

**COMMENT TO THE REVIEW GROUP ON
INTELLIGENCE AND COMMUNICATION TECHNOLOGIES**

I. Introduction

These Comments are submitted jointly by the Media Law Committee of the New York State Bar Association¹ and the Communications & Media Law Committee of the New York City Bar Association. Our members include in-house and outside counsel who regularly represent journalists and news organizations in the defense of their newsgathering activities and news content.

Recent revelations have created deep public alarm over the scope of the government's surveillance powers and the manner in which they are being exercised. The sweeping new capacity for governments to capture communications, images, metadata and locational information – and the secrecy that currently shrouds their use – challenge the very foundation of democratic governance: the ability of citizens, aided by the press, to hold their representative government accountable.

We must find ways to preserve essential individual privacy, where people can interact beyond the unwelcome gaze of their government. Given the current environment, this will require nothing short of comprehensive and creative reform. The bold new ideas needed are beyond the scope of these immediate comments, but we urge the Review Board to use this opportunity to develop and propose the concepts, principles and procedures required to safeguard our democratic society. We urge you to address the severity of the challenges posed with proposals for meaningful reform.

In this Comment, we address a more limited set of concerns. Specifically, we write to focus your attention on three issues of paramount importance to journalists and news organizations: (1) the need for rules governing the use of surveillance technology that will adequately protect the confidentiality of communications between reporters and their sources; (2) the need for new procedures or institutions to ensure maximum transparency about the government's surveillance capabilities and its authority to use those capabilities; and (3) the need for constitutional freedom of press principles to be adequately represented before any decision-making body that considers national security interests. These are all vitally important to a fully functioning democracy.

¹ Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

II. The Need to Preserve the Confidentiality of Communications Between Reporters and Their Sources

The core purpose of the constitutional guarantee of free speech and a free press is to inform the public.² An independent press is “a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences”³ The press “serves and was designed to serve [by the Founding Fathers] as a powerful antidote to any abuses of power by governmental officials.”⁴ That cherished function is certainly not a relic of a bygone era.

To fulfill its critical and constitutional mandate, the press must do far more than merely print public statements or publish prepared handouts. It must be able effectively to seek out and report the news.⁵ That task turns upon a reporter’s ability to cultivate sources, and it is a simple truth that without a cloak of confidentiality many sources with essential knowledge of controversial or otherwise newsworthy issues will not feel emboldened to speak.⁶ The recognition of this fact underlies the recognition of a widely-accepted “reporter’s privilege,” and is enshrined in the protection of anonymous speech generally. As the Supreme Court noted in *Talley v. California*, 362 U.S. 60, 65 (1960):

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

But left unchecked, the broad capabilities of modern surveillance and communications interception technology betray that history – in fact, they directly threaten the very notion of anonymity. While the Review Board should address this larger concern, we focus on the discrepancy between these surveillance capabilities and the laws that protect the confidentiality of reporter-source communications.

² See, e.g., *Stromberg v. California*, 283 U.S. 359, 369 (1931); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937); *Smith v. California*, 361 U.S. 147, 153 (1959).

³ *Estes v. Texas*, 381 U.S. 532, 539 (1965).

⁴ *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

⁵ See, e.g., *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (“[T]he press’ function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired”).

⁶ *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (“The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist’s inability to protect the confidentiality of sources s/he must use will jeopardize the journalist’s ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information . . . to the public.”)

A. The law strongly protects reporter-source communications in almost all circumstances

Our Nation's multiple legal systems recognize that confidentiality fosters communications of such significance that it warrants special protection – even in the face of competing social interests.⁷ Advancing technological capabilities must not reverse or end-run what is so dearly protected and deeply entrenched by the law.

