources of information would chill current and potential sources from providing information, and might put some in personal jeopardy. Disclosure of some forms of intelligence gathering could harm national security in other ways, such as damaging relations with foreign governments.

*Id.* The Court cautioned that "[a]ll these possible harms are real and significant, and, quite frankly, beyond debate," *id.*, and "the national security context applicable here makes these detrimental consequences even more weighty," *id.* at 495. In addition, after rejecting the ACLU's argument that the Court should conduct an independent review of the Executive Branch's classification decisions under a non-deferential standard, the Court identified numerous ways that "the proper functioning of the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification [decisions] to a heightened form of judicial review":

> The greater risk of declassification and disclosure over Executive Branch objections would chill the government's interactions with the Court. That chilling effect could damage national security interests, if, for example, the government opted to forgo surveillance or search of legitimate targets in order to retain control of sensitive information that a FISA application would contain. Moreover, government officials might choose to conduct a search or surveillance without FISC approval where the need for such approval is unclear; creating such an incentive for government officials to avoid judicial review is not preferable. *See Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (noting strong Fourth Amendment preference for searches conducted pursuant to a warrant and adopting a standard of review that would provide an incentive for law enforcement to seek warrants). Finally, in cases that are submitted, the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decision[-]making and effective oversight could also be threatened.

*Id.* at 496. Finding that the weight of all these harms counseled against public access, the Court adopted the reasoning of other courts that "have found that there is no First Amendment right of access where disclosure would result in a diminished flow of information, to the detriment of the process in question," *id.*, and remarked that this reasoning "compels the conclusion that the 'logic test' . . . is not satisfied here," *id.* at 497.

Because both the "experience" and "logic" tests were "unsatisfied," the Court concluded that "there [was] no First Amendment right of access to the requested materials." *Id.* The Court also declined to exercise its own discretion to "undertake the searching review of the Executive Branch's classification decisions requested by the ACLU, because of the serious negative consequences that might ensue . . . ." *Id.* The Court noted, however, that "[o]f course, nothing in this decision forecloses the ACLU from pursuing whatever remedies may be available to it in a district court through a FOIA request addressed to the Executive Branch." *Id.*

In the motion that is now pending, the Movants acknowledge the decision in *In re Motion for Release of Court Records* but argue that the decision erred by (1) "limiting its analysis to whether two previously published opinions of this Court 'establish a tradition of public access'" and (2) "concluding that public access would 'result in a diminished flow of information, to the detriment of the process in question.'" Mot. for Release of Ct. Records 21 (quoting *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 493, 496). Taking these two arguments in order, the first argument is premised on a misreading of the Court's analysis and an overly broad framing of the legal question. While examining the experience prong of *Richmond Newspapers*, the Court did not "limit" its analysis to two previously-published opinions; to the contrary, the Court made clear that its rationale for holding that there was no tradition of public access to FISC electronic surveillance proceedings was demonstrated by, as stated above, the lack of any

public hearing in the (at that point) approximately 30 years in which the FISC had been operating and the fact that, with *the exception of* only two published opinions, the entirety of the court's proceedings, which consisted of the issuance of thousands of judicial orders, was classified and unavailable to the public. *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 492. In other words, at that time, a minimum of 99.98% of FISC proceedings was classified and nonpublic. It would be an understatement to say that such a percentage reflected a tradition of no public access. Indeed, the Court found that "the ACLU's First Amendment claim runs counter to a long-established and virtually unbroken practice of excluding the public from FISA applications and orders . . . ." *Id.* at 493.

The Movants gain no traction challenging *In re Motion for Release of Court Records* by suggesting that the framing of the "experience" test should be enlarged to posit whether public access historically has been available to any "judicial opinions interpreting the meaning and constitutionality of public statutes," Mot. for Release of Ct. Records 14, rather than focusing on whether *FISC proceedings* historically have been accessible to the public. Such an expansive framing of the type or kind of document or proceeding at issue plainly would sweep too broadly because it would encompass grand jury opinions, which often interpret the meaning and constitutionality of public statutes but arise from grand jury proceedings, which are a "paradigmatic example" of proceedings to which no right of public access applies, *In re Boston Herald, Inc.*, 321 F.3d 174, 183 (1st Cir. 2003) (quoting *Press-Enterprise II*, 478 U.S. at 9), and a "classic example" of a judicial process that depends on secrecy to function properly, *Press-Enter. II*, 478 U.S. at 9. As demonstrated by the decision in *Press-Enterprise II*, the Supreme Court certainly contemplated the consideration of narrower subsets of legal documents and proceedings in light of the fact that it entertained the question of whether the First Amendment

right of access applied to a subset of judicial hearing transcripts—i.e., "the transcript of a preliminary hearing growing out of a criminal prosecution," 478 U.S. at 3—and never intimated that its analysis should (or could) extend to transcripts of *all* judicial hearings growing out of a criminal prosecution. Furthermore, to the extent the Movants take issue with the Court's formulation of the "experience" test on the ground that it focused too narrowly on FISC practices, Mot. for Release of Ct. Records 21 (arguing that the experience test "does not look to the particular practice of any one jurisdiction"), the fact of the matter is that FISA mandates that the FISC "shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States," 50 U.S.C. § 1803(a)(1), so the FISC's virtually-exclusive[12] jurisdiction over such proceedings is a construct of Congress and, thereby, the American people.[13] The Movants offer no authority to support a suggestion that the concentration of FISC proceedings in one judicial forum detracts from the legitimacy or correctness of applying the "experience" test to FISC proceedings rather than a broader range of proceedings. Accordingly, *In re Motion for Release of Court Records* properly framed the "experience" test to examine whether FISC proceedings—proceedings that relate to applications made by the Executive Branch for the issuance of court orders approving authorities covered exclusively by FISA—have historically been open to the press and general public.

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[12] *See* 50 U.S.C. §§ 1803(a), 1823(a), 1842(b)(1), 1861(b)(1)(A), 1881b(a), 1881c(a)(1). Although applications seeking pen registers, trap-and-trace devices, or certain business records for foreign intelligence purposes may be submitted by the government to a United States Magistrate Judge who has been publicly designated by the Chief Justice of the United States to have the power to hear such applications, FISA makes clear that the United States Magistrate Judge will be acting "on behalf of" a judge of the FISC. 50 U.S.C. §§ 1842(b)(2), 1861(b)(1)(B). In practice, no United States Magistrate Judge has been designated to entertain such applications.

[13] Although FISC proceedings occur in a single judicial forum, the district court judges designated to comprise the FISC are from at least seven of the United States judicial circuits across the country. 50 U.S.C. § 1803(a)(1).

Attending to the "logic" prong of the constitutional analysis, the Movants argue that the Court "erred in concluding that public access would 'result in a diminished flow of information, to the detriment of the process in question.'" Mot. for Release of Ct. Records 21 (quoting *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 496). The Movants neglect, however, to explain why they believe this conclusion was flawed; nor do they otherwise refute the Court's identification of the detrimental effects that could cause a diminished flow of information as a result of public access, *see In re Motion for Release of Court Records*, 526 F. Supp. 2d at 494-96. Instead, the Movants offer the conclusory statement that "disclosure of the requested opinions would serve weighty democratic interests by informing the governed about the meaning of public laws enacted on their behalf." Mot. for Release of Ct. Records 21. While it undoubtedly is the case that access to judicial proceedings and opinions plays an important, if not imperative, role in furthering the public's understanding about the meaning of public laws, the Movants cannot ignore the Supreme Court's instruction that, "[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Press-Enter. II*, 478 U.S. at 8-9. *In re Motion for Release of Court Records* identified detrimental consequences that could be anticipated if the public had access to open FISC proceedings, some of which the Court noted were "comparable to those relied on by courts in finding that the 'logic' requirement for a First Amendment right of access was not satisfied regarding various types of proceedings and records" and the others were described as "distinctive to FISA's national security context." 526 F. Supp. 2d at 494. These detrimental consequences, which are quoted above, were deemed to outweigh any benefits public access would add to the functioning of such proceedings, *id.*, and the Court emphasized that "the national security

context applicable here makes these detrimental consequences even more weighty," *id.* at 495. Because the Movants made no attempt to dispute or discredit these detrimental effects, the resulting diminished flow of information that public access would have on the functioning of FISC proceedings, or the weight the Court gave to the detrimental effects, this Court is left to view their argument as simply a generalized assertion that they disagree with *In re Motion for Release of Court Records.*[14] That disagreement being duly noted, the Movants have not made a persuasive case that the result was wrong. Consequently, this Court has no basis to disclaim the conclusion in *In re Motion for Release of Court Records* that the 'logic' test was "not satisfied[,]" *id.* at 497, and, indeed, agrees with it.

Although the records to which the ACLU sought access in *In re Motion for Release of Court Records* implicated only electronic surveillance proceedings pursuant to 50 U.S.C. §§ 1804-1805, *id.* at 486, the analysis applying *Richmond Newspapers'* "experience" and "logic" tests involved reasoning that more broadly concerned all classified, ex parte FISC proceedings regardless of statutory section. *Id.* 491-97. Notwithstanding the passage of time, that analysis retains its force and relevance.[15] The Court also sees no meaningful difference between the

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[14] The Movants specify four ways public access to FISC judicial opinions is "important to the functioning of the FISA system," Mot. for Release of Ct. Records 17-20; however, the Movants never discuss these benefits vis-à-vis the detrimental effects identified by *In re Motion for Release of Court Records.*

[15] Although there have been several public proceedings since *In re Motion for Release of Court Records* was decided, *see, e.g.*, Misc. Nos. 13-01 through 13-09, *available at* http://www.fisc.uscourts.gov/public-filings, the statistical significance of those public proceedings makes no material difference to the question of whether FISA proceedings historically have been open to the public, especially when considered in light of the many thousands more classified and ex parte proceedings that have occurred since that case was concluded. Furthermore, by and large, those public proceedings have been in the nature of this one whereby, in the wake of the unauthorized disclosures about NSA programs, private parties moved the Court for access to judicial records or for greater transparency about the number of orders issued by the FISC to providers. They are therefore distinguishable from the type of

application of the "experience" and "logic" tests to FISC proceedings versus the application of these tests to sealed wiretap applications pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20. Like FISC proceedings, Title III wiretap applications are "subject to a statutory presumption *against* disclosure,"[16] "have not historically been open to the press and general public," and are not subject to a qualified First Amendment right of access, *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) (emphasis in original). Accordingly, persuaded by *In re Motion for Release of Court Records*, this Court adopts its analysis and, for the reasons stated therein, as well as those discussed above, holds that a First Amendment qualified right of access does not apply to the FISC proceedings that resulted in the issuance of the judicial opinions the Movants now seek, which consist of proceedings pursuant to 50 U.S.C. § 1842 (pen registers and trap and trace devices for foreign intelligence and international terrorism investigations) and 50 U.S.C. § 1861 (access to certain business records for foreign intelligence and international terrorism investigations).

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proceedings relevant to the instant motion and to *In re Motion for Release of Court Records*, namely ex parte proceedings involving classified government requests for authority to conduct electronic surveillance or other forms of intelligence collection.

[16] Title III mandates that wiretap "[a]pplications made and orders granted under this chapter shall be sealed by the judge." 18 U.S.C. § 2518(8)(b). As discussed *supra*, FISA mandates that "[t]he record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence." 50 U.S.C. § 1803(c).

## V.

As already noted, the only law the Movants cite as the source for their claimed right of public access to FISC judicial opinions is the First Amendment. If any other legal bases existed to secure constitutional standing for these Movants, they were obligated to present them. Because the First Amendment qualified right of access does not apply to the FISC proceedings at issue in this matter, the Movants have no legally protected interest and cannot show that they suffered an injury in fact for the purpose of meeting their burden to establish standing under Article III.[17]

To be sure, the Court does not reach this result lightly. However, application of the Supreme Court's test to determine whether a First Amendment qualified right of access attaches to the FISC proceedings at issue in this matter leads to the conclusion that it does not. Absent some other legal basis to establish standing, this means the Court has no jurisdiction to consider causes of action such as this one whereby individuals and organizations who are not parties to FISC proceedings seek access to classified judicial records that relate to electronic surveillance, business records or pen register and trap-and-trace device proceedings. Notably, the D.C. Circuit has advised that "[e]ven if holding that [the litigant] lacks standing meant that no one could initiate" the cause of action at issue "it would not follow that [the litigant] (or anyone else) must have standing after all. Rather, in such circumstance we would infer that 'the subject matter is committed to the surveillance of Congress, and ultimately to the political process.'" *Sargeant*,

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[17] The Court's decision involves scrutiny of whether the First Amendment qualified right of access applies, but only as part of the assessment of whether the Movants have standing under Article III. Because they do not, the Court dismisses their Motion for lack of jurisdiction without, strictly speaking, ruling on the merits of their asserted cause of action. Moreover, in the absence of jurisdiction, the Court may not consider any other legal arguments or requests for relief that were advanced in the motion.

130 F.3d at 1070 (quoting *Richardson*, 418 U.S. at 179). Indeed, "[t]he assumption that if [the litigants] have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

Evidence that public access to opinions arising from classified, ex parte FISC proceedings is best committed to the political process is demonstrated by Congress's enactment of the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 ("USA FREEDOM Act of 2015"), Pub. L. 114-23, 129 Stat. 268 (2015), which, after considerable public debate, made substantial amendments to FISA. One such amendment, which is found in § 402 of the USA FREEDOM Act and codified at 50 U.S.C. § 1872(a), added an entirely new provision for the public disclosure of certain FISC judicial opinions. Consequently, FISA now states that "the Director of National Intelligence, in consultation with the Attorney General, shall conduct a declassification review of each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court . . . that includes a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term 'specific selection term', and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion." 50 U.S.C. § 1872(a). Although the Movants characterize the enactment of this provision of the USA FREEDOM Act as evidence that "favors disclosure of FISC opinions" and bolsters their argument that "public access would improve the functioning of the process in question," Notice of Supplemental Authority 2 (Dec. 4, 2015), the Court does not believe that this provision alters the First Amendment analysis. FISC proceedings of the type at issue historically have not been, nor presently will be, open to the press and general public given that no amendment to FISA altered the statutory mandate for such proceedings to occur ex parte and

pursuant to the aforementioned security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence. Furthermore, although Congress had the opportunity to do so, it made no amendment to FISA that established a procedure by which the public could seek or obtain access to FISC records directly from the Court. Rather, after informed debate, Congress deemed public access as contemplated by 50 U.S.C. § 1872(a) to be the means that, all things considered, best served the totality of the American people's interests. Accordingly, the USA FREEDOM Act enhances public access to significant FISC decisions, as provided by § 1872(a), and ensures that the public will have a more informed understanding about how FISA is being construed and implemented, which appears to be at the heart of the Movants' interest. Mot. for Release of Ct. Records 2 (stating that "Movants' current request for access to opinions of this Court evaluating the legality of bulk collection seeks to vindicate the public's overriding interest in understanding how a far-reaching federal statute is being construed and implemented, and how constitutional privacy protections are being enforced").

## CONCLUSION

For the foregoing reasons, the Court will dismiss for lack of jurisdiction the pending 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. A separate order will accompany this Opinion.

January 25th, 2017

Rosemary M Collyer

**ROSEMARY M. COLLYER**
Presiding Judge, United States Foreign Intelligence Surveillance Court

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

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| IN RE OPINIONS & ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT. | Docket No. Misc. 13-08 |

**ORDER**

For the reasons set forth in the accompanying Opinion, it hereby is **ORDERED** that the 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 is **DISMISSED** for lack of jurisdiction.

**SO ORDERED.**

January 25th, 2017

Rosemary M Collyer

**ROSEMARY M. COLLYER**
Presiding Judge, United States Foreign
Intelligence Surveillance Court

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

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| IN RE OPINIONS & ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT | ) ) ) ) ) | Docket No. Misc. 13-08 |

**THE UNITED STATES' LEGAL BRIEF TO THE EN BANC COURT**
**IN RESPONSE TO THE COURT'S ORDER OF MARCH 22, 2017**

The Presiding Judge's opinion in this case persuasively explains that, because movants have not established an injury to a *legally protected* interest that is applicable here, movants lack Article III standing, and therefore this Court lacks jurisdiction over this action. While two prior opinions of this Court have found jurisdiction over similar actions, neither of those opinions analyzed the question addressed here. The Presiding Judge's opinion is the first from this Court to address this issue, and it does so thoroughly and correctly. The en banc Court should similarly find that there is no Article III jurisdiction here.

## BACKGROUND

It is well-settled that there is no First Amendment public right of access to the proceedings, records, and rulings of this Court. *See In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, 2017 WL 427591, at *19-21 (FISA Ct. Jan. 25, 2017); *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, 2014 WL 5442058, at *4 n.10 (FISA Ct. Aug. 7, 2014); *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, 2008 WL 9487946, at *3 (FISA Ct. Aug. 27, 2008); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 492-97 (FISA Ct. 2007). Indeed, the en banc Court in this case recognized this principle in the course of

ordering briefing. *See* Order 1, Mar. 22, 2017 (ordering briefing on "the question of whether Movants established Article III standing notwithstanding that a First Amendment qualified right of access does not apply to the judicial opinions they seek"). This conclusion stems from a straightforward application of the Supreme Court's decision in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). *See also Dhiab v. Trump*, __ F.3d __, 2017 WL 1192911, at *5 (D.C. Cir. Mar. 31, 2017) (Op. of Randolph, J.) (observing that "from the beginning of the republic to the present day, there is no tradition of publicizing secret national security information involved in civil cases, or for that matter, in criminal cases," as the "tradition is exactly the opposite").

This case, however, is the first in which the Court has considered the related but distinct question of whether, given that it is plain under this Court's precedent that they lack any First Amendment right of access or other legal right to the material they seek, movants may nonetheless claim an injury to a "legally protected right" as is necessary for Article III standing and thus subject-matter jurisdiction.

## I. Prior Decisions of the Court

The first time this Court addressed an argument that the First Amendment provided a right of access to its proceedings and records, the Court rejected the movant's argument on the merits without addressing the question of Article III standing. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007). Applying the standards set forth in *Press-Enterprise*, the Court found both that the movant's claim ran "counter to a long-established and virtually unbroken practice of excluding the public from FISA applications and orders," 526 F. Supp. 2d at 493, and that access would not be logical because the "detrimental consequences" from public access "would greatly outweigh any" benefits, *id.* at 494. The Court's opinion in that case includes a jurisdictional analysis, but that analysis addresses only whether the FISC's

specialized jurisdiction, as delineated by Congress in the Foreign Intelligence Surveillance Act, permitted it to adjudicate the case. *Id.* at 486-87. The opinion in that case did not address Article III standing.

In a subsequent case, in which three movants claimed a First Amendment right to certain opinions of this Court, the Court addressed a different aspect of Article III standing than the one being considered here, namely whether the movants' claimed injuries were sufficiently concrete and particularized. *See In re Orders of this Court Interpreting Section 215 of the Patriot Act*, 2013 WL 5460064, at *2-4 (FISA Ct. Sept. 13, 2013). The Court found that two of the movants had sufficiently particularized injuries because "access to the [opinions] would assist" them in public debates. *Id.* at *4. The Court dismissed the third movant because the record contained "no information as to how the release of the opinions would aid [that entity's] activities, or how the failure to release them would be detrimental." *Id.* at *4 n.13.[1] The Court did not address whether any injury that may have existed was an injury to a legally protected interest.

## II. Procedural Background

In the instant case, three movants sought access to "opinions addressing the legal basis for the 'bulk collection' of data." Mot. for the Release of Court Records 1, Nov. 6, 2013. Movants argued that they had Article III standing because they had "a concrete and particularized injury." *Id.* at 10. They asserted a First Amendment right of access to the opinions, notwithstanding earlier decisions from this Court holding that there is no First Amendment right of access to FISC proceedings and rulings. *See id.* at 12-24. Finally, they

[1] Subsequently, the third movant provided a declaration that explained how the documents sought would advance its mission, and the Court reinstated it as a party. *See* Opinion and Order at 10, *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, Misc. 13-02 (FISA Ct. Aug. 7, 2014), available at http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-6_0.pdf.

argued that, in implementing the purported constitutional right of access, the Court should first invoke FISC Rule 62(a), order a declassification review, and then set up another round of briefing to adjudicate the government's classification decisions. *Id.* at 24-25.

In its responsive brief, the government noted that the opinions sought by movants had all been identified (there were four) and publicly released, with only classified material redacted. United States' Opp'n to Mot. 1-2, Dec. 6, 2013. The government argued that the movants lacked standing to seek an additional classification review or FISC publication because Rule 62(a) provided the movants with no rights. *Id.* at 2-4. The government further observed that both FISC Rule 3 and the FISC's own holdings preclude the Court from ordering the release of information that the executive branch has deemed classified. *Id.* at 4-7. The government noted that Congress has provided a mechanism for judicial review of classification decisions in the Freedom of Information Act ("FOIA"), pursuant to which appropriate review occurs in a district court. *Id.* at 4.

In reply, movants once again asserted their First Amendment arguments, characterizing both Rule 62(a) and FOIA as not "adequate." Reply 3, Dec. 20, 2013.

In an extensive opinion written by the Presiding Judge, the Court addressed for the first time the question of whether, in the absence of any First Amendment or other right of access to FISC opinions, movants can establish an injury to a legally protected interest as is required for Article III standing. Surveying numerous cases from the Supreme Court and circuit courts, this Court observed that "the Supreme Court and a majority of federal jurisdictions have concluded that an interest is not 'legally protected' or cognizable for the purpose of establishing standing when its asserted legal source—whether constitutional, statutory, common law or otherwise—does not apply or does not exist." 2017 WL 427591, at *8. As this Court has previously held

that there is no First Amendment right of access to this Court's proceedings, records, and rulings, and movants had identified no other legal right to the classified material sought, movants could identify no injury to a legally protected interest and thus lacked Article III standing. *Id.* at *9-15.

Movants filed a motion to alter or amend the Court's judgment. Movants' Mot. to Alter or Amend the J. & for Joint Briefing with Case No. Misc. 16-01, Feb. 17, 2017 ("Mot. to Alter or Amend"). They argued that the Presiding Judge's opinion "runs contrary to previous decisions of this Court," *id.* at 4, although the two previous decisions movants cited had not considered the legal question at issue here. *See supra* Part I. Movants further appeared to argue that, even if their First Amendment claim is meritless, they should be able to use their assertion of such a claim as a basis for Article III standing, and then use the resultant jurisdiction to ask the court to release the material sought as a matter of "discretion[]." *Id.* at 5-6.

While the Court has not ruled on the Motion to Alter or Amend, it issued an order calling for en banc review "on the ground that it is necessary to secure or maintain uniformity of the court's decisions." Order 1, Mar. 22, 2017. The Court's en banc order states that it will only be reconsidering the standing question and will not be revisiting the line of cases that have consistently held that there is no First Amendment right of access to FISC proceedings, records, and rulings. *Id.* at 1 n.1.

## ARGUMENT

It has long been recognized that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560

(1992). To establish standing, movants must establish three elements, one of which is injury in fact. "To establish injury in fact, a plaintiff must show [*inter alia*] that he or she suffered 'an invasion of a legally protected interest.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560).

## I. Movants Lack Standing to Assert a First Amendment Claim

As the Presiding Judge's opinion correctly holds, "when the source of the legal interest . . . does not apply or does not exist, the litigant has not established a colorable claim to a right that is 'legally protected' or 'cognizable' for the purpose of establishing an injury in fact that satisfies Article III's standing requirement." 2017 WL 427591, at *13 (citing cases). Thus, because this Court has previously held that there is no First Amendment right of access to the proceedings, records, or rulings of this Court, movants have no "legally protected interest" that has been injured. Without an injury to a legally protected interest, they lack Article III standing.

While the fact that a litigant may ultimately lose on the merits does not preclude a finding of standing, a litigant must do more than cite a rule of law and identify some relief it would like in order to establish jurisdiction. Rather, there must be an actual legal right that could plausibly apply under the circumstances alleged or presented. As the Seventh Circuit has explained, "the Supreme Court's standing doctrine requires litigants to establish an injury to an interest that the law protects when it is *wrongfully* invaded, and this is quite different from requiring them to establish a *meritorious* legal claim." *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) (internal quotation marks omitted) (emphasis in original). In other words, to establish standing, a plaintiff need not establish wrongfulness – *i.e.*, that its legal right was unlawfully invaded – but it must establish that there exists an applicable legal right that might plausibly have been invaded.

Thus, a plaintiff invoking the Freedom of Information Act to obtain government agency records will generally have standing even if it ultimately turns out that the documents are properly exempt from disclosure; by contrast, a plaintiff who invokes FOIA to demand original artwork from the National Gallery of Art would lack standing, as the rights conveyed by FOIA plainly do not apply to such artwork. Similarly, a plaintiff asserting a First Amendment right to protest on a public sidewalk near a government building would likely have standing, while a plaintiff asserting a First Amendment right to sit inside the Oval Office or to attend a Supreme Court deliberative conference would not.

The application of this principle here is straightforward. The movants lack an injury to a legally protected interest because they base their claim on a First Amendment right of access that simply does not exist in this context. To be sure, the First Amendment provides rights to movants. And those rights include a right of access to certain places. But, as this Court has repeatedly held, the First Amendment right of access does not extend to proceedings or rulings of the FISC. *See* Order 1, Mar. 22, 2017 ("[A] First Amendment qualified right of access does not apply to the judicial opinions [the Movants] seek."). Where, as here, a movant's claim "has no foundation in law, he has no legally protected interest and thus no standing to sue." *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997).

Movants are similarly situated to the plaintiffs in the cases described in the Presiding Judge's opinion in this case, in which courts found a lack of any legally protected interest, and therefore a lack of Article III standing. *See* 2017 WL 427591, at *9-13. For example, in *McConnell v. FEC*, certain plaintiffs sought to advance an equal protection right that applied in some circumstances, but not in the circumstances at issue in that case. 540 U.S. 93, 227 (2003), *overruled in part on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010). The Supreme

Court examined "'the nature and source of the claim asserted,'" and found that because the asserted right did not apply, the claim of injury was "not to a legally cognizable right." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Thus, those plaintiffs lacked standing. *Id.*

In *Bond v. Utreras*, an intervenor asserted an interest similar to the one asserted by movants here, namely a right of access to documents related to a judicial proceeding. *See* 585 F.3d 1061 (7th Cir. 2009). The Seventh Circuit acknowledged the existence of a "general right of public access to judicial records," but found that, because that right did not extend to the records sought by the intervenor (unfiled discovery documents), the intervenor had "no injury to a legally protected interest and therefore no standing." *Id.* at 1074, 1078. Similarly, in *Griswold v. Driscoll*, plaintiffs, like movants here, alleged a violation of their First Amendment rights. 616 F.3d 53 (1st Cir. 2010). In an opinion by Retired Justice Souter, the court held that because the First Amendment did not apply to the material at issue, the plaintiffs established neither standing nor a claim. *Id.* at 56, 60.

*McConnell v. FEC*, *Bond v. Utreras*, and *Griswold v. Driscoll* are just three of the many cases that, as this Court correctly found, support the holding in the Presiding Judge's opinion. In their motion to alter or amend the judgment, movants cited two cases that they contend are contrary. *See* Mot. to Alter or Amend 5.[2] But these cases are consistent with the Presiding Judge's opinion. In each of the cases relied on by movants, the court found that the asserted right did exist and did apply. *See Carlson v. United States*, 837 F.3d 753, 759 (7th Cir. 2016); *Doe v. Public Citizen*, 749 F.3d 246, 264 (4th Cir. 2014). It was on this basis that the court in *Carlson* distinguished *Bond v. Utreras.* See 837 F.3d at 760. *Carlson* and *Doe* are likewise

[2] Movants also argued that their injury "is concrete and particularized." Mot. To Alter or Amend 4 (citing cases). This argument is a *non sequitur*. Movants injury is insufficient, not because it is generalized or abstract, but because it is not an injury to a legally protected interest.

distinguishable from this case because here, movants have not asserted a right that exists and applies in these circumstances.

## II. To the Extent They Assert Any Other Claims, Movants Lack Both Standing and a Cause of Action

In its order inviting en banc briefing, the Court observed that "the First Amendment qualified right of access was the only ground on which Movants asserted standing." Order 1 n.1, Mar.22, 2017. The government agrees with this observation, but it appears that movants may not. In their motion to alter or amend, movants referred to "all of Movants' claims," and challenged what they described as the Court's conclusion that "in the absence of a viable First Amendment claim, Movants also lack standing to seek relief under Rule 62 [of this Court's rules] and the Court's inherent supervisory powers over its own records." Mot. to Alter or Amend 1, 5. The arguments that movants put forward in this regard are wrong.

Because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), movants "must demonstrate standing for each claim [they] seek[] to press" and "for each form of relief" they seek. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quotation marks omitted). Thus, whether or not movants have standing to assert their First Amendment claim (and they do not), they have to separately establish standing for each additional claim they might assert in this or any case. Because neither this Court's inherent supervisory powers nor Rule 62 provide any cause of action or legal rights to movants, neither provides a legally protected interest as would be necessary for Article III standing.

The Court's inherent supervisory powers obviously provide no rights to movants (or anyone else) and cannot support a suit or motion by movants. An opposite conclusion would mean that anyone could file an action in any court to ask the court to take nearly any action with regard to its employees or cases. Movants rely on *In re Motion for Release of Court Records*,

526 F. Supp. 2d 484 (FISA Ct. 2007), but that case provides no support to their position. There, the Court held that it had inherent "jurisdiction in the first instance to adjudicate a claim of right to the court's" records even though no statute provided such jurisdiction. *Id.* at 487. The inherent jurisdiction was thus jurisdiction to adjudicate a claim of right, but this inherent jurisdiction did not supply either the claim or the right.[3]

Rule 62 similarly grants movants no rights and no cause of action. That rule provides:

> The Judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the 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 (or its successor).

FISC Rule 62(a).

Movants, of course, are neither the authoring judge of any opinion nor parties to any of the underlying cases at issue. *See In re Orders*, 2013 WL 5460064, at *5 (holding that "the term 'party' in Rule 62(a) refers to a party to the proceeding that resulted in the 'opinion, order, or other decision' being considered for publication"). Thus, movants can claim no "legally protected interest" stemming from Rule 62. Without such an interest, they can have no standing to invoke the rule. Additionally, the rule does not provide them with any cause of action.

Movants' argument that this Court's holding in this case "render[s] the relief afforded by Rule 62 all but illusory," Mot. to Alter or Amend 6, misunderstands the nature of Rule 62. It is a rule of procedure for litigation pending before the Court, not a substantive right for the general

[3] Notably, the Court in that case specifically declined to rule on whether it possessed "residual discretion" to release any records. The Court held that even if it had such discretion, it would decline to exercise it "because of the serious negative consequences that might ensue." 526 F. Supp. 2d at 497. The Court ruled against the movants as to all claims. *See id.*

public. Like most rules of procedure, it governs the parties in cases and does not provide rights or a cause of action to other individuals or entities.

Movants also argue that this Court's holding is "in tension with the canon of constitutional avoidance, because it would require the FISC to resolve constitutional questions (as it did here) before considering the non-constitutional ground for relief presented by Movants." *Id.* But there is no "non-constitutional ground for relief" here, because Rule 62 does not provide any rights or cause of action to movants. Moreover, the canon of constitutional avoidance does not allow a court to assert jurisdiction in instances where Article III of the Constitution does not permit it.[4]

[4] There is an additional basis for rejecting any "claim" for discretionary dissemination. All of the unclassified material sought in this case has been released. The only remaining responsive material is classified. This Court does not release classified material to the public. FISC Rule 3; *cf. Dhiab*, 2017 WL 1192911, at *5 ("One may be confident that over many years none of the members of our court, past or present, ever supposed that in complying with [rules governing handling of classified material], we were somehow violating the Constitution.").

Of course, "there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions." *Motion for Release*, 526 F. Supp. 2d at 491; *accord Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) ("For reasons too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible.") (citation, quotation marks, and alteration omitted); *Bismullah v. Gates*, 501 F.3d 178, 187-88 (D.C. Cir. 2007) ("[I]t is within the role of the executive to acquire and exercise the expertise of protecting national security [and] [i]t is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role.").

## CONCLUSION

For the foregoing reasons, and the reasons stated in the Presiding Judge's opinion in this case, movants lack Article III standing, and this action should be dismissed for want of jurisdiction.

April 17, 2017

Respectfully submitted,

MARY B. MCCORD
Acting Assistant Attorney General
for National Security

STUART EVANS
Deputy Assistant Attorney General
National Security Division

*/s/ Jeffrey M. Smith*
JEFFREY M. SMITH
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Phone: (202) 514-5600
Fax: (202) 514-8053

*Attorneys for the United States of America*

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served by the Government via first class mail on this 17th day of April 2017, addressed to:

Patrick Toomey
ACLU Foundation
125 Broad St., 18th Floor
New York, NY 10004

Arthur B. Spitzer
ACLU Foundation of D.C.
4301 Connecticut Ave., N.W.
Suite 434
Washington, DC 20008

David A. Schulz
Media Freedom & Information Access Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520

*Counsel for Movants*

*/s/ Jeffrey M. Smith*

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

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| IN RE OPINIONS & ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT | ) ) ) ) ) | Docket No. Misc. 13-08 |

**THE UNITED STATES' RESPONSE TO**
**MOVANT'S EN BANC OPENING BRIEF**

The question before the en banc Court is "whether Movants established Article III standing notwithstanding that a First Amendment right of access does not apply to the judicial opinions they seek." Order 1 (Mar. 22, 2017). The answer is straightforward: movants have not established Article III standing because they cannot identify a *legally protected* interest given that the right they claim does not apply. Movants seek to resist this obvious conclusion by suggesting that their underlying argument – that there is a First Amendment right of public access to Foreign Intelligence Surveillance Court (FISC) proceedings and records, including the classified material at issue in this case – is open for debate. But as the question before the en banc Court makes clear, movants' First Amendment argument, which was never colorable, is foreclosed. As such, they have no legally protected interest and thus no standing.

## I. Movants Lack an Injury to a Legally Protected Interest

As movants concede, *see* Movants' Br. 10, the Supreme Court has held that there is no federal jurisdiction over a claim that is "insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quotation marks omitted). Thus, to have standing, movants must establish "an injury to an interest that the law protects when it is wrongfully invaded." *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) (emphasis omitted). Movants have not established

such a legally protected interest. Rather, the interest they posit – a supposed First Amendment right of access to proceedings, records, and rulings of this Court – is implausible in light of binding Supreme Court caselaw and is foreclosed by prior opinions of this Court. Indeed, that claim's lack of merit is part of the premise pursuant to which this Court accepted en banc review.

