

07-0981-CR

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee,

v.

YASSIN MUHIDDIN AREF, MOHAMMED
MOSHARREF HOSSAIN,

Defendants-Appellants,

v.

The NEW YORK CIVIL LIBERTIES UNION,

Intervenor-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**BRIEF OF INTERVENOR-APPELLANT
THE NEW YORK CIVIL LIBERTIES UNION**

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PRELIMINARY STATEMENT

This appeal is from a Decision and Order of the Honorable Thomas J. McAvoy, United States District Judge of the Northern District of New York. As of the filing of this brief, the ruling had not been published, but it is reported on Westlaw at *United States v. Aref*, 2007 WL 603510 (N.D.N.Y. Feb. 22, 2007).

INTRODUCTION

This appeal concerns the judiciary's role in striking the proper balance between, on the one hand, the public's First Amendment right of access to judicial opinions and judicial documents and, on the other hand, the need to prevent the release of legitimately classified information that would cause genuine damage to national security. In the criminal case underlying this appeal, the district court denied a suppression motion in a secret opinion based on a secret government submission opposing the motion. The suppression motion raised an issue of grave public concern; namely, the legality of the National Security Agency's controversial warrantless surveillance program.

The New York Civil Liberties Union ("NYCLU") sought to intervene for the limited purpose of moving for public access to the district court's opinion and the government's submission. The district court denied the public access motion

without the kind of specific, on-the-record findings necessary to support a sealing decision, based on the mistaken premise that, when the government asserts that classified information is implicated in judicial opinions and judicial documents, courts must defer entirely to the government's judgment about what information should be released to the public record. Applying the proper legal standard, this Court should unseal the district court's opinion and the government's submission, subject only to redactions the Court determines are necessary to prevent the release of legitimately classified information that, if released, would cause specific harm to national security.

JURISDICTIONAL STATEMENT

This case presents a third-party intervenor's attempt to assert its First Amendment right of public access to judicial documents and a district court opinion related to the resolution of a suppression motion in a criminal case. Because this is not a criminal matter and the district court issued final decisions on February 22, 2007, denying intervention and public access to the disputed documents, *see* Intervenor Special Appendix ("I-SPA")¹ at 7, 13, this Court has jurisdiction under

¹ Intervenor-Appellant prepared separate Joint and Special Appendices from those prepared by the defendant-appellants in the underlying criminal case. To assist the Court in distinguishing among the appendices, pages in the Intervenor Joint and Special appendices are marked "I-A" and "I-SPA," respectively.

28 U.S.C. § 1291. *See, e.g., Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 117 (2d Cir. 2006); *United States v. Graham*, 257 F.3d 143, 147 (2d Cir. 2001); *In re New York Times Co.*, 828 F.2d 110, 113 (2d Cir. 1987); *In re Application of The Herald Co.*, 734 F.2d 93, 96 (2d Cir. 1984); *In re Boston Herald, Inc.*, 321 F.3d 174, 177 (1st Cir. 2003) (finding jurisdiction over appeal from denial of public access in a criminal case based on direct appeal and on mandamus grounds).

In the alternative, the Court may exercise jurisdiction under the All Writs Act, 28 U.S.C. § 1651. *See, e.g. In re Washington Post*, 807 F.2d 383 (4th Cir. 1986) (treating appeal of denial of public access as a writ of mandamus); *United States v. Chagra*, 701 F.2d 354, 360 (5th Cir. 1983) (citing court of appeals cases reviewing denial of public access on writ of mandamus or prohibition).

The NYCLU filed its timely Notice of Appeal on March 9, 2007. Intervenor Joint Appendix (“I-A”) at 180.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the NYCLU may intervene in this criminal case for the limited purpose of moving under the First Amendment for public access to improperly sealed judicial opinions and judicial documents.
2. Whether a district court may issue a secret, *ex parte* opinion denying a suppression motion challenging the National Security Agency's warrantless surveillance program.
3. Whether, in light of the First Amendment right of public access, an entire judicial opinion and the entire substance of the government's papers in opposition to a suppression motion challenging the legality of the National Security Agency's warrantless surveillance program should be sealed from public view without specific, on-the-record, factual reasons supporting the necessity of such sealing.
4. Whether, in light of the First Amendment right of public access, federal courts have authority to review the government's unilateral determination that judicial documents should be sealed because they contain purportedly classified information.

STATEMENT OF THE CASE

This case is an appeal from the district court's February 22, 2007, denial of the NYCLU's July 6, 2006, motion to obtain public access to a judicial opinion and judicial documents related to a suppression motion challenging the National Security Agency's illegal warrantless surveillance program. The district court denied public access and denied intervenor status to the NYCLU for the purpose of making the motion for public access. *See* Opinion & Order (Feb. 22, 2007) (I-SPA7).

STATEMENT OF FACTS

The Underlying Criminal Prosecution and Motion to Suppress Evidence Obtained from Illegal NSA Surveillance

In August of 2004, the government charged Yassin Aref and Mohammed Hossain, two American citizens from Albany, with money laundering and providing material support to terrorism. The indictment arose from a sting operation involving a confidential informant's proposal to launder money purportedly used to purchase weapons for use in a fictitious assassination attempt on a Pakistani diplomat at the United Nations. *See United States v. Aref*, 2007 WL 603508 (N.D.N.Y. Feb. 22, 2007).

In late 2005, while the criminal prosecution of Aref and Hossain was pending, the *New York Times* revealed and the government confirmed the existence of a

warrantless surveillance program run by the National Security Agency (“NSA”). *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, NEW YORK TIMES, Dec. 16, 2005 (I-A153). This program apparently had been in place since shortly after the terrorist attacks of September 11, 2001. *Id.* The revelation of the program sparked a national controversy over the President’s decision to bypass the requirement of judicial approval for such surveillance established by the Constitution in the Fourth Amendment and by Congress in the Foreign Intelligence Surveillance Act of 1978 (“FISA”), 50 U.S.C. § 1806, *et seq.*

On January 17, 2006, the *New York Times* reported that FBI agents were critical of the warrantless NSA surveillance program because it produced an overwhelming and largely useless set of data for the FBI to analyze. *See* Lowell Bergman and Eric Lichtblau, *Spy Agency Data after Sept. 11 Led FBI to Dead Ends*, NEW YORK TIMES, Jan. 17, 2006 (I-A161). In response to assertions in the article by FBI agents and prosecutors that warrantless NSA surveillance resulted in “pointless intrusions on Americans’ privacy,” the authors of this article quoted unnamed government sources who defended the NSA program on the grounds that information gathered from it led directly to the investigation and prosecution of, among others, Aref and Hossain. *Id.* at 4, 8 (I-A161, I-A165).

After reading this article, Aref and Hossain filed a motion to suppress and

dismiss their prosecution as the fruit of the poisonous tree of illegal NSA surveillance. *See* Motion to Reconsider (Jan. 20, 2006) (I-A88).² The defendants believed, and continue to argue before this Court in their direct appeal, that the January 17, 2006, *New York Times* article and other evidence emerging from discovery and at trial show that the government chose to initiate the sting operation against Aref and Hossain solely based on suspicions developed as a result of unlawful NSA surveillance of one or both of the defendants.