Today a reporter's privilege is recognized by statute (or court rule) in 36 states and the District of Columbia.⁸ Of the remaining 14 states, courts in all but one have recognized common law or constitutional reporter's privilege.⁹ Only Wyoming law is silent on the issue. Congress

⁷ See MCCORMICK ON EVIDENCE §§ 72-183 (John W. Strong ed., 5th ed. 1999), § 75 (outlining historical development of judicial privileges for communications to spouses, clergy, doctors, attorneys); see, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 15, 17 (1996) (recognizing federal privilege under Fed. R. Evid. 501 for disclosures to licensed social workers based on widespread recognition under state laws of a psychotherapist's privilege); *Roviaro v. United States*, 353 U.S. 53, 59 (1957) (recognizing a qualified police informant's privilege and explaining that it is meant to ensure important information is used for the public's benefit); *Wolfle v. United States*, 291 U.S. 7, 14 (1934) (regarding the spousal privilege as essential to maintaining the marriage relationship).

⁸ See Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300-.390; Ariz. Rev. Stat. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. art. 1, § 2(b); Cal. Evid. Code § 1070; Colo. Rev. Stat. § 13-90-119; Conn. Gen. Stat. Ann. § 52-146t; Del. Code Ann. tit. 10, §§ 4320-26; D.C. Code §§ 16-4701-4704; Fla. Stat. § 90.5015; Ga. Code Ann. § 24-5-508; 735 Ill. Comp. Stat. 5/8-901-5/8-909; Ind. Code §§ 34-46-4-1, 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-1459; Me. Rev. Stat. tit. 16 § 61; Md. Code Ann., Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws §§ 767.5a, 767A.6; Minn. Stat. §§ 595.021-.025; Mont. Code Ann. §§ 26-1-901-26-1-903; Neb. Rev. Stat. §§ 20-144-20-147; Nev. Rev. Stat. 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A-21.1-21.13; N.M. Stat. § 38-6-7, NMRA Rule 11-514(c); N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. § 8-53.11; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. §§ 2739.04, 2739.12; Okla. Stat. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-.540; 42 Pa. Cons. Stat. Ann. § 5942; R.I. Gen. Laws §§ 9-19.1-1-9-19.1-3; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208; Tex. Civ. Prac. & Rem. Code Ann. §§ 22.021-22.027, Tex. Crim. Proc. Code Ann. art. 38.11, 38.111; Wash. Rev. Code Ann. § 5.68.010. Utah did not address this issue by statute, but the Utah Supreme Court created an absolute privilege for confidential information at, Utah R. Evid. 509.

⁹ See *Idaho v. Salsbury*, 924 P.2d 208, 212-213 (Idaho 1996); *Watherloo/Cedar Falls Courier v. Hawkeye Community College*, 646 N.W. 2d 97, 102-103 (Iowa 2002); *Kansas v. Sandstrom*, 581 P.2d 812 (Kan. 1978); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991); *Sinnott v. Boston Retirement Board*, 524 N.E.2d 100 (Mass. 1988); *State ex rel. Classic III, Inc. v. Ely*, 954 S.W.2d 650, 655 (Mo. Ct. App. 1997); *State v. Siel*, 444 A.2d 499 (N.H. 1982); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977); *Hopewell v. Midcontinent Broadcasting Corp.*, 538 N.W.2d 780, 782 (S.D. 1995); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974); *Brown v. Virginia*, 204 S.E.2d 429 (Va. 1974); *Clemente v. Clemente*, 56 Va. Cir. 530 (2001); *State ex rel. Charleston Mail Ass'n v. Ranson*, 488 S.E.2d 5 (W. Va. 1997); *State ex rel. Hudok v. Henry*, 389 S.E.2d 188 (W. Va. 1989); *Kurzynski v. Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995); *Zelenka v. Wisconsin*, 266 N.W.2d 279 (Wis. 1978). In Mississippi, trial courts have recognized a qualified reporter's privilege under the state's constitution. *Hawkins v. Williams*, No. 29,054 (Miss. Cir. Ct. Hinds Co. Mar. 16, 1983) (unpublished opinion). See *Pope v. Village Apartments, Ltd.*, No. 92-71-436 CV (Miss. 1st Cir. Ct. Jan. 23, 1995) (unpublished opinion) (Gibbs, J.); *Mississippi v. Hand*, No. CR89-49-C(T-2) (Miss. 2d Cir. Ct. July 31, 1990) (unpublished opinion). Hawaii enacted a reporter's privilege statute with a sunset provision; the act expired this year. See 2011 Hi. ALS 113.