Movants rely on *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), but that opinion provides for a First Amendment right of access to judicial proceedings only where both (1) "the place and process have historically been open to the press and general public" (the "experience" test), and (2) "public access plays a significant positive role in the functioning of the particular process in question" (the "logic" test). *Id.* at 8. Any claim that there is a tradition of public access to "proceedings that relate to applications made by the Executive Branch for the issuance of court orders approving authorities covered exclusively by" the Foreign Intelligence Surveillance Act ("FISA"), *In re Opinions & Orders of this Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, 2017 WL 427591, at *19 (FISA Ct. Jan. 25, 2017), is both baseless and foreclosed. And any argument that it would be logical to open up to the public classified proceedings or documents concerning foreign intelligence gathering is insubstantial, given the prospect of harms to national security that "are real and significant, and, quite frankly, beyond debate." *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 494 (FISA Ct. 2007).

The insubstantiality of movants' First Amendment argument has been explained by this Court multiple times. The Court first rejected this argument a decade ago when one of the movants here, the American Civil Liberties Union (ACLU), asserted it in an effort to obtain public access to FISC proceedings and rulings, including rulings that "'include legal analysis and legal rulings concerning the meaning of FISA.'" *Id.* at 493 (quoting brief of ACLU). This Court

explained that "the ACLU's First Amendment claim runs counter to a long-established and virtually unbroken practice of excluding the public from FISA applications and orders." *Id.* The Court further explained that the public access sought by the ACLU failed the "logic" test because it could assist adversaries in avoiding surveillance, seriously harm those targeted for surveillance, chill cooperation with investigators, damage relations with foreign governments, "chill the government's interactions with the Court," and threaten "the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decisionmaking and effective oversight." *Id.* at 494-96; *accord In re Motion for Release of Court Records*, Misc. 07-01, at 6-7 (FISA Ct. Feb. 8, 2008); *In re Proceedings Required by § 702 of the FISA Amendments Act of 2008*, 2008 WL 9487946, at *3-4 (FISA Ct. Aug. 27, 2008).

Even before the Presiding Judge's opinion in this case, it was clear and established that the purported First Amendment right of access to FISC proceedings and records did not exist. In that opinion, the Presiding Judge explained that movant's attempt to resist the Court's earlier holdings was "premised on a misreading of the Court's analysis and an overly broad framing of the legal question." *In re Opinions & Orders*, 2017 WL 427591, at *19. The Presiding Judge further explained that the correct framing of the "experience" test was whether "proceedings that relate to applications made by the Executive Branch for the issuance of court orders approving authorities covered exclusively by FISA" have "historically been open to the press and general public." *Id.* They have not; indeed, the record "reflect[s] a tradition of no public access." *Id.* Regarding the "logic" test the Presiding Judge noted that movants have failed "to explain why they believe [the Court's earlier] conclusion was flawed" and failed to "refute the Court's identification of the detrimental effects that could cause a diminished flow of information as a

result of public access," instead offering only "a generalized assertion that they disagree." *Id.* at *20 (citing *Motion for Release*, 526 F. Supp. 2d at 494-96).

Movants' underlying First Amendment argument was insubstantial from its inception, and it is now foreclosed. The question before the *en banc* Court is whether, given that it is established that there is no First Amendment right of access to FISC proceedings, records, and rulings, movants have nevertheless established "'an invasion of a *legally protected* interest.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (emphasis added). They have not because the interest they assert – public access to FISC proceedings and records – is not *legally protected. See In re Opinions & Orders*, 2017 WL 427591, at *16-21.

Movants cite to the D.C. Circuit's recent decision in *Dhiab v. Trump*, __ F.3d __, 2017 WL 1192911 (D.C. Cir. Mar. 31, 2017). That case further undermines movants' First Amendment argument. *See id.* at *5 (Op. of Randolph, S.J.) (observing that "from the beginning of the republic to the present day, there is no tradition of publicizing secret national security information involved in civil cases, or for that matter, in criminal cases," as the "tradition is exactly the opposite"). Movants point out that in *Dhiab*, the request for classified material was rejected on the merits, not for lack of standing. Movant's Br. 8. True, but that is because the claim in *Dhiab* was not clearly foreclosed by *Press-Enterprise* and other precedent, as the claim here is. *Cf. Bond*, 585 F.3d at 1073 (explaining that "the Supreme Court's standing doctrine requires litigants to establish an injury to an interest that the law protects when it is *wrongfully* invaded, and this is quite different from requiring them to establish a *meritorious* legal claim") (quotation marks omitted).

In light of *Press-Enterprise* and this Court's line of cases described above, Movants' asserted First Amendment right of access to FISC proceedings, records, and rulings "has no foundation in law." *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997). As such, movants have "no legally protected interest and thus no standing to sue." *Id.*

Movants' appeal to what they call "compelling legal and practical reasons" to reject their claim on the merits rather than on jurisdictional grounds, *see* Movants' Br. 13, fares no better. The canon of constitutional avoidance has no application here. Both the question of Article III jurisdiction and the scope of the First Amendment are constitutional questions, and both must be addressed. As the government explained in its opening brief, there are no nonconstitutional bases for relief here. *See* Gov't Br. 9-11. Nor is the "burden of proof" a relevant consideration. The question whether movants' First Amendment claim is insubstantial or foreclosed is a purely legal one on which neither party bears a burden to prove disputed facts.

## II. Movants' Misunderstand the Constitutional Power To Classify and To Protect Sensitive National Security Information

Movants' contention that Executive Branch classification should have no "significance" to the judiciary, Movant's Br. 18, is dangerously misguided. The Executive Branch has an inherent constitutional power "to classify and control access to information bearing on national security." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). And "[f]or 'reasons too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it.'" *Id.* at 529 (quoting *CIA v. Sims*, 471 U.S. 159, 170 (1985)) (alteration omitted). Preventing access to properly classified information is a "compelling interest." *Id.* at 527 (quotation marks omitted). This executive branch constitutional prerogative is routinely and uniformly respected by the judiciary, and rightly so. *See, e.g., NCRI v. Dep't of*

*State*, 251 F.3d 192, 209-10 (D.C. Cir. 2001) (determinations about access to classified information are "within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect"). Apart from the deferential standard applied in cases such as those brought pursuant to the Freedom of Information Act ("FOIA"), courts have long recognized that classification decisions are committed to the executive branch. *See, e.g.*, *Egan*, 484 U.S. at 529; *Bismullah v. Gates*, 501 F.3d 178, 187-88 (D.C. Cir. 2007); *McGehee v. Casey*, 718 F.2d 1137, 1147-50 & n.22 (D.C. Cir. 1983) (holding that the court's role was limited to "merely . . . determin[ing] that the CIA properly classified the deleted items," as the court "cannot second-guess" the executive branch's national security judgments).

The cases relied on by movants are not to the contrary. In *In re Washington Post Co.*, the court imposed procedural requirements for closing a sentencing hearing and sealing documents in a criminal case after determining that those procedures would *not* "create an unacceptable risk" of the "inappropriate disclosure of classified information," an important consideration given that such "disclosure of classified information could endanger the lives of both Americans and their foreign informants." 807 F.2d 383, 391 (4th Cir. 1986). In *United States v. Rosen*, the court recognized that, "[o]f course, classification decisions are for the Executive Branch," but held that the presence of classified information in a case would not justify "effectively clos[ing] portions" of a jury trial. 487 F. Supp. 2d 703, 717, 720 (E.D. Va. 2007). In neither case did the court overrule any classification decision or order the release of any classified information, and both courts observed that classified court records and rulings could be sealed from the public. *See Washington Post*, 807 F.2d at 391; *Rosen*, 487 F. Supp. 2d at 706, 720.

## CONCLUSION

For the reasons stated above, those stated in the government's April 17, 2017 submission, and those explained in the Presiding Judge's opinion in this case, movants lack Article III standing, and this action should be dismissed for want of jurisdiction.

May 1, 2017

Respectfully submitted,

DANA J. BOENTE
Acting Assistant Attorney General
for National Security

STUART EVANS
Deputy Assistant Attorney General
National Security Division

*/s/ Jeffrey M. Smith*
JEFFREY M. SMITH
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Phone: (202) 514-5600
Fax: (202) 514-8053

*Attorneys for the United States of America*

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

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| IN RE OPINIONS AND ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT | ) | Docket No.: Misc. 13-08 |

**THE UNITED STATES' OPPOSITION TO THE MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, *ET AL.*, FOR THE RELEASE OF COURT RECORDS**

JOHN P. CARLIN
Acting Assistant Attorney General
for National Security

J. BRADFORD WIEGMANN
Deputy Assistant Attorney General

TASHINA GAUHAR
Deputy Assistant Attorney General

NICHOLAS J. PATTERSON
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Phone: (202) 514-5600
Fax: (202) 514-8053

*Attorneys for the United States of America*

The American Civil Liberties Union and two other entities (hereinafter, "ACLU") seek the publication of opinions of this Court addressing "the legal basis for the 'bulk collection' of data by the United States government under the Foreign Intelligence Surveillance Act ('FISA'), 50 U.S.C. § 1861 *et seq.*, including but not limited to 50 U.S.C. § 1842." Mot. at 1. The ACLU's motion should be dismissed because the relevant opinions have been subjected to classification review and the unclassified portions released, and there is no basis for the Court to order a new classification review.

## ARGUMENT

### I. The ACLU's Motion Should Be Dismissed Because Declassified Versions of the Requested Opinions Have Already Been Released.

The ACLU's motion should be dismissed because this Court and the Government have already released declassified versions of the opinions that the Government has determined are responsive to the ACLU's motion after the Government conducted a classification review with the objective to release as much information in the opinions as possible consistent with national security. A new classification review would duplicate the result of the thorough review the Government already conducted.

After a review of this Court's opinions, the Government has identified four responsive opinions that address the legal basis for the "bulk collection" of data by the United States Government under the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*, including but not limited to 50 U.S.C. § 1842. After a classification review conducted by the Executive Branch consistent with Executive Order 13,526 (Dec. 29, 2009), two of the opinions were released by the Executive Branch and two others were published by this Court. They are:

(1) the Court's Opinion (J. Kollar-Kotelly) granting the Government's application seeking the collection of bulk electronic communications metadata pursuant to Section 402 of the Foreign Intelligence Surveillance Act, the Pen Register and Trap and Trace provision. (Released by the Executive Branch on November 18, 2013), *available at* http://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf.

(2) the Court's Opinion (J. Bates) granting the Government's application seeking to re-instate the National Security Agency's bulk electronic communications metadata program following the Government's suspension of the program for several months to address compliance issues identified by the Government and brought to the Court's attention. (Released by the Executive Branch on November 18, 2013), *available at* http://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

(3) the Court's Opinion (J. McLaughlin) reauthorizing the collection of bulk telephony metadata under the "business records" provision of the Foreign Intelligence Surveillance Act and re-affirming that the bulk telephony metadata collection is both lawful and constitutional. (Published by this Court on October 18, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-158-memo-131018.pdf.

(4) the Court's Opinion (J. Eagan) reauthorizing the collection of bulk telephony metadata under Section 215 of the USA PATRIOT Act and affirming that the bulk telephony metadata collection is both lawful and constitutional. (Published by this Court on September 17, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf.

Because the Government has already conducted a thorough classification review of these opinions, there is no basis to require the Government to review them again.

## II. The Court Should Not Order the Government to Conduct New Classification Reviews of the Opinions.

### *A. The ACLU does not have standing to seek declassification.*

Although this Court has inherent authority to require a classification review of its own opinions as a matter of discretion, and can order such a review *sua sponte,* that authority should be exercised in a manner that is consistent with FISA and this Court's rules. FISA does not provide third parties with the right to seek disclosure of classified FISC records. *In re Mot. for*

*Release of Ct. Records*, 526 F. Supp. 2d 484, 491 (Foreign Intel. Surv. Ct. 2007). Under United States Foreign Intelligence Surveillance Court ("FISC") Rule of Procedure 62(a) ("FISC Rule"), only a "party" may move the Court for publication of an opinion.[1] This Court recently concluded that "the term 'party' in Rule 62(a) refers to a party to the proceeding that resulted in the 'opinion, order, or other decision' being considered for publication." *In re Orders of this Ct. Interpreting Section 215 of the Patriot Act*, Docket No. Misc. 13-02, Opinion and Order, at 11 (Foreign Intel. Surv. Ct. Sept. 13, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-order-130813.pdf. The ACLU is not a party to any of the proceedings that generated the relevant opinions and, therefore, does not have standing to move for publication of the opinions.

FISC Rule 62(a)'s limitation on who can move for publication of an order, opinion, or other decision is in accord with the fact that a comprehensive statutory regime—the Freedom of Information Act ("FOIA")—governs requests for documents classified by and in the possession of the Executive Branch. *See In re Release*, 526 F. Supp. 2d at 491 n.18, 496 n.32. As this Court has recognized, although this Court has supervisory power over its own records and could

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[1] **Rule 62. Release of Court Records**

> **(a) Publication of Opinions.** The judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the 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 (or its successor).

FISC Rule of Procedure 62(a).

conduct a review "under the same standards as a district court would in FOIA litigation," "there would be no point in this Court's merely duplicating the judicial review that the ACLU, and anyone else, can obtain by submitting a FOIA request to the Department of Justice for these same records." *Id.* at 496 n.32.

The Court should insist that the ACLU respect, and not through its motion attempt to circumvent, the FOIA process enacted by Congress. Accordingly, the Government submits that the Court should not exercise its inherent discretion to determine whether to order a declassification review in this case. FOIA carefully prescribes a process whereby parties must first seek administrative review of FOIA requests before bringing litigation, and FOIA includes additional exemptions beyond the classification exemptions that would overlap with a declassification review ordered by the FISC. Such duplicative processes therefore raise administrative concerns, and the FISC should resist invitations to serve as an alternative forum for FISC-related matters that can and should be resolved through the FOIA process established by Congress.

*B. This Court traditionally does not involve itself with the Executive Branch's classification decisions.*

The ACLU seeks an order giving it full access to the opinions or, in the alternative, requiring the Government to justify any redactions to the Court as necessary to prevent a substantial probability of harm to a compelling interest. The ACLU also seeks the right to contest redactions. The ACLU invokes the First Amendment, but the First Amendment does not justify judicial (or ACLU) involvement in Executive Branch classification decisions.

Putting aside the fact that this Court has repeatedly rejected arguments that litigants such as the ACLU have a First Amendment right to access classified FISA court records,[2] the Court does not interfere with the Government's classification process and classification decisions. Under FISC Rule 62(a), the Court is empowered only to "direct the Executive Branch to review the [opinion] and redact it as necessary to ensure that properly classified information is appropriately protected." This limitation on the Court's discretion is consistent with the requirement that, "[i]n all matters, the Court and its staff shall comply with the security measures established pursuant to [Congressional mandate], as well as Executive Order 13526." FISC Rule 3; *see also* FISC Rule 62(b) (mandating that a release of FISC records must be conducted "in conformance with the security measures referenced in Rule 3"). Executive Order 13,526 "prescribes a uniform system for classifying, safeguarding, and declassifying national security information," and under that system only certain designated Executive Branch officials can classify or declassify national security information. *See* Executive Order 13,526.

Consistent with the Court's Rules of Procedure, the Court's decisions also make clear that the Court does not involve itself with the Executive Branch's declassification decisions. Indeed, "if the FISC were to assume the role of independently making declassification and

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[2] *See In re Mot. for Release of Ct. Records*, 526 F. Supp. 2d 484 (Foreign Intel. Surv. Ct. 2007); *In re Mot. for Release of Ct. Records*, Memorandum Opinion, Docket No. Misc. 07-01 (Foreign Intel. Surv. Ct. Feb. 8, 2008), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-02-us-opposition-130705.pdf (Appendix A to *In re Orders Issued by This Ct. Interpreting Section 215 of the PATRIOT Act*, Docket No. Misc. 13-02, The United States' Opposition to the Motion of the American Civil Liberties Union, *et al.*, for the Release of Court Records (Foreign Intel. Surv. Ct. July 5, 2013)). In this Court's most recent Opinion and Order involving the ACLU, the Court chose not to "reach[] the merits of the [ACLU's] asserted right of public access under the First Amendment." *See In re Orders of this Ct. Interpreting Section 215 of the PATRIOT Act*, Docket No. Misc. 13-02, Opinion and Order, at 17 (Foreign Intel. Surv. Ct. Sept. 13, 2013).

release decisions . . . there would be a real risk of harm to national security interests and ultimately to the FISA process itself." *In re Release*, 526 F. Supp. 2d at 491. "FISC judges do not make classification decisions and are not intended to become national security experts." *Id.* at 495 n.31 (citing H.R. Rep. No. 95-1283, pt. 1, at 25-26 (1978)). And, while FISC judges may have "more expertise in national security matters than a typical district court judge, that expertise [does] not equal that of the Executive Branch, which is constitutionally entrusted with protecting the national security." *Id.* Thus, this Court has recognized that "there is no role for this Court independently to review, and potentially override, Executive Branch classification decisions." *Id.* at 491.[3] This Court recently reiterated that "[i]t is fundamentally the Executive Branch's responsibility to safeguard sensitive national security information." *In re Mot. for Consent to Disclosure of Ct. Records*, Docket No. Misc. 13-01, Opinion and Order, at 6 (Foreign Intel. Surv. Ct. June 12, 2013) (citing *Department of Navy v. Egan*, 484 U.S. 518, 527-29 (1988)), *available at* www.uscourts.gov/uscourts/courts/fisc/misc-13-01-opinion-order.pdf. Thus, this Court should deny the ACLU's First Amendment classification review request and the ACLU's request to contest any redactions.

For these reasons, the Court should deny the ACLU's request for new classification reviews of the relevant opinions. There is no need for this Court to order new classification reviews of the relevant opinions because the Government recently conducted thorough classification reviews of these opinions and made "public as much information as possible about certain sensitive intelligence collection programs undertaken under the authority of the Foreign Intelligence Surveillance Act (FISA) while being mindful of the need to protect national

[3] This is not to say that Executive Branch classifications are never judicially reviewable. The proper means to obtain such review is through a FOIA request and subsequent action in district court. *See In re Release*, 526 F. Supp. 2d at 491 n.18, 496 n.32.

security."[4] Release of these documents reflected the Executive Branch's continued commitment to making information about intelligence collection publicly available when appropriate and consistent with the national security of the United States.

## CONCLUSION

For the reasons stated above, the ACLU's Motion should be denied.

December 6, 2013

Respectfully submitted,

JOHN P. CARLIN
Acting Assistant Attorney General
for National Security

J. BRADFORD WIEGMANN
Deputy Assistant Attorney General

TASHINA GAUHAR
Deputy Assistant Attorney General

/s/ Nicholas J. Patterson
NICHOLAS J. PATTERSON
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Phone: (202) 514-5600
Fax: (202) 514-8053

*Attorneys for the United States of America*

[4] *DNI Clapper Declassifies Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act (FISA), available at* http://icontherecord.tumblr.com/post/60867560465/dni-clapper-declassifies-intelligence-community. Although this statement was made in reference to the two opinions the Government released, the Government also applied the same standard when conducting the classification review of the two opinions published by this Court.

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the United States' Opposition to the Motion of the American Civil Liberties Union, *et al.*, for the Release of Court Records was served by the Government via Federal Express overnight delivery on this 6th day of December, 2013, addressed to:

Alex Abdo
Brett Max Kaufman
Patrick Toomey
Jameel Jaffer
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
aabdo@aclu.org

Arthur B. Spitzer
American Civil Liberties Union of the
Nation's Capital
4301 Connecticut Avenue, N.W., Suite 434
Washington, DC 20008
artspitzer@aclu-nca.org

David A. Schulz
Media Freedom and Information Access Clinic
Yale Law School
40 Ashmun Street, 4th Floor
New Haven, CT 06511
david.schulz@yale.edu

Gregory L. Diskant
Benjamin S. Litman
Richard I. Kim
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
blitman@pbwt.com

/s/ Nicholas J. Patterson
Nicholas J. Patterson

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

Docket Number: PR/TT [redacted]

**MEMORANDUM OPINION**

This matter is before the Court upon the government's application to re-initiate in expanded form a pen register/trap and trace (PR/TT) authorization for the National Security Agency (NSA) to engage in bulk acquisition of metadata[1] about Internet communications. The government's application also seeks Court authorization to query and use information previously obtained by NSA, regardless of whether the information was authorized to be acquired under

[1] When used in reference to a communication, "metadata" is information "about the communication, not the actual communication itself," including "numbers dialed, the length of a call, internet protocol addresses, e-mail addresses, and similar information concerning the delivery of the communication rather than the message between two parties." 2 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 4.6(b) at 476 (3d ed. 2007).

prior bulk PR/TT orders of the Foreign Intelligence Surveillance Court (FISC or "Court") or exceeded the scope of previously authorized acquisition. For the reasons explained herein, the government's application will be granted in part and denied in part.

I. History of Bulk PR/TT Acquisitions Under the Foreign Intelligence Surveillance Act

From [redacted], NSA was authorized, under a series of FISC orders under the PR/TT provisions of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1841-1846, to engage in the bulk acquisition of specified categories of metadata about Internet communications. Although the specific terms of authorization under those orders varied over time, there were important constants. Notably, each order limited the authorized acquisition to [redacted] categories of metadata.[2] As detailed herein, the government acknowledges that

[redacted]

NSA exceeded the scope of authorized acquisition continuously during the more than [redacted] years of acquisition under these orders.

In addition, each order authorized NSA analysts to access the acquired metadata only through queries based on validated "seed" accounts, i.e., Internet accounts for which there was a reasonable articulable suspicion ("RAS") that they were associated with a targeted international terrorist group; for accounts used by U.S. persons, RAS could not be based solely on activities protected by the First Amendment.[3] The results of such queries provided analysts with information about the [redacted] of contacts and usage for a seed account, as reflected in the collected metadata, which in turn could help analysts identify previously unknown accounts or persons affiliated with a targeted terrorist group. See [redacted] Opinion at 41-45. Finally, each bulk PR/TT order included a requirement that NSA could disseminate U.S. person information to other agencies only upon a determination by a designated NSA official that it is related to counterterrorism information and is necessary to understand the counterterrorism information or to assess its importance.[4]

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[2]( continued)

[redacted]

The current application relies on this prior framework, but also seeks to expand authorization in ways that test the limits of what the applicable FISA provisions will bear. It also raises issues that are closely related to serious compliance problems that have characterized the government's implementation of prior FISC orders. It is therefore helpful at the outset to summarize both the underlying rationale of the prior authorizations and the government's frequent failures to comply with their terms.

A. Initial Approval

The first application for a bulk PR/TT authorization was granted by the Honorable Colleen Kollar-Kotelly in [redacted] Judge Kollar-Kotelly authorized PR/TT surveillance [redacted] See [redacted] Opinion at 72-80.[5] When known, the particular customers [redacted] were identified in the Court's order pursuant to 50 U.S.C. § 1842(d)(2)(A)(ii). See [redacted] Opinion at 22-23.

The [redacted] Opinion authorized the acquisition of [redacted] categories of metadata:

[redacted]

[redacted]

The government proposed to collect these categories of metadata from [redacted]

[redacted]

[redacted]

[redacted]

Judge Kollar-Kotelly found that the proposed collection of information within Categories [redacted] comported with the applicable statutory definitions of "pen register" and "trap and trace device,"[7] id. at 13-17, and with the Fourth Amendment, id. at 58-61. [redacted]

[redacted]

The [redacted] Opinion stated the Court's understanding that the application sought authority to obtain only [redacted] categories of information and specified that it authorized "only the collection of information in Categories [redacted] Id. at 11 (emphasis in original). Each subsequent bulk PR/TT order adopted as its rationale the analysis and conclusions set out in the [redacted] Opinion.[8]

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[7] See 18 U.S.C. § 3127(3), (4). These definitions are more fully discussed at pages 25-26, infra.

[8] See e.g., Docket No. PR/TT [redacted] Primary Order issued on [redacted] at 5; Docket (continued...)

It was anticipated that the authorized PR/TT surveillance would "encompass [redacted] Opinion at 39-40 (internal quotations omitted).

Pursuant to 50 U.S.C. § 1842(c)(2), the initial application included a certification that the information likely to be obtained was relevant to an ongoing investigation to protect against international terrorism, which was not being conducted solely upon the basis of activities protected by the First Amendment. Docket No. PR/TT [redacted] Application filed [redacted]

[redacted]

[9] Bulk PR/TT surveillance was first approved in support of investigations of [redacted] and the collected metadata could only be accessed through queries based on seed accounts for which there was RAS that the account was associated with [redacted] July [redacted] Opinion at 72, 83. The range of terrorist organizations for which a RAS determination could support querying the metadata was [redacted] The present description of these Foreign Powers is contained in the Declaration of Michael E. Leiter, Director of the National Counterterrorism Center (NCTC), filed in docket number [redacted] which is incorporated by reference in the current application. See Docket No. PR/TT [redacted] Application filed [redacted] at 2.

([redacted] Application"), at 26.[10] Judge Kollar-Kotelly found that the sweeping and non-targeted scope of the proposed acquisition was consistent with this certification of relevance. [redacted] Opinion at 49. In making this finding, the Court relied on several factors, including NSA's efforts "to build a meta data archive that will be, in relative terms, richly populated with [redacted] communications," at least as compared with the entire universe of Internet communications, [redacted] Opinion at 47,[11] and the presence of "safeguards" proposed by the government "to ensure that the information collected will not be used for unrelated purposes," id. at 27, thereby protecting "the continued validity of the certification of relevance," id. at 70. These safeguards importantly included both the limitation that NSA

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[10] The government argued that "FISA prohibits the Court from engaging in any substantive review of this certification," and that "the Court's exclusive function" was "to verify that it contains the words required" by the statute. [redacted] Opinion at 26. The Court did not find such arguments persuasive. Id. However, because the government had in fact provided a detailed explanation of the basis for the certification, the Court did not "decide whether it would be obliged to accept the applicant's certification without any explanation of its basis" and instead "assume[d] for purposes of this case that it may and should consider the basis" of the certification of relevance. Id. at 27-28.

[redacted]

analysts could access the bulk metadata only on the basis of RAS-approved queries, id. at 42-43, 56-58, and the rule governing dissemination of U.S. person information outside of NSA, id. at 85.

However, the finding of relevance most crucially depended on the conclusion that "the proposed bulk collection . . . is necessary for NSA to employ . . . analytic tools [that] are likely to generate useful investigative leads for ongoing efforts by the [Federal Bureau of Investigation (FBI)] (and other agencies) to identify and track [redacted] Id. at 48. Consequently, "the collection of both a huge volume and high percentage of unrelated communications . . . is necessary to identify the much smaller number of [redacted] such that the entire mass of collected metadata is relevant to investigating [redacted] affiliated persons. Id. at 48-49; see also id. at 53-54 (relying on government's explanation why bulk collection is "necessary to identify and monitor [redacted] operatives whose Internet communications would otherwise go undetected in the huge streams of [redacted] communications").

B. First Disclosure of Overcollection

During the initial period of authorization, the government disclosed that NSA's acquisitions had exceeded the scope of what the government had requested and the FISC had approved. Insofar as it is instructive regarding the separate form of overcollection that has led directly to the current application, this prior episode is summarized here.

On [redacted] the government provided written notice to the FISC that it had exceeded the scope of authorized collection [redacted] Docket No. PR/TT [redacted] Notice of Compliance Incidents, filed on [redacted] On the same day, Judge Kollar-Kotelly ordered the government to provide additional information about this non-compliance, including a "full description of the scope, nature, and circumstances of any unauthorized collection" [redacted] Docket No. PR/TT [redacted] Order Regarding Disclosed Violations Involving [redacted] issued on [redacted] Order"), at 6. The government made an interim response to the [redacted] Order in the form of a Declaration of [redacted] filed in Docket No. PR/TT [redacted] on [redacted] ("[redacted] Decl."), and a fuller response in the form of a Declaration of [redacted] filed in Docket No. PR/TT [redacted] on [redacted] ("[redacted] Decl.").

As described by the government, the unauthorized collection resulted from failures to [redacted] in the manner required. [redacted] Decl. at 8-11.[12] By the government's account, the lack of required [redacted] did not result from technical difficulty or malfunction, but rather from a failure of "those NSA officials who understood in detail the requirements of the [redacted] Opinion] . . . to communicate those requirements effectively

[redacted]

to the [redacted] . . . who were directly responsible" for implementation. Id. at 5. The government assessed the violations to have been caused by "poor management, lack of involvement by compliance officials, and lack of internal verification procedures – not by bad faith." Id. at 7.

The Court had specifically directed the government to explain whether this unauthorized collection involved the acquisition of information other than the approved Categories [redacted] Order at 7. In response, the Deputy Secretary of Defense stated that the "Director of NSA has informed me that at no time did NSA collect any category of information . . . other than the [redacted] categories of meta data" approved in the [redacted] Opinion, but also noted that the NSA's Inspector General had not completed his assessment of this issue. [redacted] Decl. at 21.[13] As discussed below, this assurance turned out to be untrue.

Regarding the information obtained through unauthorized collection, the Court ordered the government to describe whether it "has been, or can be, segregated from information that NSA was authorized to collect," "how the government proposes to dispose of" it, and "how the government proposes to ensure that [it] is not included . . . in applications presented to this Court." [redacted] Order at 7-8. In response, the government stated that, while it was not

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[13] At a hearing on [redacted] Judge Kollar-Kotelly referred to this portion of the Deputy Secretary's declaration and asked: "[C]an we conclude that there wasn't content here?" [redacted] of NSA, replied: "There is not the physical possibility of our having [redacted] Docket Nos. [redacted] Transcript of Hearing Conducted [redacted] at 16-17.

feasible to segregate authorized collection from unauthorized collection on an item-by-item basis, NSA had eliminated access to the database that contained the entire set of metadata, and repopulated the databases used by analysts to run queries so that they only contained information [redacted] that had not been involved in the unauthorized collection. [redacted] Decl. at 25-26. The government asserted that, after taking these actions, NSA was "making queries against a database that contain[ed] only meta data that NSA was authorized to collect." Id. at 26. As to information disseminated outside of NSA, the government reported that it had reviewed disseminated NSA reports and concluded that just one report was potentially based on improperly collected information. [redacted] Decl. at 9-10. NSA cancelled this report and confirmed that the recipient agencies had purged it from their records. Id. at 11.

The initial bulk PR/TT authorization granted by the [redacted] Opinion was set to expire on [redacted] shortly after the government had disclosed this unauthorized collection. On that date, Judge Kollar-Kotelly granted an application for continued bulk PR/TT acquisition; however, in that application, the government only requested authorization for acquisition [redacted] that had not been subject to the [redacted] See Docket No. PR/TT [redacted] Application filed on [redacted] ("[redacted] Application"), at 9-15; Primary Order issued on [redacted] at 2-5.[14] The government represented that the PR/TT [redacted] had "fully complied with the orders of the Court."

[14] Subsequent applications and orders followed the same approach. See, e.g., Docket No. PR/TT [redacted] Application filed on [redacted] at 9-13; Primary Order issued on [redacted] at 2-5.

Declaration of [redacted] at 2-3 (Exhibit C to [redacted] Application). The government also described in that application new oversight mechanisms to ensure against future overcollection. [redacted] Application at 8-9. These included a requirement that, "at least twice during the 90-day authorized period of surveillance," NSA's Office of General Counsel (NSA OGC) "will conduct random spot checks [redacted] to ensure that [redacted] functioning as authorized by the Court. Such spot checks will require an examination of a sample of data." Id. at 9. The Court adopted this requirement in its orders granting the application, as well as in subsequent orders for bulk PR/TT surveillance.[15]

C. Overcollection Disclosed in [redacted]

In December [redacted] the government reported to the FISC a separate case of unauthorized collection, which it attributed to a typographical error in how a prior application and resulting orders had described communications [redacted] See Docket No. PR/TT [redacted], Verified Motion for an Amended Order filed on [redacted] at 4-6. The government sought a nunc pro tunc correction of the typographical error in the prior orders, which would have effectively approved two months of unauthorized collection. Id. at 7. The government represented that, with regard to prior collection [redacted] it could not

[15] See [redacted]

"accurately segregate" information that fell within the scope of the prior orders from those that did not. Id.

The FISC approved prospective collection [redacted] on the terms requested by the government when it granted a renewal application [redacted] See Docket No. PR/TT [redacted] Primary Order issued on [redacted] at 5-6. However, the FISC withheld nunc pro tunc relief for the previously collected information, and NSA removed from its systems all data collected [redacted] under the prior order. See Docket [redacted] at 18.

D. Non-Compliance Disclosed [redacted]

The next relevant compliance problems surfaced in [redacted] and involved three general subjects: (1) accessing of metadata; (2) disclosure of query results and information derived therefrom; and (3) overcollection. These compliance disclosures generally coincided with revelations about similar problems under a separate line of FISC orders providing for NSA's bulk acquisition of metadata for telephone communications pursuant to 50 U.S.C. § 1861.[16]

1. Accessing Metadata

On January [redacted] the government disclosed that NSA had regularly accessed the bulk telephone metadata using a form of automated querying based on telephone numbers that had not been approved under the RAS standard. See Docket No. BR 08-13, Order Regarding

[16] The Section 1861 orders, like the bulk PR/TT orders, permit NSA analysts to access the bulk telephone metadata only through queries based on RAS-approved telephone numbers. See, e.g., Docket No. [redacted], at 7-10.

Preliminary Notice of Compliance Incident Dated [redacted] issued on [redacted] at 2-3. The Honorable Reggie B. Walton of this Court ordered the government to verify that access to the bulk PR/TT metadata complied with comparable restrictions, noting "the similarity between the querying practices and requirements employed" in both contexts. See Docket No. PR/TT [redacted] Order issued on [redacted] at 1.

In response, the government reported that it had identified, and discontinued, a non-automated querying practice for PR/TT metadata that it had concluded was non-compliant with the required RAS approval process. See Docket No. PR/TT [redacted] Government's Response to the Court's Order Dated [redacted] filed on [redacted] at 2-6 ([redacted] Response").[17] The government's [redacted] Response also described additional oversight and

[17] This practice involved an analyst running a query using as a seed "a U.S.-based e-mail account" that had been in direct contact with a properly validated seed account, but had not itself been properly validated under the RAS approval process. [redacted] Response at 2-3. When he granted renewed authorization for bulk PR/TT surveillance on [redacted], Judge Walton ordered the government not to resume this practice without prior Court approval. See Docket No. PR/TT [redacted] Primary Order issued [redacted] at 10.

