Nos. 06-2095, 06-2140

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, et al.,
Plaintiffs-Appellees/Cross-Appellants,

v.

NATIONAL SECURITY AGENCY, et al.,
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

PLAINTIFFS-APPELLEES' MOTION TO UNSEAL SECRET MATERIALS

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PLAINTIFFS-APPELLEES'
MOTION TO UNSEAL SECRET MATERIALS

Plaintiffs-Appellees hereby move for the unsealing of secret materials filed by Defendants-Appellants on January 11 and January 24, 2007, for the reasons stated in the accompanying memorandum.

DATED this 26th of January, 2007.

Respectfully submitted,

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PLAINTIFFS-APPELLEES' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO UNSEAL SECRET MATERIALS

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FACTUAL BACKGROUND

Plaintiffs-Appellees/Cross-Appellants ("plaintiffs") challenge the improper introduction of secret materials by Defendants-Appellants ("defendants" or "government"). On January 11, 2007, almost four weeks after this appeal was fully briefed and only three weeks before the date scheduled for oral argument before this Court, plaintiffs were served with a Notice of Lodging of Classified Submission. *See* Notice of Lodging of Classified Submission, filed Jan. 11, 2007. Neither the Notice of Lodging nor the government's Listing of Classified Items Filed to Date in this Case, filed on Jan. 19, indicated the submission's import, form, author, or length. The Notice of Lodging stated only, unhelpfully, that the submission was classified.

On January 17, Attorney General Alberto Gonzalez announced that, a week earlier, a judge of the Foreign Intelligence Surveillance Court ("FISC") had "issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization." *See* Letter from Attorney General Alberto R. Gonzales to Hon. Patrick Leahy and Hon. Arlen Specter, Jan. 17, 2007 (Ex. A). The Attorney General

further stated that "[a]s a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." *Id.*

On January 24, defendants filed a Supplemental Submission Discussing the Implications of the Intervening FISA Court Orders of January 10, 2007 ("Government Supplemental Brief") and a supporting declaration by Lieutenant General Keith B. Alexander, Director of the National Security Agency ("NSA"). *See* Notice of Lodging of Classified Submission, filed Jan. 24, 2007. The same day, defendants notified plaintiffs that they had lodged additional secret materials – specifically, a classified version of the Government's Supplemental Brief and a classified declaration of Lieutenant General Keith B. Alexander. Once again, defendants' publicly filed materials provided little information about the substance of the classified materials. Defendants' public filings did make clear, however, that the secret filings relate to the orders issued by the FISC on January 10. Gov't Supp. Br. at 1.

For the reasons stated below, plaintiffs believe that all of these materials are improperly classified, at least in part, and that the unclassified portions of these materials should have been filed on the public docket in the

first instance. The government's improper secret filings constitute an abuse of this Court's process and unwarrantedly deprive the public of its right of access to information concerning judicial proceedings. Plaintiffs ask that the Court review the government's January 11 and January 24 secret submissions (collectively, the "Secret Materials") to determine to what extent they are unclassified or improperly classified, and that the Court order the government immediately to file the unclassified and improperly classified portions on the public docket. Plaintiffs emphasize that the proper disposition of this appeal does not turn on the content of the Secret Materials. If, however, the Court disagrees with plaintiffs on this point and determines that the appropriate disposition of this appeal does in fact turn on the content of the Secret Materials, due process requires that the Court permit plaintiffs' counsel access to the properly classified portions under a protective order.

ARGUMENT

I. THE FIRST AMENDMENT MANDATES THAT THE SECRET MATERIALS BE MADE PUBLIC EXCEPT TO THE EXTENT THAT SECRECY IS NECESSITATED BY A COMPELLING GOVERNMENT INTEREST AND NARROWLY TAILORED TO THAT INTEREST.