also enacted Rule 501 of the Federal Rules of Evidence, which provides that privileges in federal cases are to be governed by the common law “as interpreted by United States courts in the light of reason and experience.” Fed. R. Evid. 501. As the Chair of the House Judiciary Subcommittee on Criminal Justice stated at the time, Rule 501 “permits the courts to develop a privilege for newspaper people on a case-by-case basis.” 120 Cong. Rec. 40890, 40891 (1974). Since then eight of the U.S. Courts of Appeal have found a reporter’s privilege to be constitutionally mandated.¹⁰

The Privacy Protection Act, 42 U.S.C. § 2000aa et seq., separately codifies protection of the news gathering process by prohibiting the search *or* seizure by federal law enforcement of documents and work product of journalists, including source material, subject to certain exceptions. And the Department of Justice (“DOJ”) respects the reporter’s privilege through rules and guidelines that protect the confidentiality of reporters’ sources in most circumstances. *See* 28 C.F.R. § 50.10.

Recently, in response to public outcry over a subpoena issued for the phone records of the Associated Press, as well as a search warrant for a Fox News reporter’s e-mails, DOJ revised its news media policies to reinforce the protection of reporter-source communications from government intrusion. Under the reforms, DOJ’s “policy is to utilize such tools only as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a successful investigation or prosecution.” DOJ specifically noted that this policy applied to subpoenas, not just to the media, but to “communication service providers for the telephone toll records of the news media.” With regard to the “suspect exception” under the Privacy Protection Act for a member of the media suspected of criminal activity – including possession of classified, restricted, or national security information – DOJ determined that, even then, it “would not seek search warrants under the PPA’s suspect exception if the sole purpose is the investigation of a person other than the member of the news media.” DOJ also announced that all search warrants and requests for court orders directed at members of the news media will require the personal approval of the Attorney General.

However, in Hawaii, a reporter's privilege has been recognized by the federal district court there in a diversity action. *See De Roburt v. Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981).

¹⁰ *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). In *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000); *United States v. La Rouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998); *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 36 (2d Cir. 1998); *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *Price v. Time, Inc.*, 416 F.3d 1327, 1343 (11th Cir. 2005). In addition, district courts in the 8th Circuit have recognized a reporter’s privilege. *See e.g., Continental Cablevision, Inc. v. Storer Broadcasting Co.*, 583 F. Supp. 427, 432 (E.D. Mo. 1984) (“Because the process of newsgathering is essential to a free press, a qualified privilege to refuse to divulge the identity of confidential sources has been recognized in favor of news reporters.”).

B. Confidential communication is vital to public interest reporting

Journalists routinely rely on this legal protection to report on matters of manifest public concern.¹¹ Changing technology over the past 40 years has not changed the importance of confidentiality between reporters and sources. For instance, reporter Pierre Thomas testified that confidentiality was critical to his award-winning coverage exposing the FBI's advance knowledge of suspicious activities by those involved in the September 11 attacks: "If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles."¹²

Surveys among reporters and editors, across time, consistently reaffirm this truth: the promise of confidentiality is essential for effective newsgathering on many types of stories.¹³ For example, an examination in 2005 of roughly 6500 news media reports concluded that thirteen percent of front-page newspaper articles relied at least in part on anonymous sources.¹⁴ The same study also found that of over 1700 network news stories examined, the percentage that contained anonymous sourcing were: 53% of stories on commercial nightly newscasts, 47% on the PBS NewsHour and 50% on morning news. Another survey revealed that a significant percentage of reports citing only identified sources, originated with information from confidential sources.¹⁵

C. Current surveillance activities apparently disregard these legal protections and damage the public interest

The Review Group must ensure that the Intelligence Community recognize and operate within the well-established protections for confidential reporter-source communications.

¹¹ For more perspective on the importance of confidentiality during a period of reporting that included some of the most turbulent times in U.S. and world history, see F. Chalmers, *A Gentleman of the Press: The Biography of Colonel John Bayne MacLean* 74-75 (1969); H. Klurfeld, *Behind the Lines: The World of Drew Pearson* 50, 52-55 (1968); A. Krock, *Memoirs: Sixty Years on the Firing Line* 181, 184-185 (1968); E. Larsen, *First with the Truth*, 22-23 (1968); R. Ottley, *The Lonely Warrior -- The Life and Times of Robert S. Abbott* 143-145 (1955); C. Sulzberger, *A Long Row of Candles; Memoirs and Diaries* 241 (1969).