In its response, the government also described an automated means of querying, which it regarded as consistent with the applicable PR/TT orders. This form of querying involved the determination that an e-mail address satisfied the RAS standard, but for the lack of a connection to one of the Foreign Powers (e.g, there were sufficient indicia that the user of the e-mail address was involved in terrorist activities, but the user's affiliation with a particular group was unknown). See Declaration of Lt. Gen. Keith B. Alexander, Director of NSA, at 8 (attached at Tab 1 to [redacted] Response) ([redacted] Alexander Decl."). In the event that such an e-mail address was in contact with a RAS-approved seed account on an NSA "Alert List," that e-mail address would itself be used as a seed for automatic querying, on the theory that the requisite nexus to one of the Foreign Powers had been established. Id. at 8-9. The government later reported that it had discontinued this practice, see Docket No. PR/TT [redacted] NSA 90-Day (continued...)

compliance measures being taken with regard to the bulk PR/TT program, see [redacted] Response at 6-7, which Judge Walton adopted as requirements in his order authorizing continued bulk PR/TT surveillance on [redacted]. See Docket No. PR/TT [redacted] Primary Order issued [redacted] at 13-14. Finally, the government's response noted the commencement by NSA of a "complete ongoing end-to-end system engineering and process review (technical and operational) of NSA's handling of PR/TT metadata to ensure that the material is handled in strict compliance with the terms of the PR/TT Orders and the NSA's descriptions to the Court." [redacted] Alexander Decl. at 16.[18]

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[17](...continued)
Report filed [redacted] at 8 (Exhibit B to Application), and the Court ordered the government not to resume it without prior Court approval. See Docket No. PR/TT [redacted] Primary Order issued [redacted] at 10.

[18] On [redacted] the government provided written notice of a separate form of unauthorized access relating to the use by NSA technical personnel of bulk PR/TT metadata to identify [redacted] which they then employed for "metadata reduction and management activities" in other data repositories. See Docket No. PR/TT [redacted] Preliminary Notice of Compliance Incident filed on [redacted] at 2-3. The government assessed this practice to be inconsistent with restrictions on accessing and using bulk PR/TT metadata. Id. at 3. On [redacted] Judge Walton issued a supplemental order which, inter alia, directed the government to discontinue such use or show cause why continued use was necessary and appropriate. See Docket No. PR/TT [redacted] Supplemental Order issued on [redacted] Order"), at 4. In response, the government described the deleterious effects that would likely result from discontinuing the use of [redacted] derived from the bulk PR/TT metadata. See Docket No. PR/TT [redacted] Declaration of [redacted] NSA, filed on [redacted] at 1-3, 6 [redacted] Decl."). On [redacted] Judge Walton approved the continuation of NSA's use of [redacted] Docket No. PR/TT [redacted] Supplemental Order issued on [redacted] at 2-3. In addition, with regard to a then-recent misstatement by the government concerning when NSA had terminated automatic querying of the bulk PR/TT metadata, see [redacted]
(continued...)

2. Disclosure of Query Results and Information Derived Therefrom

Also in the [redacted] Order, the Court noted recent disclosure of the extent to which NSA analysts who were not authorized to access the PR/TT metadata directly nonetheless received unminimized query results. [redacted] Order at 2. The Court permitted the continuance of this practice for a 20-day period, but provided that such sharing shall not continue thereafter "unless the government has satisfied the Court, by written submission, that [it] is necessary and appropriate." Id. at 4. In response, the government stated that "NSA's collective expertise in [the targeted] Foreign Powers resides in more than one thousand intelligence analysts," less than ten percent of whom were authorized to query the PR/TT metadata. [redacted], [redacted] Declaration at 7-8. Therefore, the government posited that sharing "unminimized query results with non-PR/TT-cleared analysts is critical to the success of NSA's counterterrorism mission." Id. at 8. Judge Walton authorized the continued sharing of such information within NSA, subject to the training requirement discussed at pages 18-19, infra. See Docket Nos. PR/TT [redacted] & BR 09-06, Order issued on [redacted] Order"), at 7.

On [redacted], the government submitted a notice of non-compliance regarding dissemination of information outside of NSA that resulted from NSA's placing of query results into a database accessible by other agencies' personnel without the determination, required for

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[18](...continued)
[redacted] Order at 2, the Court ordered NSA not to "resume automated querying of the PR/TT metadata without the prior approval of the Court." Id. at 3.

any U.S. person information, that it related to counterterrorism information and was necessary to understand the counterterrorism information or assess its importance. See Docket No. PR/TT [redacted] Preliminary Notice of Compliance Incident filed on [redacted] Between [redacted] and [redacted] approximately 47 analysts from the FBI, the Central Intelligence Agency (CIA), and the National Counterterrorism Center (NCTC) queried this database in the course of their responsibilities and accessed unminimized U.S. person information. See Docket No. PR/TT [redacted] Report of the United States filed on [redacted] Report"), Exhibit A, Declaration of Lt. Gen. Keith B. Alexander, Director, NSA, at 11-13. NSA terminated access to this database for other agencies' personnel by [redacted] Id. at 12. Based on its end-to-end review, NSA concluded that NSA personnel "failed to make the connection between continued use of the database and the new dissemination procedures required by the Court's Orders." Id. at 15.

The government further disclosed that, apart from this shared database, NSA analysts made it a general practice to disseminate to other agencies NSA intelligence reports containing U.S. person information extracted from the PR/TT metadata without obtaining the required determination. See Docket No. PR/TT [redacted] Government's Response to the Court's Supplemental Order Entered on [redacted], filed on [redacted] at 2. The large majority of disseminated reports had been written by analysts cleared to directly query the PR/TT metadata. See Docket No. PR/TT [redacted] Declaration of [redacted] NSA, filed on [redacted], at 2. In response to these disclosures, Judge Walton ordered that, prior to receiving query

results, any NSA analyst must first have received "appropriate and adequate training and guidance regarding all rules and restrictions governing the use, storage, and dissemination of such information." [redacted] Order at 7. He also required the government to submit weekly reports on dissemination, including a certification that the required determination had been made for any dissemination of U.S. person information, and to include "in its submissions regarding the results of the end-to-end review[] a full explanation" of why this dissemination rule had been disregarded. Id. at 7-8.

Subsequently, in response to the latter requirement, the government merely stated: "Although NSA now understands the fact that only a limited set of individuals were authorized to approve these releases under the Court's authorization, it seemed appropriate at the time" to delegate approval authority to others. [redacted] Report, Exhibit A, at 17. The government's explanation speaks only to the identity of the approving official, but a substantive determination regarding the counterterrorism nature of the information and the necessity of including U.S. person information was also required under the Court's orders. See page 3, supra. It appears that, for the period preceding the adoption of the weekly reporting requirement, there is no record of the required determination being made by any NSA official for any dissemination. As far as can be ascertained, the requirement was simply ignored. See [redacted] Report, Exhibit A, at 18-19.

NSA completed its "end-to-end review" of the PR/TT metadata program on [redacted], [redacted]. See [redacted] Report, Exhibit B. On [redacted], Judge Walton granted an

application for continued bulk PR/TT authorization. In that application, the government represented that "**all the technologies used by NSA to implement the authorizations granted by docket number PR/TT [redacted] and previous docket numbers only collect, or collected, authorized metadata.**" Docket No. PR/TT [redacted] Application filed on [redacted] Application"), at 11 n.6 (emphasis in original).

3. Overcollection

Notwithstanding this and many similar prior representations, there in fact had been systemic overcollection since [redacted] On [redacted] the government provided written notice of yet another form of substantial non-compliance discovered by NSA OGC on [redacted] [19] this time involving the acquisition of information beyond the [redacted] authorized categories. See Docket No. PR/TT [redacted] Preliminary Notice of Compliance Incident filed on [redacted] at 2. This overcollection, which had occurred continuously since the initial authorization in [redacted] id. at 3, included the acquisition of [redacted] id. at 2. The government reported that NSA had ceased querying PR/TT metadata and suspended receipt of metadata [redacted] Id. The government later advised that this continuous overcollection acquired

[19] Since [redacted] NSA OGC had been obligated to conduct periodic checks of the metadata obtained at [redacted] to ensure that [redacted] were functioning in an authorized manner. See page 13, supra.

many other types of data[20] and that "[v]irtually every PR/TT record" generated by this program included some data that had not been authorized for collection. [redacted]pplication, Exhibit D, NSA Response to FISA Court Questions dated [redacted]("[redacted] Response"), at 18.

The government has provided no comprehensive explanation of how so substantial an overcollection occurred, only the conclusion that, [redacted] there was a failure to translate the technical requirements" [redacted] "into accurate and precise technical descriptions for the Court." [redacted]Report, Exhibit A, at 31. The government has said nothing about how the systemic overcollection was permitted to continue, [redacted] On the record before the Court, the most charitable interpretation possible is that the same factors identified by the government [redacted] remained unabated and in full effect: non-communication with the technical personnel directly responsible [redacted] resulting from poor management. However, given the duration of this problem, the oversight measures ostensibly taken since [redacted] to detect overcollection, and the extraordinary

[redacted]

fact that NSA's end-to-end review overlooked unauthorized acquisitions that were documented in virtually every record of what was acquired, it must be added that those responsible for conducting oversight at NSA failed to do so effectively. The government has expressed a belief that "the stand-up of NSA's Office of the Director of Compliance in July 2009" will help avoid similar failures in the future, both with respect to explaining to the FISC what NSA actually intends to do and in conforming NSA's actions to the terms of FISC authorizations. Id. at 31-32.

E. Expiration of Bulk PR/TT Authorities

The PR/TT authorization granted in Docket No. PR/TT [redacted] was set to expire on [redacted] On [redacted] the government submitted a proposed renewal application, which acknowledged [redacted] information that may not have been contemplated under prior orders. See Docket No. PR/TT [redacted] Supplemental Order issued on [redacted] Order"), at 2. The proposed application sought approval [redacted] subject to the restrictions that NSA analysts would not query the PR/TT metadata previously received by NSA[21] and that information prospectively obtained [redacted] would be stored [redacted] and not [redacted] o access or use. Id. at 2. After Judge Walton expressed concern about the merits of the

[21] The government requested in its proposed application that, if "immediate access to the metadata repository is necessary in order to protect against an imminent threat to human life," the government would "first notify the Court." [redacted] Order at 3. Instead, Judge Walton permitted access to protect against an imminent threat as long as the government provided a report.

proposed application,[22] the government elected not to submit a final application. Id. at 3. As a result, the authorization for bulk PR/TT surveillance expired on [redacted] Judge Walton directed that the government "shall not access the information [previously] obtained . . . for any analytic or investigative purpose" and shall not "transfer to any other NSA facility information . . . currently stored [redacted] Id. at 4-5. He also provided that, "[i]n the extraordinary event that the government determines immediate access to the [PR/TT metadata] is necessary in order to protect against an imminent threat to human life, the government may access the information," and shall thereafter "provide a written report to the Court describing the circumstances and results of the access." Id. at 5.[23]

F. The Current Application

On [redacted] the government submitted another proposed application, which in most substantive respects is very similar to the final application now before the Court. Thereafter, on [redacted] the undersigned judge met with representatives of the executive branch to explore a number of factual and legal questions presented. The government responded to the Court's questions in three written submissions,

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[22] The proposed application did not purport to specify the types of data acquired [redacted] or, importantly, to provide a legal justification for such acquisition under a PR/TT order.

[23] In compliance with this requirement, the government has reported that, under this emergency exception, NSA has run queries of the bulk metadata in response to threats stemming from (i) [redacted] See, e.g., Docket No. PR/TT [redacted] Reports filed on [redacted] and various reports filed from [redacted]

filed on [redacted] The government then submitted its revised, final application on [redacted], with those prior written responses attached as Exhibit D.

To enter the PR/TT order requested in the current application, or a modified PR/TT order, the Court must find that the application meets all of the requirements of Section 1842. See 50 U.S.C. § 1842(d)(1). Some of these requirements are plainly met: the government has submitted to a judge of the FISC a written application that has been approved by the Attorney General (who is also the applicant). See [redacted] Application at 1, 20; 50 U.S.C. § 1842(a)(1), (b)(1), (c). The application identifies the Federal officer seeking to use the PR/TT devices covered by it as General Keith B. Alexander, the Director of NSA, who has also verified the application pursuant to 28 U.S.C. § 1746 in lieu of an oath or affirmation. See [redacted] pplication at 5, 18; 50 U.S.C. § 1842(b), (c)(1).

In other respects, however, the Court's review of this application is not nearly so straightforward. As a crucial threshold matter, there are substantial questions about whether some aspects of the proposed collection are properly regarded as involving the use of PR/TT devices. There are also noteworthy issues regarding the certification of relevance pursuant to Section 1842(c)(2) and the specifications that the order must include under Section 1842(d)(2)(A), as well as post-acquisition concerns regarding the procedures for handling the metadata. The Court's resolution of these issues is set out below.

In the remainder of this Opinion, the Court will first consider whether the proposed collection involves the use of a PR/TT device within the meaning of the applicable statutory definitions, and whether the data that the government seeks to collect consists of information that may properly be acquired by such a device. Next, the Court will consider whether the application satisfies the statutory relevance standard and contains all the necessary elements. The Court will then address the procedures and restrictions proposed by the government for the retention, use, and dissemination of the information that is collected. Finally, the Court will consider the government's request for permission to use all previously-collected data, including information falling outside the scope of the Court's prior authorizations.

## II. The Proposed Collection, as Modified Herein, Involves the Installation and Use of PR/TT Devices

### A. The Applicable Statutory Definitions

For purposes of 50 U.S.C. §§ 1841-1846, FISA adopts the definitions of "pen register" and "trap and trace device" set out in 18 U.S.C. § 3127. See 50 U.S.C. § 1841(2). Section 3127 provides the following definitions:

> (3) the term "pen register" means a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication . . . ;[24]

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[24] The definition excludes any device or process used by communications providers or customers for certain billing-related purposes or "for cost accounting or other like purposes in the ordinary course of business." § 3127(3). These exclusions are not pertinent to this case.

> (4) the term "trap and trace device" means a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication.

These definitions employ three other terms – "electronic communication," "wire communication," and "contents" – that are themselves governed by statutory definitions "set forth for such terms in section 2510" of title 18. 18 U.S.C. § 3127(1). Section 2510 defines these terms as follows:

> (1) "Electronic communication" is defined as:
>
> any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include – (A) any wire or oral communication.[25]

18 U.S.C. § 2510(12).

> (2) "Wire communication" is defined as:
>
> any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce.

18 U.S.C. § 2510(1).

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[25] The other exclusions to this definition at Section 2510(12)(B)-(D) are not relevant to this case.

(3) "Contents" is defined to "include[] any information concerning the substance, purport, or meaning" of a "wire, oral, or electronic communication." 18 U.S.C. § 2510(8).[26]

Together, these definitions set bounds on the Court's authority to issue the requested order because the devices or processes to be employed must meet the definition of "pen register" or "trap and trace device."

[redacted]

As explained by the government, the proposed collection [redacted] Declaration of Gen. Keith B. Alexander, Director of NSA, at 23-24 (attached as Exhibit A to [redacted] Application) ([redacted] Alexander Decl."). [redacted]

[26] Different definitions of "wire communication" and "contents" are set forth at 50 U.S.C. § 1801(l) & (n). The definitions in Section 1801, however, apply to terms "[a]s used in this subchapter" – i.e., in 50 U.S.C. §§ 1801-1812 (FISA subchapter on electronic surveillance) – and thus are not applicable to the terms "wire communication" and "contents" as used in the definition of "pen register" and "trap and trace device" applicable to Sections 1841-1846 (FISA subchapter on pen registers and trap and trace devices).

[redacted] See id., Tab 2, at 1-2 n.2.[27]

Subject to the following discussion of what types of information may properly be regarded as non-content addressing, routing or signaling information, the Court concludes that this [redacted] is consistent with the statutory definitions of "pen register" and, insofar as information about the source of a communication is obtained, "trap and trace device." Each communication subject to collection is either a wire communication or an electronic

[redacted]

communication under the definitions set forth above.[28] The end-result of the collection process[29] is that only metadata authorized by the Court for collection is forwarded to NSA for retention and use. [redacted] Finally, and again subject to the discussion below regarding what types of information may properly be acquired, the Court concludes that the automated processes resulting in the transmission to NSA of information

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[28] Many of the communications for which information will be acquired will fall within the broad definition of "electronic communication" at 18 U.S.C. § 2510(12). If, however, a covered communication consists of an "aural transfer," i.e., "a transfer containing the human voice at any point between and including the point of origin and the point of reception," id. § 2510(18), then it could constitute a "wire communication" under the meaning of Section 2510(1). In either case, the communications subject to collection are "wire or electronic communication[s]," as required in Sections 3127(3) & (4).

[29] The term "process," as used in the definitions of "pen register" and "trap and trace device", has its "generally understood" meaning of "a series of actions or operations conducing to an end" and "covers software and hardware operations used to collect information." In re Application of the United States for an Order Authorizing the Installation and Use of a PR/TT Device on E-Mail Account, 416 F. Supp.2d 13, 16 n.5 (D.D.C. 2006) (Hogan, District Judge) (internal quotations and citations omitted).

[30] Accord [redacted] Opinion at 12-13; In re Application of the United States for an Order Authorizing the Use of Two PR/TT Devices, 2008 WL 5082506 at *1 (E.D.N.Y. Nov. 26, 2008) (Garaufis, District Judge) (recording and transmitting contents permissible under PR/TT order where government computers were configured to immediately delete all contents). But see In re Application of the United States for an Order Authorizing the Use of a PR/TT Device On Wireless Telephone, 2008 WL 5255815 at *3 (E.D.N.Y. Dec. 16, 2008) (Orenstein, Magistrate Judge) (any recording of contents impermissible under PR/TT order, even if deleted before information is provided to investigators).

resulting from [redacted] about communications is a form of "record[ing]" or "decod[ing]" permissible under the definition of "pen register."

C. The Requested Information

The application seeks to expand considerably the types of information authorized for acquisition. Although the government provides new descriptions for the categories of information sought, see [redacted] Alexander Decl., Tab 2, they encompass all the types of information that were actually collected (to include unauthorized collection) under color of the prior orders. Memorandum of Law and Fact in Support of Application for Pen Registers and Trap and Trace Devices for Foreign Intelligence Purposes ("Memorandum of Law") at 3, submitted as Exhibit B to the [redacted] Application.

1. The Proper Understanding of DRAS Information and Contents

The government contends that all of the data requested in this application may properly be collected by a PR/TT device because all of it is dialing, routing, addressing or signaling ("DRAS") information, and none constitutes contents. Id. at 22. In support of that contention, the government advances several propositions concerning the meaning of "dialing, routing, addressing, or signaling information" and "contents," as those terms are used in the definitions of "pen register" and "trap and trace device." While it is not necessary to address all of the government's assertions, a brief discussion of the government's proposed statutory construction will be useful in explaining the Court's decision to approve most, but not all, of the proposed collection.

The government argues that DRAS information and contents are "mutually exclusive categories," and that Congress intended for DRAS information "to be synonymous with 'non-content.'" Id. at 23, 51. The Court is not persuaded that the government's proposed construction can be squared with the statutory text. The definition of pen register covers "a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility . . ., provided, however, that such information shall not include the contents of any communication." § 3127(3). The structure of the sentence – an affirmative description of the information to be recorded or decoded, followed by a proviso that "such information shall not include the contents of any communication" – does not suggest an intention by Congress to create two mutually exclusive categories of information. Instead, the sentence is more naturally read as conveying two independent requirements – the information to be recorded or decoded must be DRAS information and, whether or not it is DRAS, it must not be contents. The same observations apply to the similarly-structured definition of "trap and trace device." See 18 U.S.C. § 3127(4) ("a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication").

The breadth of the terms used by Congress to identify the categories of information subject to collection and to define "contents" reinforces the conclusion that DRAS and contents are not mutually exclusive categories. As the government observes, see Memorandum of Law at

37, the ordinary meanings of the terms "dialing," "routing," addressing," and "signaling" – which are not defined by the statute – are relatively broad. Moreover, as noted above, the term "contents" is broadly defined to include "any information concerning the substance, purport, or meaning of [an electronic] communication." 18 U.S.C. § 2510(8) (emphasis added). And "electronic communication," too, is defined broadly to mean "any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system . . . ." 18 U.S.C. § 2510(12) (emphasis added).

Given the breadth of the terms used in the statute, it is not surprising that courts have identified forms of information that constitute both DRAS and contents. In the context of Internet communications, a Uniform Resource Locator (URL) – "an address that can lead you to a file on any computer connected to the Internet"[31] – constitutes a form of "addressing information" under the ordinary meaning of that term. Yet, in some circumstances a URL can also include "contents" as defined in Section 2510(8). In particular, if a user runs a search using an Internet search engine, the "search phrase would appear in the URL after the first forward slash" as part of the addressing information, but would also reveal contents, i.e., the "'substance' and 'meaning' of the communication . . . that the user is conducting a search for information on a particular topic." In re Application of the United States for an Order Authorizing the Use of a Pen Register and Trap, 396 F. Supp.2d 45, 49 (D. Mass. 2005) (Collins, Magistrate Judge); see

[31] See Newton's Telecom Dictionary 971 (24th ed. 2008).

also In re Pharmatrak, Inc., 329 F.3d 9, 16, 18 (1st Cir. 2003) (URLs including search terms are "contents" under Section 2510(8)).[32] In the context of telephone communications, the term "dialing information" can naturally be understood to encompass all digits dialed by a caller. However, some digits dialed after a call has been connected, or "cut through," can constitute "contents" – for example, if the caller is inputting digits in response to prompts from an automated prescription refill system, the digits may convey substantive instructions such as the prescription number and desired pickup time for a refill. Courts accordingly have described post-cut-through digits as dialing information, some of which also constitutes contents. See In re Application of the United States for an Order (1) Authorizing the Installation and Use of a PR/TT Device and (2) Authorizing Release of Subscriber and Other Information, 622 F. Supp.2d 411, 412 n.1, 413 (S.D. Tex. 2007) (Rosenthal, District Judge); In re Application, 396 F. Supp.2d at 48.

In light of the foregoing, the Court rejects the government's contention that DRAS information and contents are mutually exclusive categories. Instead, the Court will, in accordance with the language and structure of Section 3127(3) and (4), apply a two-part test to

[32] But see H.R. Rep. No. 107-236(I), at 53 (2001) (stating that the portion of a URL "specifying Web search terms or the name of a requested file or article" is not DRAS information and therefore could not be collected by a PR/TT device).

the information that the government seeks to acquire and use in this case: (1) is the information DRAS information?; and (2) is it contents?[33]

In determining whether or not the types of information sought by the government constitute DRAS information, the Court is guided by the ordinary meanings of the terms "addressing," "routing," and "signaling," and by the context in which the terms are used.[34] As the government asserts, "addressing information" may generally be understood to be "information that identifies recipients of communications or participants in a communication" and "may refer to people [or] devices." Memorandum of Law at 37.[35] The Court also agrees with the government that "routing information" can generally be understood to include information regarding "the path or means by which information travels." Memorandum of Law at 37. As will be explained more fully in the discussion of "communications actions" below, the Court adopts a somewhat narrower definition of "signaling information" than the government. In summary, the Court concludes that signaling information includes information that is utilized in

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[33] To decide the issues presented by the application, the Court need not reach the government's contention that Congress intended DRAS information to include all information that is not contents, or its alternative argument that, if there is a third category consisting of non-DRAS, non-content information, a PR/TT device may properly collect such information. See Memorandum of Law at 49-51.

[34] The government does not contend that any of the information sought constitutes only "dialing information," which it asserts "presumptively relates to telephones." Memorandum of Law at 37 n.19.

[35] See Newton's Telecom Dictionary at 89 ("An address comprises the characters identifying the recipient or originator of transmitted data.").

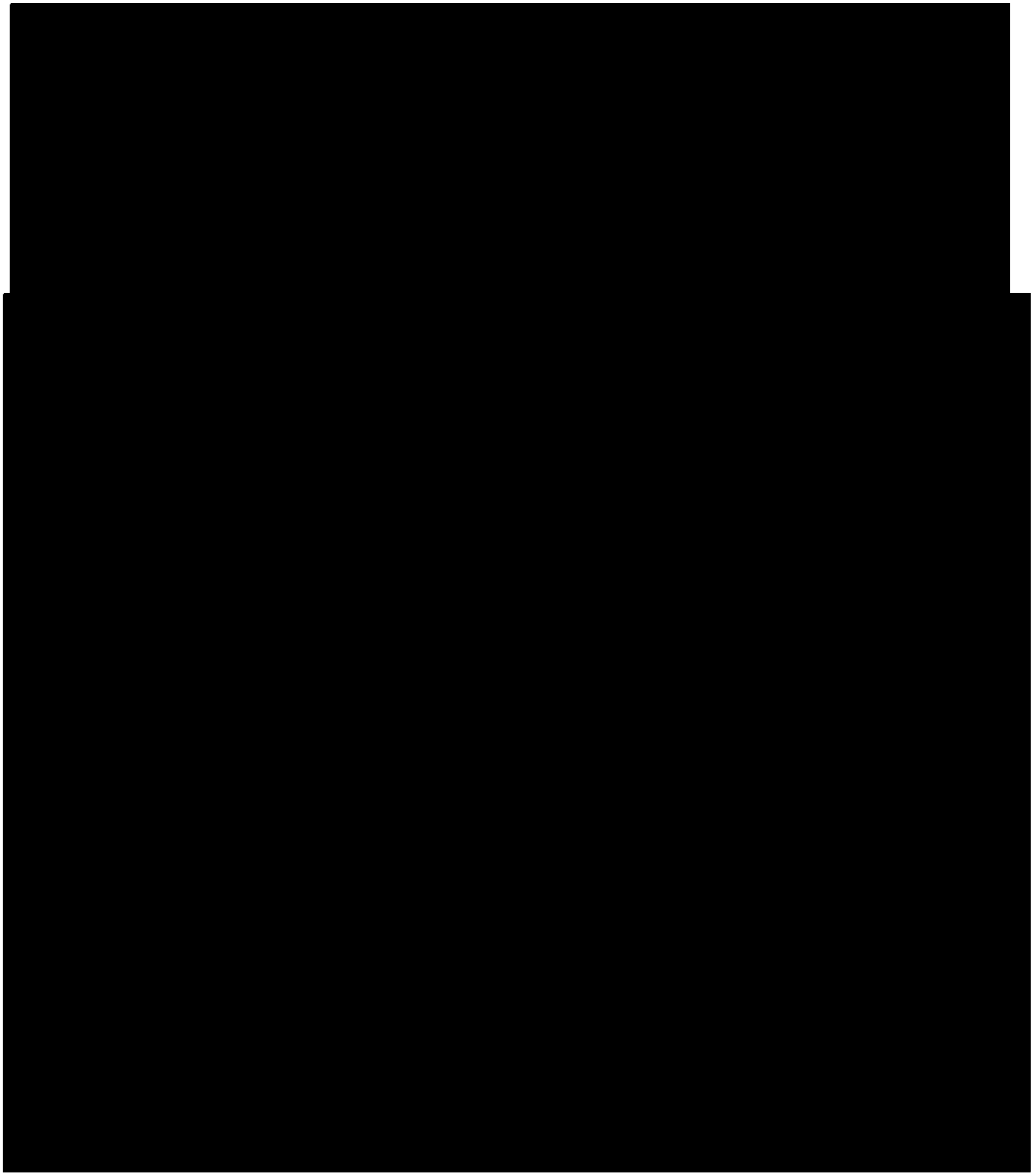
or pertains to (1) logging into or out of an account or (2) processing or transmitting an e-mail or IM communication. See pages 50-56, infra.[36]

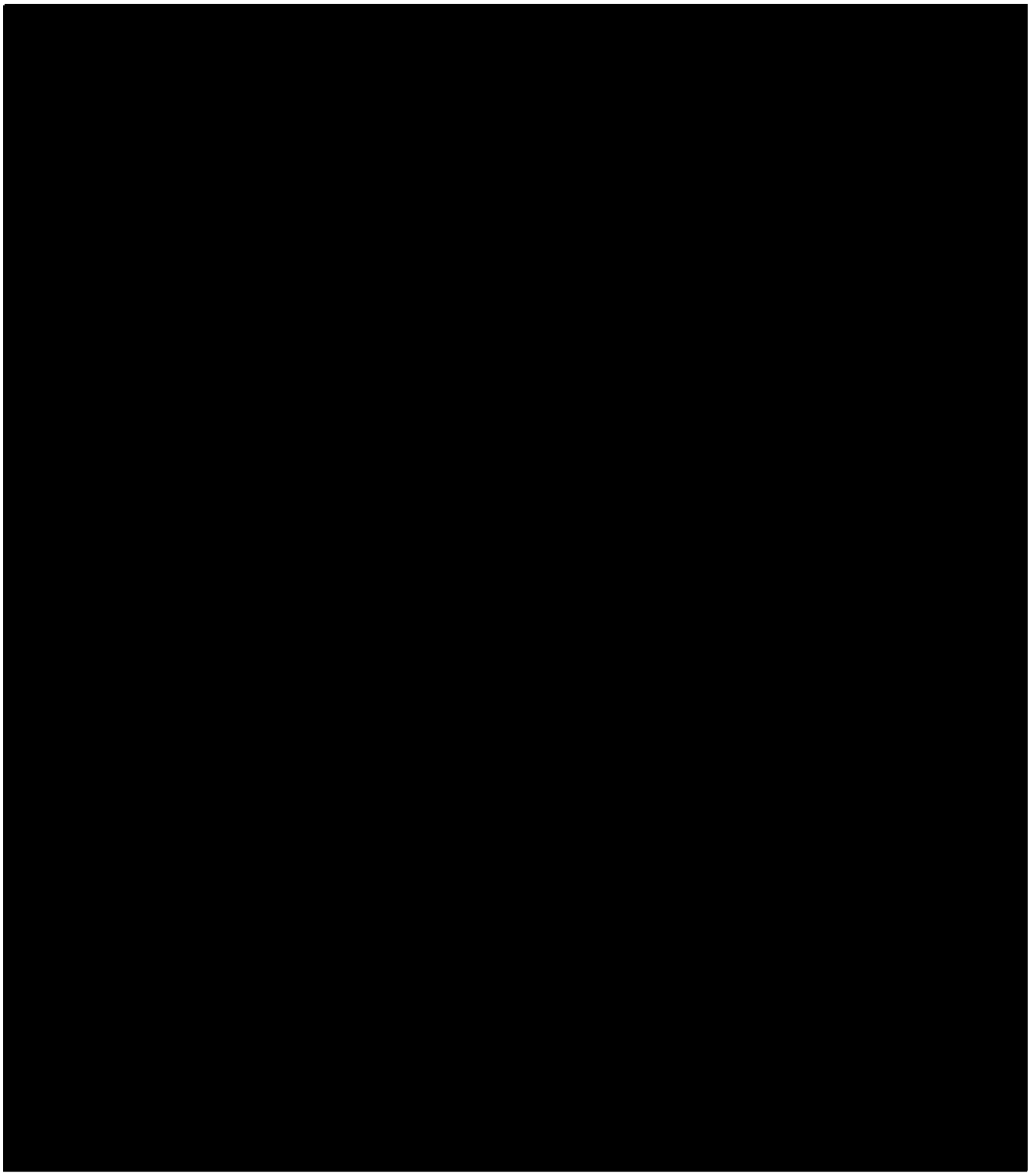
With regard to "contents," the Court is, of course, bound by the definition set forth in Section 2510(8), which, as noted, covers "any information concerning the substance, purport, or meaning" of the wire or electronic communication to which the information relates. When the communication at issue is between or among end users, application of the definition of "contents" can be relatively straightforward. For an e-mail communication, for example, the contents would most obviously include the text of the message, the attachments, and the subject-line information. In the context of person-to-computer communications like the interactions between a user and a web-mail service provider, however, determining what constitutes contents can become "hazy." See 2 LaFave, et al. Criminal Procedure § 4.6(b) at 476 ("[W]hen a person sends a message to a machine, the meaning of 'contents' is unclear."). Particularly in the user-to-provider context, the broad statutory definition of contents includes some information beyond what might, in ordinary parlance, be considered the contents of a communication.

