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

IN RE MOTION FOR PUBLICATION OF RECORDS	)	Docket No. Misc. 19-01

JOHN SOLOMON AND SOUTHEASTERN LEGAL FOUNDATION'S MOTION FOR PUBLICATION OF RECORDS

Kimberly S. Hermann
Georgia Bar No. 646473
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org

May 22, 2019

Pursuant to the First Amendment and Rule 62 of the Foreign Intelligence Surveillance Court's Rules of Procedure (FISC Rules), John Solomon and Southeastern Legal Foundation (SLF) move for the publication of Foreign Intelligence Surveillance Court (Court) records regarding: 1) any orders, opinions, decisions, sanctions, or other records related to any investigation or finding that any attorney violated the FISC Rules of Procedure or applicable Rules of Professional Conduct in connection with the Carter Page Foreign Intelligence Surveillance Act application and renewals or the Section 702 violations the government orally advised this Court about on October 24, 2016; 2) any orders, opinions, decisions, sanctions, or other records finding that any attorney violated or did not violate FISC Rule of Procedure 13, specifically, in connection with the Carter Page FISA application and renewals or the Section 702 violations the government orally advised this Court about on October 24, 2016; and 3) any records regarding any referral or complaint made to any attorney disciplinary body for conduct related to the Carter Page FISA application and renewals or the Section 702 violations the government orally advised this Court about on October 24, 2016.

INTRODUCTION

Attorneys play an integral role in the execution of our system of laws. As officers of the court, licensed lawyers voluntarily submit to regulatory governance under strict codes of conduct administered by quasi-governmental bodies charged with enforcement of those codes. On top of that, courts maintain and enforce their own rules to protect the integrity of the judicial system. While no rule is more important than another, an attorney's duty to be open and honest with the court at all times must always remain at the forefront and should guide every action an attorney takes. This is true not only for private attorneys, but especially so for our country's government attorneys. President Bill Clinton's surrender of his law license on his last day in office, followed

by disbarment by the U.S. Supreme Court, for his violations of the Rules of Professional Conduct remind us that no one is above the law.

Two decades later, we again face a possible judicial crisis. Our nation's highest law enforcement officers, national security advisors, and government attorneys are suspected of lying, misleading, and withholding information from this Court in order to obtain permission to conduct surveillance of American citizen Carter Page. If true, these misrepresentations may amount to professional misconduct including violations of the Rules of Professional Conduct in the various states where the attorneys are licensed and violations of the FISC Rules of Procedure. Whether the FBI and DOJ engaged in professional misconduct is for this Court and the governing bodies to decide. Movants file this motion as an exercise of their common law right of access and First Amendment right of access to judicial records and ask the Court to make public any judicial records related to any such misconduct. The public has an interest in transparent court proceedings and this Court has the inherent power to release the requested records.

BACKGROUND

Movants come before this Court seeking release of records related to attorney misconduct before the Court. Their purpose is not to establish that such misconduct occurred, but rather to exercise their right, and that of the public, to access judicial records. Accordingly, Movants do not seek to detail every alleged fraud, misrepresentation, or omission made to this Court, but rather, to provide the following background for context.

On October 21, 2016, the FBI and DOJ sought and received a FISA probable cause order from this Court authorizing the government to conduct electronic surveillance of an American citizen and volunteer advisor to the Trump presidential campaign, Carter Page. In total, the FBI

and the DOJ obtained one initial FISA warrant targeting Carter Page and three renewals from this Court. The FBI and DOJ presented to this Court that initial application and all subsequent renewals had been verified, and each was certified by the Director or Deputy Director of the FBI and approved by the Attorney General, Deputy Attorney General, or the Senate-confirmed Assistant Attorney General for the National Security Division. The contents of the application and renewals remained secret until early 2018 when Congressman Devin Nunes, Chairman of the House Permanent Select Committee on Intelligence, publicly released a memorandum detailing alleged misconduct before this Court by the FBI and DOJ. Release of the memorandum followed President Trump's decision to declassify a redacted version of the Carter Page FISA application. A few weeks later, the Select Committee's Democratic members released their own memorandum responding to Congressman Nunes' memo and unequivocally stating that neither the FBI nor the DOJ abused the FISA process or committed misconduct before this Court.