¹² Aff. of Pierre Thomas, ¶12, ¶14, *Wen Ho Lee v. U.S. Dept. of Justice*, Case No. 99-3380 (TPJ) (D. D.C. 2002).

¹³ See Reporters and Confidential News Sources Survey 2004 ("2004 Reporters Survey"), <http://www.firstamendmentcenter.org/reporters-and-confidential-news-sources-survey-%c2%97-2004> (last visited September 25, 2013) (indicating that 86% of journalist surveyed agree that confidentiality is essential to their ability to report news); see also Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U. L. Rev. 18 (1969); V. Blasi, *Press Subpoenas: An Empirical and Legal Analysis*, Study Report of the Reporters' Committee on Freedom of the Press 20-29 (1972).

¹⁴ State of the News Media 2005, Newspaper content analysis, at <http://stateofthemediamedia.org/2005/newspapers-intro/content-analysis/> (last visited September 25, 2013).

¹⁵ See 2004 Reporters' Survey.

Confidentiality is meaningless if government officials possess few checks on their power to collect domestic metadata and communications.

As the comment submitted by the Columbia Journalism School explains in detail, the seeming contradiction between protective laws and pervasive surveillance chills sources from speaking openly to journalists. Just the uncertainty about how and when the power to “listen in” is exercised leads to unacceptable self-censorship.

III. There Is a Vital Public Interest in Maximizing the Transparency of Surveillance Powers and the Procedures to Protect Civil Liberties

The current Administration should need no reminders about the broad benefits of transparency. A day after his inauguration, President Obama made clear that “[a] democracy requires accountability, and accountability requires transparency.”¹⁶ We agree that government should be transparent, participatory, and collaborative. The Intelligence Community, however, seems to have escaped the reach of these principles.

Until recently, a broad swath of controversial law enforcement and national security activity remained impenetrably cloaked, with the public unaware of the powers and procedures used to conduct surveillance. What the latest disclosures reveal is an *inversion* of transparency: surveillance permits government agencies to access the content and communications of citizens, but secrecy prevents citizens from returning the scrutiny. In fact, secrecy has prevented journalists from reporting the very type of meaningful information that is necessary for public accountability and democratic self-governance. This must not persist.

At its core, we face an age-old problem: our government has always needed to keep limited, legitimate secrets, and the public has always been entitled to all information that is not absolutely essential to be kept secret. This balance has been turned on its head. Admittedly, the volume of information recorded, collected, and produced, coupled with the diffuse nature of our threats, makes that problem complex. But the principles of the First Amendment should still carry forward, and guarantee maximum transparency for several reasons.

Transparency is a precondition for informed governance. Without question, “open debate and discussion of public issues are vital to our national health.”¹⁷ Participation, engagement, and robust discussion are a cherished part of our heritage, and require access to information to thrive. That is why the First Amendment “protects the public and the press from abridgement of their rights of access to information about the operation of their government.”¹⁸ As the Court explained in *Globe Newspaper Co. v. Superior Court*, the First Amendment right of access is *based upon* the common understanding that a “major purpose of that Amendment was to protect

¹⁶ President’s Memorandum on Transparency and Open Government, signed on January 21, 2009 http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment

¹⁷ *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

¹⁸ *Richmond Newspapers*, 448 U.S. at 584 (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials).

free discussion of governmental affairs.”¹⁹ Discussion is meaningless, however, if there is no relevant and detailed information to discuss.

Simply put, the public is entitled to know about the laws passed and enforced by their government—a nation under the rule of law must allow the public to know the law. The current environment, in which the legality and contours of surveillance programs remain shrouded in secrecy, violates this principle.