The NYCLU's Involvement in this Case and the Secret, Ex Parte Government Submission and Court Opinion on the Suppression Motion

On February 15, 2006, upon learning that legality of the NSA's warrantless surveillance program had been raised by the defendants' suppression motion, the New York Civil Liberties Union ("NYCLU") requested permission from the district court to submit an *amicus curiae* brief on the issue of the legality of the NSA program. *See* Letter from C. Dunn to the Hon. Thomas J. McAvoy (Feb. 15, 2006) (I-A134). The American Civil Liberties Union ("ACLU"), of which the NYCLU is the New York State affiliate, had filed a civil challenge to the NSA program that was pending at the time of the events described herein, and has since been dismissed on purely procedural

² Defendants' motion was styled as a motion for reconsideration because the district court previously denied an omnibus suppression motion made before allegations of NSA spying surfaced. Thus, defendants were asking the court to reconsider suppression in light of the new evidence of illegal NSA surveillance.

grounds. *See ACLU v. NSA*, ---F.3d ---, No. 06-2095/2190 (6th Cir. July 6, 2007) (granting motion to dismiss on standing grounds).

On March 10, 2006, while the NYCLU's application for *amicus* status was pending, the government submitted an entirely sealed, *ex parte* submission in opposition to the defendant's suppression motion. *See* Notice of Submission of *In Camera, Ex Parte* Classified Memorandum (March 10, 2006) (I-A136) (hereinafter, the "Sealed Submission"). The government had not filed a motion to seal, and the filing appeared to violate the terms of a pre-existing protective order by failing to include a redacted, public version of the Sealed Submission.³

³ In September of 2004, in the early stages of the underlying criminal prosecution, prior to the allegations of illegal NSA surveillance and the filing of the suppression motion, a consortium of media outlets moved to intervene for the general purpose of obtaining access to court records in the case and opposing the government's proposed protective order governing information covered by the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3. The district court denied that motion as unripe because it sought disclosure of court records generally rather than access to particular documents or proceedings. *See* Decision & Order (Nov. 16, 2004) (I-A60). The court did, however, allow the press intervenors to present their objections to the Government's proposed protective order and, having considered those objections, held that the press intervenor's "period of intervention ha[d] ended." *Id.* at 12 (I-A71). The court then issued a protective order that, among other things: allowed for the disclosure of classified information and pleadings containing classified information to lead counsel for both defendants because they had obtained appropriate security clearances; and required the filing of all judicial documents on the public docket with redactions for legitimately classified information, particularly if the document contained legal argument. *See* Protective Order (Nov. 16, 2004) at ¶¶ 12, 14, 17, 18 (I-A72). The protective order delegated authority to determine whether filings should be sealed (continued next page)

On the same day, the district court denied the defendant's suppression motion in a cursory, four-sentence public order indicating that an entirely sealed, *ex parte* opinion and order regarding the suppression motion (hereinafter, the "Sealed Opinion") had been lodged with the Clerk of Court. *See* Order Denying Defendants' Motion for Reconsideration (March 10, 2006) (I-A138). Three days later, the district court denied the NYCLU's motion to participate as *amicus curiae* as moot. *See* Order (March 13, 2006) (I-A139).

Defendant Aref's and NYCLU's Mandamus Petitions to this Court and the District Court's Belated Ruling on the Propriety of Sealing its Opinion and the Government's Submission

On March 24, 2006, in response to the district court's Sealed Opinion, Aref filed a mandamus petition asking this Court to order the government to disclose whether NSA surveillance occurred in this case; to find that the district court's ruling on the suppression motion based on *ex parte* evidence violated the Sixth Amendment; and to rule on the merits of the defendant's suppression motion. *See Aref v. United States*, 452 F.3d 202, 204 (2d Cir. 2006). A few days later, on March 27, 2006, because the controversy regarding the Sealed Submission and the Sealed Opinion had moved to the Court of Appeals, the NYCLU filed a motion to

or released on the public docket to a Court Security Officer. *Id.* at ¶¶ 17, 18.

intervene in Aref's mandamus petition as well as its own petition seeking public access to those materials. 452 F.3d at 205.

Shortly after the NYCLU filed its petition for mandamus, the district court issued an opinion and order addressing, for the first time, its decision to seal the Sealed Submission and Sealed Opinion. *See* Decision and Order (March 28, 2006) (I-SPA1). The district court stated that both the Sealed Opinion and the Sealed Submission "were so limited in scope and so interrelated with classified information, [that] the filing of redacted materials or a redacted Order that did not divulge classified information would be impossible." *Id.* On April 28, 2006, the NYCLU filed a supplemental memorandum in support of its petition for mandamus addressing the district court's opinion.

On June 23, 2006, the Court denied both Aref's and the NYCLU's mandamus petitions for lack of jurisdiction, holding that Aref was not entitled to interlocutory review and the NYCLU must first file a petition for intervention in the district court before seeking relief from this Court. 452 F.3d at 206-07 ("If NYCLU wanted to petition this Court for mandamus ... it might have sought intervention in the district court"). The Court did not pass on the merits of either Aref's or the NYCLU's challenge to the district court's actions.

The NYCLU's Motion to Intervene for the Limited Purpose of Gaining Public Access to the Secret Government Submission and Court Opinion

Following this Court's instruction, the NYCLU on July 6, 2006, filed motions in the district court to intervene and for public access to the Sealed Submission and Sealed Opinion. *See* Motions for Intervention and Public Access (I-A142 to I-A147). On February 22, 2007 – several weeks after Aref and Hossain's trial and conviction and more than six months after the NYCLU filed its motions – the court denied the NYCLU's motions. *See* Opinion & Order (Feb. 22, 2007) (I-SPA7).

While the NYCLU's motions for intervention and public access were pending, the district court on February 9, 2007, officially inquired of the government whether more of the Sealed Submission could be released. *See* Notice of Submission of *In Camera, Ex Parte*, Classified Memorandum in Response to the Court's Inquiry (Feb. 9, 2007) (I-A169).⁴ In response to this inquiry, the

⁴ In its opinion denying the NYCLU's motions for limited intervention and public access, the district court suggests that because of its February 9 and February 22, 2007, orders "the issue raised in the NYCLU's application was, in essence, decided before the instant application was made" and thus the NYCLU's motions should be denied. Decision & Order at 5 (I-SPA11). This assertion belies the fact that the NYCLU raised the public access issue to this Court nearly a year earlier, in March of 2006, and filed the "instant application" six months before the district court issued its order requesting that the government file more of the Sealed Submission on the public docket. Moreover, as argued throughout this brief, the district court struck an improper balance between the legitimate protection of (continued next page)

government filed on the public docket a redacted version of the Sealed Submission. *Id.* This version revealed none of the substance of the government's opposition to the suppression motion. It consisted of two documents: a legal memorandum, all of which was redacted but the title, a single paragraph noting the subject matter of the defendants' suppression motion, and the signature line; and the Declaration of FBI Assistant Director for Counterterrorism, Willie T. Hulon, all of which was redacted but the paragraphs identifying Mr. Hulon and the signature line.

On February 16, 2007, the NYCLU sent a letter to the district court inquiring into the nature of these newly released documents and requesting that the court rule on its pending motion for public access. *See* Letter from C. Stoughton to the Hon. Thomas J. McAvoy (Feb. 16, 2007) (I-A178).