Since the release of the contradictory memorandums, many new facts have come to light. Most pertinent for purposes of this Motion are facts surrounding an overall lack of candor by the FBI and DOJ to this Court about the series of memorandums commonly referred to as the "Steele dossier," which served as a primary basis for the application and renewal requests. For example, it has come to light that in the summer of 2016 (months before the initial Carter Page FISA application was filed with this Court), then-senior DOJ official Bruce Ohr briefed both FBI and DOJ officials about the Steele dossier, explicitly cautioning that the British intelligence operative's work was opposition research connected to Hillary Clinton's campaign. Included in those briefings was several senior DOJ officials. Despite Ohr's warnings about political bias, neither the FBI nor the DOJ reportedly informed this Court, arguably misleading this Court in their effort to obtain a surveillance order targeting an American citizen. Most notably, the government certified to this

Court that it possessed no derogatory information about the informant Steele when, in fact, it possessed information that he had provided inaccurate or disproven information to government agencies, admitted to leaking to the news media in violation of his informant agreement, was "desperate" to defeat Donald Trump's campaign and faced an Election Day deadline to force his information into the public sphere.

By way of another example, U.S. government officials have disclosed that DOJ and FBI officials approved the Carter Page applications and renewals, some without even fully reading them. This was despite warnings by multiple persons in the FBI, DOJ, and State Department that the applications and renewals were based largely on unverifiable and/or debunked information

Instead of addressing those concerns, the public record indicates that DOJ and FBI presented the already debunked information to this Court as both true and verified. In doing so, those attorneys allegedly violated FISC Rule of Procedure 13 which requires the government to correct any misstatements or omissions of material fact made to the Court. Those attorneys also allegedly violated the Rules of Professional Conduct by:

- knowingly making false statements of fact to the Court (ABA Model Rule 3.3(a)(1)),
- knowingly failing to correct a false statement or fact previously made to the Court (ABA Model Rule 3.3(a)(1)),
- knowingly offering evidence the attorney knows is false (ABA Model Rule 3.3(a)(3))
- knowingly disobeying an obligation under the rules of the Court (ABA Model Rule 3.4(c)),
- making a false statement of material fact or law to any person or entity other than the client (ABA Model Rule 4.1(a)),

- failing to disclose a material fact to any person or entity other than the client when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client (ABA Model Rule 4.1(b)),
- failing to report misconduct of subordinate attorneys (ABA Model Rule 5.1(c)(2)),
- ratifying the misconduct of another attorney (ABA Model Rule 5.1(c)(1)),
- violating or attempting to violate the Rules of Professional Conduct (ABA Model Rule 8.4(a)),
- knowingly assisting or inducing another to violate the Rules of Professional Conduct (ABA Model Rule 8.4(a)),
- violating or attempting to violate the Rules of Professional Conduct through the acts of another person (ABA Model Rule 8.4(a)),
- engaging in conduct involving dishonesty (ABA Model Rule 8.4(c)),
- engaging in conduct involving fraud (ABA Model Rule 8.4(c)),
- engaging in conduct involving deceit (ABA Model Rule 8.4(c)),
- engaging in conduct involving misrepresentation (ABA Model Rule 8.4(c)), and
- engaging in conduct that seriously interferes with the administration of justice (ABA Model Rule 8.4(d)).

It is true that the public does not know with certainty if the FBI and DOJ attorneys actually engaged in misconduct. Although the newly released transcripts of congressional testimony and public statements made by current and former government employees strongly suggest attorney misconduct, unless and until this Court releases judicial records regarding its investigations or findings related to attorney misconduct committed in conjunction with the Carter Page applications and renewals, the public cannot know the truth. Movants urge this Court to release the requested

records because leaving the issue of attorney misconduct before this Court to public speculation undermines the integrity of both this Court and the FISA process in general.