The First Amendment right of access to civil proceedings is well established. *See, e.g., Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695

n.11 (6th Cir. 2002) (recognizing First Amendment right to attend civil proceedings); *Doe v. United States*, 253 F.3d 256, 262 (6th Cir. 2001) (recognizing right of access to appellate argument); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177-79 (6th Cir. 1983) (stating that the First Amendment right of access to judicial proceedings applies to "civil as well as criminal" proceedings (quoting *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 599 (1980) (Stewart, J., concurring)). This constitutional right of access extends to documents filed in connection with judicial proceedings. *See, e.g., Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006); *United States v. Miami Univ.*, 294 F.3d 797, 823 (6th Cir. 2002); *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 897 (7th Cir. 1994); *Application of Nat'l Broad. Co., Inc.*, 828 F.2d 340, 344 (6th Cir. 1987); *FTC v. Standard Fin. Mgmt. Corp.,* 830 F.2d 404, 409 (1st Cir. 1987) ("relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies").

The guarantee of public access to judicial proceedings and documents serves multiple ends. It promotes confidence in the judicial system. *See Application of Nat'l Broad. Co., Inc.*, 828 F.2d at 345 ("The first amendment

right of access is, in part, founded on the societal interests in public awareness of, and its understanding and confidence in, the judicial system"); *Press-Enter. Co. v. Superior Court of Cal. for Riverside County*, 464 U.S. 501, 508 (1984) (hereinafter "*Press Enterprise I*"); *Huminski v. Corsones*, 396 F.3d 53, 81 (2d Cir. 2005) ("[I]n these cases . . . the law itself is on trial, quite as much as the cause which is to be decided. Holding court in public thus assumes a unique significance in a society that commits itself to the rule of law"); *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) ("This preference for public access is rooted in the public's first amendment right to know about the administration of justice. It helps safeguard the integrity, quality and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies.") (internal quotation marks and citations omitted); *Matter of Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) ("What happens in the halls of government is presumptively open to public scrutiny . . . . Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification."). Public access also serves as a check against abuse. *Richmond Newspapers, Inc.*, 448 U.S. at 569 (discussing the value of an open justice system and noting that "[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of

small account" (quoting Jeremy Bentham, Rationale of Judicial Evidence 524 (1827))).

There is no question that a presumptive right of access attaches to the Secret Materials. The government has submitted these materials in support of its argument that the appeal is moot and that the district court's grant of summary judgment was incorrect. Multiple courts have recognized that the right of access attaches to documents filed in support of or opposition to dispositive motions. *See e.g., Lugosch*, 435 F.3d at 124 (recognizing First Amendment right of access to documents filed in support of summary judgment); *Va. Dept. of State Police v. Wash. Post*, 386 F.3d 567, 578-79 (4th Cir. 2004); *Rushford v. New Yorker Magazine, Inc.* 846 F.2d 249, 252-53 (4th Cir. 1988); *Application of Nat'l Broad. Co., Inc.*, 828 F.2d at 344; *In re Gabapentin Patent Litig.*, 312 F. Supp. 2d 653 (D.N.J. 2004).

Recognition of the First Amendment right of access is of particular importance in the instant case because of the extraordinary public interest in, and significance of, the issues presented in this appeal. *See Application of Nat'l Broad. Co., Inc.,* 828 F.2d at 345 (First Amendment right of access attaches where "it strengthens the judicial process for the public to be informed of how the issue is approached and decided"). The warrantless surveillance program at issue in this case has been the subject of controversy

and criticism since it was disclosed in late 2005. The program has been the subject of countless media reports and editorials and has been the topic of extraordinary debate in the American legal community. The secrecy surrounding the FISA judge's January 10 orders, and the government's continued assertion of authority to disregard FISA and the Constitution, have only deepened public interest and concern.[1]

Because the First Amendment right of access is engaged here, the Secret Materials must be made public unless "specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enter. Co. v. Superior Court of Cal. for Riverside County*, 478 U.S. 1, 13-14 (1987)

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[1] *See, e.g.,* Seth Stern, *Justice Officials Leave Lawmakers Confused About New Surveillance Program*, CONG. QUARTERLY, Jan. 18, 2007 ("Heather A. Wilson . . . a member of the House Permanent Select Committee on Intelligence, said the information relayed to her . . . suggested it is a programmatic authorization, meaning that it does not require the administration to get warrants on a case-by-case basis."); Patrick Radden Keefe, *Gonzales' Trojan Horse: FISA-approved surveillance may not be a civil liberties coup*, SLATE, Jan. 19, 2007, *available at* http://www.slate.com/id/2157857/fr/nl/; Transcript of Background Briefing by Senior Justice Department Officials, Jan. 17, 2007, *available at* http://www.fasorg/irp/news/2007/01/doj011707.html ("[W]e continue to believe as we've always said and as we've explained at length that the President has the authority to authorize the terrorist surveillance program, that he has that authority under the authorization for the use of military force and under Article II of the Constitution. That's not changing."); *id.* ("Well, certainly I don't believe, as we've always said, that there's any need for statutory limitations on the Terrorist Surveillance Program or the President's conduct of the program.").