The following week, on the same day that it denied the NYCLU's motions, the district court formalized its request to the government to release "as much of the [Sealed Submission] as does not compromised [sic] legitimately classified national security information." *See* Order (Feb. 22, 2007) (I-SPA13). On April 16, 2007, the government released an additional item to the public docket consisting of an entirely blank document with only the signature line unredacted. *See* Government's

classified national security information and the public's First Amendment right of access to judicial documents, and thus the NYCLU was, and is, entitled to more relief than the district court's February 9 and February 22 orders provided.

Ex Parte, In Camera, Classified Memorandum in Response to the Court's Inquiry Regarding Declassification and Unsealing of the Government's March 10, 2006, Filing (dated January 29, 2007) (I-A182). Because of the title of this document, Intervenor-Appellant believes it is part of, or at least related to, the Sealed Submission.

SUMMARY OF ARGUMENT

The suppression motion underlying this controversy deals with a matter of extreme national importance and public concern: allegations of illegal domestic spying, excessive government secrecy, and the abuse of executive power surrounding the National Security Agency's warrantless surveillance program. The motion was prompted by media reports that government officials sought to defend the NSA program by pointing to the prosecution of Aref and Hossain as an example of a success story emerging from it.

The NYCLU, its 48,000 members, and the general public have a strong interest in understanding how the government responded to and how the district court resolved the important issues raised in this motion, regardless of whether resolution turned on a legal defense of the NSA program, contentions of the absence of taint attributable to admitted NSA surveillance, or a government denial that NSA surveillance occurred in this case. The district court, however, foreclosed

this possibility by sealing the entirety of its opinion and allowing the government to seal the entirety of the substance of its opposition to the suppression motion. The NYCLU's right to intervene for the purpose of moving for public access to the Sealed Opinion and Sealed Submission is supported by a long line of public access cases from the Supreme Court and this Court, and the district court's denial of intervention status to the NYCLU was in error.

The district court also erred in denying the NYCLU's motion for public access.⁵ In light of the fundamental requirement of open judicial decisionmaking, the district court's sealing of the entirety of its opinion denying the suppression motion was inappropriate.

Furthermore, the district court's sealing decisions regarding both the Sealed Opinion and the government's Sealed Submission incorrectly applied long-standing legal standards balancing the First Amendment right of public access to judicial documents with national security concerns, for two reasons.

First, the district court did not provide specific, on-the-record findings sufficient to support a conclusion that wholesale sealing of the Sealed Opinion and the substance of the Sealed Submission was warranted. Instead, the court

⁵ The district court's determination to limit public access is subject to *de novo* review by this Court. See *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) (“[C]onstitutional access claims engender *de novo* review.”).

inappropriately deferred to the government's conclusion that complete secrecy was necessary because some part of the information contained in these documents was classified.

Second, the district court failed to review independently whether the information that the government alleged was classified was in fact properly classified and would pose a threat to national security if disclosed. The district court erroneously believed that courts have no authority to undertake such a review in First Amendment public access cases. In light of these errors, this Court should undertake its own determination of what portions of the Sealed Opinion and Sealed Submission must remain sealed to prevent disclosure of legitimately classified information that, if released, would pose a threat to national security.

ARGUMENT

I. The NYCLU is Entitled to Intervene for the Limited Purpose of Asserting a First Amendment Right of Public Access to the Sealed Opinion and Sealed Submission.

The district court's decision to deny the NYCLU intervenor status was in error. The Supreme Court and this Court have long held that the public has a right to obtain limited intervention in criminal cases for the purpose of moving for public access under the First Amendment. *See, e.g., Press-Enterprise Co. v. Superior*

Court of Calif., Riverside County, (Press Enterprise II), 478 U.S. 1 (1986); *Press-Enterprise Co. v. Superior Court of Calif., Riverside County, (Press Enterprise I)*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *United States v. Alcantara*, 396 F.3d 83 (2d Cir. 2005); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987); *In re Application of the Herald Co.*, 734 F.2d 93 (2d Cir. 1984).

The district court’s decision to deny the NYCLU’s right to intervene contradicts this entire line of well-established precedent.

Although no rule of procedure creates a mechanism for intervention in criminal cases,⁶ this Court has acknowledged that the unique nature of the First Amendment right of public access requires judicial recognition of a limited right of intervention. *See In re Herald Co.* 734 F.2d at 102 (“Since by its nature the right of public access is shared broadly by those not party to the litigation, vindication of that right requires some meaningful opportunity for protest by persons other than the initial litigants.”). *See also In re Associated Press*, 162 F.3d 503, 508 (7th Cir. 1998) (“[R]epresentatives of the press and general public must be given an opportunity to be heard on the question of their exclusion from proceedings or

⁶ As the Supreme Court has recognized, courts have authority to “formulate procedural rules not specifically required by the Constitution or the Congress” in order to “implement a remedy for violation of recognized rights.” *United States v.* (continued next page)

access to documents.”).

Public access cases most often involve a representative of the news media, but the press has no special right of access that the general public and the NYCLU do not share. *Cf. Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972) (noting that the press does not have First Amendment rights different from or greater than the public at large). The general public’s standing to bring First Amendment access claims has been recognized by other circuits. *See Rosenfeld v. Montgomery County Public Schools*, 25 Fed. Appx. 123, 131-32 (4th Cir. 2001) (recognizing that general public, not just press, having standing to move to unseal documents); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994) (recognizing individuals’ right to intervene for limited purpose of moving to challenge a protective order). Moreover, organizations like the NYCLU have in other contexts been held to be “representatives of the news media.” *Cf. Electronic Privacy Information Ctr. v. Department of Defense*, 241 F. Supp.2d 5, 10-15 (D. D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the media” for purposes of the Freedom of Information Act). Just as a reporter would, the NYCLU intends to publish any information revealed as a result of its motion via channels such as its

Hastings, 461 U.S. 499, 505 (1983) (internal citations omitted).

website, its regular newsletter, e-mail alerts, press releases, and other publications. *See* Declaration of NYCLU Executive Director D. Lieberman, ¶¶ 2, 5 (July 6, 2006) (I-A148).

For the foregoing reasons, the NYCLU was entitled to limited intervention. In holding otherwise, the district court did not apply any standards of law or provide any basis for denying the NYCLU intervenor status; rather it simply stated that “since the issue raised in the NYCLU’s application was, in essence, decided before the instant application was made and was based upon the standard advocated for by the NYCLU in its present application, the Court finds no reason to grant the NYCLU intervention in this action.” *See* Decision & Order at 5 (I-SPA11). The court’s apparent assumption that intervention should be denied because it was denying the motion for public access on the merits was erroneous; the right to intervene is the right to be heard on the issue of public access, an issue distinct from whether public access is warranted in any given case. *See In re Associated Press*, 162 F.3d at 508 (finding district court’s denial intervention motion in error because it denied petitioner a mechanism to raise public access issues). Thus, this Court should find the district court’s denial of intervenor status to the NYCLU in error and reach the merits of the NYCLU’s motion for public access.

II. The District Court Erred in Sealing the Entirety of a Judicial Opinion and the Entirety of the Substance of a Judicial Document.