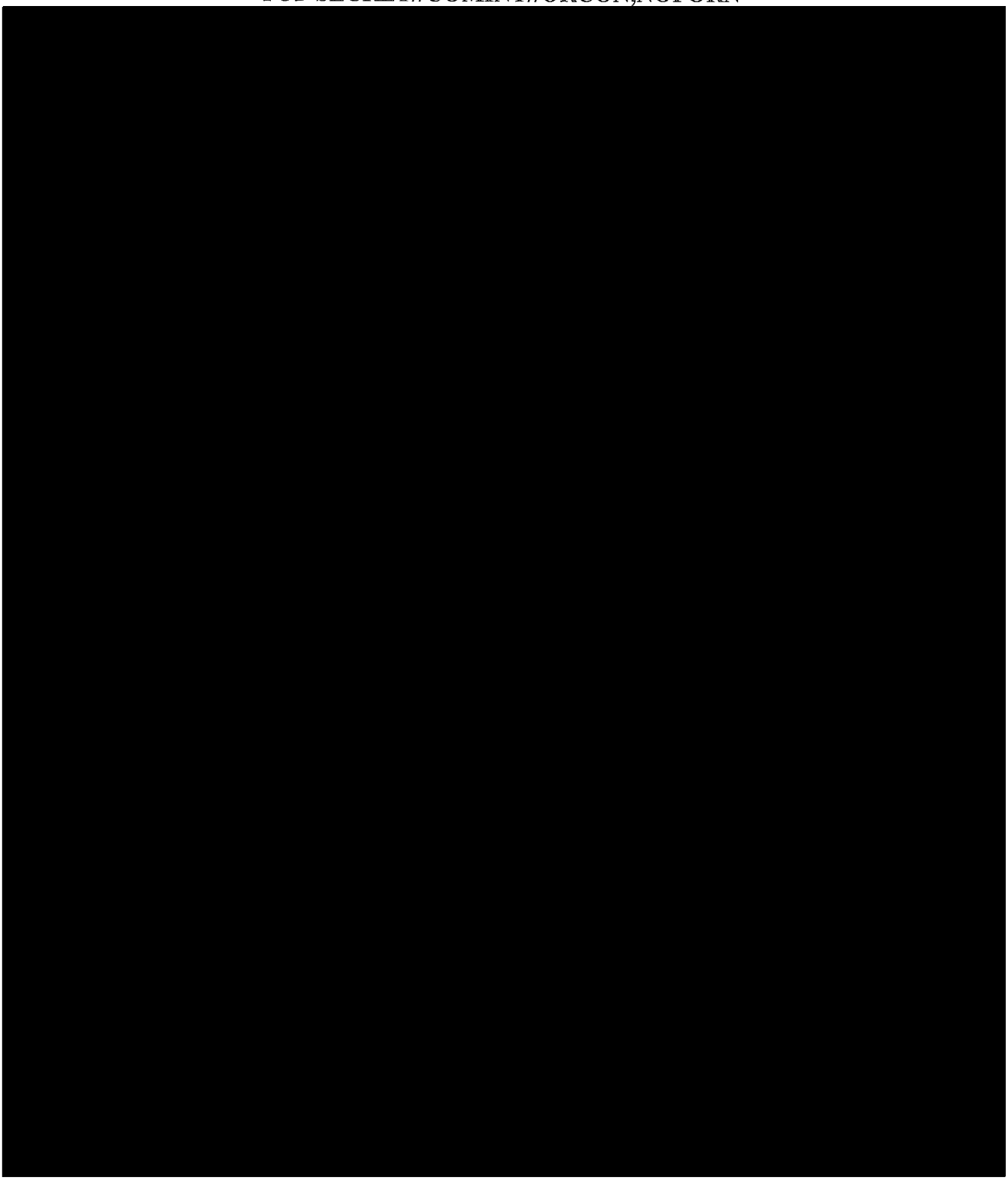
2. The Categories of Metadata Sought for Acquisition

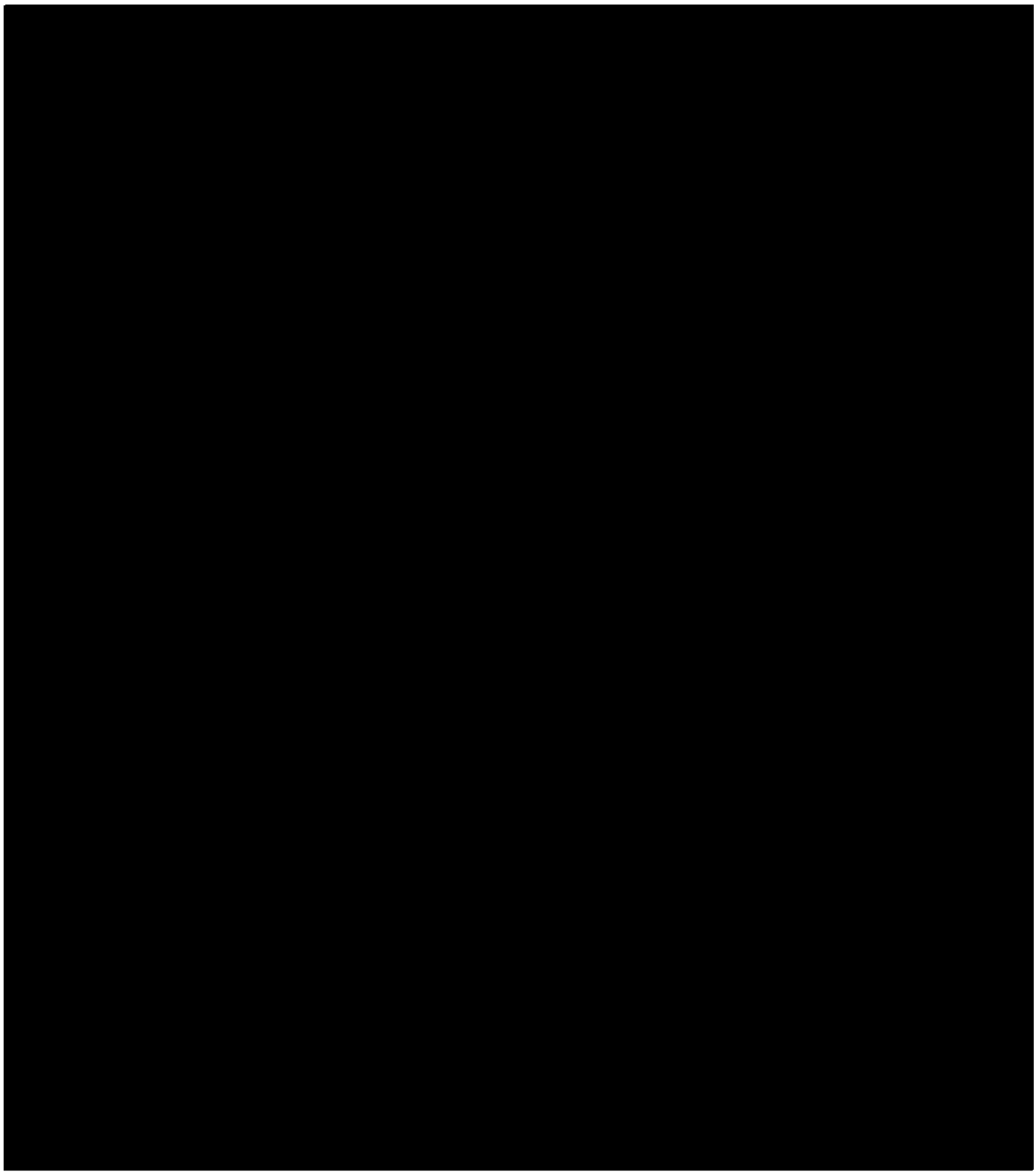
The government requests authority to [redacted] categories of [redacted]

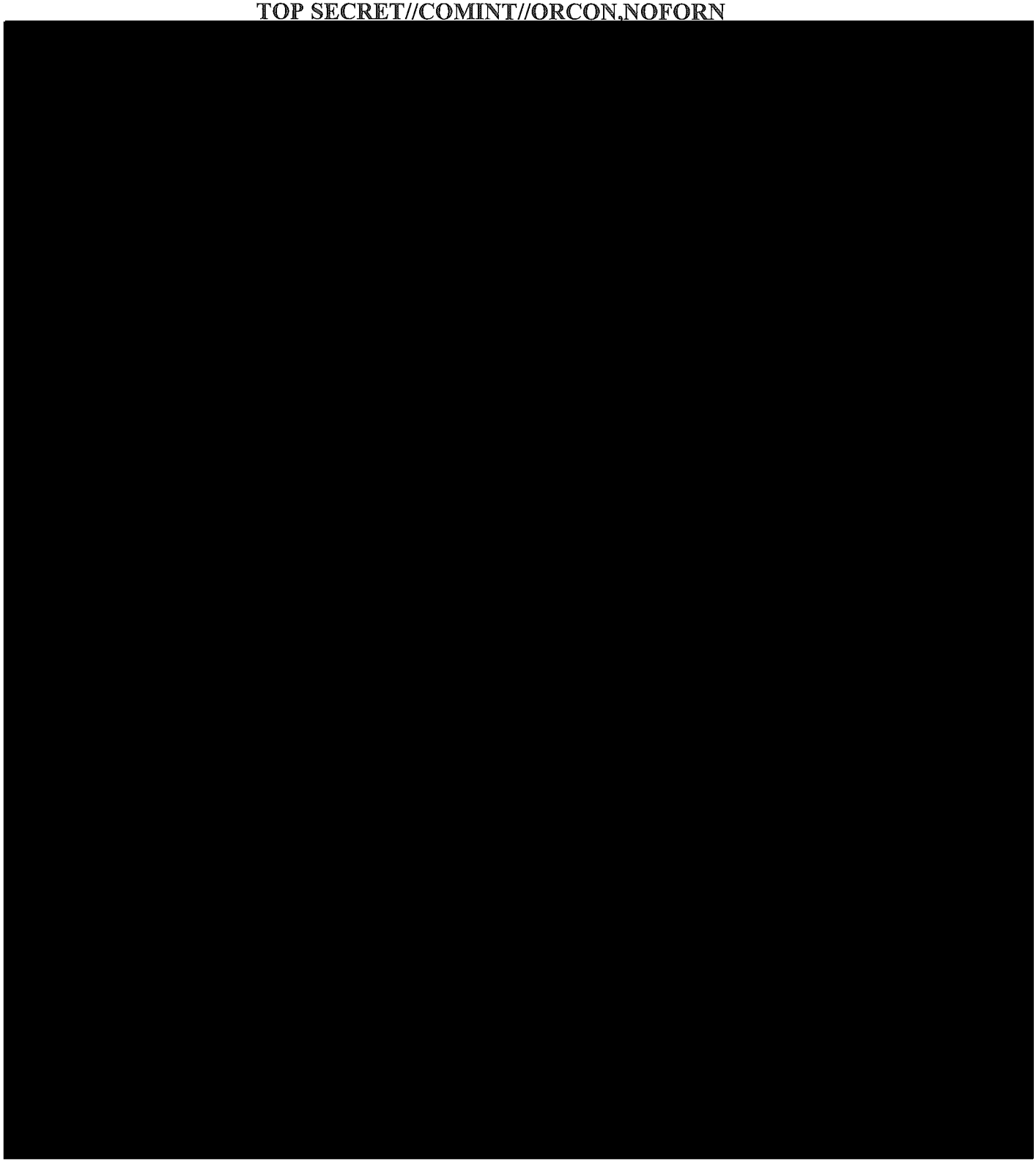
[36] For purposes of this Opinion, the term "e-mail communications" refers to e-mail messages sent between e-mail users [redacted]