Likewise, this Court released a Public Opinion in spring 2017 that revealed the government belatedly disclosed on October 24, 2016 significant violations of Section 702 procedures that impinged on the Fourth Amendment protections afforded to Americans. In its ruling, the court specifically cited an institutional "lack of candor." The American public has an overwhelming interest in determining if that lack of candor subsequently resulted in disciplinary action against attorneys or government officials involved in the Section 702 conduct.

STANDING

A party has standing to seek relief from a federal court when he suffers an "injury in fact," a causal connection between the injury and the conduct complained of exists, and it is likely that the injury will be redressed by a favorable decision. *In re Certification of Questions of Law*, No. 18-01 (FISA Ct. Rev. Mar. 16, 2018) at *8-9 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 61 (1992)). Movants' asserted injury is a lack of access to any order, opinion, decision, sanction, or other record related to any investigation or finding that any attorney violated the FISC Rules of Procedure, including FISC Rule of Procedure 13, or applicable Rules of Professional Conduct in connection with the Carter Page FISA application and renewals, the Section 702 misconduct, and any records regarding any referral or complaint made to any attorney disciplinary body for conduct related to the Carter Page FISA application and renewals or Section 702 misconduct. This injury is an "injury in fact" because it is concrete, particularized, and actual or imminent. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013).

John Solomon is an award-winning investigative journalist who currently serves as executive vice president of digital video and an opinion contributor for *The Hill*, a daily news

publication in Washington with more than 30 million monthly readers. He formerly worked at *The Associated Press* (for nearly 20 years) and as editor-in-chief of The Washington Times. As one of our country's most well respected investigative journalists, he is credited with exposing U.S. and FBI intelligence failures before the September 11, 2001 attacks on our country,[1] federal scientists' misuse of foster children and veterans in drug experiments,[2] and numerous cases of political corruption.[3] In 2017, Mr. Solomon, along with fellow journalist Sara Carter, exposed the government's unlawful surveillance of American citizens and abuse of the FISA application process,[4] including the aforementioned abuses documented by this Court in its spring 2017 order. Most recently, Mr. Solomon has reported on a constant stream of evidence raising questions about possible FISA abuses related to the Carter Page FISA application and renewals.[5] His investigative

---

[1] John Solomon, *State FBI Memo Warned of Arabs Training at Flight Schools*, Ariz. Daily Sun (May 3, 2002), https://azdailysun.com/state-fbi-memo-warned-of-arabs-training-at-flight-schools/article_d9be3b2e-6897-57bb-94d2-9592304d7cc5.html.

[2] John Solomon, *Government Tested AIDS Drugs on Foster Kids*, NBCNews.com, (May 4, 2005) http://www.nbcnews.com/id/7736157/ns/health-aids/t/government-tested-aids-drugs-foster-kids/#.XOVwWIhKiUk; *Medical Experiments on Veterans*, C-SPAN (Jun. 17, 2008), https://www.c-span.org/video/?205567-6/medical-experiments-veterans.

[3] John Solomon and Laurel Adams, *Audit Says Legal Aid Boss Charged Taxpayers for Club, Car*, The Center for Public Integrity (Oct. 21, 2010), https://publicintegrity.org/accountability/audit-says-legal-aid-boss-charged-taxpayers-for-club-car/; John Solomon and Alison Spann, *FBI Uncovered Russian Bribery Plot Before Obama Administration Approved Controversial Nuclear Deal with Moscow*, The Hill (Oct. 17, 2017, 6:00 AM), https://thehill.com/policy/national-security/355749-fbi-uncovered-russian-bribery-plot-before-obama-administration; John Solomon, *New Details of Investigation of a Hotel Maid's Charge that She was Sexually Assaulted by IMF Chief*, The Center for Public Integrity (May 21, 2011), https://publicintegrity.org/accountability/new-details-of-investigation-of-a-hotel-maids-charge-that-she-was-sexually-assaulted-by-imf-chief/; John Solomon and Aaron Mehta, *Stimulating Hypocrisy: Scores of Recovery Act Opponents Sought Money out of Public View*, The Center for Public Integrity (Oct. 19, 2010), https://publicintegrity.org/federal-politics/stimulating-hypocrisy-scores-of-recovery-act-opponents-sought-money-out-of-public-view/.