(hereinafter "*Press Enterprise II*"); *see also Detroit Free Press*, 303 F.3d at 705 (closure justified only if "necessitated by a compelling governmental interest" and "narrowly tailored to serve that interest" (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982))); *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995); *U.S. v. Beckham,* 789 F.2d 401, 414 (6th Cir. 1986) ("When a deprivation of access to information occurs due to an exclusion from judicial records, the constitutional right to know is implicated . . . 'only the most compelling reasons can justify non-disclosure of judicial records'") (internal quotation marks and citation omitted). In applying this standard, the Court must consider whether less restrictive alternatives to closure would adequately protect the interests the court seeks to protect. *Detroit Free Press,* 303 F.3d at 707; *see also Huminski*, 396 F.3d at 82-83.[2]

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[2] These stringent requirements apply with equal force in the national security context. *See, e.g., New York Times Co. v. United States*, 403 U.S. 944 (1971) ("*Pentagon Papers*") (rejecting government's request to close part of oral argument); *United States v. Moussaoui*, 65 Fed. App. 881, 887 (4th Cir. 2003) (rejecting government's argument for entirely closed appellate argument and noting that "the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents"); *Detroit Free Press*, 303 F.3d at 710 (rejecting government's argument that "[b]y the simple assertion of 'national security,' the Government...may, without review, designate certain classes of cases as 'special interest cases' and, behind closed doors, adjudicate the merits of these cases to deprive non-citizens of their fundamental liberty interests"); *In re Wash. Post Co. v. Soussoudis*, 807 F.2d 383, 392 (4th Cir. 1987) (holding

II. THE COURT HAS THE AUTHORITY AND THE OBLIGATION TO REVIEW THE SECRET MATERIALS TO DETERMINE WHETHER THEY ARE PROPERLY CLASSIFIED.

The government's bare assertion that materials are classified does not provide a constitutionally adequate justification for a denial of public access. To the contrary, it is "fundamental that 'every court has supervisory power over its own records and files.'" *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)). Even where evidence is classified, courts have the authority, and indeed the obligation, to independently assess whether the evidence is *properly* classified. *See, e.g., Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (requiring *de novo* judicial review of pre-publication classification determinations to ensure that information was properly classified and to ensure that agency "explanations justif[ied] censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification"); *Snepp v. United States*, 444

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that traditional First Amendment prerequisites to closure or sealing are "fully applicable in the context of closure motions based on threats to national security").

U.S. 507, 513 n.8 (1980) (judicial review of pre-publication classification determinations).[3]

The Secret Materials appear to have been classified inappropriately, at least in part. The government's public papers make clear that all of the Secret Materials relate to orders issued by a FISA judge on January 10. But government officials have now discussed those ostensibly classified orders publicly on multiple occasions. On the afternoon of January 17, Justice Department lawyers discussed the orders in a background briefing for the

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[3] The fear that the executive branch will overclassify is not speculative. *See* Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989 at A25; (former Solicitor General who fought to keep the Pentagon Papers secret stating that "[i]t quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principle concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another"); Meredith Fuchs, *Judging Secrets: The Role the Courts Should Play in Preventing Unnecessary Secrecy,* 58 ADMIN. L. REV. 131, 133-34 (2006) (noting that classification of information has nearly doubled since 2001, and noting that "[o]fficals throughout the military and intelligence sectors have admitted that much of this classification is unnecessary"); National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report, at 417 (G.P.O. 2004) ("Current security requirements nurture overclassification .... No one has to pay the long-term costs of over-classifying information, though these costs – even in literal financial terms – are substantial."); Editorial, N.Y. TIMES, July 12, 2005, at A20 ("The Bush administration is classifying the documents to be kept from public scrutiny at the rate of 125 a minute. . . . No one questions the need for governments to keep secret things that truly need to be kept secret, especially in combating terrorists. But the government's addiction to secrecy is making an unnecessary casualty of the openness vital to democracy.").