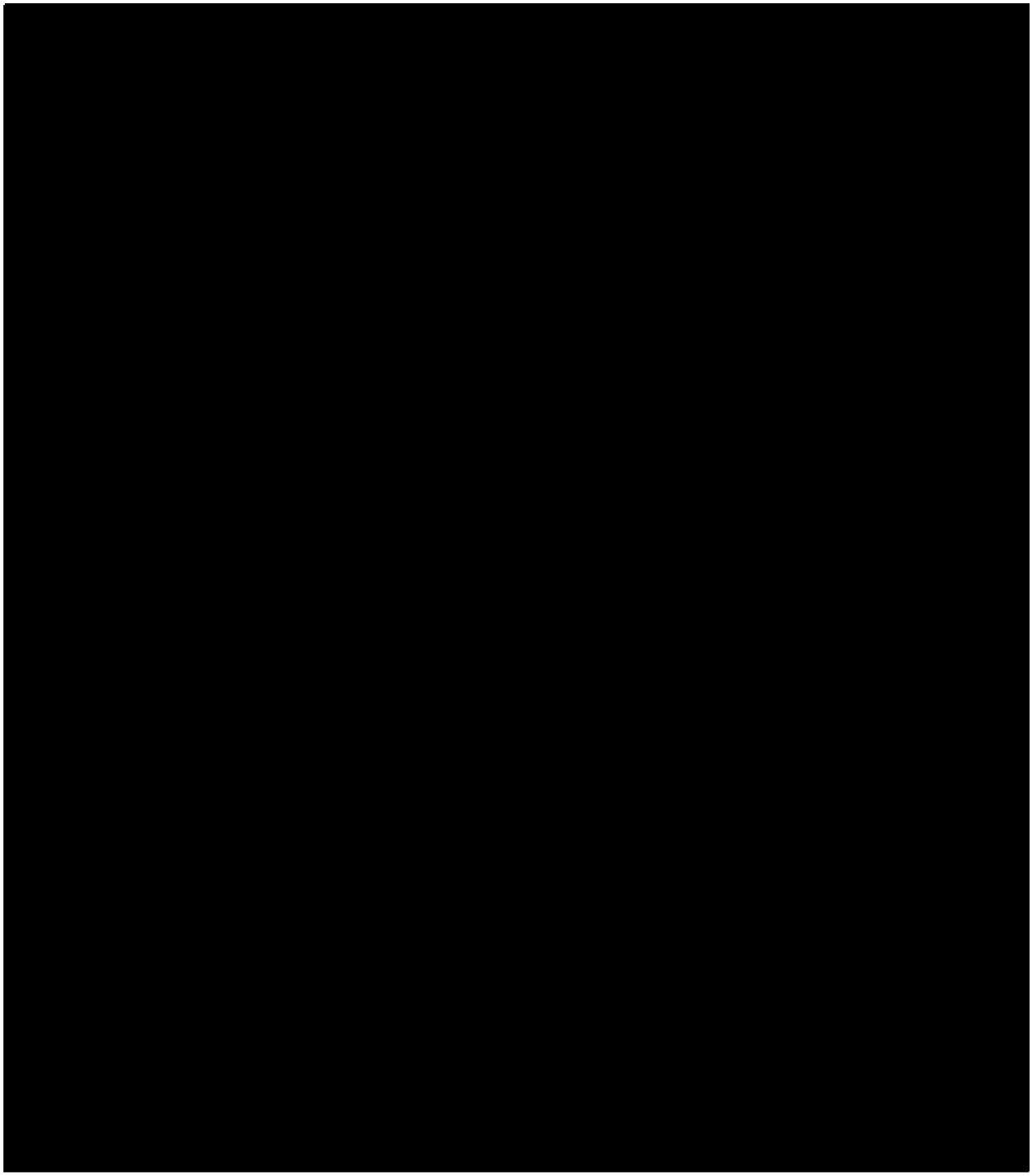


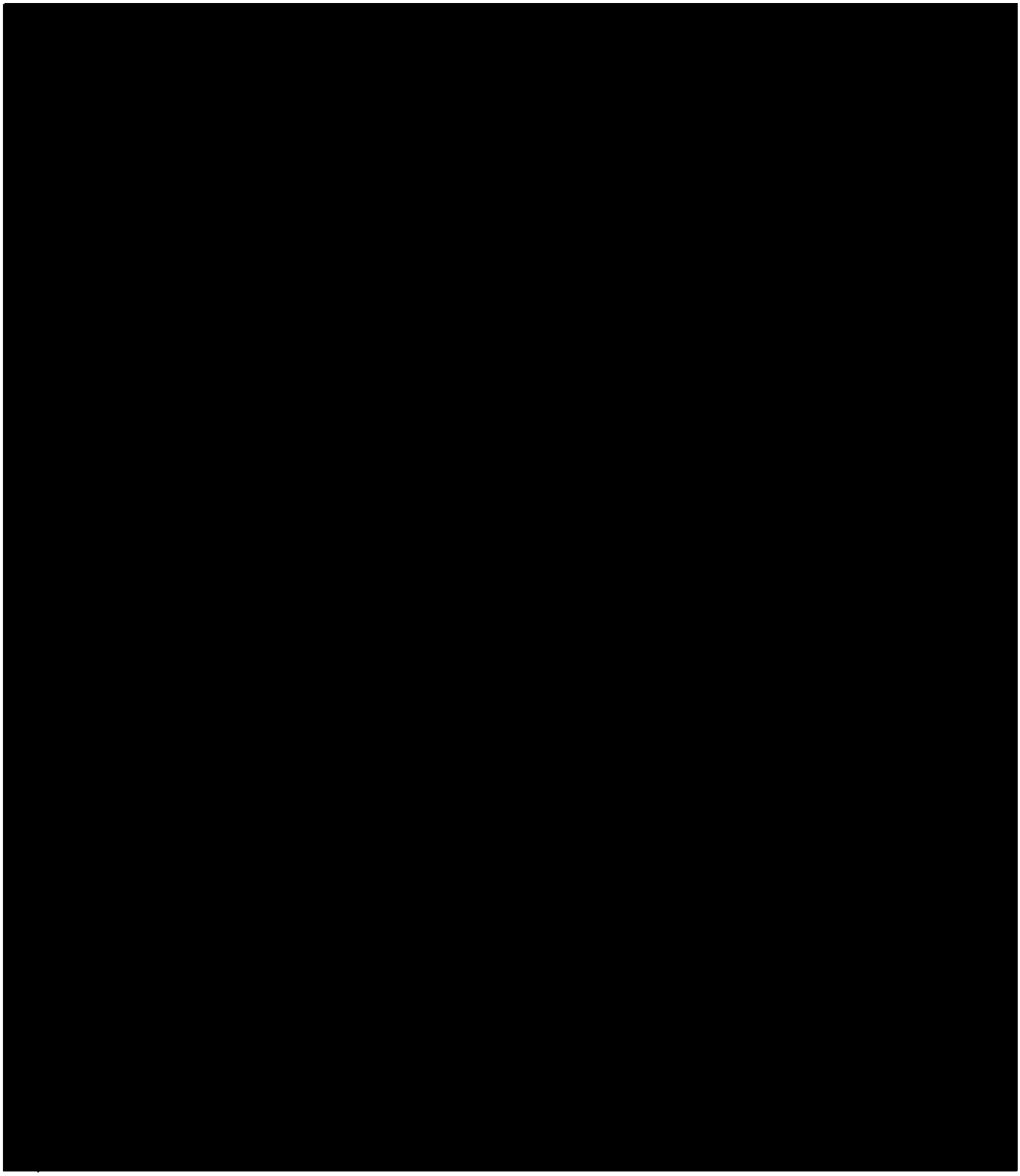


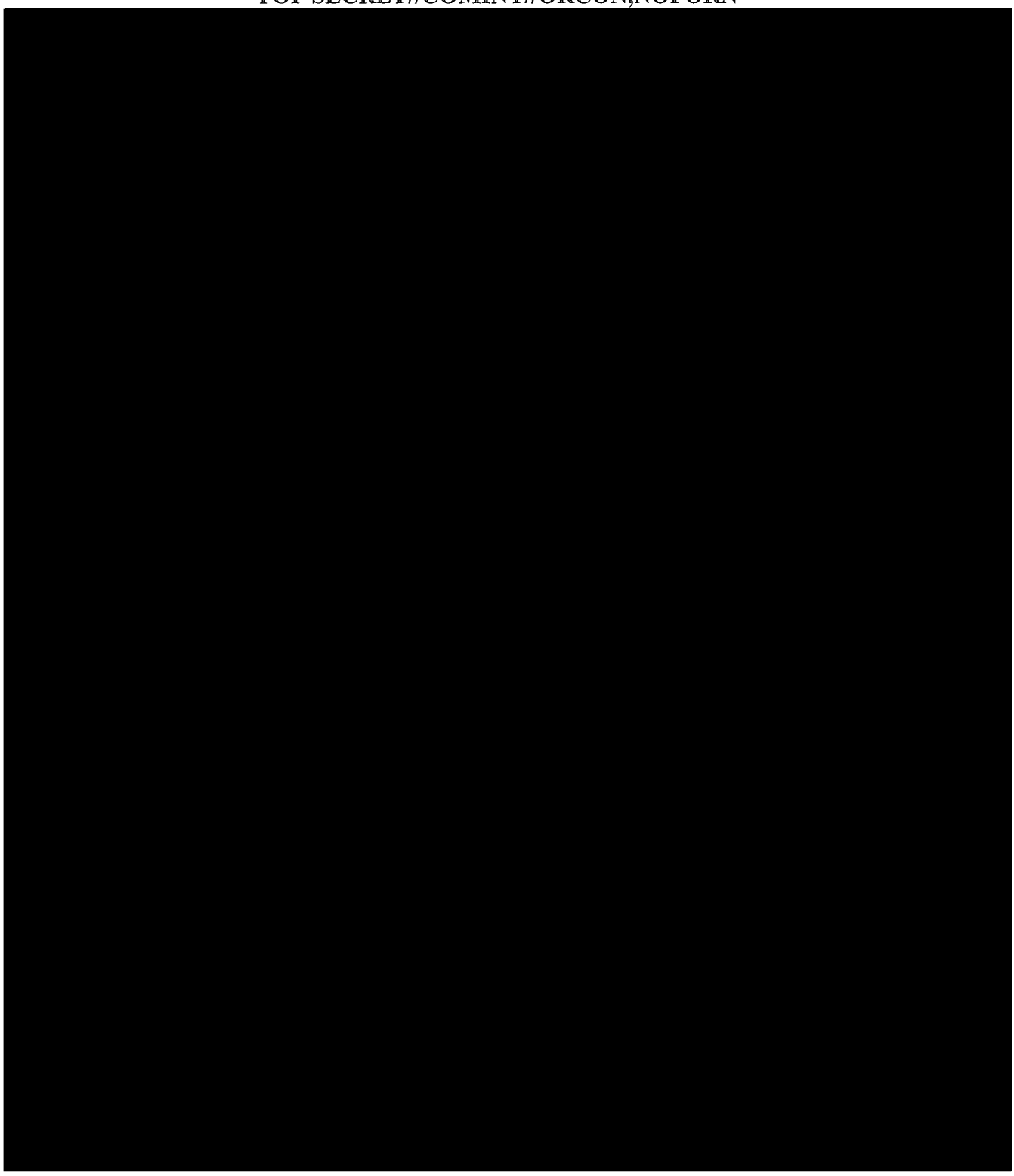


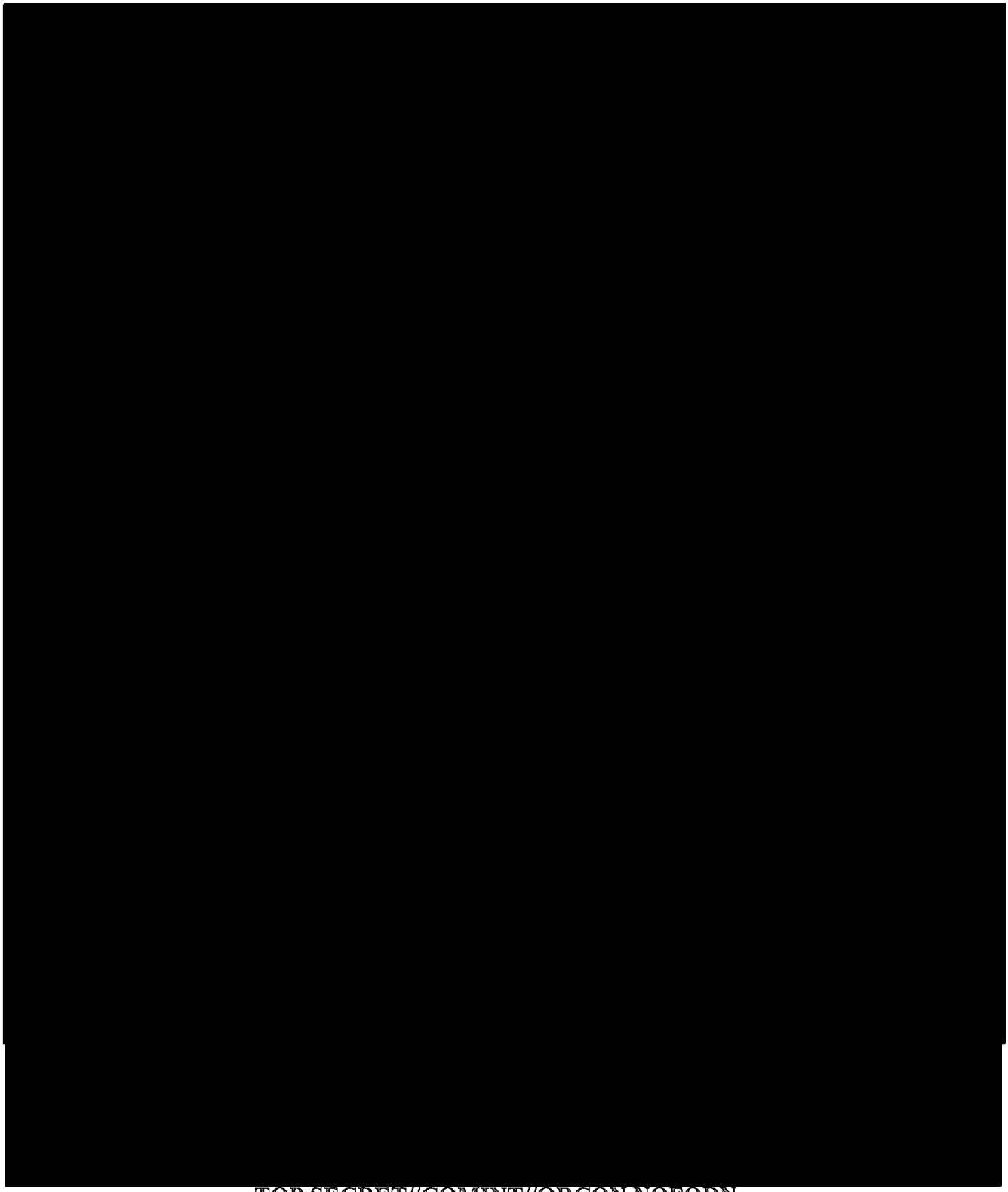


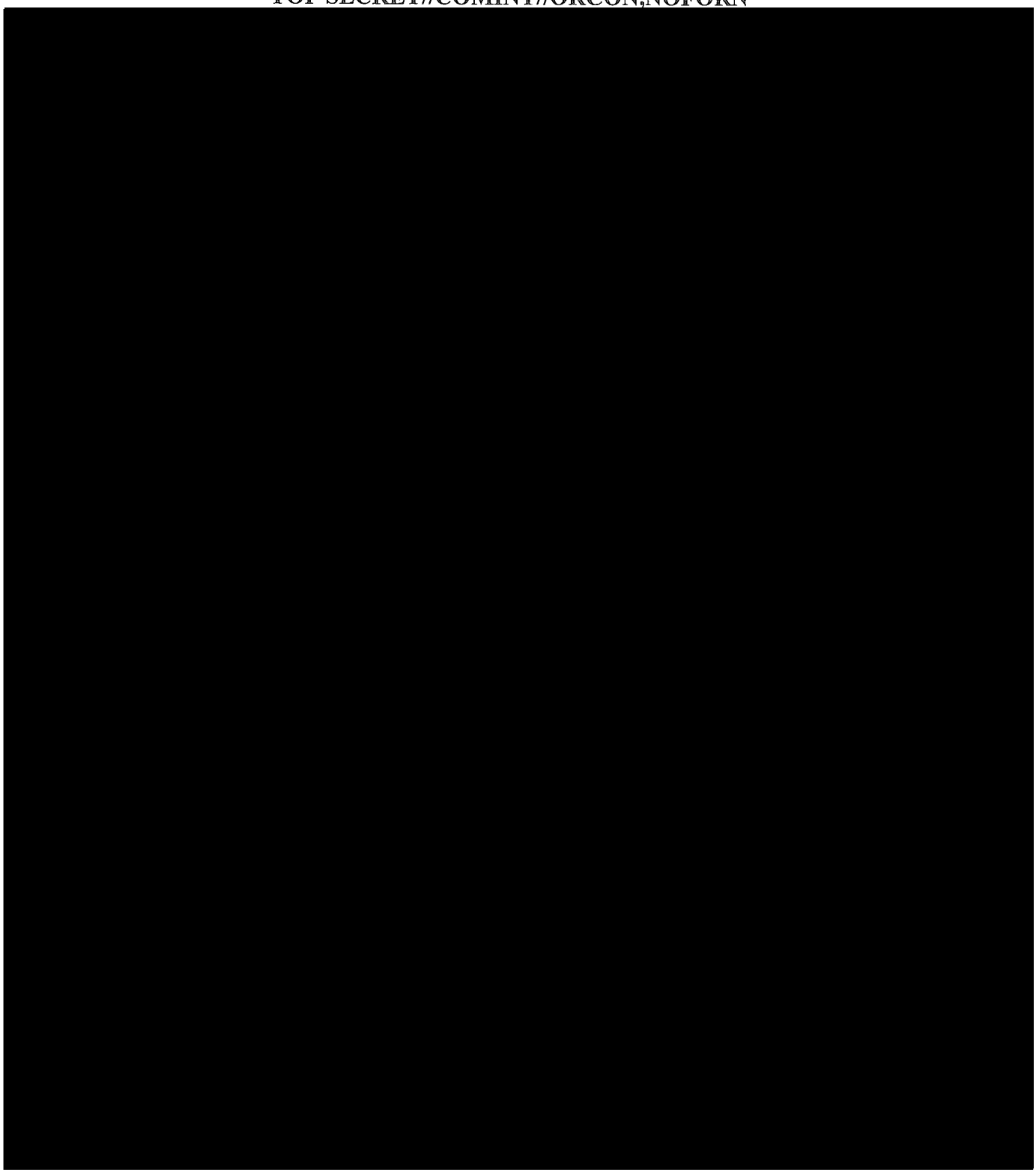


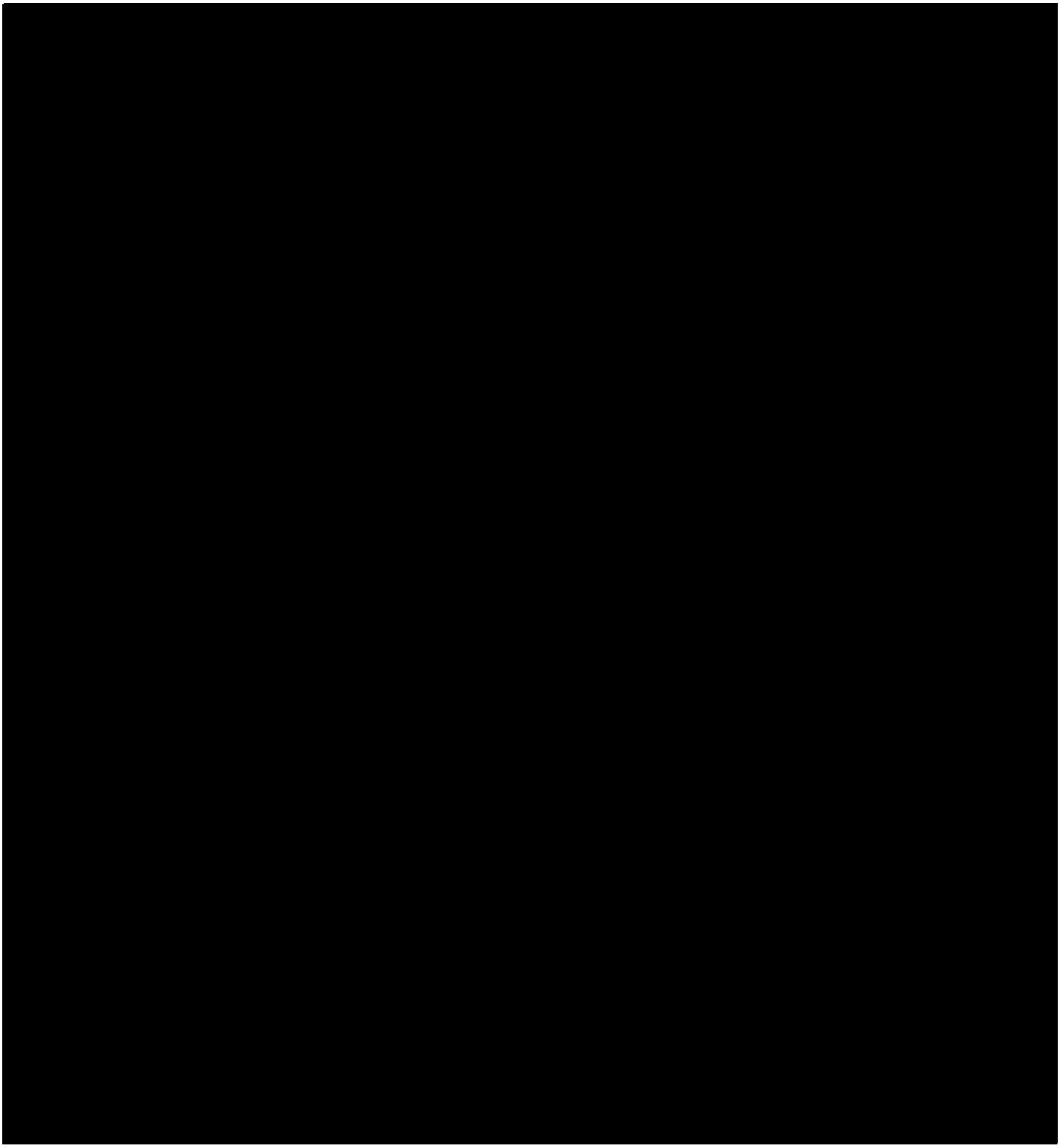


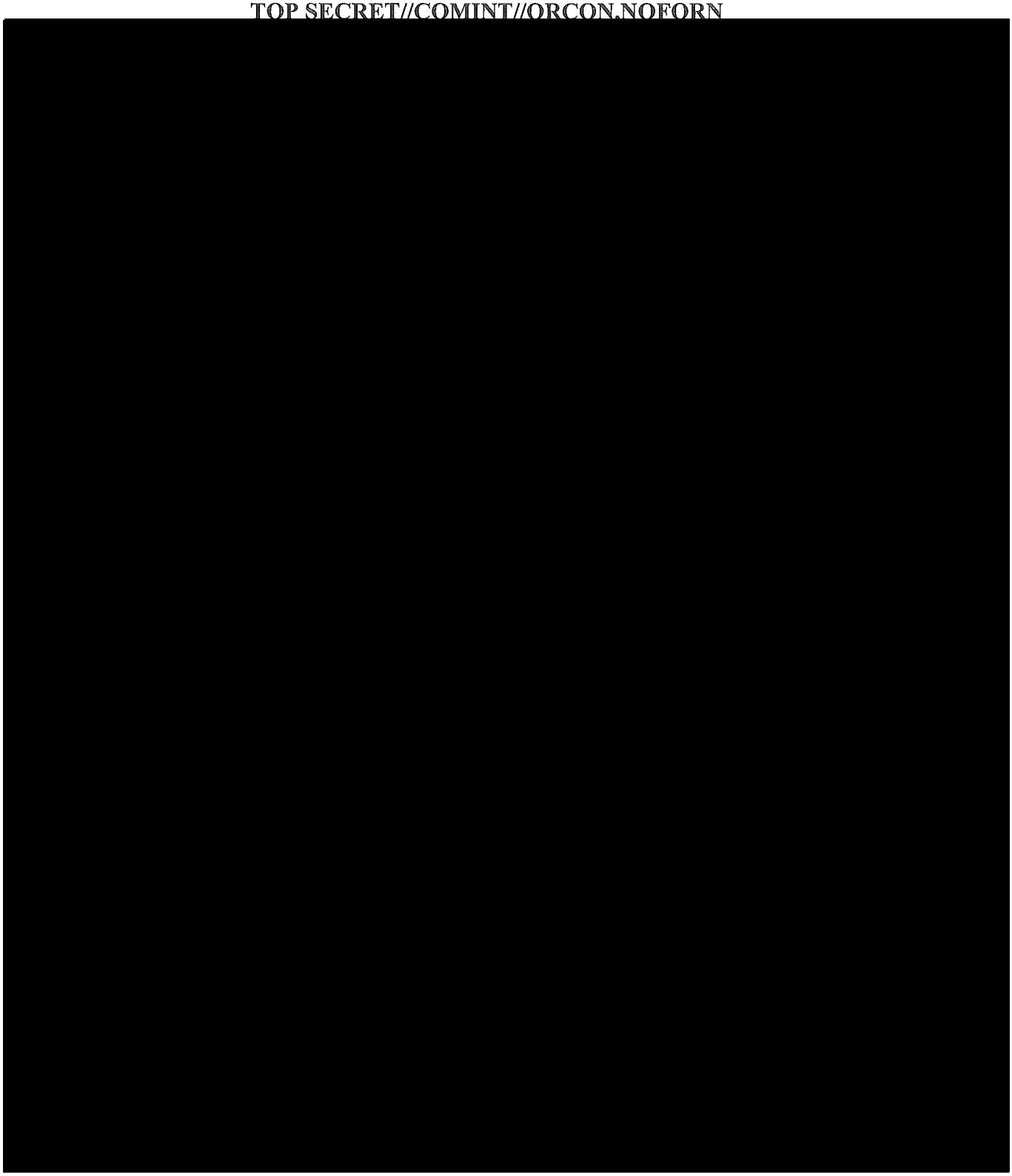


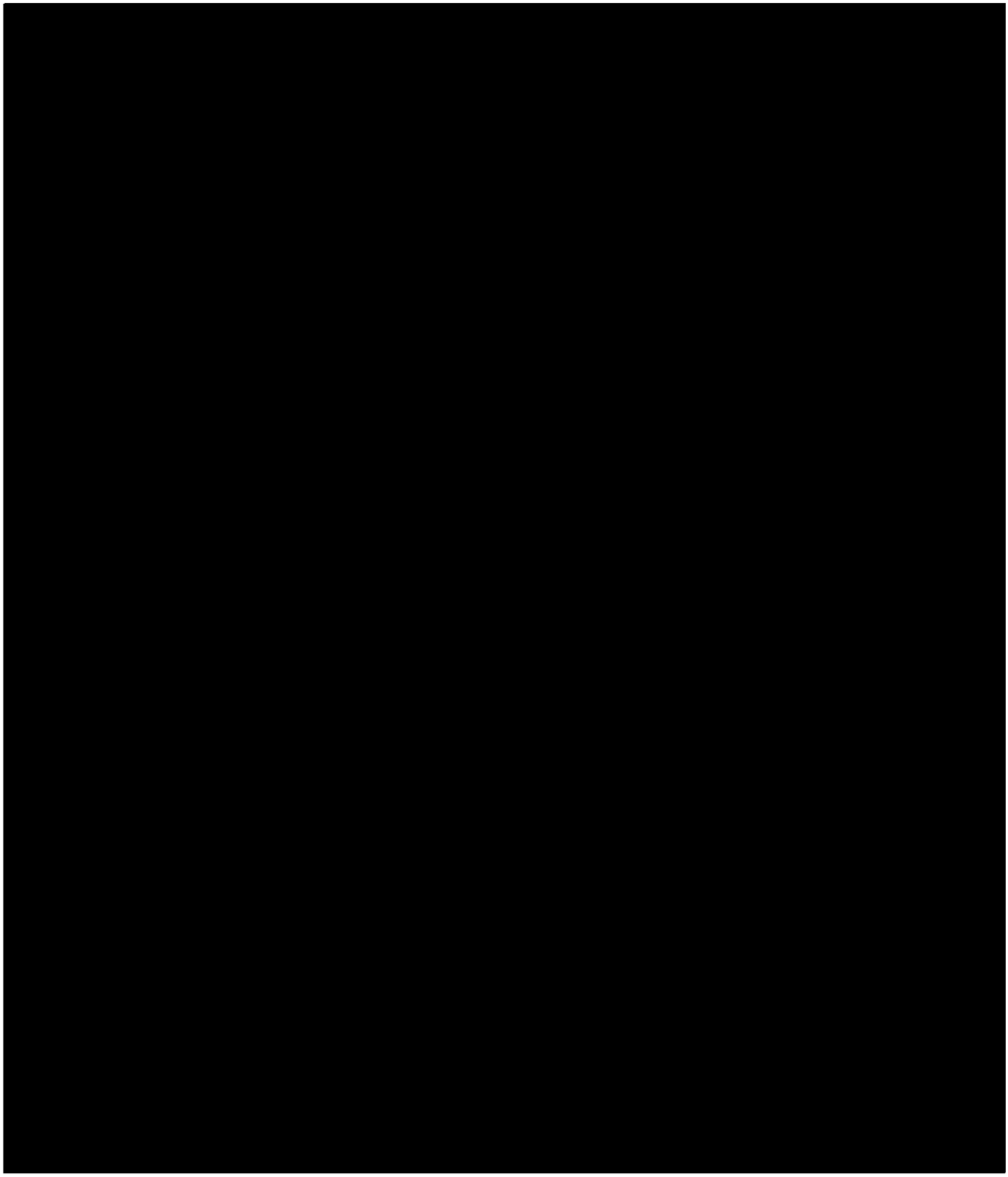


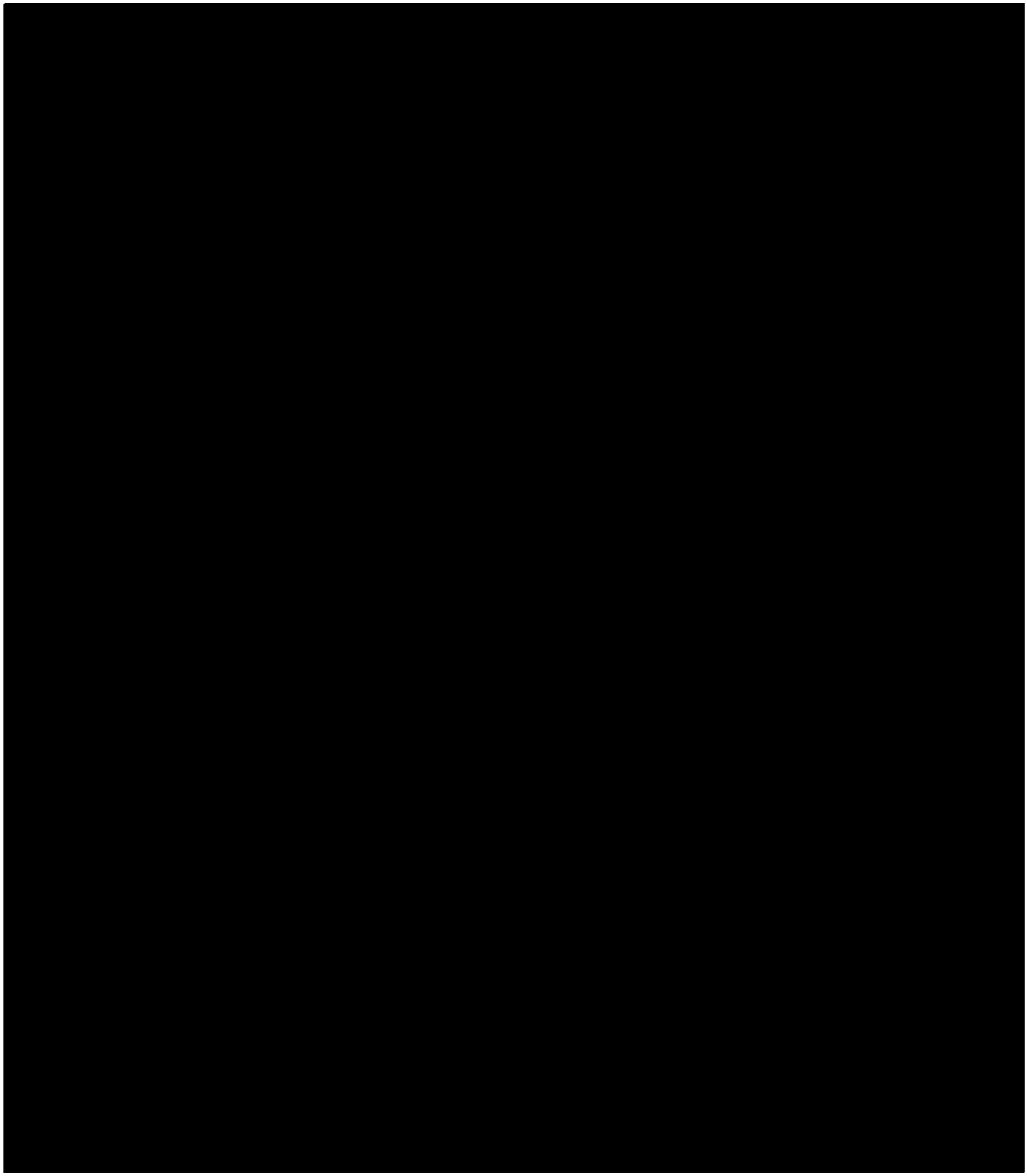


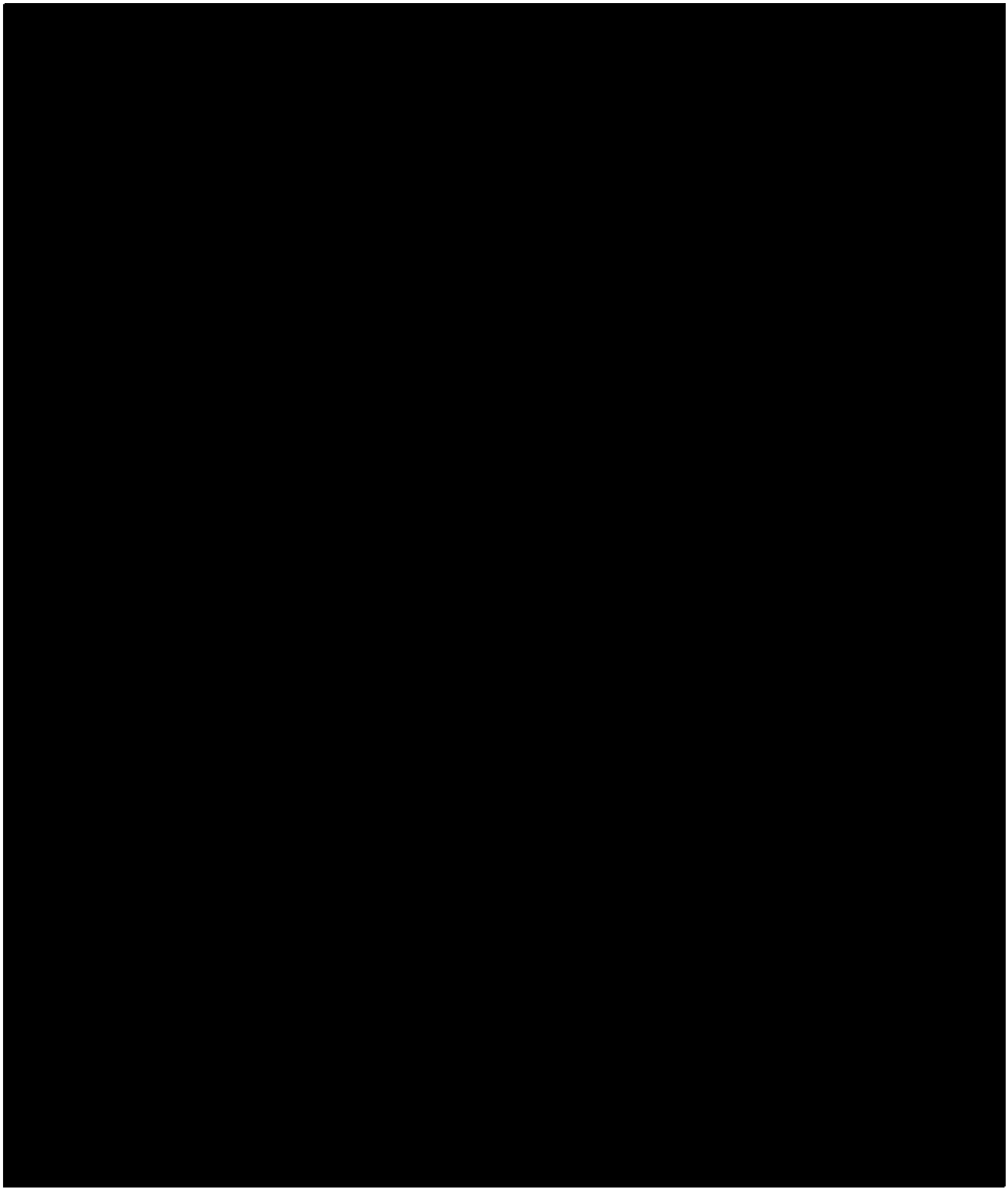


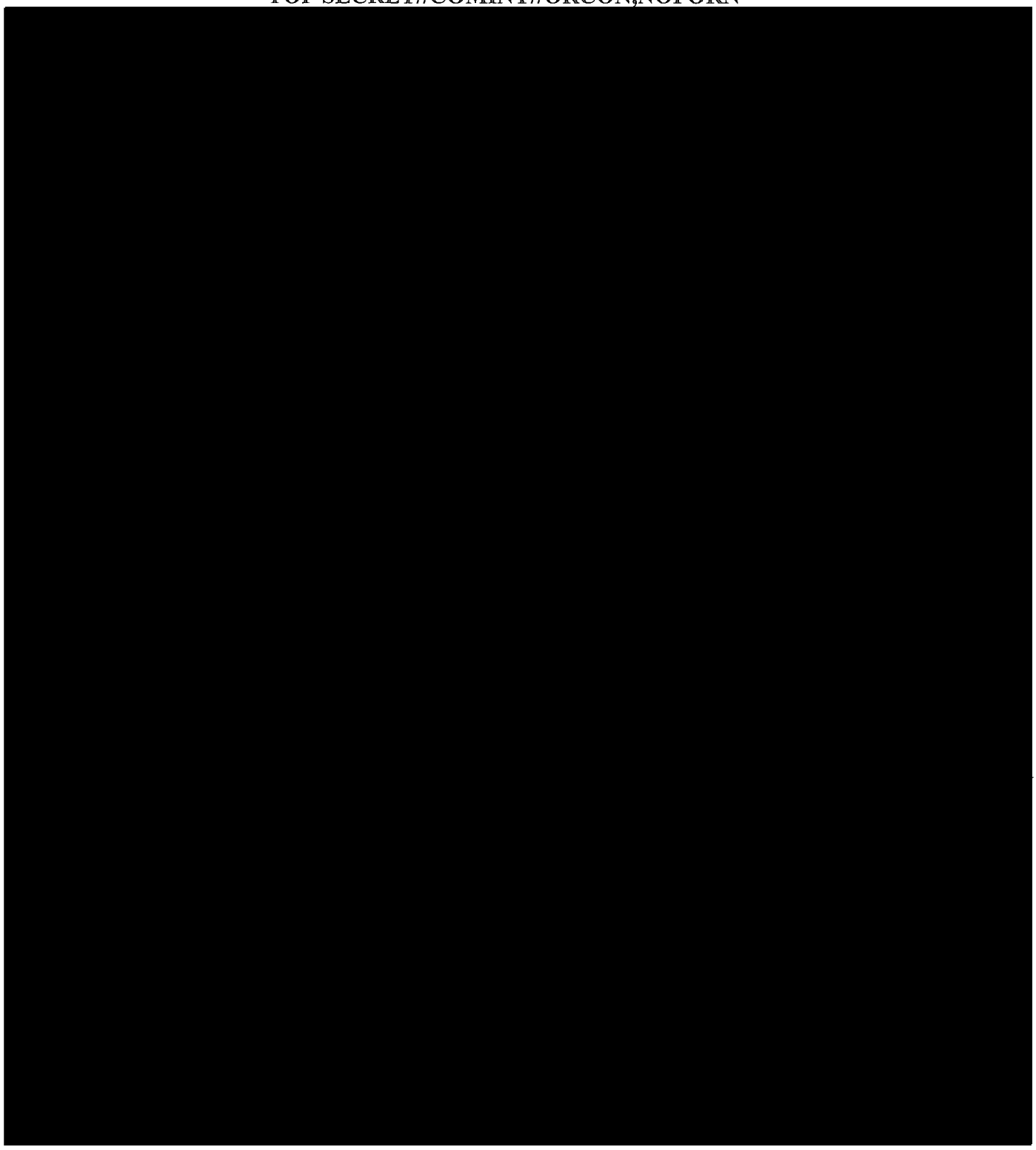












[redacted]

Within the definitions of "pen register" and "trap and trace device," "signaling information" appears as the fourth and final item in a list of undefined terms that all modify "information": "dialing, routing, addressing, [and/or] signaling information." 18 U.S.C. § 3127(3), (4). It is well-established in statutory interpretation that one term appearing within a list may take its meaning from the character of the other listed terms.[47] Here, the other three terms modifying "information" are not merely "associated with" a communication. Rather, dialing, routing, and addressing information are all types of information that, in the context of a

[redacted]

[47] See, e.g., Dolan v. United States Postal Serv., 546 U.S. 481, 486-87 (2006) ("'[A] word is known by the company it keeps' – a rule that 'is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.'") (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)); Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 8 (1985) (recognizing the "'familiar principle of statutory construction that words grouped in a list should be given related meaning'") (quoting Securities Indus. Ass'n v. Board of Governors, 468 U.S. 207, 218 (1984)).

communication, particularly relate to the transmission of the communication to its intended party. By placing "signaling" within the same list of types of communication-related information, Congress presumably intended "signaling information" likewise to relate to the transmission of a communication.

The wording of a related provision lends further support to this interpretation:

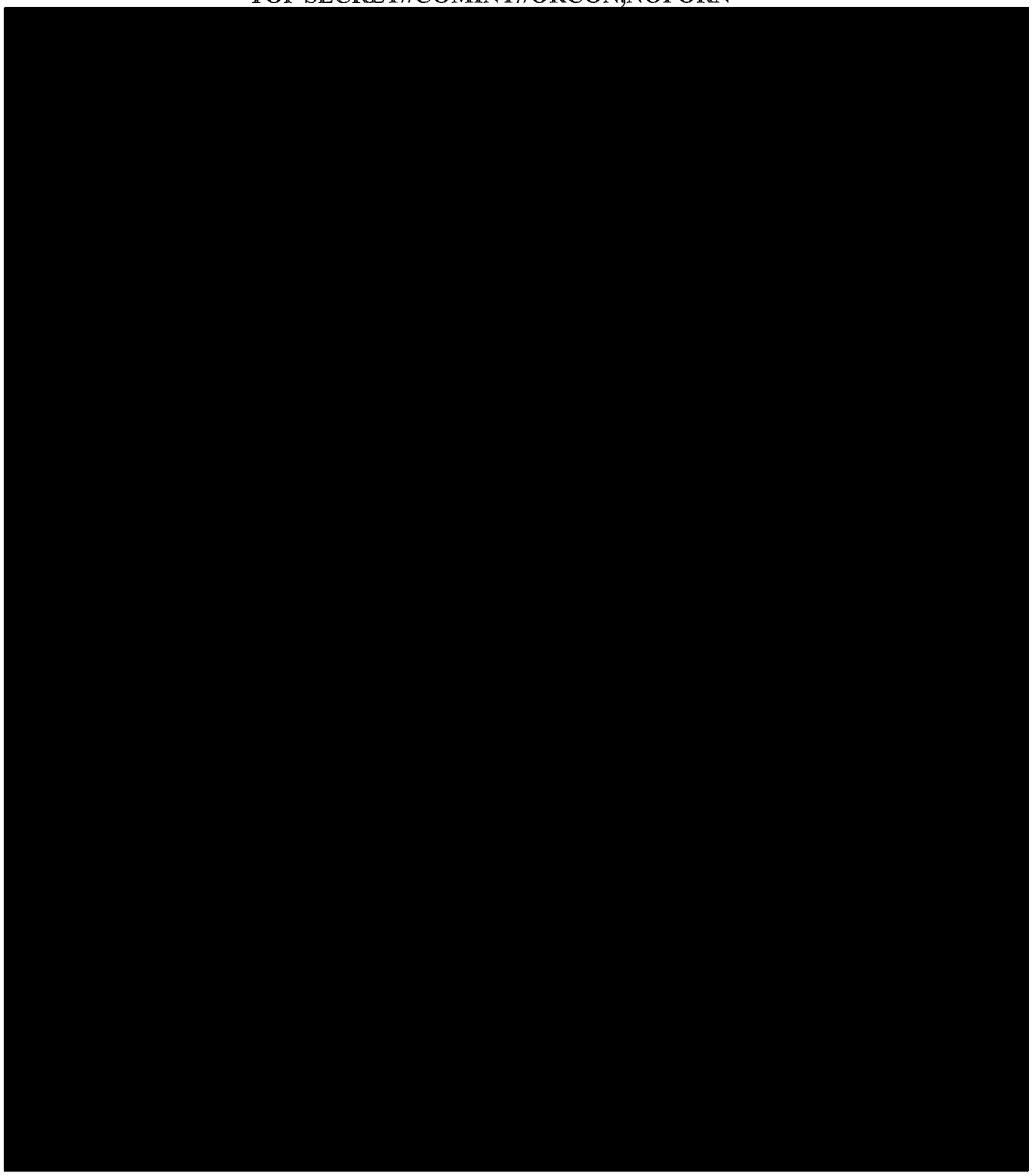
> A government agency authorized to install and use a pen register or trap and trace device . . . shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications.

18 U.S.C. § 3121(c) (emphasis added). Questions of available technology aside, there is no reason to think Congress intended to compel an agency deploying a PR/TT device to try to avoid acquiring data that would constitute DRAS information under the definitions of "pen register" and "trap and trace device." For this reason, Section 3121(c) strongly suggests that the intended scope of acquisition under a PR/TT device is DRAS information utilized in the processing and transmitting of a communication.[48]

[redacted]

The legislative history relied on by the government, see Memorandum of Law at 52, actually points to a similar conclusion about the intended scope of signaling information to be acquired by a PR/TT device. It states that "orders for the installation of [PR/TT] devices may obtain any non-content information – 'dialing, routing, addressing, and signaling information' – utilized in the processing or transmitting of wire and electronic communications." H.R. Rep. No. 107-236(I), at 53 (emphasis added; footnote omitted). Moreover, the particular types of information mentioned in the legislative history as DRAS information that may be collected by a PR/TT device all pertain to the processing or transmitting of a communication. See, e.g., id. (referencing "attempted connections," including "busy signals" and "packets that merely request a telnet connection in the Internet context"). The House report states that "non-content information contained in the 'options field' of a network packet header constitutes 'signaling' information and is properly obtained by an authorized pen register or trap and trace device." Id. at 53 n.1. [redacted]

[redacted]



[redacted]

b. Contents

As noted above, "contents," "when used with respect to any . . . electronic communication, includes any information concerning the substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8) (emphasis added). "Electronic communication" is also defined broadly, so that it encompasses the exchanges of information between account user and provider that are described by communications actions. And of course, the definitions of "pen register" and "trap and trace device" provide that the information acquired "shall not include the contents of any communication," Section 3127(3) & (4) (emphasis added) – unqualified language that certainly seems to include electronic communications between account users and providers. The combined literal effect of these provisions appears to be that PR/TT devices may not obtain any information concerning the substance, purport, or meaning of any communication, including those between account users and providers, and that communications actions that divulge any such information would be impermissible "contents" for purposes of a PR/TT authorization.

The government does not directly confront the statutory text on this point. It does argue, however, that an expansive, literal understanding of the prohibition on acquiring "contents" would lead to an absurd and unintended restriction on what PR/TT devices can do. Specifically, the government notes that the electronic impulses transmitted by dialing digits on a telephone

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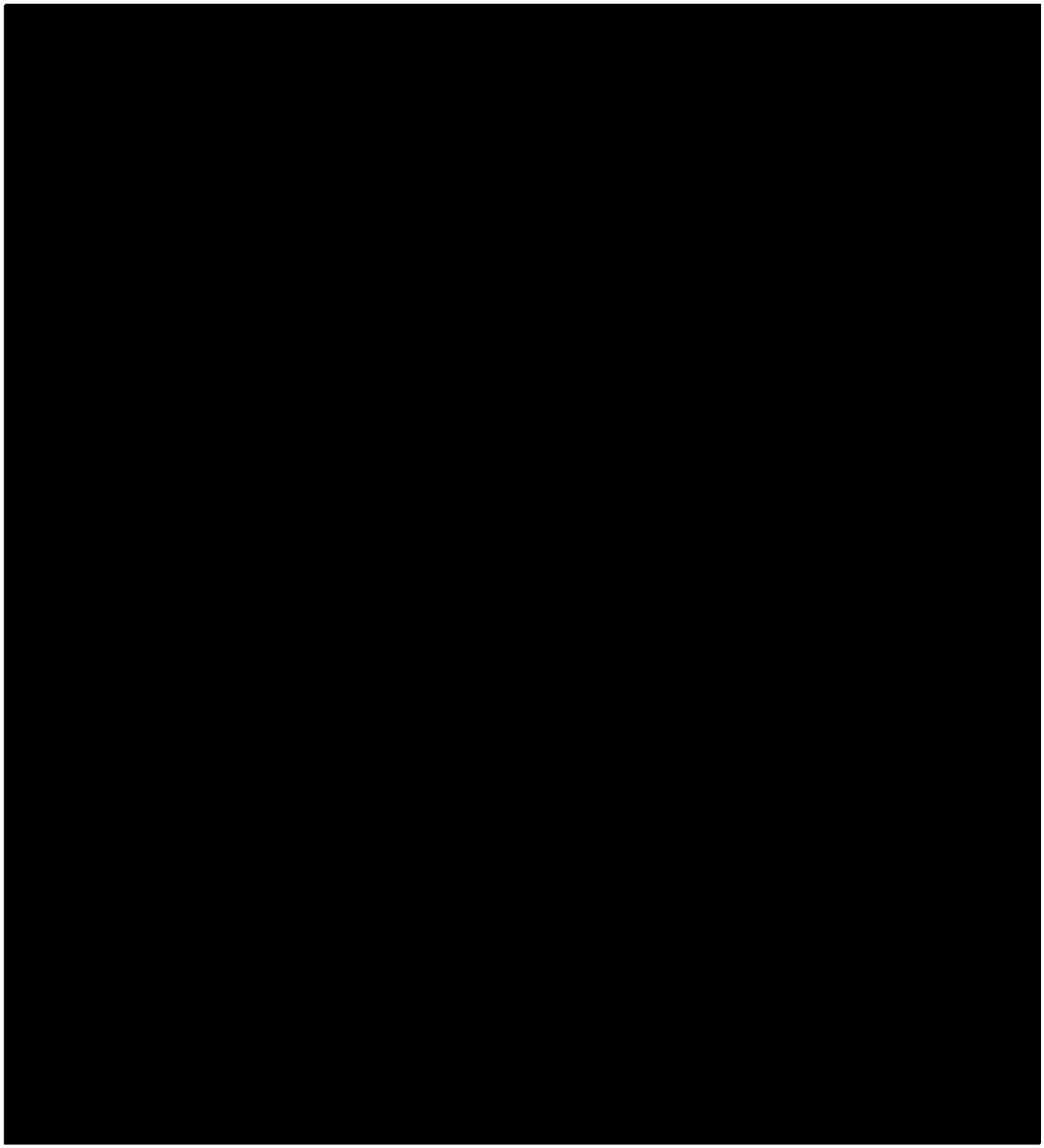
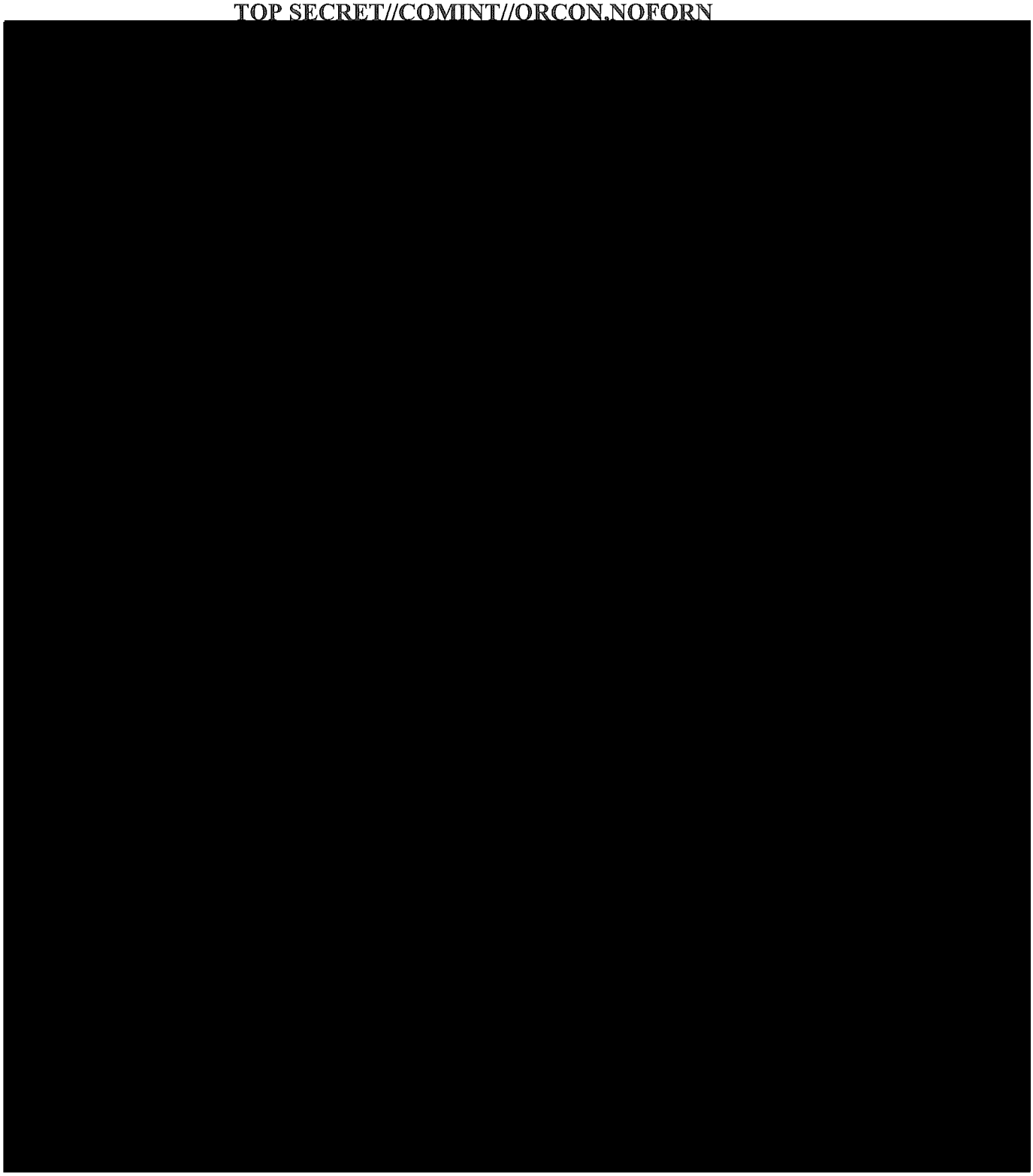
[49] The Court's understanding of "processing" and "transmitting" e-mail [redacted] is set forth below. See pages 63-64, infra.

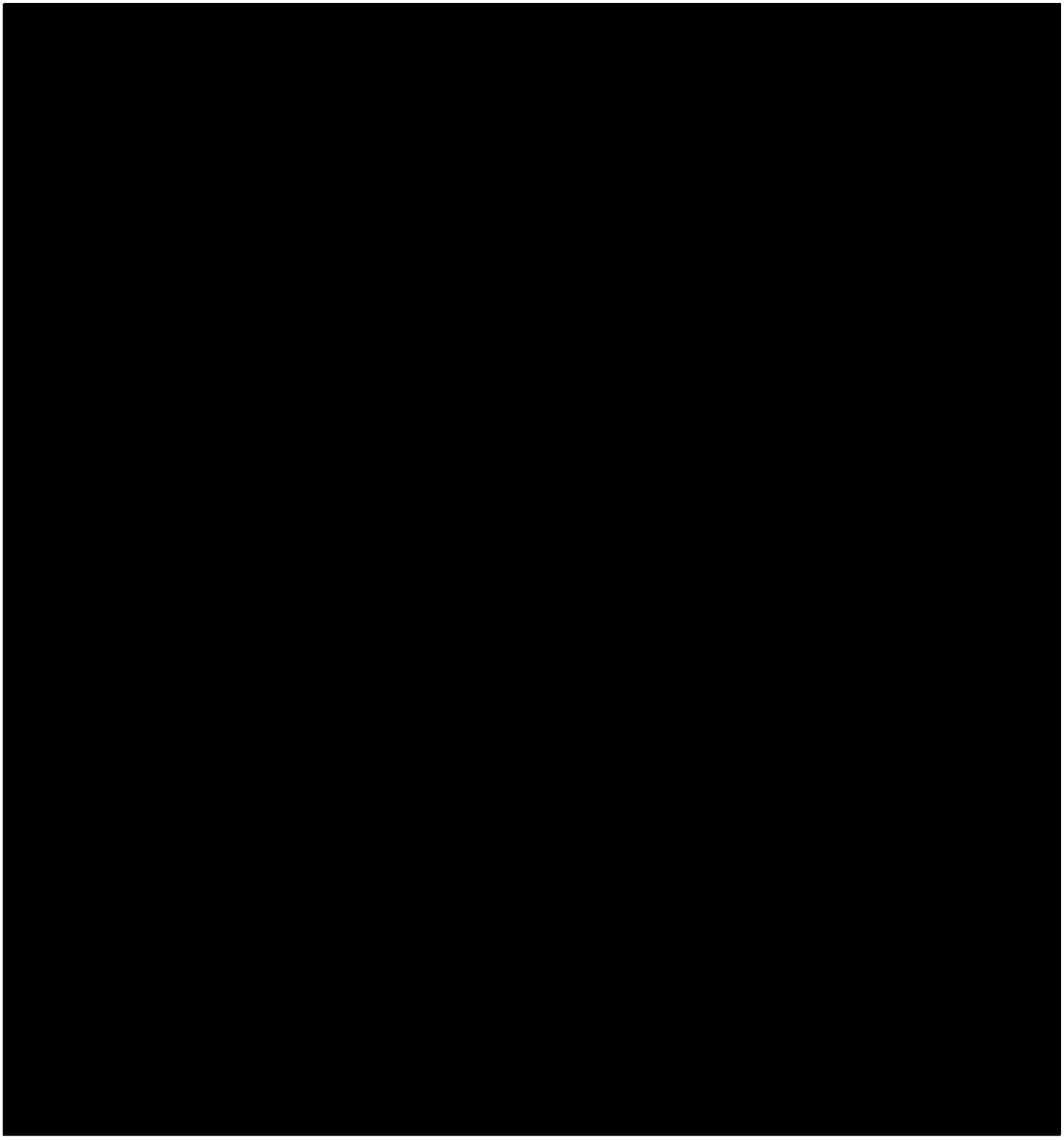
literally qualify as an "electronic communication" under Section 2510(12), but the "import" of that communication – i.e., "place a call from this telephone to the one whose number has been dialed" – has never been understood to be impermissible "contents" under the PR/TT statute. See [redacted] Response at 7.