[4] John Solomon and Sara Carter, *Obama Intel Agency Secretly Conducted Illegal Searches on Americans for Years* PopularResistance.org (May 27, 2017), https://popularresistance.org/obama-intel-agency-secretly-conducted-illegal-searches-on-americans-for-years/.

[5] John Solomon, *Collusion Bombshell: DNC Lawyers Met with FBI on Russia Allegations Before Surveillance Warrant*, The Hill (Oct. 3, 2018), https://thehill.com/hilltv/rising/409817-russia-collusion-bombshell-dnc-lawyers-met-with-fbi-on-dossier-before; John Solomon, *Memos Detail FBI's 'Hurry the F Up Pressure' to Probe Trump Campaign*, The Hill (July 6, 2018), https://thehill.com/hilltv/rising/395776-memos-detail-fbis-hurry-the-f-up-pressure-to-probe-trump-campaign; John Solomon, *The Damning Proof of Innocence that FBI Likely Withheld in*

journalism, including daily articles and radio and television appearances, has shined a light on possible attorney misconduct, misrepresentation to the court, and withholding of information that could result in public attorney discipline or sanction in any other court. Thus, the Court's withholding of the requested records constitutes a concrete and particularized injury in fact to Mr. Solomon and the American public he serves as a widely read and watched journalist.

Southeastern Legal Foundation, a national public interest law firm founded in 1976, is committed to protecting the rule of law and strives to hold any level of government accountable when it violates the law. SLF engages in litigation and public policy advocacy in support of these principles. Appearing over 20 times a year before the U.S. Supreme Court through both direct representation and as *amicus curiae*, SLF has won critical cases on government accountability, unconstitutional government regulation, free speech, and property rights.[6] As all attorneys should, SLF takes its ethical obligations seriously, especially when the most public of attorneys engage in professional misdeeds which undermine and jeopardize the necessary public confidence on which the rule of law depends. This is why SLF filed a bar complaint against President Bill Clinton[7] and a subsequent mandamus action[8] with the Arkansas Supreme Court to take action on the complaint and Judge Susan Weber-Wright's contempt order,[9] which ultimately resulted in President Bill Clinton's loss of law license, payment of a $25,000 fine, and disbarment by the U.S. Supreme

---

Russian Probe, The Hill (May 14, 2019), https://thehill.com/opinion/white-house/434054-the-damning-proof-of-innocence-that-fbi-likely-withheld-in-russian-probe.

[6] *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656 (1993); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Nat'l. Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018).

[7] https://docs.wixstatic.com/ugd/3f4d64_79fce472b6a84ec19b258f6f34da65a3.pdf.

[8] Petition for Writ of Mandamus, *Hogue v. Neal*, 340 Ark. 250 (2000) (No. 99-1451), https://docs.wixstatic.com/ugd/3f4d64_d9128da8623e470b9f7641ff9e834454.pdf.

[9] *See Jones v. Clinton*, 36 F. Supp. 2d 1118, 1120 (D. Ark. 1999).

Court.[10] SLF has been at the forefront of exposing fraud on the court by the most high profile attorney in our country, and holding him accountable for that fraud. SLF continues its efforts to preserve the integrity of the profession and judiciary by seeking the records related to the alleged and suspected attorney misconduct with respect to the Carter Page FISA application and renewals. Thus, the Court's withholding of the requested records constitutes a concrete and particularized injury in fact to SLF.

Finally, the causation and redressability requirements are clearly met. The Court has possession and control over the records Movants seek and its continued withholding of them causes movants' asserted injury. A ruling in favor of Movants and subsequent release of the records would redress that injury.