press.[4] On January 18, the Attorney General discussed the orders in public testimony to the Senate Judiciary Committee. The orders have also been discussed in public correspondence between the Senate Judiciary Committee and the FISC. *See* Letter from Hon. Patrick Leahy & Hon. Arlen Specter to Hon. Colleen Kollar-Kotelly, Jan. 17, 2007 (Ex. B); Letter from Hon. Colleen Kollar-Kotelly to Hon. Patrick Leahy & Hon. Arlen Specter, Jan. 17, 2007 (Ex. C). That senior government officials have been willing to discuss, describe, summarize, explain, and characterize the orders publicly makes clear that at least some information in the orders is not actually classified (or has been improperly classified) and is not being treated as classified by the government. Notably, a January 17 letter from the Presiding Judge of the FISC states that documents requested by the Senate Judiciary Committee "contain" classified information, presumably indicating that, while some information in the January 10 orders and associated FISC documents is classified (whether properly or improperly), some information is not. To the extent that the Secret Materials consist of unclassified or improperly classified information, the Secret Materials should be made public. *See Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986); *Ass'n for the Reduction of Violence v. Hall*, 734 F.2d 63, 66 (1st Cir. 1984)

[4] *See* http://www.fas.org/irp/news/2007/01/doj011707.html.

(stating that court should accommodate moving party's interest in disclosure "where it is possible . . . to make the innocuous portions of documents containing privileged information available by excising the privileged sections").

The mere fact that a judge of the FISC issued the orders does not mean that secrecy is required. The FISC has made public its rules of procedure.[5] The FISC has published its May 17, 2002 ruling relating to amendments to FISA made by the USA Patriot Act. *In re All Matters Submitted to Foreign Surveillance Court*, F. Supp. 2d 611 (FISA Ct. 2002). The FISA Court of Review has published its November 18, 2002 decision adjudicating the government's appeal from that ruling. *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002). The FISA Court of Review has also made public a transcript of a September 9, 2002 closed hearing.[6] While FISA orders are ordinarily secret, FISA itself provides for disclosure in some circumstances. *See* 50 U.S.C. 1806(f) (allowing for protected disclosure of FISA applications, orders, and other materials where "necessary to make an accurate determination of the legality of the surveillance"). The mere fact that the January 10 orders were issued by a

[5] *See* http://www.fas.org/irp/agency/doj/fisa/fiscrules.pdf.
[6] *See* http://www.fas.org/irp/agency/doj/fisa/hrng090902.htm.

FISA judge does not itself justify blanket classification and does not justify the secrecy that the government has demanded here.

III. IF THIS COURT DETERMINES THAT THE DISPOSITION OF THE APPEAL TURNS ON THE SUBSTANCE OF THE SECRET MATERIALS, DUE PROCESS REQUIRES THAT THE MATERIALS BE MADE AVAILABLE TO PLAINTIFFS.

Nothing turns on the substance of the Secret Materials. While the government contends that the case is moot, its voluntary cessation of the surveillance challenged here is insufficient to end the controversy, whatever the action taken by a FISA judge on January 10. Should this Court disagree with plaintiffs on this point, however, and find that the appropriate disposition of this appeal does in fact turn on the content of the Secret Materials, due process requires that the Court permit plaintiffs' counsel access to the classified portions of the Secret Materials under a protective order.

"Our system of justice does not encompass *ex parte* determinations on the merits of cases in civil litigation." *Ass'n for Reduction of Violence*, 734 F.2d at 67 (quoting *Kinoy v. Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975)); *see also Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir. 1996) ("[o]ur adversarial legal system generally does not tolerate *ex parte* determinations on the merits of a civil case") (quoting *Application of Eisenberg*, 654 F.2d

1107, 1112 (5th Cir. Unit B Sept. 1981)); *Abourezk*, 785 F.2d at 1061 ("a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions"). The rule against secret evidence reflects a recognition that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring); *id.* at 143 (Black, J., concurring).