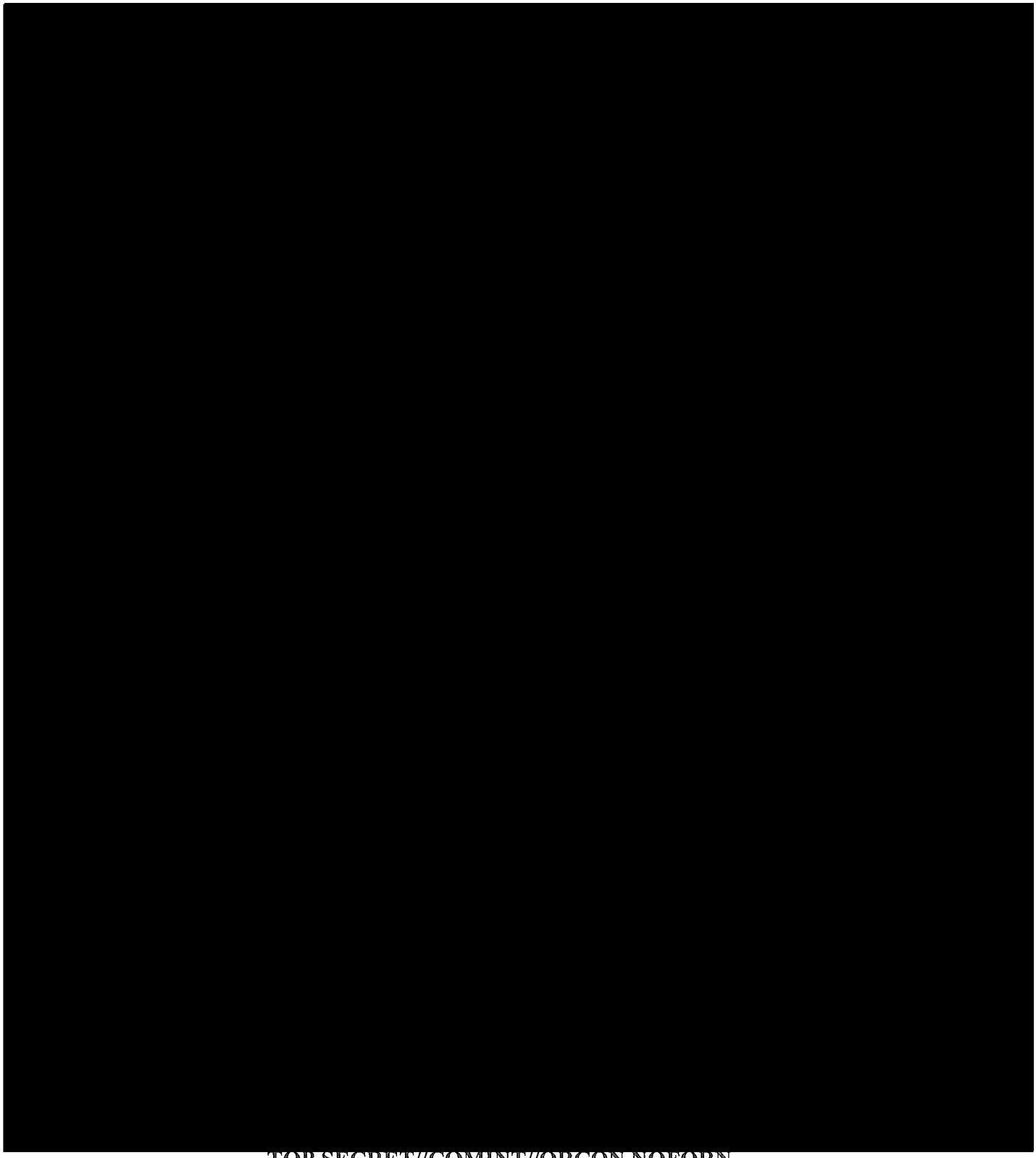
[redacted]

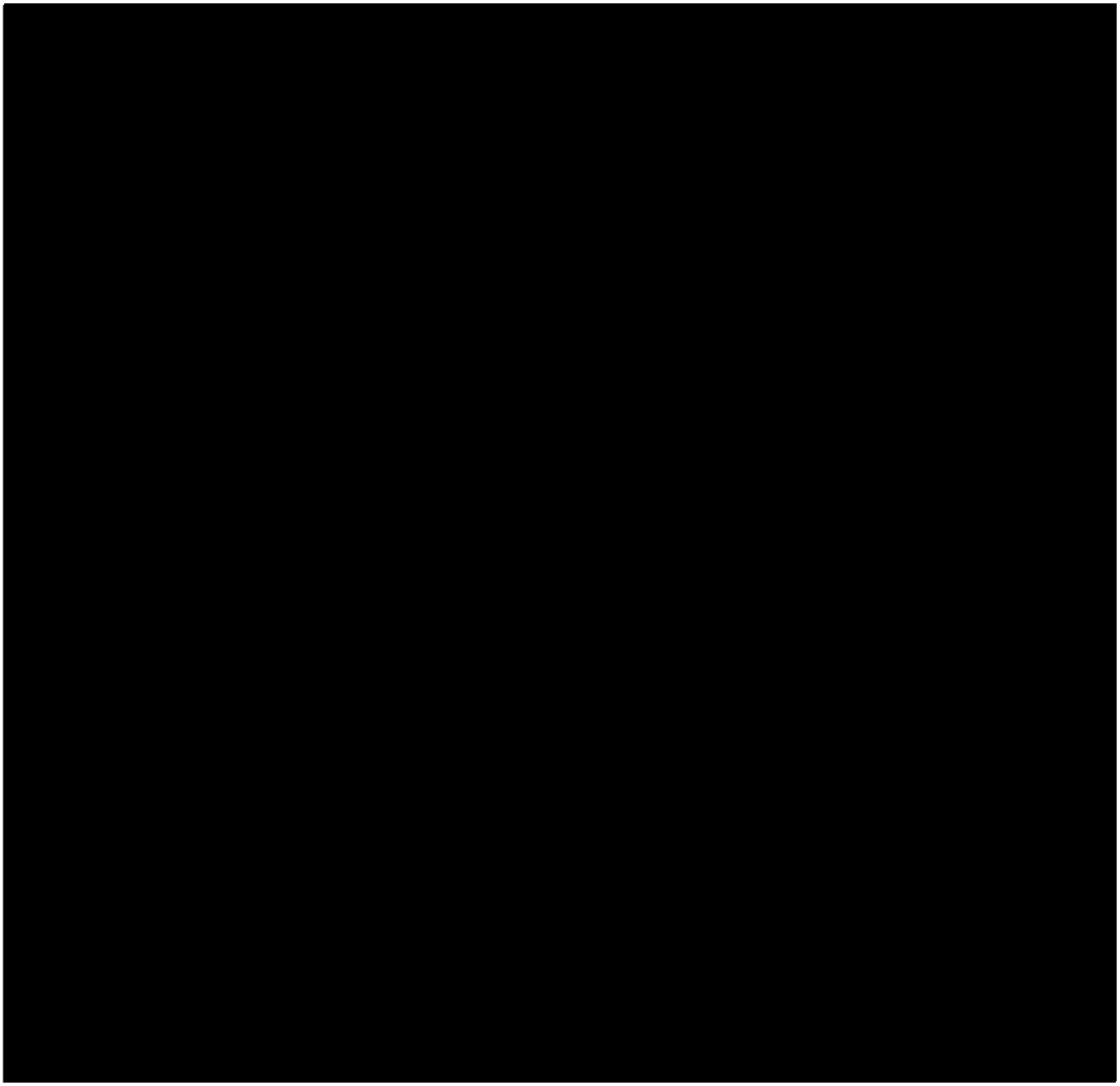
[50] While Congress sought, in the relevant statutory definitions, to reinforce "a line identical to the constitutional distinction" between contents and non-contents "drawn by the . . . Supreme Court in Smith v. Maryland, 442 U.S. 735, 741-43 (1979)," H.R. Rep. No. 107-236(I), at 53, it also expanded the "pen register" and "trap and trace" definitions to a broad range of Internet communications for which the scope of Fourth Amendment protections is unclear, see, e.g., 2 LaFave, et al. Criminal Procedure § 4.4(a) at 456-57 (the law is "highly unsettled," with "a range of different ways that courts plausibly could apply the Fourth Amendment to Internet communications").



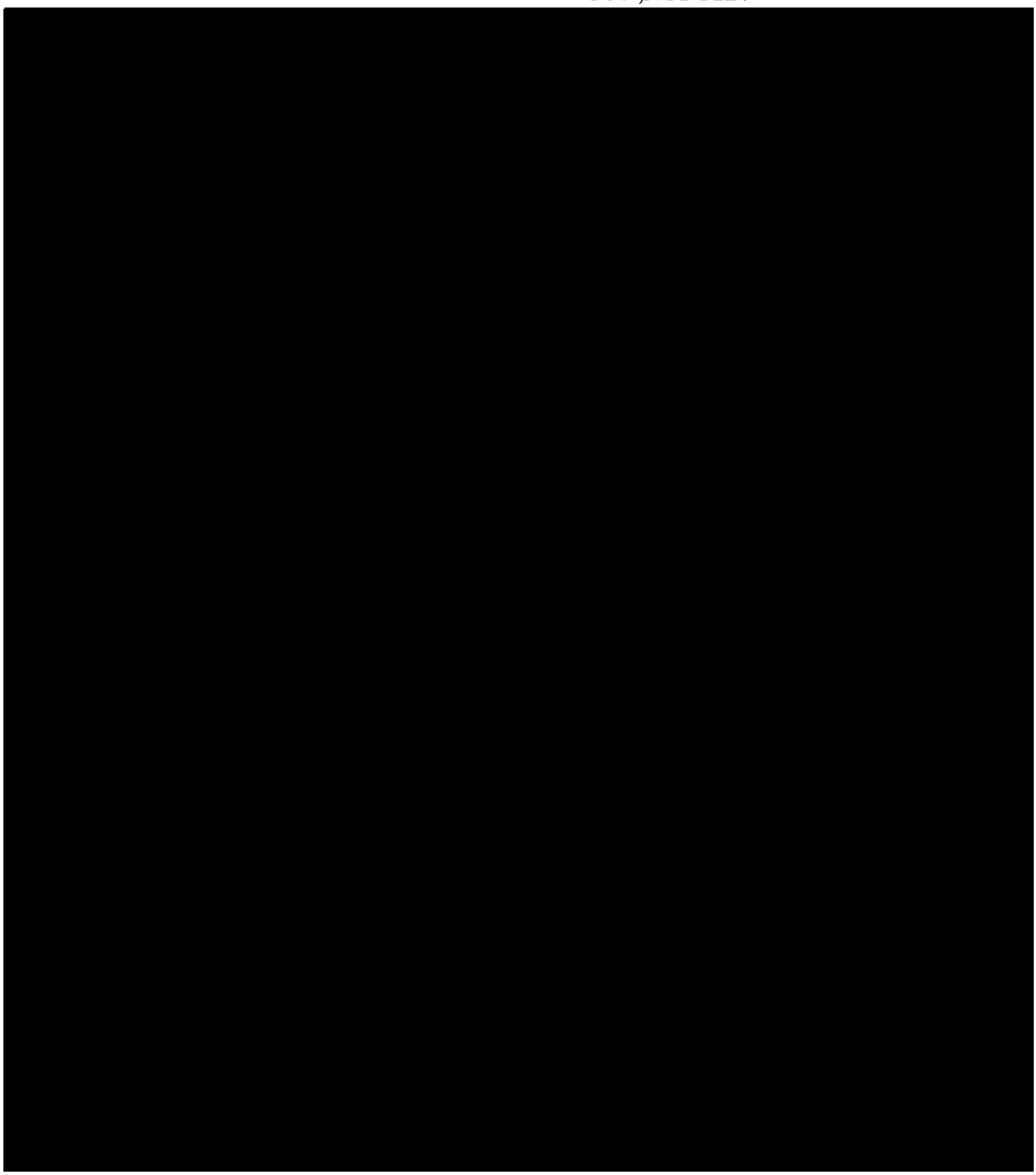


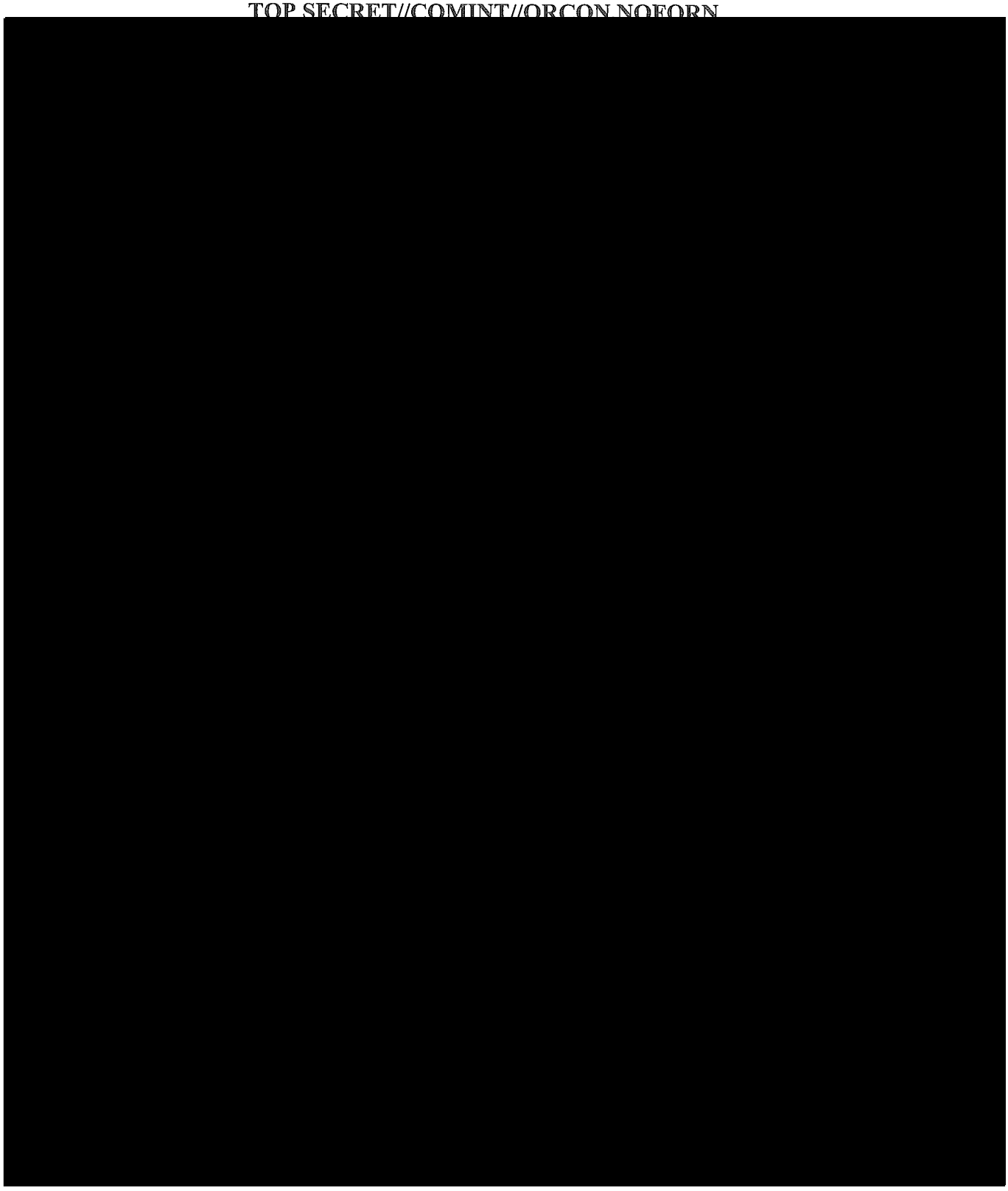


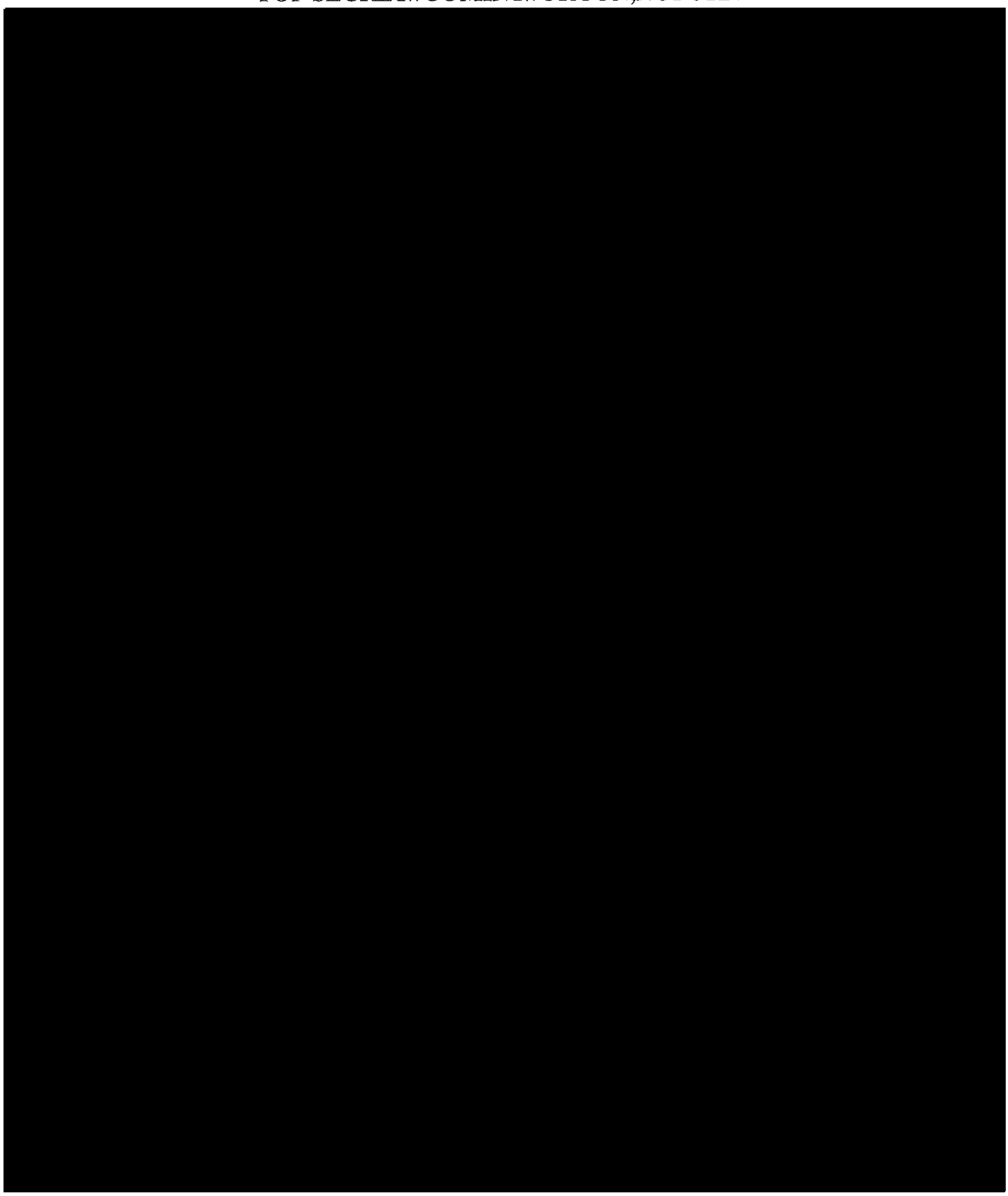


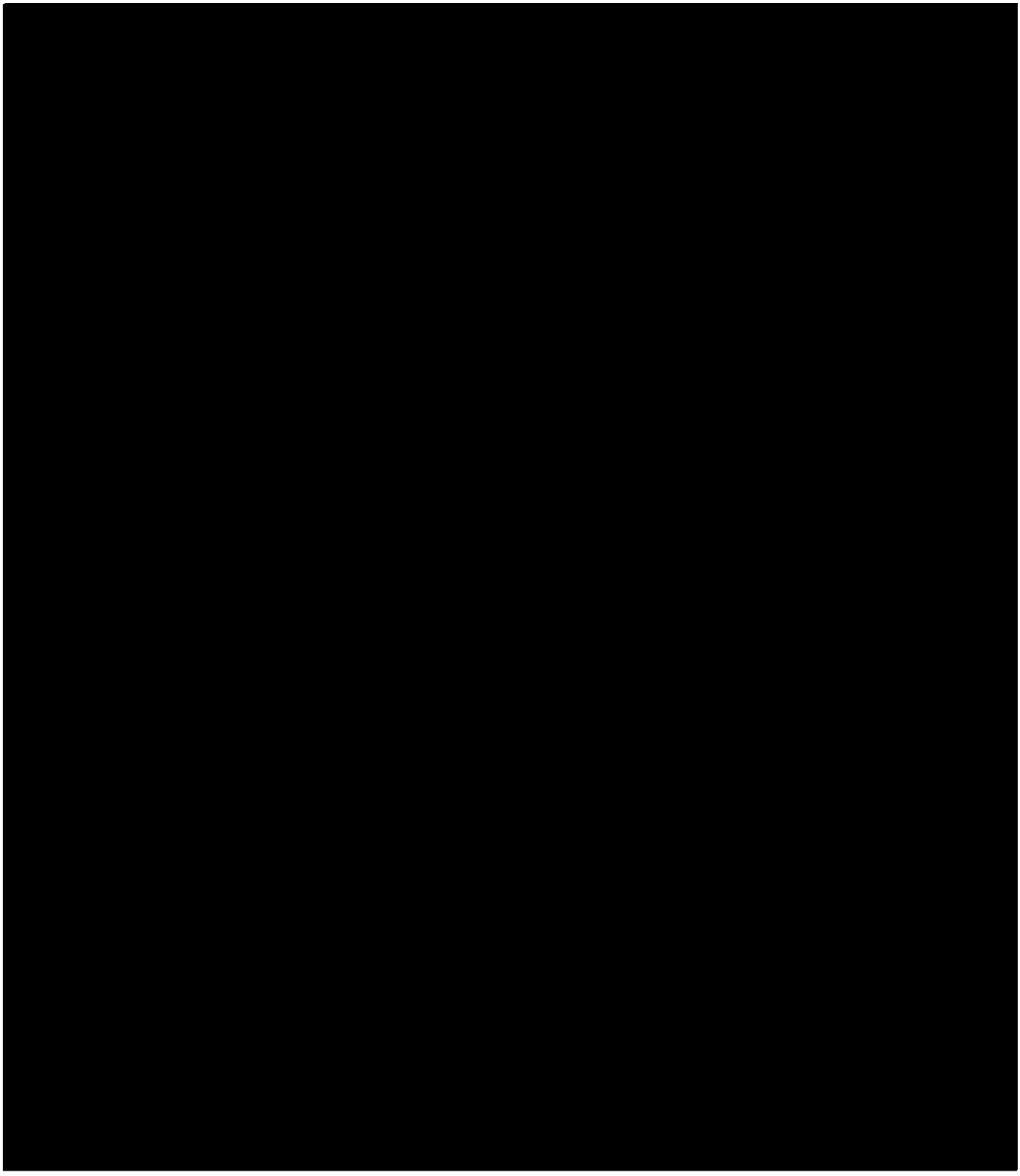


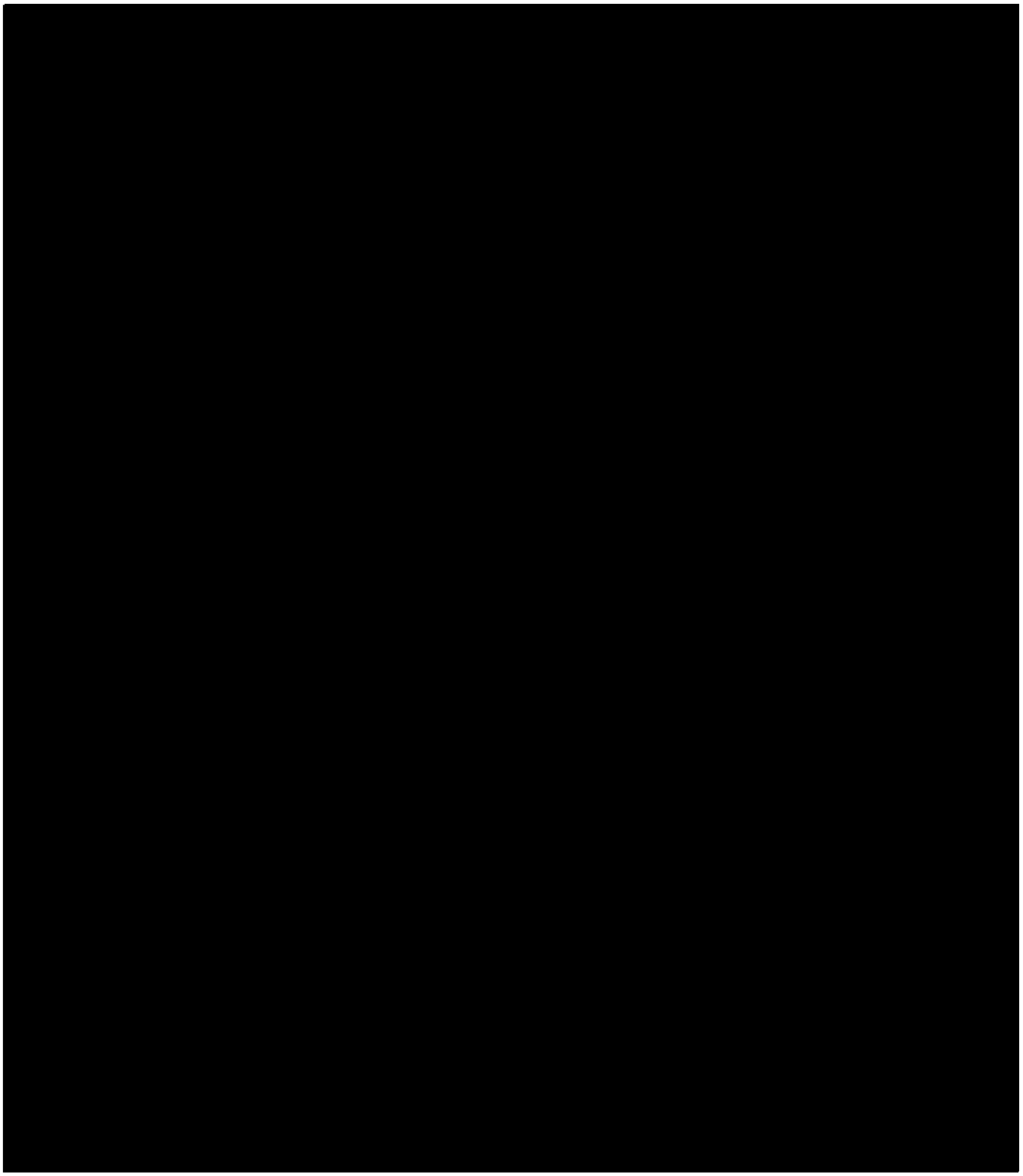
[53] See, e.g., TRW Inc. v. Andrews, 534 US. 19, 31 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (citation and internal quotations omitted); accord Duncan v. Walker, 533 U.S. 167, 174 (2001).

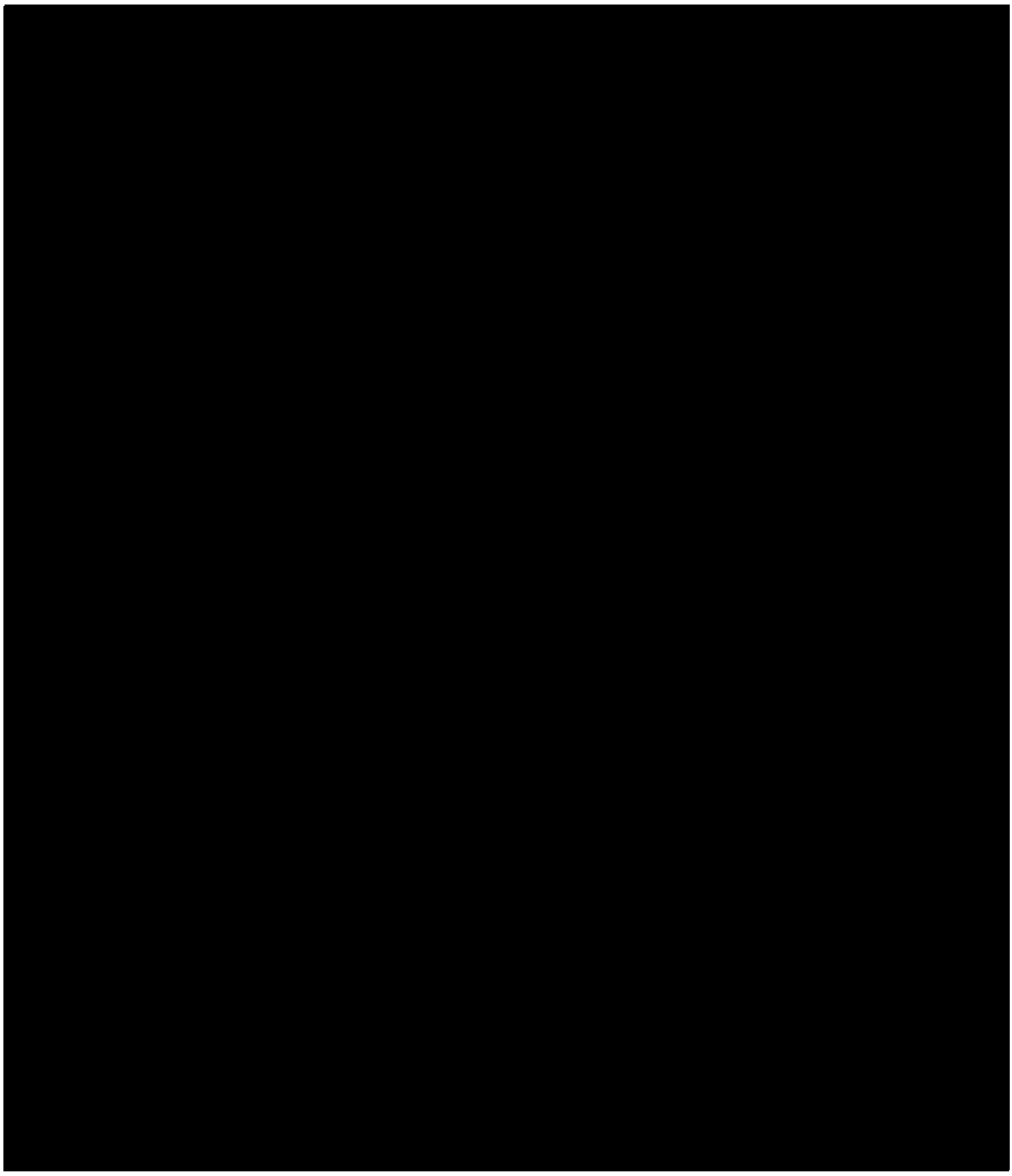


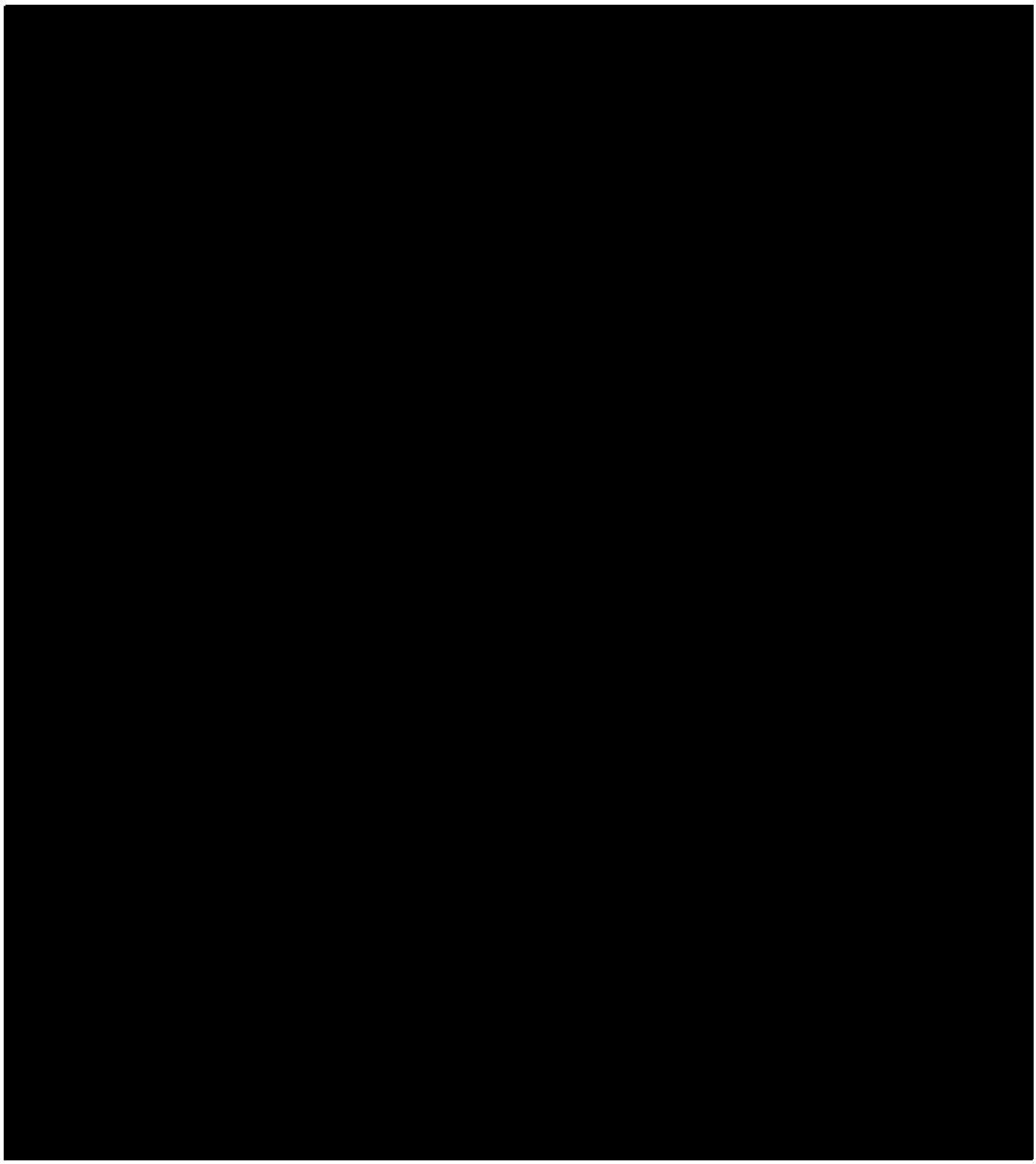












The foregoing analysis has involved difficult line-drawing. But the end-results correspond well with the evident legislative purpose of permitting the acquisition of DRAS information for e-mail [redacted] while avoiding the acquisition of the contents of electronic communications, [redacted] The Court believes that this approach is necessary to ensure that the authority sought by the government [redacted] is limited to non-content signaling information properly subject to collection by a PR/TT device. Given the challenges presented by this category of metadata, the Court's authorization will be limited to the [redacted] approved above. [redacted]

III. The Application Satisfies the Applicable Statutory Requirements

A. Request to Re-Initiate and Expand Collection

The current application, in comparison with prior dockets, seeks authority to acquire a much larger volume of metadata at a greatly expanded range of facilities,[56] while also modifying

[redacted]

– and in some ways relaxing – the rules governing the handling of metadata. In the foreseeable future, NSA does not expect to implement the full scope of the requested authorization because of processing limitations. [redacted] Response at 1. Even so, NSA projects the creation of [redacted] metadata records per day during the period of the requested order, compared with the norm under prior orders of approximately [redacted] records per day. Id. That is roughly an 11- to 24-fold increase in volume.