Transparency promotes accountability. At the heart of the democratic commitment is the idea that accountability is in the interest of the Government and the citizenry alike. Oversight, however, is not possible if the public is kept in the dark about their government’s activity. Concurring in *Richmond Newspapers*, Justice Brennan explained the crucial structural role that public access plays in the proper functioning of our nation’s justice system:

Open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous “checks and balances” of our system, because “contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”²⁰

Only with information can the public monitor whether the government is acting in compliance with the rule of law, safeguarding individual liberty, and fully exercising its lawful powers to protect national security.

Transparency builds public confidence. As it stands, the public receives precious little information about surveillance operations from the government, either voluntarily shared or compelled through requests. Though the public cannot articulate its own rights or interests, the totally opaque Foreign Intelligence Surveillance (“FIS”) Court is supposed to stand in its stead, insuring that civil liberties and proper procedures are considered throughout the surveillance process. But, as Justice Brennan explained,

Secret hearings – though they be scrupulously fair in reality – are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court’s decision sealed from public view.²¹

That, unfortunately, is the status quo in the FIS Court. There is simply no opportunity to inspire confidence in its fairness and sound reasoning, and no chance to inspire confidence in the government through public education regarding its processes, methods, and remedies.²² There is no ground on which public trust can stand.

¹⁹ 457 U.S. at 604.

²⁰ *Id.*, at 592 (Brennan, J., concurring) (quoting *In re Oliver*, 333 U.S. 257, 271 (1948)).

²¹ *Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J.).

²² See *Richmond Newspapers*, 448 U.S. at 569-71.

The government currently imposes secrecy even beyond its own courts and agents, extending to private industry actors as well. A number of technology companies – including Google, Microsoft, Facebook, Yahoo! – are gagged from disclosing the national security requests they receive from the government, a situation they believe “violates the First Amendment, as it interferes with both the public’s right to obtain truthful information about a matter of substantial public debate and service providers’ rights to publish such information.”²³ This sends a clear message: *secrecy* is the priority, and public information is not.

Amidst secrecy from every corner, the public is asked blindly to trust government policy. That there is a deficit of public trust is no surprise – and the current lack of confidence ultimately undermines the very security that the public and the government both desire.

Transparency need not deny security. Overwhelming secrecy was once justified by a parade of horrors that would supposedly befall the country if NSA activities were disclosed. But imposing limits on transparency to satisfy claimed security needs is a slippery slope to total secrecy if meaningful procedural safeguards do not exist or strict substantive standards governing the scope of secrecy are lacking. As Justice Black cautioned in *New York Times v. United States*, 403 U.S. at 719:

The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

The difficulty, we recognize, is how to protect the government’s legitimate interest in keeping *some* operational details secret while abiding by its constitutional mandate to provide access to information critical to democratic governance. Total secrecy is not the answer.

For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. . . [T]he hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.²⁴

And yet, legitimate requests for information about surveillance have long been met with silence, stonewalling and misrepresentation. Federal agencies reflexively fight Freedom of Information requests on this topic, arguing vehemently for deference to their wholly secretive positions. Rarely is redaction, the time-tested method to excise what is secret while preserving what is public, used to balance secrecy with access. Even requests from Congress regarding

²³ *In re Motions to Disclose Aggregate Data Regarding FISA Orders and Directives*, Case Nos. Misc. 13-03, 13-04, 13-05, 13-06.

²⁴ *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

surveillance programs have similarly remained unanswered,²⁵ and the classified briefings *designed* to inform our elected representatives have been less than accessible and transparent.²⁶

All this indicates that when it comes to disclosure, the scales at present are improperly tipped against transparency. The public has little access to information, and those who seek to provide it (including the press) face threats for doing so. Any solution going forward must right this system.

IV. Comprehensive and Thorough Reform is Urgently Needed

Too often, details about surveillance, intelligence, and information collection practices have remained elusive or entirely obscured. Adding insult to injury, this secrecy is invoked in the public's name, for their own protection. This secrecy goes far beyond the narrow scope of legitimate secrets permissibly kept from the public. As we have learned, even legal interpretations of the PATRIOT Act and constitutional standards were kept shrouded from scrutiny. It is clear – more than ever – that secrecy cannot be self-regulated.