JURISDICTION

This Court once observed, "Notwithstanding the esoteric nature of its caseload, the FISC is an inferior court established by Congress under Article III, and like all such courts was vested with certain inherent powers upon its creation." *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007) (Misc. 07-01) (Bates). As an Article III court, this Court possesses inherent supervisory power over its own records. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). And this Court's Rules provide a mechanism for publishing those records. FISC R. P. 62 (FISC judges can, either *sua sponte* or in response to a motion for publication, direct the publication of FISC orders, opinions, decisions or "other related records"). On at least four occasions, this Court has exercised jurisdiction over third party common law and First Amendment

[10] *Clinton resigns from bar, beats deadline for disbarment*, Washington Times (Nov. 10, 2001), https://www.washingtontimes.com/news/2001/nov/10/20011110-031024-7822r/.

right of access motions.[11] *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486-87 ("Indeed, it would be quite odd if the FISC did not have jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files."); *In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, Misc. No. 08-01, 2008 WL 9487946, at *2 (FISA Ct. Aug. 27, 2008) (considering a motion for "any legal opinions issued by the Court"); *In re Orders of This Court Interpreting Section 215 of the Patriot Act*, Misc. 13-02, 2013 WL 540064 (FISA Ct. Sept. 13, 2013) (considering a First Amendment right of access motion for Section 215 opinions); *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, Misc. 13-02, 2014 WL 5442058 (FISA Ct. Aug. 7, 2014) (considering a First Amendment right of access motion for opinions interpreting 50 U.S.C. § 1861).

ARGUMENT

I. Movants have a common law and First Amendment right of access to this Court's judicial records related to any attorney misconduct.

The public has an interest in transparent court proceedings. This is true even when the court operates largely behind closed doors due to the sensitive and classified nature of its docket. Transparency breeds misconduct, misrepresentations, and overall abuse. As James Madison wrote, "popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy,"[12] which served as an inspiration for the Freedom of Information Act, according to the U.S. Department of Justice.[13] Here, that interest rises to the level of an enforceable

[11] The FISC's exercise of jurisdiction over these motions is consistent with U.S. Supreme Court precedent and that of every other federal circuit. *See, e.g.*, *Assoc. Press v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 705 F.2d 1143, 1145 (1983).

[12] Letter from James Madison to W.T. Barry (Aug. 14, 1822), in The Writings of James Madison (Gaillard Hunt ed.).

[13] https://www.justice.gov/oip/blog/foia-post-2008-celebrating-james-madison-and-freedom-information-act.

common law right of access and First Amendment right of access to judicial records addressing attorney misconduct.

A. Movants have a common law right of access to judicial records addressing attorney misconduct.

The Supreme Court has recognized a common law right "to inspect and copy public records and documents." *Nixon*, 435 U.S. at 597. The common law right attaches to the records sought here because they are judicial records. *See United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995). Courts regularly address allegations of attorney misconduct and issue opinions, orders, sanctions, and referrals to disciplinary boards where appropriate. In the context of attorney misconduct, these various documents all reflect a court's reasoning and findings with respect to violations of court rules or Rules of Professional Conduct and thus, are necessarily considered "judicial documents." *See Amodeo*, 44 F.3d at 145-46 (a document is considered a "judicial document" or "judicial record" when it is "relevant to the performance of the judicial function and useful in the judicial process); *In re Application of U.S. for an Order Pursuant to 18 U.S.C. § 2703(D)*, 707 F.3d 283, 290-91 (4th Cir. 2013) (judicial records are documents "filed with the objective of obtaining judicial action or relief" and which "play a role in the adjudicative process or adjudicate substantive rights").

And Movants' common law right is entitled to a strong presumption of access because judicial records regarding findings of attorney misconduct are in and of themselves dispositions on matters. Courts have recognized that final decisions from courts should be in the public domain. *Joy v. North*, 692 F.2d at 880; *see also Nash v. Lathrop*, 142 Mass. 29, 35-36 (1886) ("The policy of the Commonwealth always has been that the opinions of the justices, after they are delivered,

belong to the public."). And while the different circuits apply different balancing tests[14] to determine whether "countervailing interests" outweigh the presumption of access, one can hardly imagine an interest greater than protecting the integrity of the judiciary, the FISA application process, and the constitutional rights of American targets of surveillance.