The NYCLU sought intervention below in order to challenge the district court's March 10, 2006, decision to: (1) allow the government to file the entirety of its submission in opposition to the defendants' suppression motion under seal; and (2) seal the entirety of its opinion denying the suppression motion, accompanied only by a public order indicating the disposition of the motion. The district court denied the NYCLU's motion for public access to the Sealed Opinion and Sealed Submission. However, on the same day it denied that motion it asked the government to release "as much of the [Sealed Submission] as does not compromised [sic] legitimate national security information." *See* Order (I-SPA11). The government subsequently released a redacted version of its Sealed Submission, described in more detail above, which kept the entire substance of the government's opposition to the suppression motion secret. *See* Notice of Submission of *In Camera, Ex Parte*, Classified Memorandum in Response to the Court's Inquiry (Feb. 9, 2007) (I-A169).

In issuing the Sealed Opinion and permitting the government to withhold the entire substance of the Sealed Submission, the district court misapplied the legal standard governing the sealing of judicial opinions and judicial documents.

Although it cites to the relevant language from the Supreme Court’s *Press-Enterprise* decision, the district court failed to apply that standard to the Sealed Opinion and inappropriately abdicated to the government its judicial responsibility to determine whether information that the government seeks to withhold from public scrutiny should be so withheld.

The standards governing the sealing of judicial documents are strict. “The presumption of openness 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-Enterprise I*, 464 U.S. at 510. “Such circumstances will be rare ... and the balance of interests must be struck with special care.” *Waller v. Georgia*, 467 U.S. 39, 45 (1984). *See also ABC, Inc. v. Stewart*, 360 F.3d 90, 98 (2d Cir. 2004) (observing that “the presumption of access cannot easily be overcome”); *Alcantara*, 396 F.3d at 192 (noting that denials of access are to be “very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons.”) (internal quotation omitted). As argued more fully below, the standards for sealing entire judicial opinions – as opposed to judicial documents such as papers submitted to a court by a party for the purpose of resolving a motion – are even more rigorous in light of the importance of open judicial deliberations to the proper functioning of our

democratic system and the legitimacy of judicial decisionmaking.

A. Courts Should Not Seal Entire Judicial Opinions.

The notion of an entirely secret opinion is simply inconsistent with the proper role of the judiciary in American government. Unsurprisingly, therefore, courts have addressed the issue of secret opinions infrequently, and this Court and the Supreme Court never have done so directly. Every court to do so, however, has condemned the very notion. As the Seventh Circuit recently noted, wholly sealed opinions are foreign to our judicial system, even in cases involving official state secrets – the most absolute form of national security concern:

Redacting portions of opinions is one thing, secret disposition is quite another. ... What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification. The Supreme Court issues public opinions in all cases, even those said to involve state secrets.

Hicklin Engineering, L.C. v. R.J. Bartell, 439 F.3d 346, 348-49 (7th Cir. 2006)

(citing cases).

In a case indistinguishable from the present one, *United States v. Ressam*, 221 F. Supp.2d 1252 (W.D. Wash. 2002), the court rejected the government's objection that the risk of revealing classified information justified sealing certain

court orders. *Ressam* involved the prosecution of an al-Qaeda trained Algerian terrorist who had plotted to detonate explosives at the Los Angeles International Airport. Despite the weighty national security concerns at issue in the case, the court explained that the First Amendment required a public opinion with only a narrowly tailored redaction of ten words that described, with specificity, legitimately classified information:

[T]here is a venerable tradition of public access to court orders, not only because of the inherent value in publicly announcing a particular result, but because dissemination of the court’s reasoning behind that result is a necessary limitation imposed on those entrusted with judicial power. A court’s order therefore serves a function that extends far beyond a specific case. More than merely informing the parties of an outcome of a motion, an order also enlightens the public about the functioning of the judicial system. ... The benefits of access to court orders do not accrue merely in those members of the public that read or hear of them. The court itself, knowing that its determinations will be scrutinized by others, is further encouraged to coherently explain the reasoning behind its decision. In short, the general practice of disclosing court orders to the public not only plays a significant role in the judicial process, but is also a fundamental aspect of our country’s open administration of justice.

221 F. Supp.2d at 1262-63. *See also United States v. Turner*, 206 Fed. Appx. 572, 574 n.1 (7th Cir. 2006) (refusing to seal or omit discussion of important facts in opinion based on the need for public understanding of judicial decisionmaking); *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying motion to file opinion under seal “because decisions of the court are a matter of public record”); *BBA Nonwovens Simpsonville, Inc. v. Superior Nonwovens, LLC*, 303

F.3d 1332, 1335 n.1 (Fed. Cir. 2002) (citing the public right of access to deny a request for secret opinion); *United States v. Rosen*, 487 F. Supp.2d 703, 715-16 (E.D. Va. 2007) (noting that “requiring a judge’s rulings to be made in public deters partiality and bias In short, justice must not only be done, it must be seen to be done.”).

Although this Court and the Supreme Court have never been presented with the issue of secret opinions directly, and thus never have had the opportunity to rule on their impropriety, both courts have repeatedly emphasized the importance of open judicial decisionmaking to the fundamental legitimacy of the criminal process. *See Press-Enterprise II*, 478 U.S. at 13 (“People in an open society do not demand infallibility from their institutions, but it is difficult to accept what they are prohibited from observing.”) (internal quotation omitted); *Press-Enterprise I*, 464 U.S. at 508 (“Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”); *Globe Newspaper Co.*, 457 U.S. at 606 (“[P]ublic access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.”); *United States v. Amodeo (Amodeo II)*, 71 F.3d 1044, 1048 (2d Cir. 1995) (“Monitoring [of judicial decisionmaking] both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring,

moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings.”).

Though this case raises national security concerns, it is no different from *Ressam* or the state secrets opinions discussed in *Hicklin Engineering*. Indeed, the fact that this case involves the highly controversial and potentially illegal NSA surveillance program only highlights the need to maintain public confidence and promote public understanding through open judicial decisionmaking. Thus, as the cases discussed above make clear, the district court’s decision to seal the entirety of its opinion denying the defendants’ suppression motion was inconsistent with fundamental notions of judicial legitimacy and should be reversed. At least some part of the court’s rationale in deciding this important issue should be on the public record. As discussed in Part III, this Court should engage in its own, independent analysis of the extent to which redactions from the Sealed Opinion are necessary. Just as in the *Ressam* case, limited redactions should be allowed only if portions of the opinion actually contain, in this court’s view, legitimately classified information that would cause specific harm to national security if disclosed.

B. The Government’s Sealed Submission is a Judicial Document to Which a Weighty First Amendment Presumption of Public Access Attaches.

As discussed in the previous section, the Sealed Opinion is subject to the

strongest possible presumption of public access. The government’s Sealed Submission also qualifies for the presumption. This Court has long held that the First Amendment creates a strong presumption of public access to material submitted in conjunction with a suppression motion. *See, e.g., In re New York Times*, 828 F.2d at 110. Only last year, the Court reaffirmed the importance of the First Amendment right of access to judicial documents submitted to a court for consideration in resolving a motion. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (holding that documents submitted in conjunction with a summary judgment motion trigger presumption of public access). *See also Joy v. North*, 693 F.2d 880, 893 (2d Cir. 1982) (holding that documents opposing motions are entitled to heaviest presumption of access because “adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.”).