Looking forward, the Review Group should seek creative solutions that honor First Amendment guarantees of access to government information. Palliative measures, like occasional at-will disclosures, are insufficient—and they cannot stand in for a comprehensive new procedural architecture that will guarantee meaningful transparency and protect confidential communications.

Specifically, we believe this procedural framework should involve three facets:

- (1) Clear, consistent standards for determining when access may be denied and defining what truly requires secrecy – that is, where release of information would have substantial, articulable adverse consequences;
- (2) A presumption of openness instead of a predisposition for secrecy, placing the burden to justify secrecy always on the government; and
- (3) New procedures that include a meaningfully adversarial process for resolving secrecy requests, impose independent oversight outside of the Executive branch, and require sufficient disclosures to allow meaningful public accountability.

We trust that the Review Group will apply these throughout their recommended reforms, for the FIS Court and beyond. In the meantime, we offer a few preliminary suggestions:

²⁵ See Correspondence between Senate Permanent Select Intelligence Committee and Congressman H. Morgan Griffith, *available at* <http://www.documentcloud.org/documents/747919-griffith-letter-1.html#document/p1>, and correspondence between Senate Permanent Select Intelligence Committee and Congressman Alan Grayson, *available at* <http://www.documentcloud.org/documents/747920-email-exchange.html#document/p5>.

²⁶ Garance Franke-Ruta, “The Hidden Top Secret Briefing Most of Congress Missed,” *The Atlantic* (Sept. 20, 2013), *available at* <http://www.theatlantic.com/politics/archive/2013/09/The-Hidden-Top-Secret-Briefing-Most-of-Congress-Missed/279857/>

a. Implement clear, consistent protection for confidential communications

There is no ambiguity that the law recognizes the necessity of confidential communications between a reporter and a source. It is less clear, however, whether the Intelligence Community does. While we acknowledge that the Intelligence Community implements its own interpretations of constitutional limitations, compliance regimes, and data minimization procedures, there is *no assurance* that these procedures comport with the reporter-source privilege guaranteed by law. (In fact, it seems highly improbable that mass data collection can coexist with confidential communications.) This Review Group must find some way to reconcile existing practices with these legal guarantees.

The Supreme Court offers the following guiding principle from the legislative investigation context:

an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition is that the State convincingly show a substantial relation between the information sought and a subject of *overriding and compelling* state interest.²⁷

This Review Group should graft this type of protection onto the Government’s surveillance activities – and, more importantly, ensure that the Government *demonstrate* why its interest is overriding and compelling.

b. *Richmond Newspapers* standards must govern access to the FIS Court

The Supreme Court uses an “experience” and “logic” analysis to consider access to judicial proceedings. The right of access “has special force” when it carries the “favorable judgment of experience,” but what is crucial in deciding where an access right exists “is whether access to a particular government process is important in terms of that very process.”²⁸ While this right has most frequently been asserted to compel access to judicial proceedings and documents, the right also applies to proceedings and information in the executive and legislative branches.²⁹

The FIS Court is an Article III court, issuing legal opinions that interpret the nation’s surveillance laws and deciding whether they comport with Constitutional principles. This type

²⁷ *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963).

²⁸ *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). See also *Globe Newspaper*, 457 U.S. at 605-06; *Press Enterprise II*, 478 U.S. at 8-9; *United States v. Simone*, 14 F.3d 833, 837 (3d Cir. 1994); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1173 (3d Cir. 1986).

²⁹ E.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695-96, 700 (6th Cir. 2002) (right of access to executive branch deportation proceedings); *Whiteland Woods, L.P. v. Twp. of West Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (municipal planning meeting); *Cal-Almond, Inc. v. U.S. Dep’t of Agric.*, 960 F.2d 105, 108-10 (9th Cir. 1992) (Agriculture department voters list); *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 574-75 (D. Utah 1985) (administrative hearing), vacated as moot, 832 F.2d 1180 (10th Cir. 1987).

of Constitutional decision-making has historically been public, and logic counsels strongly in favor of access to FIS opinions concerning the scope of its authority: the public should be entitled to details about the lawful limits of government power over information and their communications. FIS proceedings and opinions should *only* be closed to the public if the strict standards articulated in *Richmond Newspapers* and its progeny are met by the government.

