Docket No. 20-01

IN THE

United States Foreign Intelligence Surveillance Court of Review

Washington, D.C.

IN RE OPINIONS AND ORDERS BY THE FISC ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

MOVANTS' RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

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[*] Because of the coronavirus pandemic, Movants' offices are closed, and staff are working from home. Movants are therefore unable to submit bound paper copies of this brief with colored covers, and respectfully ask to be relieved of that requirement, as other courts of appeals have suspended hard-copy requirements.

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The American Civil Liberties Union and the American Civil Liberties Union of the District of Columbia are non-profit corporations. They have no parent corporations and do not issue stock. The Media Freedom and Information Access Clinic is an organization within Yale University, which is a non-profit corporation and does not issue stock. Movants do not have parent corporations or owners that are under foreign ownership, control, or influence, as defined in Intelligence Community Standard 700-01.

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INTRODUCTION

This Court has jurisdiction to review a decision by the Foreign Intelligence Surveillance Court ("FISC") addressing the public right of access to its judicial opinions. The Court has already exercised that jurisdiction once before in this matter, after the en banc FISC upheld Movants' standing to assert their access claim. *See In re Certification of Questions of Law*, No. 18-01 (FISCR Mar. 16, 2018). The only difference now is that Movants are petitioning for review, having had their application for access denied on the merits, whereas before, the FISC itself invited review by certifying the standing question to this Court. That difference does not strip this Court of its authority to review Movants' petition.

First, the FISA statute gives this Court "jurisdiction to review the denial of any application made under this chapter." 50 U.S.C. § 1803(b). Movants' access motion is an "application" within the ordinary meaning of this provision, because it sought relief from the FISC in the exercise of its powers under "this chapter." As the statute does not limit who may seek review in these circumstances, Movants may petition for review from the FISC's denial of their application.

Second, this Court also possesses ancillary jurisdiction to entertain Movants' petition. This Court has inherent authority to control its own records, and a statutory duty to maintain the security of those records. *Id.* § 1803(c). If the Court had no authority to entertain petitions concerning public access to the FISC's records—

including government petitions seeking review of FISC disclosure orders—the Court's ability to exercise supervisory authority over the FISC's records and over its own opinions, once transmitted to the FISC, would be significantly impaired.

Third, even if no direct appeal were available, this Court expressly has authority to hear Movants' petition for a writ of mandamus, which raises the same merits issues. Appellate courts have routinely considered petitions for writs of mandamus brought by intervenors seeking public access to judicial records and proceedings. That authority is available to the Court here as well.[1]

ARGUMENT

I. This Court Has Jurisdiction to Entertain Movants' Petition for Review.

A. This Court Has Jurisdiction to Review the Denial of Movants' Application Under 50 U.S.C. § 1803.

This Court's statutory jurisdiction extends to reviewing "the denial of *any* application made under this chapter." 50 U.S.C. § 1803(b) (emphasis added). The ordinary meaning of "any application" in 50 U.S.C. § 1803(b) is just that—"any application." *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[R]ead naturally, the word 'any' has an expansive meaning, that is, one or some

[1] Movants note that the Order to Show Cause concerns "a novel or significant interpretation of the law," requiring appointment of an amicus curiae absent "a finding that such appointment is not appropriate." 50 U.S.C. § 1803(i)(2)(A); *see* Order at 2, *In re Certification of Questions of Law* (FISCR Jan. 9, 2018) (appointing amicus curiae).

indiscriminately of whatever kind." (internal quotation marks omitted)). Movants' application seeking access to FISC opinions arose under "this chapter" because the FISC was created by, and issues its opinions pursuant to authority it receives from, the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801, *et. seq.*

The government may urge the Court to read § 1803 narrowly to permit review of only the FISC's denial of electronic surveillance applications, but that reading would not be consistent with the statute as a whole. Where Congress intended to refer only to applications "for electronic surveillance"—as it did in specifying the jurisdiction of the FISC (as opposed to the FISCR) elsewhere in § 1803—it was specific. *See id.* § 1803(a)(1) ("application for electronic surveillance"). By contrast, the words "any application made under this chapter" encompass applications of the kind Movants made here, over which the FISC properly held it had ancillary jurisdiction pursuant to its inherent, supervisory power to control its own records. *See In re Opinions & Orders of this Ct. Addressing Bulk Collection of Data Under FISA*, Misc. No. 13-08, slip op. at 4–11 (FISC Feb. 11, 2020) ("*In re Opinions*"). Indeed, in previously appointing an amicus curiae in this matter, both the FISC and this Court appear to have already interpreted the standalone word "application" to encompass Movants' motion. *See* 50 U.S.C. § 1803(i)(2)(A) (authorizing appointment of amicus to assist in consideration of certain "application[s] for an order or review"); Order, *In re Opinions* (FISC May 1, 2018); Order, *In re*

Certification of Questions of Law (FISCR Jan. 9, 2018).