As the D.C. Circuit has recognized, "It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts." *Abourezk*, 785 F.2d at 1060-61; *see also Allende v. Shultz*, 605 F. Supp. 1220, 1226 (D.Mass. 1985) ("the very nature of the adversary system demands that both parties be given full access to any information which may form the basis for a judgment"); *United States v. Zolin*, 491 U.S. 554, 571 (1989); *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1346 (9th Cir. 1981) ("The system functions properly and leads to fair and accurate resolutions, only when vigorous and informed argument is possible. Such argument is not possible, however, without disclosure to the parties of the evidence submitted to the court."); *Am.-Arab Anti-*

Discrimination Comm. v. Reno, 70 F.3d 1045, 1069 (9th Cir. 1995) ("the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error"), *vacated on other grounds,* 525 U.S. 471 (1999).[7]

There are narrow exceptions to the rule against secret evidence, but none applies here. The chief exception relates to circumstances in which secret evidence is introduced to support the invocation of an evidentiary privilege. Accordingly, plaintiffs have not contested the government's previous secret filings in this case. *See* Updated Listing of Classified Items Filed To Date In This Case (filed Jan. 24, 2007). Plaintiffs understood that those filings were meant to support the government's invocation of the state secrets privilege. Now, however, the government has introduced secret materials for an entirely different purpose – namely, to support its suggestion of mootness. Again, plaintiffs believe that the government's suggestion of mootness can (and should) be rejected without reference to the content of the Secret Materials. But if the Court believes that the content of

[7] Here, again, the constitutional principles apply with equal force in the national security context. *See, e.g., Bl(a)ck Tea Soc. v. City of Boston*, 378 F.3d 8, 18 (1st Cir. 2004) (Lipez, J., concurring); *Am.-Arab Anti-Discrimination Comm.*, 70 F.3d at 1045; *Abourezk,* 785 F.2d at 1061; *Naji v. Nelson,* 113 F.R.D. 548 (N.D. Ill. 1986); *Allende*, 605 F. Supp. at 1226; *Kinnoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975).

the Secret Materials could have determinative significance, due process requires that the Secret Materials be made available to plaintiffs.

If a party refuses to provide material responsive to a discovery request based on a claim of privilege, either party may then submit material *ex parte* for review by the court *in camera* to support or refute the claim of privilege. *See, e.g.*, *Ellsberg v. Mitchell*, 709 F.2d 51, 57-58 (D.C. Cir. 1983); *Halkin v. Helms*, 598 F.2d 1, 5 (D.C. Cir. 1978) (stating that court may review secret affidavit *ex parte* and *in camera* to evaluate a claim of military and state secrets privilege); *In re John Doe Corp.*, 675 F.2d 482, 489-90 (2d Cir. 1982) (stating that court may review *ex parte* evidence to refute claim of attorney-client privilege by grand jury witness). The courts have recognized, however, that the use of *ex parte* evidence to resolve claims of privilege in discovery disputes and the use of *ex parte* evidence to determine the outcome of a case are fundamentally distinct. Litigants are flatly prohibited from submitting *ex parte* evidence on dispositive issues. A defendant cannot wield information presented *ex parte* "as a sword to seek [a dispositive legal ruling] and at the same time blind plaintiff so that he cannot counter. Defendant's affidavit must contain on its face, for plaintiff to see, whatever defendant wishes to rely upon to seek [a dispositive legal ruling]." *Bane v. Spencer*, 393 F.2d 108, 109 (1st Cir. 1968); *see also*

Abourezk, 785 F.2d at 1061; *Naji v. Nelson*, 113 F.R.D. at 552 ("While it is not unusual for a court to engage in the inspection of *in camera* materials when a party seeks to *prevent* the use of materials in litigation, reliance on *ex parte* evidence to decide the merits of a dispute can be permitted in only the most extraordinary of circumstances.").

In *Kinoy v. Mitchell*, the court explained the fundamental difference between relying on a privilege to withhold information and relying on secret evidence on the merits:

> [T]he Government presents the Court, *in camera*, with material which it asserts must be withheld from plaintiffs as privileged, yet which it requests the Court to consider in ascertaining material facts and drawing legal conclusions concerning dispositive issues in the case. In this Court's view such a course is wholly unacceptable . . . Either the documents are privileged, and the litigation must continue as best it can without them, or they should be disclosed at least to the parties, in which case the Court will rule after full argument on the merits.