B. Movants have a First Amendment right of access to judicial records addressing attorney misconduct.

The public and press have a "qualified First Amendment right . . . to access certain judicial documents." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004). The qualified right attaches to judicial records that "have historically been open to the press and general public" when public access to those records "plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) (*Press-Enter. II*). Under the Supreme Court's prevailing "experience and logic" test, Movants have a qualified First Amendment right of access to the requested records because courts, including this one, regularly make public findings of attorney misconduct, and there is little question that informing the public of misconduct committed by our country's most public attorneys would play a significant role in the functioning and integrity of the FISC and the FISA application process generally.

In evaluating experience, courts look at how the requested documents are treated based on the common law right of access, how this particular court treats such documents, and how other

[14] The Second and Ninth Circuits apply the "compelling circumstances" test under which "only the most compelling circumstances should prevent contemporaneous public access to" judicial records. *See In re Application of Nat'l Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980); *Valley Broad Co. v. U.S. Dist. Court*, 798 F.2d 1289 (9th Cir. 1986). The Fifth Circuit gives a defendant's competing fair trial rights precedence, which is inapplicable here. *See, e.g.*, *Belo Broad Corp. v. Clark*, 654 F.2d 423, 431 (5th Cir. 1981). And the Third, Seventh, and D.C. Circuits apply an "articulable facts" standard, which here, assuming the information in the newly released transcripts is true, would favor access because the Court presumably is itself aware of attorney misconduct. *See, e.g.*, *United States v. Edwards*, 672 F.2d 1289 (7th Cir. 1982); *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981); *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1981).

courts have treated such documents. As discussed above, the common law right of public access applies to the requested documents.

With respect to the second consideration, it is important to remember that Movants are not seeking classified FISA applications or pleadings. Rather, they are seeking judicial records addressing attorney misconduct before this Court, so the experience prong must be evaluated in that context. Although this Court's proceedings are secret, opinions from this Court that inform the public of and admonish attorney misconduct, executive agency misconduct, and abuse of the FISA application procedures have been made public on numerous occasions. For example, in a declassified FISC opinion from 2002, the Court addressed the FBI's failure to inform the Court that the person they were seeking a FISA warrant to surveil was one of their own informants[15] and expressed its concern that "misinformation found its way into the FISA applications and remained uncorrected for more than one year despite procedures to verify the accuracy of FISA pleadings." *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 621 (FISA Ct. 2002). And in a declassified 2016 opinion, the Court addressed the "FBI's apparent disregard of minimization rules" and the government's failure "to meet its obligation to provide prompt notification to the FISC when non-compliance is discovered" as required by FISC Rule of Procedure 13. FISC Memorandum and Order (Apr. 26, 2017). There is thus a history of the public having access to this Court's opinions addressing attorney and government misconduct.

Turning to the third consideration, there is also a history of other courts issuing public opinions, orders, or decisions finding attorney misconduct or imposing sanctions – even to those

[15] John Solomon, *Mueller hauled before secret FISA court to address FBI abuses in 2002, Congress told*, The Hill (Feb. 6, 2019), https://thehill.com/opinion/white-house/428755-mueller-hauled-before-secret-fisa-court-to-address-fbi-abuses-in-2002.

attorneys who occupy the highest office in our country. There are several points on this consideration. First, an opinion, order, or decision on attorney misconduct should not be treated any differently than any other opinion, order, or decision of a court. All other Article III courts routinely make their opinions publicly available, so opinions of the FISC should be no different. Second, one need look no further than Judge Susan Weber-Wright's public opinion and order finding President Bill Clinton "in contempt of court for his willful failure to obey [the] Court's discovery Orders." *Jones*, 36 F. Supp. 2d at 1120. Other courts addressing the issue have found that the public has a First Amendment right to motions for sanctions and the resulting orders, opinions, and decisions imposing or declining to impose sanctions or attorney discipline. *See, e.g.*, *360 Mortg. Grp. LLC*, No. 5:14-CV-00310-F, 2016 U.S. Dist. LEXIS 68694, at *6 (E.D. N.C. May 25, 2016) (explaining that transparency in a dispute over legal ethics "is undoubtedly beneficial"); *United States ex rel. Thomas v. Duke Univ.*, No. 1:17-CV-276, 2018 Dist. LEXIS 150001, *12 (M.D. N.C. Sept. 4, 2018) ("the public has a First Amendment right of access to the materials filed in connection with a sanctions motion").