A narrow reading would also frustrate appellate review in ways Congress could not have intended. For example, it would prevent the government from appealing a variety of FISC orders, such as: orders finding a constitutional right of access to various FISC records; orders exercising the FISC's discretion to publish its opinions; and orders sanctioning government officials for misconduct. Similarly, a narrow reading would prevent both the government and communications providers from appealing contempt rulings by the FISC, such as when a provider challenges a surveillance order and the government seeks to compel immediate compliance.

The Court can resolve any doubt concerning its statutory authority by analogizing to the collateral order doctrine, which has supplied authority to entertain appeals in other public access cases in the federal appellate courts. *See, e.g.*, *In re N.Y. Times Co.*, 828 F.2d 110, 113 (2d Cir. 1987); *United States v. Chagra*, 701 F.2d 354, 358–60 (5th Cir. 1983); *United States v. Criden*, 675 F.2d 550, 552 (3d Cir. 1982). In establishing that doctrine, the Supreme Court applied a "practical rather than a technical construction" to 28 U.S.C. § 1291's jurisdictional limitation on appellate review to "final" judgments—thereby permitting appeals of decisions "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is

adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Here, too, this appellate Court should follow those practical considerations and read § 1803 to permit Movants' appeal: there is a final decision from the FISC; it presents an issue collateral to those raised in the underlying FISC proceedings; and there is a risk of irreparable harm to constitutional interests that are "too important to be denied review." *Id.*

Forty years ago, the Supreme Court first recognized a constitutional right of public access to certain judicial proceedings and records, and then made clear that the press and public "must be given an opportunity to be heard" on any limitation of that right. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982). At that time, no procedural rules allowed participation in a criminal prosecution by third parties claiming a constitutional interest in the proceeding; there is no analog to Fed. R. Civ. P. 24 in the rules governing criminal cases. Nonetheless, Article III appellate courts fashioned multiple procedural mechanisms for non-parties to assert their constitutional access right in the first instance and to later obtain appellate review: via (a) direct intervention, *see, e.g.*, *United States v. Aref*, 533 F.3d 72 (2d Cir. 2008); *In re Associated Press*, 162 F.3d 503 (7th Cir. 1998); (b) the collateral order doctrine, *see, e.g.*, *N.Y. Times Co.*, 828 F.2d at 113; *Chagra*, 701 F.2d at 358–60; *Criden*, 675 F.2d at 552; and (c) writs of mandamus, *see e.g.*, *United States v. Brooklier*, 685 F.2d 1162, 1165–66 (9th Cir. 1982); *CBS Inc. v. Young*, 522 F.2d 234, 237 (6th Cir.

1975); *see also infra* Part II. Just as other appellate courts responded to the Supreme Court's recognition of a public access right by identifying mechanisms for appellate review, this Court should ensure there is a means for parties to seek review of FISC orders granting or denying an application for public access to its records.

B. This Court Has Ancillary Jurisdiction to Review the FISC's Denial of the Motion.

In addition to the express grant of jurisdiction in § 1803(b), this Court has ancillary jurisdiction to consider Movants' petition. This Court controls access to its own records and docket, and, given the need to ensure uniform rules for public access, it necessarily has ancillary jurisdiction to review a FISC ruling on a motion for the release of court records.

The Supreme Court has recognized that federal courts may exercise ancillary jurisdiction over claims outside of their explicit statutory grants when the exercise of jurisdiction "enable[s] a court to function successfully." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379–80 (1994). The "doctrine of ancillary jurisdiction . . . recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." *Id.* at 378; *see also* 50 U.S.C. § 1803(h) ("Nothing in this chapter shall be construed to reduce or contravene the inherent authority of a court established under this section . . . .").

In order to exercise its inherent powers as an Article III court and fulfill its statutory duty to control its docket and papers, this Court must have jurisdiction to review FISC rulings on the release of records filed with the FISC. This Court has a duty to "take such actions as are reasonably necessary to administer [its] responsibilities under [FISA]." 50 U.S.C. § 1803(g)(1). One of this Court's enumerated responsibilities under the Act is the proper handling of records that contain classified information. *See id.* § 1803(c). In accordance with this mandate, this Court's procedural rules require it to comply with a series of statutes regarding information security. *See* FISCR R. P. 3. Therefore, to comply with the requirements of § 1803, this Court must be able to control its own docket and papers, including by reviewing the FISC's decisions concerning public access to its opinions—which, under the FISC's ruling in this very matter, are issued pursuant to *its own* ancillary jurisdiction below. *See In re Opinions* at 4–11. Indeed, it would be anomalous if this Court had ancillary jurisdiction to rule on motions for access to its own records, as it surely does, but lacked jurisdiction to review petitions concerning access to FISC records—particularly because the record in any given FISC proceeding is likely to substantially overlap with that in a FISCR proceeding reviewing the FISC's work.

II. The Court May Review the FISC's Decision Through Movants' Petition for a Writ of Mandamus.

The Supreme Court has long recognized "that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial

administration in the federal system." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259–60 (1957). And the Supreme Court and federal appeals courts have relied on the writ of mandamus as a vehicle for that supervision. *See id.*; *accord, e.g.*, *United States v. Lasker*, 481 F.2d 229, 235 (2d Cir. 1973); *Dellinger v. Mitchell*, 442 F.2d 782, 790 (D.C. Cir. 1971). This Court is no different: it exercises supervisory control over the FISC just as federal appeals courts do over federal district courts. *See* 50 U.S.C. §§ 1803(b), (j); *id.* § 1861(f)(3); *id.* § 1881a(i)(6).