The history of material misstatements in prior applications and non-compliance with prior orders gives the Court pause before approving such an expanded collection. The government's poor track record with bulk PR/TT acquisition, see pages 9-22, supra, presents threshold concerns about whether implementation will conform with, or exceed, what the government represents and the Court may approve. However, after reviewing the government's submissions and engaging in thorough discussions with knowledgeable representatives, the Court believes that the government has now provided an accurate description of the functioning of the [redacted] and the types of information they obtain. In addition, the Court is approving proposed modifications of the rules for NSA's handling of acquired information only insofar as they do not detract from effective implementation of protections regarding U.S. person information.

B. Relevance

The current application includes a certification by the Attorney General "that the

[redacted]

information likely to be obtained from the pen registers and trap and trace devices requested in this Application . . . is relevant to ongoing investigations to protect against international terrorism that are not being conducted solely upon the basis of activities protected by the First Amendment to the Constitution." [redacted] Application at 19. In its wording, this certification complies with the statute's requirement of a certification of relevance.[57] As explained below, the Court also finds that there is an adequate basis for regarding the information to be acquired as relevant to the terrorist-affiliated Foreign Powers that are the subject of the investigations underlying the application. See note 9, supra.[58]

As summarized above, the [redacted] Opinion's finding of relevance most crucially depended on the conclusion that bulk collection is necessary for NSA to employ analytic tools that are likely to generate useful investigative leads to help identify and track terrorist operatives. See page 9, supra. However, in finding relevance, the [redacted] Opinion also relied on

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[57] Under FISA, a PR/TT application requires

> a certification by the applicant that the information likely to be obtained is foreign intelligence information not concerning a United States person or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution.

50 U.S.C. § 1842(c)(2).

[58] The government again argues that the Court should conduct no substantive review of the certification of relevance. See Memorandum of Law at 29. This opinion follows Judge Kollar-Kotelly's [redacted] Opinion in assuming, without conclusively deciding, that substantive review is warranted. See note 10, supra.

NSA's efforts to acquire metadata that [redacted] See page 8, supra.[59] For purposes of assessing relevance, the primary difference between the current application and prior bulk PR/TT authorizations is that the current application encompasses a much larger volume of communications, without limiting the requested authorization to streams of data with a relatively high concentration of Foreign Power communications.[60]

There is precedent, however, for concluding that a wholly non-targeted bulk production of metadata under Section 1861 can be relevant to international terrorism investigations. In those cases, the FISC has found that the ongoing production by major telephone service providers of call detail records for all domestic, United States-to-foreign, and foreign-to-United States calls, in order to facilitate comparable forms of NSA analysis and with similar restrictions on handling and dissemination, is relevant to investigations of the Foreign Powers. See, e.g., Docket No. [redacted]

[59] As part of the relevance analysis, the [redacted] Opinion also relied on the presence of "safeguards" governing the handling and dissemination of the bulk metadata and information derived from it. The safeguards proposed in the current application are discussed below, and, as modified, the Court finds them to be adequate. See Part IV, infra.

[60] The current application also seeks to expand the categories of metadata to be acquired for each communication. The Court is satisfied that the categories of metadata described in the current application constitute directly relevant information, insofar as they relate to communications of a Foreign Power. See, e.g., [redacted] Alexander Decl. at 19-22. The metadata for other communications is relevant to the investigations of the Foreign Powers for the reasons discussed herein.

[redacted] Primary Order issued on [redacted], at 2-19.[61]

The current application similarly supports a finding of relevance for this non-targeted form of bulk acquisition of Internet metadata because it "will substantially increase NSA's ability to detect and identify the Foreign Powers and those individuals affiliated with them." [redacted] Alexander Decl. at 18. There is credible testimony that terrorists affiliated with the Foreign Powers attempt to conceal operational communications by [redacted] See id. at 9, 11. Terrorist efforts to evade surveillance, in combination with the inability to know the full range of ongoing terrorist activity at a given time, make it "impossible to determine in advance what metadata will turn out to be valuable in tracking, identifying, characterizing and exploiting a terrorist." Id. at 17-18. Analysts know that terrorists' communications are traversing Internet facilities within the United States, but "they cannot know ahead of time . . . exactly where." Id. at 18. And, if not captured at the time of transmission, Internet metadata may be "lost forever." Id. For these reasons, bulk collection of metadata is necessary to enable retrospective analysis, which can uncover new terrorists, as well

[61] The current application further resembles the bulk productions of metadata under Section 1861 in that it proposes to capture metadata for a larger volume of U.S. person communications. See [redacted] Response at 3. The Court is satisfied that the increase in U.S. person communications does not undermine the basis for relevance, particularly in view of the specific safeguards for accessing and disseminating U.S. person information.

as e-mail accounts used by known terrorists that otherwise would be missed. Id. at 21-22.[62]

As the [redacted] Opinion recognizes, the relevance standard does not require "a statistical 'tight fit' between the volume of proposed collection and the much smaller proportion of information" that pertains directly to a Foreign Power. [redacted] Opinion at 49-50. Nor, in the Court's view, does the relevance standard necessarily require a PR/TT authorization to limit collection to [redacted] of Foreign Power communications. The circumstances that make bulk metadata relevant include [redacted] Alexander Decl. at 18. It follows that some Foreign Power communications [redacted]

[redacted]

C. Specifications of the Order

Section 1842(d)(2)(A) requires a PR/TT order to

specify–

> (i) the identity, if known, of the person who is the subject of the investigation;
>
> (ii) the identity, if known, of the person to whom is leased or in whose name is listed the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied; and
>
> (iii) the attributes of the communications to which the order applies, such as the number or other identifier, and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied.[65]

[redacted]

In this case, the subjects of the relevant investigations are sufficiently identified, to the extent known, as the enumerated Foreign Powers "and unknown persons in the United States and abroad affiliated with the Foreign Powers." [redacted] Primary Order at 2-3.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[67] See, e.g., Docket No. PR/TT [redacted] Application at 26 n.15, Primary Order issued on [redacted] at 3 [redacted]

[redacted]

At this pre-collection stage, it is uncertain to which facilities PR/TT devices will be attached or applied during the pendency of the initial order. See pages 76-77, supra; [redacted] Response at 1-2. For this reason, and because the Court is satisfied that other specifications in the order will adequately demarcate the scope of authorized collection, the Court will issue an order that does not identify persons pursuant to Section 1842(d)(2)(A)(ii). However, once this surveillance is implemented, the government's state of knowledge may well change. Accordingly, the Court expects the government in any future application to identify persons (as described in Section 1842(d)(2)(A)(ii)) who are known to the government for any facility that the government knows will be subjected to PR/TT surveillance during the period covered by the requested order.

Section 1842(d)(2)(A)(iii) requires the order to specify "the attributes of the communications to which the order applies, such as the number or other identifier, and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied." The order specifies the location of each facility. The Court is also satisfied that "the attributes of the communications to which the order applies" are

appropriately specified. Acquisition of particular forms of metadata (described in Part II, supra) is authorized for all e-mail [redacted] communications traversing any of the communications facilities at the specified locations. This form of specification is consistent with the language of Section 1842(d)(2)(A)(iii) and is sufficient to delineate the scope of authorized acquisition from that which is not authorized.[68]

IV. The Court Approves, Subject to Modifications, the Restrictions and Procedures Proposed by the Government For the Retention, Use, and Dissemination of the PR/TTMetadata

Unlike other provisions of FISA, the PR/TT provisions of the statute do not expressly require the adoption and use of minimization procedures. Compare 50 U.S.C. §§ 1805(c)(2)(A) & 1824(c)(2)(A) (providing that orders authorizing electronic surveillance or physical search must direct that minimization procedures be followed). Accordingly, routine FISA PR/TT orders do not require that minimization procedures be followed. The government acknowledges, however, that the application now before the Court is not routine. As discussed above, the government seeks to acquire information concerning [redacted] electronic communications, the vast majority of which, viewed individually, are not relevant to the counterterrorism purpose of the collection, and many of which involve United States persons. In light of the sweeping and non-targeted nature of the collection for which authority is sought, the government proposes a

[redacted]

number of restrictions on retention, use, and dissemination, some of which the government refers to as "minimization" procedures. See, e.g., Memorandum of Law at 4, 17. The restrictions now proposed by the government are similar, but not identical, to the rules that were adopted by the Court in its [redacted] Order in Docket Number PR/TT [redacted] Order"), the most recent order authorizing bulk PR/TT collection by NSA.

Absent any suggestion by the government that a different standard should apply, the Court is guided in assessing the proposed restrictions by the definition of minimization procedures in 50 U.S.C. § 1801(h).[69] Because procedures satisfying that definition are sufficient

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[69] Section 1801(h) defines "minimization procedures" in pertinent part as follows:

> (1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;
>
> (2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in [50 U.S.C. § 1801(e)(1)], shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; [and]
>
> (3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes[.]
>
> . . .

50 U.S.C. § 1801(h).

under FISA to protect the privacy interests of United States persons with respect to the acquisition, use, and dissemination of the contents of communications, restrictions meeting the same standard are also at least adequate in the context of the collection and use of non-content metadata. Guided by the Section 1801(h) standard, the Court concludes, for the reasons stated below, that the procedures proposed by the government, subject to the modifications described below, are reasonably designed in light of the nature and purpose of the bulk PR/TT collection to protect United States person information, and to ensure that the information acquired is used and disseminated in furtherance of the counterterrorism purpose of the collection.

A. Storage and Traceability

NSA will continue to store the PR/TT data that it retains in repositories within secure networks under NSA's control. [redacted]lexander Decl. at 24. As was the case under the [redacted] Order, the data collected pursuant to the authority now sought by the government will carry unique markings that render it distinguishable from information collected by NSA pursuant to other authorities. [redacted] Response at 15; see also Declaration of [redacted] NSA, filed on [redacted] in Docket No. PR/TT [redacted] ([redacted] Decl.") at 14 n.8. The markings, which are applied to the data before it is made available for analytic querying and remain attached to the information as it is stored in metadata repositories, see [redacted] Response at 15, are designed to ensure that software and other controls (such as user authentication tools) can restrict access to the PR/TT data solely to authorized personnel who have received appropriate training regarding the special rules for using

and disseminating such information. See [redacted] Alexander Decl. at 24-25; [redacted] Decl. at 14 n.8. After PR/TT metadata is queried in accordance with the procedures described below, the query results (including analytic output based on query results)[70] will remain identifiable as bulk PR/TT-derived information. See [redacted] Response at 15. Such traceability enables NSA personnel to adhere to the special rules for disseminating PR/TT-derived information that are described below.

B. Access to the Metadata by Technical Personnel for Non-Analytic Purposes

Under the approach proposed by the government, "[t]rained and authorized technical personnel" will be permitted to access the metadata to ensure that it is "usable for intelligence analysis." Id. at 25. For example, such personnel may access the metadata to perform processes designed to prevent the collection, processing, or analysis of metadata associated with [redacted] to create and maintain records necessary to demonstrate compliance with the terms of authority granted; or to develop and test technologies for possible use with the metadata. Id.[71] Similar non-analytic

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[70] The government has explained that "[q]uery results could include information provided orally or in writing, and could include a tip or a lead (e.g., 'A query on RAS-approved identifier A revealed a direct contact with identifier Z'), a written or electronic depiction of a chain or pattern, a compilation or summary of direct or indirect contacts of a RAS-approved seed, a draft or finished report, or any other information that would be returned following a properly predicated PR/TT query." [redacted] Response at 15 n.6.

[71] An authorized NSA technician may query the metadata with a non-RAS-approved identifier for the limited purpose of determining whether such identifier is an unwanted [redacted] Alexander Decl. at 25. After recognizing a [redacted]

(continued...)

access by appropriately trained and authorized technical personnel was permitted under the [redacted] Order. See [redacted] Order at 10.

C. Access by Analysts

NSA analysts will query the metadata that is collected only with RAS-approved "seed" identifiers, in accordance with the same basic framework that was approved by the Court in the [redacted] Order. See [redacted] Alexander Decl. at 26-27; [redacted] Order at 7-9. An identifier may be approved for use as a querying seed in one of two ways. First, an identifier may be used as a seed after a designated "approving official" (i.e., the Chief or Deputy Chief of NSA's Homeland Analysis Center, or one of 20 authorized Homeland Mission Coordinators[72]) determines that the available facts give rise to a reasonable articulable suspicion that the identifier is associated with one of the targeted Foreign Powers. [redacted] Alexander Decl. at 26-27. Before querying can be performed using an identifier that is reasonably believed to be used by a United States person, NSA's Office of General Counsel (OGC) must determine that the identifier is not regarded as associated with a Foreign Power solely based on activities that are

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[71](...continued)
[redacted] through such a query, the NSA technician could share the query results – i.e., the identifier and the fact that it is a [redacted] – with other NSA personnel responsible for the removal of unwanted metadata from NSA's repositories, but would not be permitted to share any other information from the query. Id. at 25-26.

[72] The [redacted] Order identified one approving official in addition to the 22 officials listed here. See [redacted] Order at 8 (listing the Chief, Special FISA Oversight and Processing, Oversight and Compliance, Signals Intelligence Directorate as one of the 23 approving officials).

protected by the First Amendment. Id. at 27. Second, an identifier that is the subject of electronic surveillance or physical search pursuant to 50 U.S.C. § 1805 or § 1824 based on this Court's finding of probable cause that such identifier is used by an agent of a Foreign Power may be deemed RAS-approved without review by an NSA designated approving official. Id.

As was the case under the Court's [redacted] Order and prior orders in this matter, RAS-approved queries of the collected data will take the form of "contact chaining." Id. at 18. Such queries yield data for all communications within two "hops" of the RAS-approved seed. Id. The first hop acquires data regarding all identifiers that have been in contact with the seed, and the second hop yields data for all identifiers in contact with identifiers that were revealed by the first hop. Id. at 18 n.12. The government asserts, and the Court has previously accepted, that "[g]oing out to the second 'hop' enhances NSA's ability to find, detect and identify the Foreign Powers and those affiliated with them by greatly increasing the chances that previously unknown Foreign Power-associated identifiers may be uncovered." Id. at 18-19 n.12; [redacted] Opinion and Order at 48.[73]

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[73] NSA also intends to perform [redacted] The government has clarified in connection with this application, however, that [redacted] is not used as a means for querying the metadata, but instead is applied only to the results of RAS-approved contact-chaining queries. See [redacted] Response at 16.

The government's proposed RAS-approval and querying process differs in two noteworthy respects from the approach previously approved by the Court. First, unlike RAS approvals made pursuant to the [redacted] Order and prior orders in this matter,[74] RAS approvals made under the approach now proposed by the government will expire after a specified time. A determination by a designated approving official for an identifier reasonably believed to be used by a United States person would be effective for 180 days, while such a determination for any other identifier would last for one year. [redacted] Alexander Decl. at 27. An identifier deemed approved based on FISC-authorized electronic surveillance or physical search will be subject to use as a seed for the duration of the FISC authorization. Id. The adoption of fixed durations for RAS approvals will require the government at regular intervals to renew its RAS assessments for identifiers that it wishes to continue to use as querying "seeds." The re-evaluations that will be required under the proposed approach can be expected to increase the likelihood that query results are relevant to the counterterrorism purpose of the bulk metadata collection and to reduce the amount of irrelevant query results (including information regarding

[74] Previously, approved identifiers remained eligible for querying until they were affirmatively removed from the list of approved "seed" accounts. The government's practice was to remove identifiers from the list only "[w]hen NSA receive[d] information that suggest[ed] that a RAS-approved e-mail address [was] no longer associated with one of the Foreign Powers"; implicitly, the mere passage of time without new information did not obligate the government to revoke a RAS approval. See Docket No. PR/TT [redacted] NSA 90-Day Report to the Foreign Intelligence Surveillance Court filed on [redacted] at 6. The government had informed the Court on [redacted] that it was "developing a framework within which to revalidate, and when appropriate, reverse . . . RAS approvals," id. at 6, but it does not appear that the new framework had been implemented before the expiration of the Court's [redacted] Order on [redacted].

United States persons) that is yielded.

The second proposed change to the process involves the number of NSA personnel permitted to perform RAS-approved queries. Unlike the [redacted] Order and prior orders in this matter, which limited the number of analysts permitted to run such queries, the re-initiation proposed by the government has no such limitation. See Id. at 26 n.18; [redacted] Order at 7. The government instead proposes the use of "technical controls" to "block any analytic query of the metadata with a non-RAS-approved seed." [redacted] Alexander Decl. at 26 n.18. The government further notes that all analytic queries will continue to be logged, and that the creation and maintenance of auditable records will "continue to serve as a compliance measure." Id.; see also [redacted] Order at 7. In light of the safeguards noted by the government, and the additional fact that no identifier will be eligible for use as a querying seed without having first been approved for querying by a designated approving official (or deemed approved by virtue of a FISC order), the Court is satisfied that it is unnecessary to limit the number of NSA analysts eligible to conduct RAS-approved queries.

D. Sharing of Query Results Within NSA

The government's proposal for sharing query results within NSA is similar to the approach approved by the Court last year. The [redacted] Order provided, subject to a proviso that is discussed below, that the unminimized results of RAS-approved queries could be "shared with other NSA personnel, including those who are not authorized to access the PR/TT metadata." [redacted] Order at 11. The basis for such widespread sharing of query results

within NSA was the government's assertion that analysts throughout the agency address counterterrorism issues as part of their missions and, therefore, have a need for the information.[75] Presumably for the same reason, the government proposes in the application now before the Court that the results of RAS-approved queries be available to all NSA analysts for intelligence purposes, and that such analysts be allowed to apply "the full range of SIGINT analytical tradecraft" to the query results. [redacted] Alexander Decl. at 28 n.19.[76] The Court is satisfied

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[75] In a declaration filed in Docket Number PR/TT [redacted] late last year, the Director of NSA explained that:

> NSA's collective expertise in the[] Foreign Powers resides in more than [redacted] intelligence analysts, who sit, not only in the NSA's Counterterrorism Analytic Enterprise, but also in other NSA organizations or product lines. Analysts from other product lines also address counterterrorism issues specific to their analytic missions and expertise. For example, the International Security Issues product line pursues foreign intelligence information on [redacted] including [redacted] The mission of the Combating Proliferation product line includes identifying connections between proliferators of weapons of mass destruction and terrorists, including those associated with the Foreign Powers. The International Crime and Narcotics product line identifies connections between terrorism and human or nuclear smuggling or other forms of international crime. . . . Each of the NSA's ten product lines has some role in protecting the Homeland from terrorists, including the Foreign Powers. Because so many analysts touch upon terrorism information, it is impossible to estimate how many analysts might be served by access to the PR/TT results.

[redacted] Report, Exhibit A at 5-6.

[76] The [redacted] Order did not explicitly authorize NSA analysts to apply the "full range of SIGINT tools" to PR/TT query results, but, at the same time it placed no limit on the analytical tools or techniques that could be applied by the trained analysts who were entitled to have access to query results. Accordingly, the Court views the express reference to "the full range of analytic tools" in the government's proposal as a clarification of prior practice that the Court, in any event, approves.

that such internal sharing remains appropriate, subject to the training requirement that is discussed below.

E. Dissemination Outside NSA

The government's proposed rules for disseminating PR/TT-derived information outside of NSA are slightly different from the procedures that were previously in place. Under the [redacted] Order, NSA was required to "treat information from queries of the PR/TT metadata in accordance with United States Signals Intelligence Directive 18 (USSID 18)" – NSA's standard procedures for handling Signals Intelligence collection – and to "apply USSID 18 to minimize information concerning U.S. persons obtained from the pen registers and trap and trace devices authorized herein." [redacted] Order at 12. In addition,

> before NSA disseminate[d] any U.S. person identifying information outside of NSA, the Chief of Information Sharing Services in the Signals Intelligence Directorate, the Senior Operations Officer at NSA's National Security Operations Center, the Signals Intelligence Directorate Director, the Deputy Director of NSA, or the Director of NSA [was required to] determine that the information identifying the U.S. person [was] in fact related to counterterrorism information and that it [was] necessary to understand the counterterrorism information or assess its importance.

Id.

The government's proposal has the same two basic elements, although they are worded slightly differently. First, NSA "will apply the minimization and dissemination procedures of Section 7 of [USSID 18] to any results from queries of the metadata disseminated outside of NSA in any form." [redacted] Alexander Decl. at 28. Second,

> prior to disseminating any U.S. person information outside NSA, one of the officials listed in Section 7.3(c) of USSID 18 (i.e., the Director of NSA, the Deputy Director of

> NSA, the Director of the Signals Intelligence Directorate (SID), the Deputy Director of the SID, the Chief of the Information Services (ISS) office, the Deputy Chief of the ISS office, and the Senior Operation Officer of the National Security Operations Center) must determine that the information identifying the U.S. person is in fact related to counterterrorism information and that it is necessary to understand the counterterrorism information or assess its importance.

Id.

The differences are not material. Although the proposal refers specifically to "the minimization and dissemination procedures of Section 7 of [USSID 18]" rather than to USSID 18 generally, the Court does not understand any difference in meaning to be intended; indeed, Section 7 is the portion of USSID 18 that specifically covers disseminations outside NSA. See [redacted] Application, Tab C (USSID 18), at 8-10. With regard to the application of the counterterrorism purpose requirement, the proposal adds two high-ranking NSA officials (the Deputy Director of the SID and the Deputy Chief of the ISS office) to the list of five officials who were previously designated to make the required determination. The Court is aware of no reason to think that the two additional officials are less suited than the other five to make the required determination, or that their designation as approving officials will undermine the internal check that is provided by having high-ranking NSA officials approve disseminations that include United States person identifying information.[77]

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[77] Like the [redacted] Order, the government's proposal would also permit NSA to "share results derived from intelligence analysis queries of the metadata, including U.S. person identifying information, with Executive Branch personnel . . . in order to enable them to determine whether the information contains exculpatory or impeachment information or is otherwise discoverable in legal proceedings." [redacted] Alexander Decl. 28-29; see also [redacted]

(continued...)

The government's proposal contains one additional element that was not part of the framework approved by the Court in the [redacted] Order. Specifically, the government proposes that "[i]n the extraordinary event that NSA determines that there is a need to disseminate information identifying a U.S. person that is related to foreign intelligence information, as defined by 50 U.S.C. § 1801(e), other than counterterrorism information and that is necessary to understand the foreign intelligence information or assess its importance, the Government will seek prior approval from the Court." [redacted] Alexander Decl. at 28 n.20. Insofar as the government's proposal invites the Court to review and pre-approve individual disseminations of information based upon the Court's own assessments of foreign intelligence value, the Court declines the invitation. The judiciary is ill-equipped to make such assessments, which involve matters on which the courts generally defer to the Executive Branch.[78] In the

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[77](...continued)
[redacted] Order at 12-13. The government's current proposal also permits such sharing with Executive Branch personnel "to facilitate their lawful oversight functions." [redacted] Alexander Decl. at 29. Although the [redacted] order did not contain an explicit provision to this effect, sharing for such purposes was plainly contemplated. See, e.g., [redacted] Order at 16 (providing for NSD review of RAS querying justifications).

[78] See, e.g., Holder v. Humanitarian Law Project, — U.S. —, 2010 WL 2471055, *22 (June 21, 2010) ("[W]hen it comes to collecting evidence and drawing factual inferences in [the national security] area, the lack of competence on the part of the courts is marked.") (citation and internal quotation marks omitted); Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) ("a court would be ill-equipped to determine [the] authenticity and utterly unable to assess [the] adequacy" of the executive's security or foreign policy reasons for treating certain foreign nationals as a "special threat"); Regan v. Wald, 468 U.S. 222, 243 (1984) (giving the "traditional deference to executive judgment" in foreign affairs in sustaining President's decision to restrict travel to Cuba against a due process challenge).

event, however, that NSA encounters circumstances that it believes necessitate alteration of the dissemination procedures that have been approved by the Court, the government may obtain prospectively-applicable modifications to those requirements upon a determination by the Court that such modifications are appropriate under the circumstances and in light of the sweeping and non-targeted nature of the PR/TT collection. Cf. Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search § I.D (on file with the Court in Docket No. 08-1833).

F. Retention

Under the [redacted] Order, the PR/TT metadata was available for querying for four and one-half years, after which it had to be destroyed. [redacted] Order at 13. The four-and-one-half-year retention period was originally set based upon NSA's assessment of how long collected metadata is likely to have operational value. See [redacted] Opinion at 70-71. Pursuant to the government's proposal, the retention period would be extended to five years. [redacted] Application at 13. The government asserts that the purpose of the change is to "develop and maintain consistency" with the retention period for NSA's bulk telephony metadata collection, which is authorized by this Court under the FISA business records provision, 50 U.S.C. § 1861. [redacted] Response at 24. The Court is satisfied that the relatively small extension of the retention period that is sought by the government is justified by the administrative benefits that would result.

G. Oversight

The government proposes to employ an internal oversight regime that closely tracks the oversight provisions adopted by the Court in the [redacted] Order, requiring, among other things, that NSA OGC and NSD take various steps to ensure that the data is collected and handled in accordance with the scope of the authorization. Compare [redacted] Order at 13-16, with [redacted] Alexander Decl. at 29-30. There is, however, one significant difference. The [redacted] Order required NSA OGC to ensure that all NSA personnel permitted to access the metadata or receive query results were first "provided the appropriate and adequate training and guidance regarding the procedures and restrictions for storage, access, and dissemination of the PR/TT metadata and/or PR/TT metadata-derived information, i.e., query results." [redacted] Order at 13-14. The analogous oversight provision in the government's current proposal, by contrast, directs NSA OGC and the Office of the Director of Oversight and Compliance (ODOC) to ensure that adequate training and guidance is provided to NSA personnel having access to the metadata, but not to those receiving query results. See [redacted] Alexander Decl. at 29. As discussed above, the government has proposed special rules and restrictions on the handling and dissemination of query results. Most notably, PR/TT query results must remain identifiable as bulk PR/TT-derived information, see [redacted] Response at 15, and may not be disseminated outside NSA without the prior determination by a designated official that any United States person information relates to counterterrorism information and that it is necessary to understand the counterterrorism information or to assess its importance. [redacted]

[redacted] Alexander Decl. at 28. To follow those rules, NSA personnel must know and understand them.

As noted above, NSA's record of compliance with these rules has been poor. Most notably, NSA generally disregarded the special rules for disseminating United States person information outside of NSA until it was ordered to report such disseminations and certify to the FISC that the required approval had been obtained. See pages 18-19, supra. The government has provided no meaningful explanation why these violations occurred, but it seems likely that widespread ignorance of the rules was a contributing factor.

Accordingly, the Court will order NSA OGC and ODOC to ensure that all NSA personnel who receive PR/TT query results in any form first receive appropriate and adequate training and guidance regarding the procedures and restrictions for the handling and dissemination of such information.

H. Reporting

The reporting requirements proposed by the government are similar to the reporting requirements adopted by the Court in the [redacted] Order. Compare [redacted] Alexander Decl. at 31, with [redacted] Order at 16-18. As was previously the case, the government will submit reports to the Court approximately every 30 days and upon requesting any renewal of the authority sought. Se[redacted] Alexander Dec. at 31. The 30-day reports will include "a discussion of the queries made since the last report and NSA's application of the RAS standard." Id. Because NSA will not apply the requested authority to particular

[redacted] however, the 30-day reports will no longer include a discussion of "changes in the description of the [redacted] . . . or in the nature of the communications carried thereon." See [redacted] Order at 16. Like the [redacted] Order, the government's proposal will also require it, upon seeking renewal of the requested authority, to file a report describing "any new facility proposed to be added" and "any changes proposed in the collection methods." [redacted] Alexander Decl. at 31.

The [redacted] Order also directed the government to submit weekly reports listing each instance in which "NSA has shared, in any form, information obtained or derived from the PR/TT metadata with anyone outside NSA," including a certification that the requirements for disseminating United States person information (i.e., that a designated official had determined that any such information related to counterterrorism information and was necessary to understand courterterrorism information or to assess its importance) had been followed. See [redacted] Order at 17. The government's proposal does not include such a requirement. In light of NSA's historical problems complying with the requirements for disseminating PR/TT-derived information, the Court is not prepared to eliminate this reporting requirement altogether. At the same time, the Court does not believe that weekly reports are still necessary to ensure compliance. Accordingly, the Court will order that the 30-day reports described in the preceding paragraph include a statement of the number of instances since the preceding report in which NSA has shared, in any form, information obtained or derived from the PR/TT metadata with anyone outside NSA. For each such instance in which United States person information has been

shared, the report must also include NSA's attestation that one of the officials authorized to approve such disseminations determined, prior to dissemination, that the information was related to counterterrorism information and necessary to understand the counterterrorism information or to assess its importance.

## V. The Government's Request for Authority to Access and Use All Previously Collected Data

The government seeks authority to access and use all previously acquired bulk PR/TT data, including information not authorized for collection under the Court's prior orders, subject to the same restrictions and procedures that will apply to newly-acquired PR/TT collection. See [redacted] Application at 16. For the following reasons, the Court will grant the government's request in part and deny it in part.

### A. The [redacted] Order

As discussed above, after the government disclosed the continuous and widespread collection of data exceeding the scope of the Court's prior orders dating back to [redacted] it elected not to seek renewal of the authority granted in the [redacted] Order. The government was unable, before the expiration of that authority on [redacted], to determine the extent to which the previously-acquired information exceeded the scope of the Court's orders or to rule out the possibility that some of the information fell outside the scope of the pen register statute. See [redacted] Order at 2-4. Accordingly, as an interim measure, Judge Walton entered an order on [redacted] directing the government not to access the information previously

obtained "for any analytic or investigative purpose," except when such access is "necessary to protect against an imminent threat to human life." See [redacted] Order at 4-5; see also page 23, supra.

The application now before the Court includes a request to lift the [redacted] Order. See [redacted] Application at 16. Since [redacted], both the Court and the government have had the opportunity to make a thorough assessment of the scope and circumstances of the overcollection and to consider the pertinent legal issues. Based on that assessment, the Court believes that it is now appropriate to rescind the [redacted] Order, which, as noted, was intended to be an interim measure, and to refine the rules for handling the prior bulk PR/TT collection.

B. The Court Lacks Authority to Grant the Government's Request in its Entirety

The Court concludes that it has only limited authority to grant the government's request for permission to resume accessing and using previously-collected information. As discussed in more detail below, the Court concludes that it possesses authority to permit the government to query data collected within the scope of the Court's prior orders, and that it is appropriate under the circumstances to grant such approval. But for information falling outside the scope of the prior orders, the Court lacks authority to approve any use or disclosure that would be prohibited under 50 U.S.C. § 1809(a)(2). Accordingly, the Court will deny the government's request with respect to those portions of the unauthorized collection that are covered by Section 1809(a)(2). To the extent that other portions of the unauthorized prior collection may fall outside the reach of

Section 1809(a)(2), the Court concludes that it has authority to grant the government's request and that it is appropriate under the circumstances to do so.

1. Information Authorized for Acquisition Under the Court's Prior Orders

The government argues that the FISA PR/TT statute, 50 U.S.C. § 1842, empowers the Court to authorize NSA to resume querying the prior collection in its entirety. See Memorandum of Law at 72-73. As discussed above, the Court continues to be satisfied that it may, pursuant to Section 1842 and subject to appropriate restrictions, authorize NSA to acquire, in bulk, the metadata associated with Internet communications transiting the United States. Further, although Section 1842 does not explicitly require the application of minimization procedures to PR/TT-acquired information, the Court also agrees that in light of the sweeping and non-targeted nature of this bulk collection, it has authority to impose limitations on access to and use of the metadata that NSA has accumulated.

The Court is satisfied that it may invoke the same authority to permit NSA to resume querying the PR/TT information that was collected in accordance with the Court's prior orders. The Court is further persuaded that, in light of the government's assertion of national security need,[79] it is appropriate to exercise that authority. Accordingly, the Court hereby orders that the government may access, use, and disseminate bulk PR/TT information that was collected in

[79] See [redacted] Alexander Decl. at 10 n.6 ("The ability of NSA to access the information collected under docket number PR/TT [redacted] and previous dockets is vital to NSA's ability to carry out its counterterrorism intelligence mission. If NSA is not able to combine the information it collects prospectively with the information it collected [previously], there will be a substantial gap in the information available to NSA.").

accordance with the terms of the Court's prior orders, subject to the procedures and restrictions discussed herein that will apply to newly-acquired metadata.