Finally, the alleged attorney misconduct here relates directly to the Carter Page application and renewals, which gave the government authority to essentially spy on Donald Trump's campaign. The underlying judicial orders here are analogous to wiretap orders such that any misstatements or omissions made by FBI, DOJ, or other government attorneys in the Carter Page application and renewals are analogous to false affidavits submitted to a court to obtain a wiretap order. And in the latter, courts routinely publish judicial records finding or declining to find attorney misconduct in those cases. *See, e.g.*, *United States v. Olderbak*, 961 F.2d 756, 762-63 (8th Cir. 1992) (analyzing claim of attorney misconduct in published opinion). In the interest of justice and to carry out its duty to consider "whether the attorney has abused the judicial process, and if

so, what sanctions would be appropriate," *Cooter & Gell v. Harmarx Corp.*, 496 U.S. 384, 396 (1990), this Court should follow suit.

Moving to the second part of the *Press-Enter. II* test, the records sought related to attorney misconduct meet the "logic" prong because they play "a significant positive role" in the functioning of the judicial process. *Press-Enter. II.*, 478 U.S. at 1, 9, 11. As officers of the court, attorneys have an obligation to be open and honest with the court at all times, to not mislead the court, and to disclose all facts (good and bad) in ex parte proceedings like those before this Court. The alleged claims of misconduct asserted in the Nunes Memo and made apparent by the newly released testimony of numerous FBI and DOJ employees involve lying, misleading, and withholding information from this Court in violation of both this Court's Rules and the Rules of Professional Conduct. The integrity and reputation of this Court and the FISA process more generally hinge on how this Court handles these allegations, and thus, it is imperative that the Court make public any related judicial records.

Finally, neither the government nor any other party can meet the strict-scrutiny test to overcome Movants' First Amendment right of access. A court may restrict access only on the basis of a "compelling governmental interest," and only if the denial is "narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982). And the burden to overcome the right rests with the party seeking to restrict access. *Id.* Here, there is no compelling governmental interest in preventing the release of this Court's orders, opinions, decisions, or related judicial records regarding attorney misconduct. The governmental interest is quite the contrary. The FBI, DOJ, and any other governmental agency should welcome public disclosure of findings of attorney misconduct so that it can be addressed and so that proper procedures can be put in place to ensure such misconduct never happens again. That interest rings true in any court,

but even more so in this Court where proceedings are all conducted ex parte and orders always implicate constitutional rights of American surveillance targets.

II. Alternatively, the Court should exercise its Rule 62 discretion and release the requested judicial records.

If the Court ultimately determines that neither the First Amendment nor the common law right of access require the release of the requested judicial records, the Court should exercise its inherent authority and release them to protect this Court's integrity, the public's confidence and trust in the FISA application process, and the constitutional rights of any American that is the target of a surveillance order. Rule 62 of this Court permits the FISC judges to either *sua sponte*, or in response to a motion for publication, direct the publication of FISC orders, opinions, decisions or "other related records." As laid out above, there is ample evidence in the public sphere for the public to conclude, or at least seriously believe, that FBI, DOJ, and possibly other government attorneys committed numerous violations of this Court's Rules of Procedure and Rules of Professional Conduct.

Those alleged violations include, but are not limited to, knowingly making false statements of fact to the Court (ABA Model Rule 3.3(a)(1)), knowingly failing to correct a false statement or fact previously made to the Court (ABA Model Rule 3.3(a)(1)), knowingly offering evidence the attorney knows is false (ABA Model Rule 3.3(a)(3)), knowingly disobeying an obligation under the rules of the Court (ABA Model Rule 3.4(c)), making a false statement of material fact or law to any person or entity other than the client (ABA Model Rule 4.1(a)), failing to disclose a material fact to any person or entity other than the client when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client (ABA Model Rule 4.1(b)), failing to report misconduct of subordinate attorneys (ABA Model Rule 5.1(c)(2)), ratifying the misconduct of another attorney (ABA Model Rule 5.1(c)(1)), violating or attempting to violate the Rules of Professional Conduct