c. Release FIS Court opinions construing legislation and scope of authority

Even under the *Richmond Newspapers* standard, some FIS Court proceedings related to individual surveillance applications may be properly closed. Opinions from these otherwise closed proceedings – particularly those that interpret laws or the constitutionality of certain requests – *must* be released to the public after the hearing is complete. This should be completed within a short timeframe, allowing for properly withheld information to be redacted. In the interim, the Government, as the party requesting review, should be asked to submit a concise summary of the legal issues involved in a given FIS Court proceeding, so that the public may be aware of the issues before the Court.

d. Ensure that sealing decisions are made by Article III judges and not by the Executive Branch under FOIA.

As the Supreme Court has made clear, court records cannot constitutionally be sealed from public view 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.”³⁰ And because the First Amendment right of access is an affirmative right that the public has standing to enforce,³¹ the public must be given notice and an opportunity to be heard before access is limited.³² Should any records from the FIS Court docket be sealed, the sealing process must comply with these pre-existing constitutional guidelines.

Importantly, an agency’s claim that something is classified does not alone suffice under this standard: deeper scrutiny and an adversarial process is necessary to properly evaluate the need for secrecy. Whether this should be served by a special Constitutional Advocate, as Senator Ron Wyden has suggested, or some other method, one issue is clear: someone outside of the Intelligence Community must be a neutral arbiter of what may be kept secret.

We applaud the FIS Court for taking the first step towards transparency by creating a public docket for declassified opinions.³³ This should be the one of many measures that will help make this important court more transparent.

³⁰ *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986).

³¹ *Huminski v. Corsones*, 386 F.3d 116, 146 (2d Cir. 2004)

³² *Globe Newspapers*, 457 U.S. at 609 n.25 (“[R]epresentatives of the press and general public ‘must be given an opportunity to be heard on the question of their exclusion.’”) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979)).

³³ Available at <http://www.uscourts.gov/uscourts/courts/fisc/index.html>

V. The Importance of a Full Accounting to Restore Public Trust

The simple truth is that – when it comes to surveillance – much of the public no longer trusts what the government does in its name. Official representations about these programs do little to fix the problem. For example, the Director of National Intelligence James R. Clapper admitted he misled Congress about the NSA metadata collection program. He said the NSA had no such program, and later described this as the least “untruthful” remark he could make. Similarly, the FIS Court, in an opinion authored by Judge Walton, condemned the government for putting forth justifications of their activity that “strains credulity,” and found that the minimization procedures proposed by the government “ha[d] been so frequently systemically violated that it can fairly be said that this critical element of the overall regime has never functioned effectively.”³⁴ That opinion has an entire section labeled “Misrepresentations to the Court.” While healthy skepticism sustains democracy, such deeply fractured trust will do no one any good.

It is too late for piecemeal disclosures to salvage public confidence. Partial disclosures of information, including documents interpreting collection³⁵ under the Foreign Intelligence Surveillance Act, and numerous calls for inspector general review of the implementation of the Act are all fine first steps, but they are not nearly enough.

A full accounting of the NSA’s information collection process would be an important step to fixing this problem. Without a full inquiry, it will be difficult ever to restore public confidence that legal standards are being observed and adequate oversight is being exercised.

VI. Conclusion

True security for our nation must incorporate constitutional principles at every level. We urge this Review Group to chart a course forward that intertwines First Amendment interests with security principles, and we look forward to continuing this conversation in the months to come.

³⁴ Available at <http://www.documentcloud.org/documents/785205-pub-march-2-2009-order-from-fisc.html>

³⁵ Available at <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/915-dni-declassifies-intelligence-community-documents-regarding-collection-under-section-702-of-the-foreign-intelligence-surveillance-act-fisa>

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Respectfully submitted,

Media Law Committee
New York State Bar Association,

Lynn Oberlander, Chair
Lynn_Oberlander@newyorker.com
(212) 286-5857

Communications & Media Law Committee,
New York City Bar Association

Jonathan Donnellan, Chair
JDonnellan@hearst.com
(212) 649-2051