2. Information Not Authorized for Acquisition Under the Court's Prior Orders

By contrast, the Court is not persuaded that it has authority to grant the government's request with respect to all information collected outside the scope of its prior orders. FISA itself precludes the Court from granting that request in full.

a. 50 U.S.C. § 1809(a)(2) Precludes the Court from Granting the Government's Request with Respect to Some of the Prior Unauthorized Collection

The crucial provision of FISA, 50 U.S.C. § 1809, provides, in pertinent part, as follows:

> (a) Prohibited Activities
>
> A person is guilty of an offense if he intentionally –
>
> . . .
>
> (2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by this chapter, chapter 119, 121, or 206 of Title 18 or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 of this title.

50 U.S.C. § 1809(a)(2).

Section 1809(a)(2) has three essential elements: (1) the intentional disclosure or use of information (2) obtained under color of law through electronic surveillance (3) by a person knowing or having reason to know that the information was obtained through electronic surveillance not authorized by one of the enumerated (or similar) statutory provisions. The

government's request to access, use, and disseminate the fruits of the prior unauthorized collection implicates all three elements of Section 1809(a)(2)'s criminal prohibition.

Application of the first two elements is straightforward. Plainly, conducting contact chaining inquiries of stored data and sharing the query results both within and outside NSA would constitute the intentional use and disclosure of information.[80] It is also clear that the data previously collected by the government – which was acquired through the use of orders issued by this Court pursuant to FISA – was obtained "under color of law." See West v. Atkins, 487 U.S. 42, 49-50 (1988) (explaining that the misuse of authority possessed by virtue of law is action "under color of law").[81]

The third element requires lengthier discussion, but, in summary, the Court concludes that some of the prior bulk PR/TT collection is information that the responsible government officials know or have reason to know was obtained through electronic surveillance not authorized by one of the statutory provisions referred to in Section 1809(a)(2). To begin with,

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[80] Insofar as the government contends that Section 1809(a)(2) reaches only "intentional violations of the Court's orders," or "willful" as opposed to intentional conduct, see Memorandum of Law at 74 n. 37, the Court disagrees. The plain language of the statute requires proof that the person in question "intentionally" disclosed or used information "knowing or with reason to know" the information was obtained in the manner described.

[81] The phrase "a person" in Section 1809 is certainly intended to cover government officials. In addition to requiring conduct "under color of law," the statute provides an affirmative defense to prosecution for a "law enforcement or investigative officer engaged in the course of his official duties" in connection with electronic surveillance "authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction." See 50 U.S.C. § 1809(b).

the language of Section 1809(a)(2) demonstrates that Congress intended at least some unauthorized PR/TT acquisitions to be covered by the criminal prohibition. The statute expressly reaches, among other things, information obtained through "electronic surveillance not authorized by this chapter, [or] chapter 119, 121, or 206 of Title 18." Section 1809 is part of Chapter 36 of Title 50 of the U.S. Code. Chapter 36, in turn, encompasses all of FISA, as codified in Title 50, including FISA's PR/TT provisions found at 50 U.S.C. §§ 1841-1846. Accordingly, "this chapter" in Section 1809(a)(2) refers in part to the FISA PR/TT provisions. Moreover, Chapter 206 of Title 18, which is also referenced in Section 1809(a)(2), consists exclusively of the PR/TT provisions of the criminal code, 18 U.S.C. §§ 3121-3127, key portions of which are incorporated by reference into FISA. See 50 U.S.C. § 1841(2) (incorporating the definitions of "pen register" and "trap and trace device" found at 18 U.S.C. § 3127). Because Chapter 206 of Title 18 authorizes no means of acquiring information other than through the use of PR/TT devices, Section 1809(a)(2)'s reference to "electronic surveillance" must be understood to include at least some information acquired through the use of PR/TT authority.

That conclusion is reinforced by examination of FISA's definition of "electronic surveillance," which applies to Section 1809, see 50 U.S.C. § 1801 ("As used in this subchapter: . . ."), and which is broad enough to include some (but not necessarily all) information acquired through the use of PR/TT devices.[82] "Electronic surveillance" is defined, in

[82] See also H.R. Rep. 95-1283, pt. 1, at 51 (1978) ("The surveillance covered by [Section 1801(f)(2)] is not limited to the acquisition of the oral or verbal contents of a communication . . . (continued...)

pertinent part, as "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States." 50 U.S.C. § 1801(f)(2).[83] For purposes of this definition of "electronic surveillance," "contents" is defined in Section 1801(n) to include, among other things, "any information concerning the identity of the parties" to a communication "or the existence . . . of that communication."[84] "Wire communication" is defined as "any communication while it is being carried by a wire, cable, or other like connection

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[82](...continued)
[and] includes any form of 'pen register' or 'touch-tone decoder' device which is used to acquire, from the contents of a voice communication, the identities or locations of the parties to the communication.").

[83] Section 1801(f) includes three additional definitions of "electronic surveillance," only one of which appears to have any possible application with regard to the prior bulk PR/TT collection. Subsections (f)(1) ("the acquisition . . . of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person") and (f)(3) ("the intentional acquisition . . . of any radio communication") are flatly inapplicable. Subsection (f)(4) could apply to the extent the prior collection included non-wire communications acquired under "circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." The Court's analysis of Section 1809(a)(2) would, of course, apply identically to prior unauthorized collection constituting "electronic surveillance" under any of the definitions set forth in Section 1801(f).

[84] As noted above, the definition of "contents" in Section 1801(n) is different than the definition of "contents" in 18 U.S.C. § 2510(8) – the latter definition does not include information concerning the identity of the parties to or the existence of the communication. See page 27, supra; [redacted] Opinion at 6 n.6. Accordingly, information constituting "contents" as used in Section 1801(f) can be acquired through the use of a PR/TT device, provided that it does not also constitute "contents" under Section 2510(8) and that it otherwise satisfies the statutory requirements for acquisition by PR/TT collection.

furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign commerce." 50 U.S.C. § 1801(*l*). Reading those definitions together, then, "electronic surveillance" includes, among other things, the acquisition (1) by an electronic, mechanical, or other surveillance device (2) of information concerning the identity of the parties to or the existence of any communication to or from a person in the United States, (3) when such information is acquired in the United States (4) while the communication is being carried on a wire, cable, or other like connection furnished or operated by a common carrier.

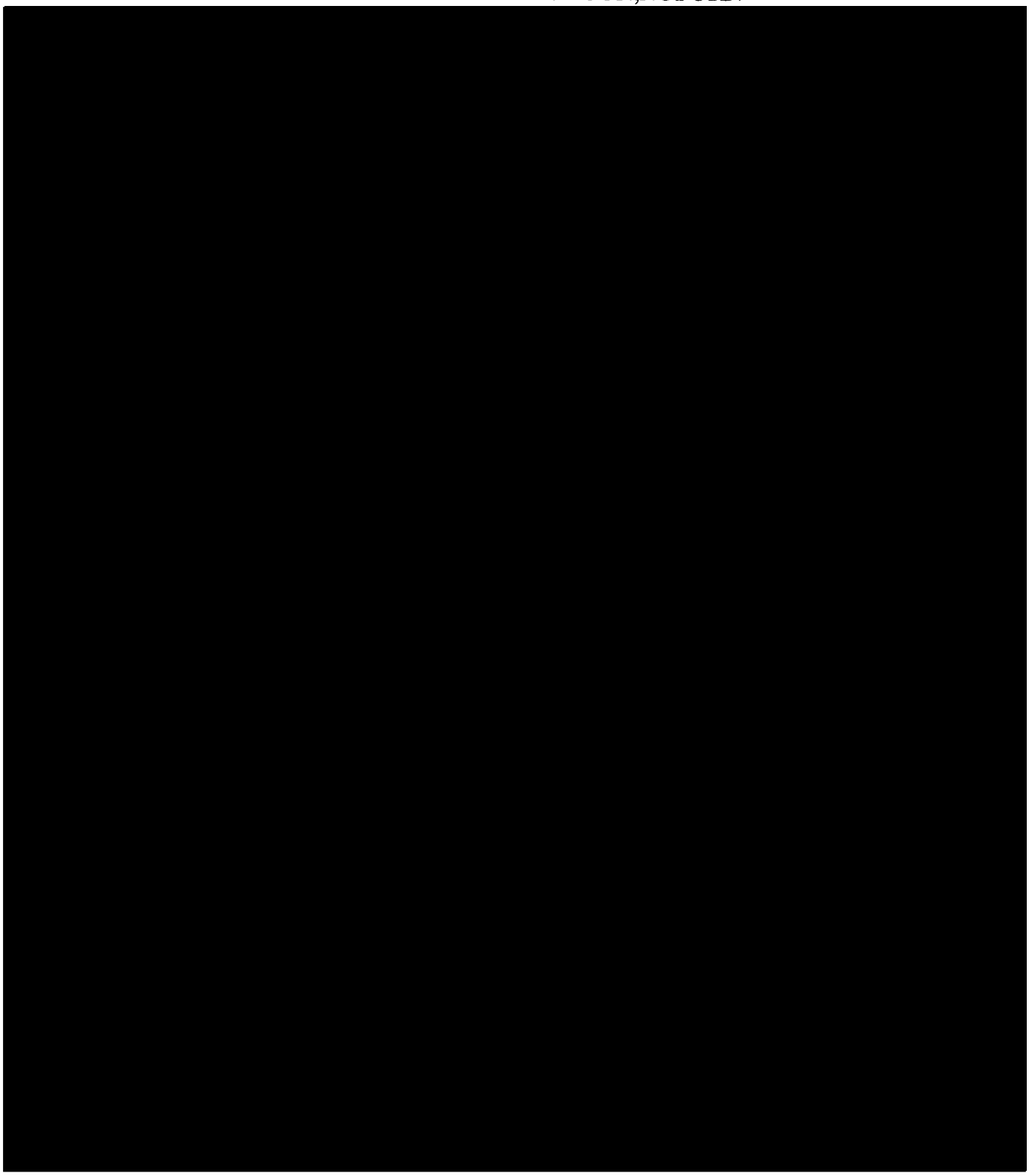
The unauthorized portion of the prior PR/TT collection includes some information that meets all four of these criteria. First, there is no question that the prior collection was acquired through the use of "electronic, mechanical, or other surveillance devices." See, e.g., [redacted] Decl. at 9 (describing the use of "NSA-controlled equipment or devices" to "extract metadata for subsequent forwarding to NSA's repositories").

Second, the overcollection included information concerning the identity of the parties to and the existence of communications to or from persons in the United States. Persons in the United States were parties to some of the communications for which data was acquired. See, e.g., [redacted] Application at 5-6 (stating that the collection will include metadata pertaining to persons within the United States); id. at 9 (stating that the "collection activity . . . will collect metadata from electronic communications that are: (1) between the United States and abroad; (2) between overseas locations; and (3) wholly within the United States"). And, as discussed above,

the unauthorized collection included: [redacted] All of these forms of information concern the existence of an associated communication, and many of them could also concern the identities of the communicants.

Third, the data previously collected, both authorized and unauthorized, was acquired in the United States. See, e.g., [redacted] Application at 9 ("All of the collection activity described above will occur in the United States . . . ."); [redacted] Opinion at 72-80 [redacted]

Fourth, it appears that much, and perhaps all, of the information previously collected was acquired while the associated communication was "being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign commerce." See 50 U.S.C. § 1801(*l*). [redacted]



For the foregoing reasons, the Court concludes that at least some of the data previously collected, including portions of the data that was not authorized by the Court's prior orders, constitutes unauthorized "electronic surveillance" under Section 1809(a)(2). But that does not complete the analysis. Section 1809 does not prohibit all disclosures or uses of unauthorized electronic surveillance; rather, it reaches disclosure or use only by "a person knowing or having reason to know" that the information was obtained through unauthorized electronic surveillance.

The Court concludes that the knowledge requirement is satisfied for some of the prior unauthorized collection constituting electronic surveillance. The government has acknowledged that particular portions of the prior collection fell outside the scope of the Court's prior

authorizations. See generally [redacted] Report. Further, some of that unauthorized collection is identifiable as electronic surveillance – i.e., as information concerning the identity of the parties to or the existence of any communication to or from a person in the United States that was acquired in the United States while the communication was being carried on a wire, cable, or other like connection furnished or operated by a common carrier. As demonstrated above, the government's filings dating back to [redacted] demonstrate that most, if not all, of the information previously collected was acquired in the United States [redacted] The government's descriptions of the overcollected information make clear that the information concerns the identity of the parties, the existence of the communication, or both. Finally, the information available to the government – e.g., e-mail identifiers [redacted] – is likely to make some of the data collected identifiable as concerning communications to or from a person in the United States. Accordingly, the Court concludes that the government officials responsible for using and making disclosures of bulk PR/TT-derived information know or have reason to know that portions of the prior collection constitute unauthorized electronic surveillance.[86]

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[86] In the law enforcement context, courts have held that there is no statutory prohibition on the use – specifically, the evidentiary use – of the results of unlawful PR/TT surveillance. See, e.g., Forrester, supra, 512 F.3d at 512-13 (citing cases). Those decisions, however, do not address the potential application of Section 1809(a)(2), and so provide no basis for departing from the clear terms of that statutory prohibition. Indeed, Forrester recognized that suppression would be warranted if it were "clearly contemplated by [a] relevant statute" and stressed that the party seeking suppression had failed to "point to any statutory language requiring suppression." (continued...)

b. Section 1809(a)(2) Applies to the Prior Collection

The government does not contest that portions of the prior collection contain information that the responsible officials know or have reason to know constitutes "electronic surveillance" that was collected without the necessary authority. Instead, the government offers several reasons why it believes Section 1809(a)(2) presents no bar to Court approval of use of the prior collection. The Court finds the government's contentions unpersuasive.

The government argues that the opening phrase of 50 U.S.C. § 1842(a) vests the Court with authority to enter an order rendering Section 1809(a)(2) inapplicable. See Memorandum of Law at 74 n. 37. The Court disagrees. Section 1842(a), which is entitled "Application for authorization or approval," provides in pertinent part as follows:

> Notwithstanding any other provision of law, the Attorney General or a designated attorney for the government may make an application for an order or an extension of an order authorizing or approving the installation or use of a pen register or trap and trace device for any investigation to obtain foreign intelligence information . . . .

As the context makes clear, the opening phrase "[n]othwithstanding any other provision of law" in Section 1842 relates to the circumstances in which the government may apply for an order permitting it to install and use a PR/TT device for foreign intelligence purposes. It does not speak to the Court's authority to grant a request for permission to use and disclose information

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[86](...continued)
Id. at 512; see also Nardone v. United States, 302 U.S. 379, 382-84 (1937) (statute prohibiting any person from divulging the substance of interstate wire communications precluded testimony by law enforcement agents about such communications).

obtained in violation of prior orders authorizing the installation of PR/TT devices. Indeed, the Court finds nothing in the text of Section 1842 or the other provisions of FISA that can be read to confer such authority, particularly in the face of the clear prohibition set forth in Section 1809(a)(2).

The government next contends that because the Court has, in its prior orders, regulated access to and use of previously accumulated metadata, it follows that the Court may now authorize NSA to access and use all previously collected information, including information that was acquired outside the scope of prior authorizations, so long as the information "is within the scope of the [PR/TT] statute and the Constitution." Memorandum of Law at 73. But the government overstates the precedential significance of the Court's past practice. The fact that the Court has, at the government's invitation, exercised authority to limit the use of properly-acquired bulk PR/TT data does not support the conclusion that it also has authority to permit the use of improperly-acquired PR/TT information, especially when such use is criminally prohibited by Section 1809(a)(2).

The Court has limited the access to and use of information collected in accordance with prior authorizations, in view of the sweeping and non-targeted nature of that collection. The Court has done so within a statutory framework that generally permits the government to make comparatively liberal use, for foreign intelligence purposes, of information acquired pursuant to PR/TT orders, and in which the Court generally has a relatively small role beyond the acquisition

stage.[87] Thus, the Court's prior orders in this matter are notable not because they permitted the use of PR/TT-acquired data – again, the statute itself generally allows the use and dissemination of properly-acquired PR/TT information for foreign intelligence purposes – but because they imposed restrictions on such use to account for the bulk and non-targeted nature of the collection.[88] The Court has never authorized the government to access and use information collected outside the scope of its prior orders in this matter. Indeed, in the prior instances in which the Court learned of overcollections, it has carefully monitored the disposition of the improperly-acquired information to ensure that it was not used or disseminated by the government. See pages 11-12, 14, supra.

The government further contends that Rule 10(c) of the Rules of this Court gives the Court discretion to authorize access to and use of the overcollected information. Memorandum of Law at 73. The Court disagrees. Rule 10(c) requires the government, upon discovering that

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[87] As discussed above, unlike the provisions for electronic surveillance and physical search, see 50 U.S.C. §§ 1801-1812, 1821-1829, the FISA PR/TT provisions do not require the application of Court-approved minimization procedures. In the context of Court-authorized electronic surveillance and physical searches, such procedures govern not only the acquisition of information, but also its retention and dissemination. See 50 U.S.C. §§ 1801(h), 1821(4). Like the electronic surveillance and physical search provisions, the FISA PR/TT provisions limit the use and disclosure of information acquired for law enforcement and other non-foreign intelligence-related purposes. Compare 50 U.S.C. § 1845 with 50 U.S.C. § 1806.

[88] Contrary to the government's assertion, the imposition of restrictions on the use and dissemination of the data collected is not "unique" to the bulk PR/TT. Indeed, the Court restricts the government's use of [redacted] See, e.g., Docket No. PR/TT [redacted] Primary Order at 4.

"any authority granted by the Court has been implemented in a manner that did not comply with the Court's authorization," to notify the Court of the incident and to explain, among other things, "how the government proposes to dispose of or treat any information obtained as a result of the non-compliance." FISC Rule 10(c). Rule 10 does not explicitly give the Court the authority to do anything. To be sure, the rule implicitly recognizes the Court's authority, subject to FISA and other applicable law, to ensure compliance with its orders and with applicable Court-approved procedures. It does not, however, state or suggest that the Court is free in the event of an overcollection to dictate any disposition of the overcollected material that it wishes, without regard to other provisions of law, such as Section 1809(a)(2).[89]

Finally, insofar as the government suggests that the Court has inherent authority to permit the use and disclosure of all unauthorized collection without regard to Section 1809, see Memorandum of Law at 73-74 & n.37, the Court again must disagree. To be sure, this Court, like all other Article III courts, was vested upon its creation with certain inherent powers. See In

[redacted]

re Motion for Release of Court Records, 526 F. Supp. 2d 484, 486 (FISA Ct. 2007); see also Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("It has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . ."). It is well settled, however, that the exercise of such authority "is invalid if it conflicts with constitutional or statutory provisions." Thomas v. Arn, 474 U.S. 140, 148 (1985). And defining crimes is not among the inherent powers of the federal courts; rather, federal crimes are defined by Congress and are solely creatures of statute. Bousley v. United States, 523 U.S. 614, 620-21 (1998); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). Accordingly, when Congress has spoken clearly, a court assessing the reach of a criminal statute must heed Congress's intent as reflected in the statutory text. See, e.g., Huddleston v. United States, 415 U.S. 814, 831 (1974). The plain language of Section 1809(a)(2) makes it a crime for any person, acting under color of law, intentionally to use or disclose information with knowledge or reason to know that the information was obtained through unauthorized electronic surveillance. The Court simply lacks the power, inherent or otherwise, to authorize the government to engage in conduct that Congress has unambiguously prohibited.[90]

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[90] In its [redacted] Response at page 4 n.1, the government added an alternative request for the Court to amend all prior bulk PR/TT orders nunc pro tunc to permit acquisition of the overcollected information. The Court denies that request. Nunc pro tunc relief is appropriate to conform the record to a court's original intent but is not a means to alter what was originally intended or what actually transpired. See, e.g., U.S. Philips Corp. v. KBC Bank N.V., 590 F.3d 1091, 1094 (9th Cir. 2010) (citing cases). Here, the prior bulk PR/TT orders make clear that the Court intended to authorize the government to acquire only information [redacted]

(continued...)

For the foregoing reasons, the Court will deny the government's request for authority to access and use portions of the accumulated prior PR/TT collection constituting information that the government knows or has reason to know was obtained through electronic surveillance not authorized by the Court's prior orders.

c. Portions of the Unauthorized Collection Falling Outside the Scope of Section 1809(a)(2)

There is one additional category of information to consider – overcollected information that is not subject to Section 1809(a)(2). The Court is not well positioned to attempt a comprehensive description of the particular types of information that are subject (or not) to Section 1809(a)(2)'s prohibition, but it appears that some of the overcollected data is likely to fall outside its reach. For example, NSA may have no way to determine based on the available information whether a particular piece of data relates to a communication obtained from the [redacted] Similarly, it may not be apparent from available information whether the communication to which a piece of data relates is to or from a person in the United States, such that acquisition constituted electronic surveillance as defined at Section 1801(f)(2).

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[90](...continued)
[redacted] categories. Nunc pro tunc relief would thus be inappropriate here. See page 14, supra (discussing an instance in which the Court declined to grant a comparable request for nunc pro tunc relief).

When it is not known, and there is no reason to know, that a piece of information was acquired through electronic surveillance that was not authorized by the Court's prior orders, the information is not subject to the criminal prohibition in Section 1809(a)(2). Of course, government officials may not avoid the strictures of Section 1809(a)(2) by cultivating a state of deliberate ignorance when reasonable inquiry would likely establish that information was indeed obtained through unauthorized electronic surveillance. See, e.g., United States v. Whitehill, 532 F.3d 746, 751 (8th Cir.) (where "failure to investigate is equivalent to 'burying one's head in the sand,'" willful blindness may constitute knowledge), cert. denied, 129 S. Ct. 610 (2008). However, when it is not known, and there is genuinely no reason to know, that a piece of information was acquired through electronic surveillance that was not authorized by the Court's prior orders, the information is not subject to the criminal prohibition in Section 1809(a)(2).

The Court is satisfied that neither Section 1809(a)(2) nor any other provision of law precludes it from authorizing the government to access and use this category of information. The bigger question here is whether the Court should grant such authority. Given NSA's longstanding and pervasive violations of the prior orders in this matter, the Court believes that it would be acting well within its discretion in precluding the government from accessing or using such information. Barring any use of the information would provide a strong incentive for the exercise of greater care in this massive collection by the executive branch officials responsible for ensuring compliance with the Court's orders and other applicable requirements. On the other hand, the government has asserted that it has a strong national security interest in accessing and

using the overcollected information. The Court has no basis to question that assertion. Furthermore, high-level officials at the Department of Justice and NSA have personally assured the Court that they will closely monitor the acquisition and use of the bulk PR/TT collection to ensure that the law, as reflected in the Court's orders, is carefully followed by all responsible officials and employees. In light of the government's assertions of need, and in heavy reliance on the assurances of the responsible officials, the Court is prepared – albeit reluctantly – to grant the government's request with respect to information that is not subject to Section 1809(a)(2)'s prohibition. Hence, the government may access, use, and disseminate such information subject to the restrictions and procedures described above that will apply to future collection.

The Court expects the responsible executive branch officials to act with care and in good faith in determining which portions of the prior collection are subject to Section 1809(a)(2)'s prohibition. The authorization to use overcollected information falling outside the scope of the criminal prohibition should not be understood as an invitation to disregard information that, if pursued, would create a reason to know that data was obtained by unauthorized electronic surveillance within the meaning of Section 1809(a)(2). The Court also expects the government to keep it reasonably apprised with regard to efforts to segregate those portions of the prior collection that it intends to use from the portions it is prohibited from using. Accordingly, the Court will order that each of the 30-day reports described above include a description of those efforts.

VI. Conclusion

For all the reasons set forth herein, the government's application will be granted in part and denied in part. Accompanying Primary and Secondary Orders are being issued contemporaneously with this Memorandum Opinion.

Signed [redacted] P02:37 _____ E.T.
Date Time

**JOHN D. BATES**
Judge, United States Foreign
Intelligence Surveillance Court

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted] : Docket Number: PR/TT [redacted]

**OPINION AND ORDER**

This matter comes before the Court on an application of the Government for authority for the National Security Agency (NSA) to collect information regarding e-mail and certain other forms of Internet communications under the pen register and trap and trace provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA or the Act), Title 50, United States Code (U.S.C.), §§ 1801-1811, 1841-1846. This application seeks authority for a



Derived from: Pleadings in the above-captioned docket
Declassify on: [redacted]

much broader type of collection than other pen register/trap and trace applications and therefore presents issues of first impression.[1] For that reason, it is appropriate to explain why the Court concludes that the application should be granted as modified herein.

Accordingly, this Opinion and Order sets out the bases for the Court's findings that: (1) the collection activities proposed in the application involve the installation and use of "pen registers" and/or "trap and trace devices" as those terms are used in FISA, 50 U.S.C. §§ 1841-1846; (2) the application, which specifies restrictions on the retention, accessing, use, and dissemination of information obtained from these collection activities, "satisfies the requirements" of 50 U.S.C. § 1842 for the issuance of an order "approving the installation and use of a pen register or trap and trace device," id. § 1842(d)(1), subject to modifications stated herein;[2] and (3) the installation and use of these pen registers and/or trap and trace devices pursuant to

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[1] The application was filed in two steps: an application filed on [redacted] followed by an addendum filed on [redacted] For ease of reference, the following discussion refers to both submissions collectively as the application.

[2] The Court has authority in this case to "enter an ex parte order as requested, or as modified." 50 U.S.C. § 1842(d)(1).

this Opinion and Order will comply with the First and Fourth Amendments.

In making these findings, the Court relies on factual representations made in the application, which was submitted by the Attorney General as applicant and verified by the Director of the NSA (DIRNSA); in the separate declaration of the DIRNSA (Attachment A to the application); and in the declaration of the [redacted] (Attachment B to the application). The Court has given careful consideration to the arguments presented in the Government's memorandum of law and fact (Attachment C to the application).

By letter dated [redacted] the Court directed the Government to respond to two questions necessary to its ruling on this application. The Court relies on the Government's responses to these questions, which were provided in a letter submitted on [redacted]

The Court also relies on information and arguments presented in a briefing to the Court on [redacted] which addressed the current and near-term threats posed by [redacted]

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[3] One of these questions concerned First Amendment issues presented by the application. The other concerned the length of time that the Government expected the collected information to retain operational significance. These questions and the Government's responses are discussed more fully below.

[redacted] investigations conducted by the Federal Bureau of Investigation (FBI) to counter those threats, the proposed collection activities of the NSA (now described in the instant application), the expected analytical value of information so collected in efforts to identify and track operatives [redacted] and the legal bases for conducting these collection activities under FISA's pen register/trap and trace provisions.[4]

The principal statutory issues in this matter are whether the proposed collection constitutes the installation and use of "pen registers" and/or "trap and trace devices" and, if so, whether the certification pursuant to 50 U.S.C. § 1842(c)(2) is adequate. These issues are addressed below.

I. THE PROPOSED COLLECTION IS A FORM OF PEN REGISTER AND TRAP AND TRACE SURVEILLANCE.

For purposes of 50 U.S.C. §§ 1841-1846, FISA adopts the definitions of "pen register" and "trap and trace device" set out

[4] This briefing was attended by (among others) the Attorney General; [redacted] the DIRNSA; the Director of the FBI; the Counsel to the President; the Assistant Attorney General for the Office of Legal Counsel; the Director of the Terrorist Threat Integration Center (TTIC); and the Counsel for Intelligence Policy.

in 18 U.S.C. § 3127. See 50 U.S.C. § 1841(2). Section 3127 gives the following definitions:

> (3) the term "pen register" means a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication, but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of business;
>
> (4) the term "trap and trace device" means a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication.

These definitions employ three other terms - "electronic communication," "wire communication," and "contents" - that are themselves governed by statutory definitions "set forth for such terms in section 2510" of title 18. 18 U.S.C. § 3127(1). Section 2510 defines these terms as follows:

(1) "Electronic communication" is defined at 18 U.S.C. § 2510(12) as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole

or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include - (A) any wire or oral communication."[5]

(2) "Wire communication" is defined at 18 U.S.C. § 2510(1) as

> any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce.

(3) "Contents" is defined at 18 U.S.C. § 2510(8) to "include[] any information concerning the substance, purport, or meaning" of a "wire, oral, or electronic communication."[6]

While the definitions of "pen register" and "trap and trace device" each contain several elements, the application of these

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[5] The other exclusions to this definition at § 2510(12)(B)-(D) are not relevant to this case.

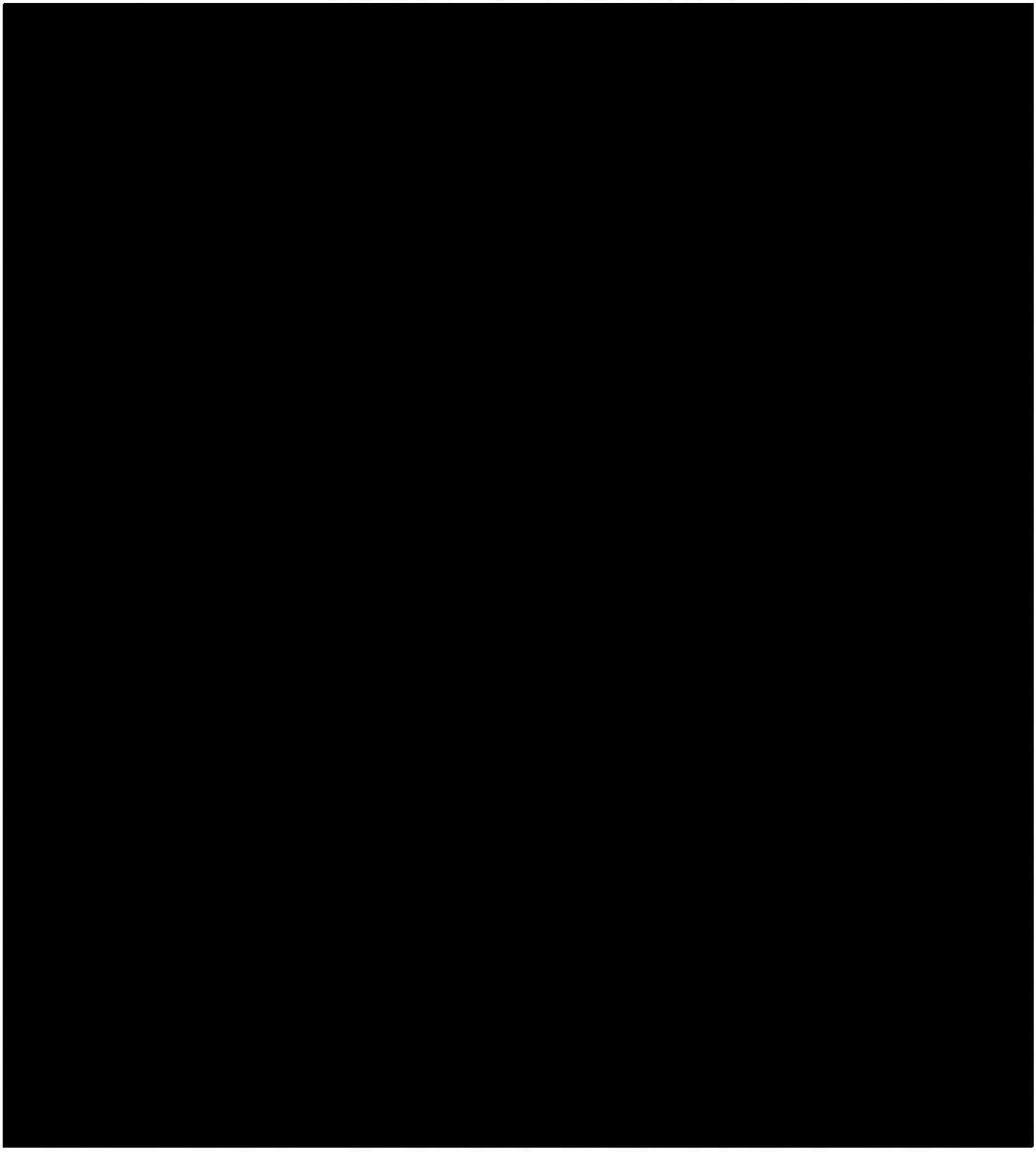
[6] Different definitions of "wire communication" and "contents" are provided at 50 U.S.C. § 1801(l), (n). However, the definitions set forth in § 1801 apply to terms "[a]s used in this subchapter," i.e., in 50 U.S.C. §§ 1801-1811 (FISA subchapter on electronic surveillance), and thus have no bearing on the meaning of "wire communication" and "contents" as used in the definitions of "pen register" and "trap and trace device" applicable to §§ 1841-1846 (separate FISA subchapter on pen registers and trap and trace devices).

definitions to the devices described in the application presents two primary questions: (1) Does the information to be obtained constitute "dialing, routing, addressing, or signaling information" that does not include the "contents" of any communication? (2) Does the means by which such information would be obtained come within the definition of "pen register" or "trap and trace device?" In addressing these questions, the Court is mindful that "when the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms." Lamie v. United States Trustee, 124 S. Ct. 1023, 1030 (2004) (internal quotations and citations omitted).

A. The Information to Be Obtained Is "Dialing, Routing, Addressing, or Signaling Information" and Not "Contents."

The Government uses the umbrella term "meta data" to designate the categories of information it proposes to collect. This meta data comprises [redacted] categories:

[redacted]



[redacted]

[redacted]

[redacted]

Also, the address from which an e-mail was sent and [redacted] are not part of the e-mail's "contents."

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[8] This is the first application presented to this Court for authority to [redacted] under pen register/trap and trace authority. The Court understands that FBI devices implementing prior pen register/trap and trace surveillance authorized by this Court have not obtained [redacted] See Memorandum of Law and Fact at 23-24 n.14. The fact that prior applications did not seek authority for this specific form of collection sheds no light on the merits of the instant application.

[redacted] but this isolated fact does not provide "information concerning the substance, purport, or meaning" of the e-mail. 18 U.S.C. § 2510(8).[9]

The DIRNSA Declaration mentions other types of information that are not described in the application as forms of meta data to be collected.[10] The Court understands such references to pertain to information or inferences that could be gleaned from accumulating meta data in Categories [redacted] above and/or analyzing meta data, perhaps in conjunction with information from other sources. This Opinion and Order authorizes only the collection of information in Categories [redacted]

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[9] The finding that the [redacted] meta data do not constitute "content" is also supported by the assurance that meta data "does not include information from either the `subject' or 're' line of the E-mail [redacted] DIRNSA Declaration at 3 n.1.

[10] These references in the DIRNSA Declaration include [redacted] at 12, and information said to pertain to elements of [redacted]