(ABA Model Rule 8.4(a)), knowingly assisting or inducing another to violate the Rules of Professional Conduct (ABA Model Rule 8.4(a)), violating or attempting to violate the Rules of Professional Conduct through the acts of another person (ABA Model Rule 8.4(a)), engaging in conduct involving dishonesty (ABA Model Rule 8.4(c)), engaging in conduct involving fraud (ABA Model Rule 8.4(c)), engaging in conduct involving deceit (ABA Model Rule 8.4(c)), engaging in conduct involving misrepresentation (ABA Model Rule 8.4(c)), and engaging in conduct that seriously interferes with the administration of justice (ABA Model Rule 8.4(d)).

In addition to the alleged violations of the Rules of Professional Conduct, there is ample evidence in the public sphere to believe that the government attorneys violated Rule 13 of this Court's Rules of Procedure when they failed to disclose the true origins of the Steele dossier, that the Steele dossier had not actually been verified, that the Democratic National Committee funded the Steele dossier, that Steele had an election day deadline, and that multiple attorneys, agents, and government employees deemed the Steele dossier unreliable before the Carter Page FISA application was even filed.

Without the release of the requested records, the public is left with no way of knowing whether these violations actually occurred. And continued public speculation can only serve to harm to the integrity of this Court and less confidence in the FISA application process. In the alternative, disclosure of attorney misconduct and this Court's actions to protect the FISA process and public from further abuse of the FISA process could actually increase the public's confidence in this Court and protect the integrity of the legal profession.

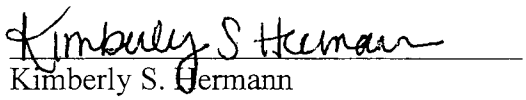
CONCLUSION

For the foregoing reasons, the Movants respectfully request this Court to make public 1) any orders, opinions, decisions, sanctions, or other records related to any investigation or finding

that any attorney violated the FISC Rules of Procedure or applicable Rule of Professional Conduct in connection with the Carter Page FISA application and renewals or the Section 702 violations disclosed by this Court's previous public order in spring 2017; 2) any orders, opinions, decisions, sanctions, or other records finding that any attorney violated or did not violate FISC Rule of Procedure 13, specifically, in connection with the Carter Page FISA application and renewals or the Section 702 violations disclosed by this Court's previous public order in spring 2017; and 3) any records regarding any referral or complaint made to any attorney disciplinary body for conduct related to the Carter Page FISA application and renewals or the Section 702 violations disclosed by this Court's previous public order in spring 2017.

Dated: May 22, 2019

Respectfully submitted,



Kimberly S. Hermann
Georgia Bar No. 646473
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org

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

IN RE MOTION FOR PUBLICATION OF RECORDS	)	Docket No. Misc. 19-01

CERTIFICATION OF BAR MEMBERSHIP AND SECURITY CLEARANCE

Pursuant to Rules 7 and 63 of the U.S. Foreign Intelligence Surveillance Court, Movants, submits the following information:

I. Bar Membership Information.

Kimberly S. Hermann is a member, in good standing, of the following federal courts: the U.S. Supreme Court, the U.S. Court of Appeals for the Sixth, Tenth, Eleventh, Federal, and District of Columbia Circuits, and the U.S. District Court for the Northern District of Georgia and the Middle District of Georgia. She is licensed to practice law by the bar of the State of Georgia.

II. Security Clearance Information.

Kimberly S. Hermann does not hold, and has never held, a security clearance. Because Movants' motion and the related briefing does not contain classified information, Movant respectfully submits that Kimberly S. Hermann may participate in proceedings on the motion without access to classified information or security clearance. *See* FISC R.P. 63 (requiring counsel only to have "appropriate security clearances").

Dated: May 22, 2019

Respectfully submitted,

Kimberly S. Hermann
Georgia Bar No. 646473
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org