As a court that supervises a lower court, this Court may issue writs of mandamus under the All Writs Act. That Act authorizes "[t]he Supreme Court and all courts established by Act of Congress" to "issue all writs necessary and appropriate in aid of their respective jurisdictions," 28 U.S.C. § 1651(a), including a "writ of mandamus against a lower court," *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004). The FISCR is a court established by Congress, *see* 50 U.S.C. § 1803(b), and it has recognized in its own rules that it possesses the power to issue writs of mandamus. *See* FISCR R. P. 8 ("All writs that may be issued by United States courts of appeals shall be available to the FISCR.").

Because the All Writs Act does not provide "an independent grant of appellate jurisdiction," courts may only consider mandamus petitions if "an independent statute . . . grants [the court] jurisdiction." *In re al-Nashiri*, 791 F.3d 71, 75–76 (D.C. Cir. 2015) (internal citations and quotation marks omitted). As discussed previously,

this Court has jurisdiction to review FISC rulings on right-of-access claims pursuant to 50 U.S.C. §§ 1803(b), (g)(1), and (j). Indeed, the Court has already exercised that jurisdiction in this very matter pursuant to § 1803(j). *See In re Certification of Questions of Law*, No. 18-01 (FISCR Mar. 16, 2018). Thus, even if Movants cannot directly appeal the FISC order, this Court clearly has subject matter jurisdiction to consider the issues it raises through a mandamus petition.

Nothing in FISA precludes the Court from exercising mandamus power here. As noted previously, Congress authorized the Court to "take such actions . . . as are reasonably necessary to administer [its] responsibilities under this chapter," 50 U.S.C. § 1803(g)(1), including those related to managing access to classified information, *see id.* § 1803(c). If the Court holds that an appeal is not a proper vehicle for challenging a FISC right-of-access decision, mandamus may offer the only way for it to review orders releasing or withholding otherwise classified decisions. Thus, far from undercutting legislative intent, exercising mandamus review here would allow the Court to fulfill the role Congress intended for it.

The federal courts of appeal have regularly exercised their authority under the All Writs Act to consider, and grant, mandamus relief to parties seeking access to judicial records in proceedings below. *See, e.g.*, *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 63, 65 (4th Cir. 1989); *In re Globe Newspaper Co.*, 920 F.2d 88, 90 (1st Cir. 1990); *In re Providence Journal Co., Inc.*, 293 F.3d 1, 5, 9 (1st Cir. 2002); *San Jose*

Mercury News, Inc. v. U.S. Dist. Ct., 187 F.3d 1096, 1100 (9th Cir. 1999). Movants' mandamus petition is similar to the ones that courts reviewed in these cases.[2]

Finally, reviewing Movants' petition for review as a petition for a writ of mandamus would serve the purposes for which mandamus review exists. The Supreme Court has recognized the importance of mandamus review in cases involving the balance of judicial and executive powers. *See Cheney*, 542 U.S. at 382. And federal courts of appeal have exercised their mandamus authority to consider otherwise unreviewable petitions that pit "important constitutional rights" against pressing issues of "court administration." *Globe Newspaper*, 920 F.2d at 90–91; *see San Jose Mercury News*, 187 F.3d at 1103. This case involves both considerations.

CONCLUSION

The Court should find that it has the authority to entertain Movants' petition.

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[2] Movants' status as third parties does not defeat the Court's authority to review the petition. *See, e.g.*, *United States v. McVeigh*, 106 F.3d 325, 334 n.7 (10th Cir. 1997); *In re Wash. Post Co.*, 807 F.2d 383, 388 (4th Cir. 1986); *Globe Newspaper*, 920 F.2d at 90. Nor does the fact that the Court may never, in the end, exercise jurisdiction over the underlying surveillance applications. *See Clyma v. Sunoco, Inc.*, 594 F.3d 777, 779–83 (10th Cir. 2010) (entertaining petition for writ of mandamus from nonparty where trial court proceedings had concluded and parties had voluntarily dismissed appeal). Nor would mandamus review here lead to "piecemeal appeals," *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943), as the nondisclosure decision that Movants challenge is a final one.

Dated: April 17, 2020

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* This memorandum has been prepared with the assistance of Yale Law School students, Anya Allen ('22) and Katrin Marquez ('20). This brief does not purport to present the institutional views of Yale Law School, if any.

** Pursuant to FISCR R. P. 9(d), 9(e), and 19, Movants submit that Michael Perloff is a member of good standing in the United States District Court for the District of Columbia and is licensed to practice law by the bars of the State of New York and the District of Columbia. He does not hold a security clearance.

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation set out in the Order of the Foreign Intelligence Surveillance Court of Review dated April 10, 2020, because it is no more than 10 pages in length excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I, Patrick Toomey, certify that on this day, April 17, 2020, a copy of the foregoing brief was served on the following persons by the methods indicated:

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