The Supreme Court has explained the particular importance of public access with regard to suppression motions in criminal cases:

The need for an open proceeding may be particularly strong with respect to suppression hearings. A challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor. As the Court of Appeals for the Third Circuit has noted, “[s]trong pressures are naturally at work on the prosecution’s witnesses to justify the propriety of their conduct in obtaining’ the evidence. The public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny.

Waller, 467 U.S. at 47 (quoting *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 605 (3d Cir. 1969)). See also *United States v. Criden*, 675 F.2d 550, 556-57 (3d Cir. 1982) (noting importance of public access to suppression proceedings in criminal cases); *Rosen*, 487 F. Supp.2d at 715 (“[R]equiring prosecutors to present their charges and evidence publicly deters prosecutorial vindictiveness and abuse of power.”).

This case is far more serious than a routine police misconduct case like the one at issue in *Waller*. The defendants’ suppression motion raises issues of domestic spying and unconstitutional overreaching by the executive branch, conduct that to this day remains a contentious issue between Congress and the President and is being litigated in the federal courts. Despite the heightened need for public scrutiny, however, the district court directly contravened the Supreme Court’s admonition in *Waller* by permitting the government to hide its reasons for opposing the defendants’ suppression motion. Thus, the public is deprived of an opportunity to scrutinize the government’s conduct. See *Alcantara*, 396 F.3d at 195 (“The First Amendment right of access to criminal trials ‘ensure[s] that this constitutionally protected discussion of public affairs is an informed one.’”) (quoting *Globe Newspaper Co.*, 457 U.S. at 605).

That the Sealed Submission may contain national security information does

not alter the presumption of public access. Courts facing similar issues have emphasized the importance of protecting the public's First Amendment right of access and have rejected calls for excessive secrecy. For example, *In re Washington Post*, 807 F.2d 383, 391 (4th Cir. 1986), holds that there is a right of public access to plea and sentencing hearings in foreign espionage prosecutions – an arena in which the most fundamental state secrets may arise – and emphasizes that the calculus for determining when national security concerns outweigh the presumption of access is no different than in any public access case.

Similarly, in one of the most high-profile terrorism prosecutions yet undertaken in the United States, the Fourth Circuit refused to water down the presumption of public access to judicial documents, noting that “[t]he value of openness in judicial proceedings can hardly be overestimated,” and further that “the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents.” *United States v. Moussaoui*, 65 Fed. Appx. 881, 887 (4th Cir. 2003). The Sixth Circuit has also confronted the issue of the interplay between national security concerns and public access, holding that the government's concerns do not automatically trump First Amendment rights of access to judicial proceedings. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 711 (6th Cir. 2002) (refusing government's request to close immigration

proceedings involving national security information).

C. The District Court Improperly Abdicated to the Government Authority to Determine Whether Information Is Properly Classified and Did Not Provide a Compelling Justification for Sealing the Entire Sealed Opinion and Accepting the Government’s Near-Total Redactions of the Sealed Submission.

In sealing the entirety of the Sealed Opinion and the entire substance of the Sealed Submission, the district court misapplied the legal standards governing the First Amendment right of public access. Specifically, the district court erred in: (1) accepting, without question or scrutiny, the government’s assertion that because classified national security information may be involved, all of the substance of the Sealed Submission and the entire Sealed Opinion must be withheld from the public record; and, (2) concluding that, in First Amendment public access motions, courts have no authority to review the government’s designation of information as “classified.”

1. *The District Court Improperly Delegated its Judicial Authority to the Government and Failed to Justify, as a Matter of Law, Wholesale Sealing of the Secret Opinion and the Substance of the Secret Submission.*

Given the strong presumption of public access to the Sealed Opinion and the Sealed Submission, their contents should only be withheld from the public “based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise I*, 464 U.S. at 510. “Such

circumstances will be rare ... and the balance of interests must be struck with special care.” *Waller*, 467 U.S. at 45. *See also Alcantara*, 396 F.3d at 192 (noting that denials of access are to be “very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons.”) (internal quotation omitted).

The district court erred in applying the *Press-Enterprise* standard because it improperly abdicated to the government the court’s authority and responsibility to determine what information should be placed on the public docket and what should remain sealed. The district court’s opinions reflect unquestioning acceptance of the government’s assertion that sealing the court’s opinion and the entire substance of the Sealed Submission was necessary because they implicated purportedly classified information. Indeed, in denying the NYCLU’s motion for public access on February 22, 2007, the district court expressly empowered the government to determine for itself what portions of the Sealed Submission should be released. *See* Order (Feb. 22, 2007) (I-SPA13).

It is the judiciary’s responsibility to balance the need for legitimate secrecy with the right of public access to judicial documents and opinions. This Court has specifically cautioned lower courts to conduct an “independent balancing of interests” in public access cases and to ensure that decision to seal are not “the

result of an improper delegation of judicial authority” to the parties. *Amodeo II*, 71 F.3d at 1047. *See also United States v. Amodeo (Amodeo I)*, 44 F.3d 141, 147 (2d Cir. 1995) (“While we think it proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document, we consider it improper for the district court to delegate its authority to do so.”). That one of the parties is the government is immaterial; the executive branch cannot dictate to the judiciary how to manage its files. As this Court has noted, 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)).

In deferring to the government’s judgment, the district court also ran afoul of this Court’s requirement of “specific, on the record findings” to support sealing decisions. *In re New York Times*, 828 F.2d at 116 (quoting *Press-Enterprise II*, 106 S. Ct. at 2743). *See also Romero v. Drummond Co.*, 480 F.3d 1234, 1247 (11th Cir. 2007) (reversing district court sealing decision where record did not contain any evidence to support court’s findings); *Phoenix Newspapers, Inc. v. U.S. District Court*, 156 F.3d 940, 949-50 (9th Cir. 1998) (district court must “make specific factual findings, rather than basing its decision on conclusory assertions alone.”)

(internal quotation omitted).

Both the district court's March 28, 2006, opinion justifying the sealing decision and its February 22, 2007, opinion denying the NYCLU's motion for public access lack the requisite degree of specificity. There is no discussion of the facts underlying the district court's determination that sealing was required, no description of the material being sealed, and no discussion of how that material specifically threatens national security in a manner that outweighs the public's First Amendment interests in its publication. *See, e.g., In re Associated Press*, 162 F.3d at 510 (holding that a "district court's explanation for permitting the sealing of any material that is part of the record ought to provide a description of the documents and the reasons for their sealing").

This Court has on more than one occasion vacated district court sealing decisions for failure to provide sufficiently specific justifications. In *In re New York Times*, the Court noted that although the district court identified the need to balance the parties' interest in secrecy with the First Amendment right of public access, its findings were "broad and general" and its "rulings were not specific enough to meet the requirements of *Press-Enterprise II* and *Waller*." 828 F.2d at 116. Similarly, in *In re Application of the Herald Co.*, 734 F.2d at 101, the Court vacated a district court's order to close a courtroom during a suppression hearing,

noting that “we cannot sustain the order on the limited basis thus far set forth by the District Judge.” Although the judge wrote that closure was necessary to avoid “tainting of any future proceedings by pre-trial disclosures,” the judge’s failure to elaborate on the threat of the taint rendered the order unworkable. *Id.*

Even in the context of national security concerns, appellate courts have imposed strict obligations on district courts to provide specific factual explanations for the need to maintain secrecy in criminal cases. *See In re Washington Post*, 807 F.2d 383 (4th Cir. 1986) (reversing sealing orders for failure to explain why national security would be harmed by disclosure of that specific information).