67 F.R.D. at 15; *see also Ass'n for Reduction of Violence*, 734 F.2d at 67 (reversing and remanding after grant of summary judgment based on *ex parte* evidence, and stating that "[i]f the defendants renew their motion for summary judgment, the district court will have to rule on the motion without relying on any privileged materials"); *Abourezk,* 785 F.2d at 1061.[8]

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[8] The other line of cases in which courts have allowed *ex parte* evidence involves contexts in which *ex parte* evidence is introduced

That some or all of the information in the Secret Materials is classified does not mean the information can be denied to plaintiffs. The Court has wide latitude to control the introduction and protection of sensitive or classified information in the litigation process. *See, e.g., Webster v. Doe,* 486 U.S. 592, 604 (1988) (noting that "the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission"). Where necessary, courts have provided plaintiffs' counsel access to classified information under an appropriately crafted protective order. *See, e.g., In re Guantanamo Detainee Cases,* 355 F. Supp. 2d 443, 452 (D.D.C. 2005) (noting that pursuant to a protective order, the government "served on counsel for the petitioners with appropriate security clearances versions [of relevant documents] containing most of the classified information disclosed in the Court's copies but redacting some classified information that respondents alleged would not exculpate the detainees from their 'enemy combatant' status"); *United States v. Lockheed Martin Corp.,* 1998 WL

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pursuant to a statutory or regulatory scheme that is consistent with due process. *See, e.g., Allen v. CIA*, 636 F.2d 1287, 1298 n.63 (D.C. Cir. 1980) (Freedom of Information Act). No statute authorizes the introduction of *ex parte* evidence here.

306755 (D.D.C. 1998) (setting parameters of protective order to protect any classified information that may come out in depositions of defense contractors in civil litigation); *Doe v. Tenet,* 329 F.3d 1135, 1148 (9th Cir. 2003) (suggesting that measures to protect sensitive and classified information in civil litigation include "sealing records, and requiring security clearances for court personnel and attorneys with access to the court records"), *rev'd on other grounds in Tenet v. Doe,* 344 U.S. 1 (2005); *In re United States,* 872 F.2d 472, 478 (D.C. Cir. 1989) (discussing protective orders and seals among the mechanisms that may be employed to protect classified or sensitive evidence).[9]

CONCLUSION

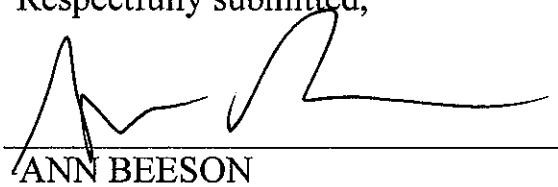
For the foregoing reasons, plaintiffs respectfully urge that that the Court review the Secret Materials to determine to what extent they are unclassified or improperly classified, and that the Court order the government immediately to file the unclassified and improperly classified portions on the public docket. As to any properly classified portions of the government's Secret Materials, plaintiffs respectfully urge that the Court

[9] Similar protective orders have been granted in the criminal context. *See* Classified Information Procedures Act (CIPA), 18 U.S.C. app. III § 1 *et seq,; see also United States v. Pappas,* 94 F.3d 795, 799-800 (2d Cir. 1996); *United States v. Rezaq*, 156 F.R.D. 514, 524 (D.D.C. 1994), *vacated in part on other grounds*, 899 F. Supp. 697 (D.D.C. 1995); *United States v. Musa*, 833 F. Supp. 752, 753-54 (E.D.Mo. 1993); 18 U.S.C. App. III § 3.

make these portions available to plaintiffs under a protective order insofar as the Court believes that the question of mootness turns on their substance.

DATED this 26th day of January 2007.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

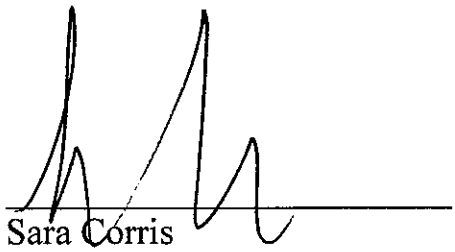
I hereby certify that this Brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains no more than 4000 words, and was prepared in 14-point Times New Roman font using Microsoft Word.

Sara Corris

CERTIFICATE OF SERVICE

I certify that on this 26th day of January, 2007, I served two copies of the foregoing motion upon the following counsel by FedEx next-day courier:

Douglas N. Letter
Thomas N. Bondy
Anthony A. Yang
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3602



Sara Corris

Exhibit A

The Attorney General
Washington, D.C.

January 17, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Minority Member
Committee of the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

I am writing to inform you that on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

In the spring of 2005—well before the first press account disclosing the existence of the Terrorist Surveillance Program—the Administration began exploring options for seeking such FISA Court approval. Any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from al Qaeda—the very speed and agility that was offered by the Terrorist Surveillance Program. These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders.

The President is committed to using all lawful tools to protect our Nation from the terrorist threat, including making maximum use of the authorities provided by FISA and taking full advantage of developments in the law. Although, as we have previously explained, the Terrorist Surveillance Program fully complies with the law, the orders the Government has obtained will allow the necessary speed and agility while providing substantial advantages. Accordingly, under these circumstances, the President has

determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires.

The Intelligence Committees have been briefed on the highly classified details of these orders. In addition, I have directed Steve Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, and Ken Wainstein, Assistant Attorney General for National Security, to provide a classified briefing to you on the details of these orders.

Sincerely,

/s/

Alberto R. Gonzales
Attorney General

cc: The Honorable John D. Rockefeller, IV
The Honorable Christopher Bond
The Honorable Sylvester Reyes
The Honorable Peter Hoekstra
The Honorable John Conyers, Jr.
The Honorable Lamar S. Smith

Exhibit B

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 17, 2007

TPM

The Honorable Colleen Kollar-Kotelly
Presiding Judge
U.S. Foreign Intelligence Surveillance Court
DOJ Building, Room 6725
10th & Constitution Avenue, N.W.
Washington, D.C. 20530

Dear Judge Kollar-Kotelly:

Attorney General Gonzales revealed today that the Foreign Intelligence Surveillance Court issued orders on January 10, 2007 authorizing the government to engage in electronic surveillance of communications into or out of the United States by terrorism suspects, subject to approval of the Court. I enclose a copy of the letter he sent to us and also note that the Department of Justice briefed the media on these matters at 2:30 this afternoon.

On behalf of the Senate Judiciary Committee, we ask that you provide the Committee with copies of the orders and opinions. We also request that you make the Court's decision public to the extent possible.

These are matters of significant interest to the Judiciary Committee and the Congress and to the American people, as well. We all have an interest in ensuring that the government is performing surveillance necessary to prevent acts of terrorism and that it is doing so in ways that protect the basic rights of all Americans, including the right to privacy.

Sincerely,

PATRICK LEAHY
Chairman

ARLEN SPECTER
Ranking Member

Encl.

Exhibit C

UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT

Washington, D.C.

Honorable Colleen Kollar-Kotelly
Presiding Judge

January 17, 2007

Honorable Patrick Leahy
Chairman, United States Senate
Committee on the Judiciary
Senate Office Building
Washington, DC 20510-6275

Honorable Arlen Specter
Ranking Member, United States Senate
Committee on the Judiciary
Senate Office Building
Washington, DC 20510-6275

Dear Chairman Leahy and Ranking Member Specter:

I am writing in response to your request that I provide the Committee on the Judiciary with "copies of the orders and opinions" issued in the matter referenced in Attorney General Alberto R. Gonzales' letter to you, dated January 17, 2007. As the presiding judge of the Foreign Intelligence Surveillance Court (FISC), I have no objection to this material being made available to the Committee. However, the Court's practice is to refer any requests for classified information to the Department of Justice. In this instance, the documents that are responsive to your request contain classified information and, therefore, I would ask you to discuss the matter with the Attorney General or his representatives. If the Executive and Legislative Branches reach agreement for access to this material, the Court will, of course, cooperate with the agreement.

Sincerely,

Colleen Kollar-Kotelly

Colleen Kollar-Kotelly
Presiding Judge