The district court’s decisions on public access in this case consist of precisely the kind of excessively “broad and general findings” that this Court described as insufficient in *In re New York Times*. They were simply incantations of the legal standard and conclusory applications of that standard, and relied primarily on the fact that the government informed the court that classified information was implicated. Moreover, although the district court earlier found that “the filing of redacted materials ... would be impossible,” *see* Decision & Order (March 28, 2006) (I-SPA4), less than a year later it asked the government to re-issue its submission with redactions, which the government did. *See* Notice of Submission of *In Camera, Ex Parte*, Classified Memorandum in Response to the Court’s

Inquiry (Feb. 9, 2007) (I-A169); Order (Feb. 22, 2007) (I-SPA13). Having retreated from its declaration that releasing additional information was “impossible,” it cannot be that the district court’s March 28, 2006, opinion reflects the kind of “reasoned conclusion” supported by specific facts that this Court requires when determining exactly how much of a judicial document should be released to the public docket. *See In re Application of the Herald Co.*, 734 F.2d at 100 (“[T]he trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow”).

The drastic outcome of the district court’s decision – namely, sealing an entire judicial opinion and the entirety of the substance of the government’s justification for rejecting the defendants’ motion to suppress evidence obtained through warrantless NSA surveillance – naturally follows from this flawed process.

The unprecedented nature of secret opinions has been noted above. And as the Seventh Circuit has noted, legal briefs in the nation’s most sensitive litigation, including the Pentagon Papers case and a case involving hydrogen bomb plans, have always been publicly available. *See Krynicki v. Falk*, 983 F.2d 74, 76 (7th Cir. 1992). This case does not seem to present national security concerns any more serious than in those cases.

Therefore, because of its failure to provide specific, on-the-record findings

that sealing was necessary based on an independent, reasoned analysis, the district court's decision should be reversed. The district court should not have permitted the government to dictate how judicial documents should be sealed, and the outcome of the district court's various orders.

2. *In First Amendment Public Access Cases, Courts Are Required to Review Government Assertions that Information is Legitimately Classified.*

The district court's deference to the government was based in part on the court's view that if the government told the court information was classified, the court had no authority to review or analyze that assertion and therefore must seal what the government says must be sealed. This is incorrect as a matter of law. In a variety of contexts, courts are called upon to review executive branch classification decisions when the secrecy of purportedly classified information conflicts with constitutional or statutory rights of access to information. The First Amendment right of public access is one of those contexts.

In a recent First Amendment public access case relating to an espionage prosecution involving state secrets and classified information, the Eastern District of Virginia noted:

While it is true, as an abstract proposition, that the government's interest in protecting classified information can be a qualifying compelling and overriding interest, it is also true that the government must make a specific showing of harm to national security in order to carry its burden [under the *Press-Enterprise* standard]. The government's *ipse dixit* that information is

damaging to national security is not sufficient ... whether it appears by way of classified status or the bald assertion of counsel that information is damaging to national security. ... Of course, classification decisions are for the Executive Branch, and the information's classified status must inform an assessment of the government's asserted interests under *Press-Enterprise*. But ultimately, trial judges must make their own judgment about whether the government's asserted interest ... is compelling or overriding. ... [A] generalized assertion ... of the information's classified status ... is not alone sufficient to overcome the presumption in favor of open trials.

United States v. Rosen, 487 F. Supp.2d 703, 716-17 (E.D. Va. 2007).

In another espionage prosecution, the Fourth Circuit expressed similar concerns about deferring to government determinations that secrecy is necessary to protect classified information:

[T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy ... would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Washington Post, 807 F.2d at 391-92. And in a civil case challenging warrantless NSA surveillance of communications between terrorism suspects and their attorneys, a federal district court in this Circuit reviewed whether it was proper to treat as classified the fact that the government had recorded certain conversations, ultimately rejecting the argument that disclosure of that purportedly

classified fact would harm national security. *See Turkmen v. Ashcroft*, --- F.R.D. --- 2006 WL 1517743 (E.D.N.Y. May 30, 2006).⁷

Courts have also affirmed the judicial obligation to review classification designations in the context of First Amendment challenges to pre-publication limitations on speech that may implicate classified information. *McGehee v. Casey* holds that reviewing courts should conduct a *de novo* review of classification decisions and demand supporting affidavits from government officials “with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification.” 718 F.2d 1137, 1148 (D.C. Cir. 1983). As the *McGehee* court noted, while the executive branch’s “tasks include the protection of national security and the maintenance of the secrecy of sensitive information, the judiciary’s tasks include the protection of individual rights.

⁷ Even in cases where courts maintain secrecy in order to protect classified information, they do so only after engaging in an independent analysis of whether that information is properly classified – procedurally and substantively. *See United States v. Abu Marzook*, 412 F. Supp.2d 913, 918-21 (N.D. Ill. 2006) (allowing limited closure of courtroom where government offered specific and compelling reasons in detailed, sworn affidavits, reviewed independently by the court, explaining why information was properly classified and would harm national security if disclosed); *United States v. Pelton*, 696 F. Supp. 156, 159 (D. Md. 1986) (allowing limited closure of espionage trial to protect classified information after court “conducted its own analysis of the classified affidavit [supporting the motion to seal the courtroom] and finds that there are serious national security concerns that would be affected”).

Considering that speech concerning public affairs is more than self-expression; it is the essence of self-government, and that the line between information threatening to foreign policy and matters of legitimate public concern is often very fine, courts must assure themselves that the reasons for classification are rational and plausible ones.” *Id.* at 1149 (internal quotations and citation omitted).⁸

Courts – including this Court – also routinely review classification designations in Freedom of Information Act (“FOIA”) cases to determine whether federal intelligence agencies may withhold certain documents under the Act’s

⁸The 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 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 that “[o]fficials 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, NEW YORK TIMES, July 12, 2005 at A20 (“The Bush administration is classifying 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.”).

exemption for properly classified materials. In *Halperin v. FBI*, 181 F.3d 279, 289 (2d Cir. 1999), this Court noted that “an agency's decision to withhold information under FOIA is reviewed under the Executive Order upon which the classification determination was made.” See also *Hayden v. National Security Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979) (when reviewing FOIA requests for purportedly classified information, the “court must make a *de novo* review of the agency’s classification decision, with the burden on the agency to justify nondisclosure.”); *American Library Assn. v. Faurer*, 631 F. Supp. 416, 422-23 (D. D.C. 1986) (noting that “the Court’s inquiry does not end” with NSA’s assertion that documents sought under FOIA are classified and concluding exemption applies only after *de novo* review of an affidavit providing NSA’s reasons for continuing to classify the information); *Powell v. United States*, 584 F. Supp. 1508, 1516 (N.D. Cal. 1984) (noting that “this court clearly has the responsibility to review *de novo* the agency’s classification decision” and finding no continued justification for classification); *Weberman v. National Security Agency*, 490 F. Supp. 9, 13-14 (S.D.N.Y. 1980) (finding that certain information was “improperly classified” by the NSA and thus cannot be withheld from the public). Certainly, if courts may review classification designations where there is a qualified statutory right to information, courts must review such designations where, as here, there is a

qualified constitutional right.

The foregoing cases establish conclusively that, in First Amendment public access cases, courts must review executive branch classification decisions. Thus, the premise of the district court's decision denying the NYCLU's motion for public access is flawed. The government's assertion that material is classified does not end the inquiry where the First Amendment's presumption of public access applies. Courts have the authority and, when considering motions for public access, the obligation to independently review classification designations.

The scope of this review, of course, must be informed by due deference to the executive branch's superior expertise in assessing threats to national security. But the need to balance national security concerns with the constitutional right of public access requires the judiciary to review classification designations carefully. First, a court must assure itself, and the public, that the information is actually "classified." Classified information is statutorily defined and must be formally designated as such by a limited set of specified executive actors with authority make such designations. *See* Exec. Order 13,292; Exec. Order 12,958 § 1.3. There is no indication in this case that the district court undertook even this minimal level of review.

Second, a court must ensure the information was classified according to the

substantive terms and limitations of Executive Order 12,958. That order prohibits classification of information in order to “conceal violations of law, inefficiency, or administrative error, prevent embarrassment to a person, organization, or agency, restrain competition; or prevent or delay the release of information that does not require protection in the interest of national security.” Exec. Order 12,958 § 1.7. Courts may review classification decisions to ensure compliance with these provisions. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 139-140 (1951) (finding classification designations violated the terms of the relevant executive order). In this case, the district court did not consider whether any of the purportedly classified information identified by the government complied with the substantive terms of Exec. Order 12,958.

Finally, as the case law cited above makes clear, “trial judges must make their own judgment” about whether the government has shown that the harm from release of material designated as classified outweighs the public interest in understanding judicial reasoning and processes that underlies the First Amendment right of public access. *Rosen*, 487 F. Supp.2d at 717. *See also In re Washington Post*, 807 F.2d at 391-92 (cautioning against courts’ blind acceptance of government assertions of harm to national security from disclosure of information). As the D.C. Circuit stated in *McGehee*, reviewing courts should conduct a *de novo*

review of classification decisions and demand supporting affidavits from government officials “with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification.” 718 F.2d at 1148. If the government cannot demonstrate that “logical connection,” the judicial document or opinion at issue should be released to the public docket.

III. The Court Should Review the Sealed Opinion and the Sealed Submission and Make Them Public Except to the Extent that the Court Finds Redactions Are Necessary to Protect Legitimately Classified National Security Information.

Having established that the district court’s decision to seal its opinion and the entire substance of the government’s opposition was in error, this Court should undertake its own independent review of the extent to which redactions of the contested documents are necessary to protect what, in the Court’s view, constitutes legitimately classified national security information, the release of which would cause specific harm. Applying the proper standards governing public access motions, it is likely that more should be revealed to the public than the district court permitted.

A. Remand to the District Court Is Unnecessary.

The criminal proceedings in the district court have ended. The district court has already issued two opinions on the issue of public access to these documents,

both of which failed to apply the correct legal standards. The NYCLU filed its motion for public access over a year from the date of this brief, in July of 2006. The district court waited seven months before ruling on that motion in February of 2007. Given that the questions of whether the government has presented a compelling interest to justify sealing and whether sealing is the most narrowly tailored option are legal questions, this Court need not remand this matter to the district court for a third opinion but should undertake its own legal determination regarding public access.

As this Court and others have held, the right of public access is time-sensitive and demands prompt consideration. *See Lugosch*, 435 F.3d at 127 (“Our public access cases and those in other circuits emphasize the importance of immediate access where a right to access is found. ... The public cannot properly monitor the work of the courts with long delays in adjudication based on secret documents.”); *Grove Fresh Distributors, Inc. v. John Labatt Ltd.*, 24 F.3d 893, 897 (7th Cir. 1994) (“To delay or postpone disclosure underlines the benefit of public scrutiny and may have the same result as complete suppression.”). “[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment.” *Nebraska Press Ass’n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J.). In other public access cases, this Court has reached an issue rather

than remand in order to “avoid the delay that remanding on the First Amendment question would occasion.” *Hartford Courant*, 380 F.3d at 91. In this case, the Sealed Opinion and Sealed Submission have been improperly sealed since March of 2006. The controversy over the NSA’s warrantless surveillance program remains timely, and the public and the NYCLU remain committed to understanding the role that program played in this prosecution. Therefore, the Court should reach the ultimate question and issue an order requiring public access to the district court’s opinion and the substance of the government’s submission, with only limited redactions the Court finds necessary to protect legitimately classified national security information.

B. The First Amendment Right of Access Likely Requires that More of the Sealed Opinion and the Sealed Submission Be Revealed to the Public.

Applying this Court’s precedent as explained in detail in Part II, *supra*, the Court should release the district court’s opinion and the government’s submission, except to the extent that “specific, on the record findings are made demonstrating that [sealing or redaction] is essential to preserve higher values and is narrowly tailored to serve that interest.” *In re New York Times*, 828 F.2d at 116 (quoting *Press-Enterprise II*, 106 S. Ct. at 2743). *See also Lugosch*, 435 F.3d at 120. Such findings should be supported by factual information in the record sufficient to

support a conclusion by the Court that disclosure of the sealed or redacted material would cause specific harm to national security, regardless of whether that material has been officially designated as “classified.” *See* Part II.C.1., *supra* at 34; *Moussaoui*, 65 Fed. Appx. at 885, 889 (“The burden of establishing that a particular document should be sealed rests on the party promoting the denial of access.”).

The NYCLU is handicapped in its ability to suggest the appropriate level of redaction and public disclosure by its inability to know the content of either the district court’s decision or the government’s opposition papers. However, it is likely that additional information about this matter ought to be revealed to the public. As discussed above, sealing the entirety of the district court’s opinion, accompanied only by a public order indicating the existence of that opinion is unprecedented and should be rejected out of hand. Some portion of the court’s reasoning in rejecting the defendant’s motion to suppress should be part of the public record.

Moreover, if either the government’s submission or the district court’s opinion were to contain any legal analysis or argument defending the NSA spying program or any discussion of the effect of any taint resulting from the program on the prosecution of Aref and Hossain, such content is not classified national security

information, a fact recognized in the government-proposed protective order that the district court adopted in this case. Protective Order ¶ 18 (I-A80) (stating that redacted versions of legal briefs containing classified information should be filed publicly). *See also Ressam*, 221 F. Supp.2d at 1264 (holding that “statements about the relevant law” should not be redacted from legal documents dealing with classified information).⁹

Alternatively, if the documents simply assert that Aref and Hossain were not the objects of illegal NSA wiretapping, then that fact alone should not be kept secret. It is not evident how merely revealing the existence or non-existence of NSA surveillance in this particular case could pose a substantial enough threat to national security to override the public’s strong First Amendment interest in understanding the role of NSA spying in this case and the basis for targeting Aref and Hossain for a sting operation. This is particularly so given that a government assertion that no NSA surveillance occurred would directly contradict statements

⁹ Further, if the government’s opposition to the suppression motion is based on a lack of taint resulting from NSA surveillance, defendants in this case would have been entitled to a hearing to determine whether the prosecution of them was the fruit of the poisonous tree of illegal surveillance. *See, e.g., Alderman v. United States*, 394 U.S. 165 (1969) (defendants have a constitutional right to information necessary to prepare a defense based on unlawful surveillance); *United States v. Magaddino*, 496 F.2d 455 (2d Cir. 1975) (upholding suppression motions where government failed to carry its burden to show lack of taint from unlawful surveillance).

reportedly made by government officials to the *New York Times* for the purpose of countering public criticism of the NSA spying program. The public has a strong interest in knowing if the government has made inconsistent representations regarding this important national controversy. When the government presents such directly conflicting statements, the need for public scrutiny is at its peak.

Courts confronting this issue have held that the mere fact of the existence or non-existence of an NSA wiretap is not protected from disclosure in civil litigation under the state secrets doctrine. In a recent decision in a civil case challenging warrantless wiretapping program, a federal district court ordered the government to disclose whether the plaintiffs had been subject to NSA surveillance. *See Turkmen v. Ashcroft*, --- F.R.D. ---, 2006 WL 1517743 (E.D.N.Y. May 30, 2006). The same occurred in *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978), another civil action against the NSA in which the court refused to dismiss the case on state secrets grounds because, in the court's view, confirming the existence or non-existence of NSA spying would not threaten state secrets. Similarly, *Jabara v. Kelly*, 75 F.R.D. 475, 493 (E.D. Mich. 1977), holds that although details of NSA wiretaps – the where, when, and how – should not be revealed, the mere fact that the plaintiff was the object of surveillance was not protected.

The fact that the *New York Times* has reported that NSA surveillance

occurred in this case highlights the dubiousness of any claim that further disclosure of this fact must be avoided. *See, e.g., In re Grand Jury Subpoena*, --- F.3d ---, 2007 WL 1855055 (D.C. Cir. June 29, 2007) (releasing parts of secret affidavits related to the grand jury in the I. Lewis Libby trial where its contents had been discussed in the media; “one can safely assume that the ‘cat is out of the bag’ when a grand jury witness ... discusses his role on the CBS Evening News.”); *Romero*, 480 F.3d at 1247 (“[B]ecause the substance of the Colombian official’s declaration had already been reported by the *Miami Herald*, sealing these documents could not remedy any of the highly unlikely harms that could be caused” by disclosure).

Where courts have held that the existence of NSA surveillance should remain secret, they have done so only based on well-supported, fact-based affidavits indicating that disclosure would cause specific harm to national security sources or a particular, on-going foreign intelligence investigation. *See, e.g., Halkin v. Helms*, 598 F.2d 1, 8-9 (D.C. Cir. 1978) (holding that disclosing identity of several individuals and organizations whose communications were acquired by NSA risked revealing state secrets, where Secretary of Defense filed public and sealed affidavits explaining the impact of disclosure in that particular instance on ongoing intelligence efforts).

This Court should assure itself that any asserted harm to a specific

investigation resulting from confirming or denying an NSA wiretap in this case is not the kind of speculation courts have rejected as insufficient to outweigh First Amendment concerns, particularly considering the ample amount of time that has passed since Aref and Hossain were arrested. *Cf. In re Washington Post*, 807 F.3d at 391 n.8 (rejecting as excessively speculative government concerns that providing notice of court closure would harm national security by revealing the existence of covert operations in a criminal case).

Similarly, given the extensive media coverage of the NSA surveillance program, as well as the fact that the government itself has publicly acknowledged, described, and defended the program in great detail,¹⁰ it strains credulity to imagine

¹⁰ On January 19, 2006, the Department of Justice issued a 42-page white paper discussing in detail its justification for the NSA program. *See Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) (available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>). Government officials have testified about the details of the NSA program before Congress at least four times. *See The Worldwide Terror Threat: Hearing Before the S. Select Comm. on Intelligence, 109th Cong. (2006)*, available at 2006 WL 246499 (testimony of John Negroponte, Director of National Intelligence and Gen. Michael Hayden, then Principal Deputy Director of National Intelligence); *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006)*, available at 2006 WL 270364 (testimony of Alberto Gonzales, Att'y Gen. of the United States); *Oversight on the Department of Justice: Hearing Before the H. Comm. on the Judiciary, 109th Cong. (2006)*, available at 2006 WL 896707 (testimony of Alberto Gonzales, Att'y Gen. of the United States); *Hearing on the Nomination of General Michael V. Hayden to be the Director of the Central Intelligence Agency Before the* (continued next page)

that affirming or denying the existence of one NSA wiretap in one particular instance would reveal anything not already known about the NSA's intelligence gathering capabilities. Thus, there is reason to believe that the government has not proven a specific, tangible threat to national security sufficient to outweigh the countervailing interests in judicial integrity, openness, and informed public debate that underlie the First Amendment right of public access.

S. Select Comm. on Intelligence, 109th Cong. (2006). Vice President Cheney has promoted the NSA Program during a commencement address at the U.S. Naval Academy and at four separate rallies for servicemen and servicewomen. *See* Vice President Richard Cheney, Commencement Address at the United States Naval Academy (May 26, 2006) (*available at* www.whitehouse.gov/news/releases/2006/05/print/20060526-4.html); Vice President Richard Cheney, Remarks at a Rally for the Troops at Fort Leavenworth (Jan. 6, 2006) (*available at* www.whitehouse.gov/news/releases/2006/01/print/20060106-9.html); Vice President Richard Cheney, Remarks at a Rally for the Troops at Charleston Air Force Base (Mar. 17, 2006) (*available at* www.whitehouse.gov/news/releases/2006/03/print/20060317-3.html); Vice President Richard Cheney, Remarks at a Rally for the Troops at Scott Air Force Base (March 21, 2006) (*available at* www.whitehouse.gov/news/releases/2006/03/print/20060321-6.html); Vice President Richard Cheney, Rally for the Troops at Fairchild Air Force Base (Apr. 17, 2006) (*a available at* www.whitehouse.gov/news/releases/2006/04/print/20060419-3.html). Administration officials have even participated in public web discussions in defense of the NSA Program. In January 2006, for example, Attorney General Gonzales conducted a web discussion — part of the White House's online interactive forum called "Ask the White House" — where he answered questions from members of the public regarding the NSA program. Alberto Gonzales, "Ask the White House" (Jan. 25, 2006) (*available at* <http://www.whitehouse.gov/ask/20060125.html>).

In sum, there are compelling First Amendment interests at stake in this Court's resolution of a suppression motion raising issues of unlawful surveillance by the NSA. It should be possible for the Court to balance national security concerns against these strong constitutional values by releasing the district court's opinion and the government's submission, including all legal arguments and analysis, with limited redactions of facts supported by specific findings that such redactions are the only means of protecting legitimately classified national security information, the disclosure of which would cause specific harm to national security.

CONCLUSION

For all the foregoing reasons, the Intervenor-Appellant, the NYCLU, urges the Court to reverse the district court's ruling denying intervention and denying the motion for public access and unseal the Sealed Opinion and Sealed Submission, with any redactions the Court determines are necessary to prevent the release of legitimately classified information that, if released, would cause specific harm to national security.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, according to the word-processing program with which it was prepared, complies with Rule 32(a)(7) of the Federal Rules of Appellate Procedure in that it contains a total of 11,790 words.

 /s/ Corey Stoughton
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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2007, I caused to be served two copies of the attached Brief of Intervenor-Appellant the NYCLU by United States First Class Mail on the following counsel of record:

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