In the United States Foreign Intelligence Surveillance Court of Review

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

Docket No. FISCR 20-01

On Petition for Review of a Decision of the
United States Foreign Intelligence Surveillance Court

DECIDED: APRIL 24, 2020

Before: CABRANES, TALLMAN, and SENTELLE, *Judges*.

Patrick Toomey, Brett Max Fauman, American Civil Liberties Union Foundation, New York, NY; Arthur B. Spitzer, Scott Michelman, Michael Perloff, American Civil Liberties Union Foundation of the District of Columbia, Washington, D.C.; David Schulz,

Charles Crain, Media Freedom & Information Access Clinic, Abrams Institute at Yale Law School, New Haven, CT; Alex Abdo, Jameel Jaffer, Knight First Amendment Institute at Columbia University, *for Petitioners*.

John C. Demers, J. Bradford Wiegmann, Melissa MacTough, Jeffrey M. Smith, National Security Division, United States Department of Justice, Washington, D.C., *for United States of America*.

PER CURIAM:

On February 11, 2020, the United States Foreign Intelligence Surveillance Court (the "FISC") (Rosemary M. Collyer, *Judge*) dismissed a motion filed by the American Civil Liberties Union, the American Civil Liberties Union of the District of Columbia[1], and the Media Freedom and Information Access Clinic (jointly, the "Movants")[2] for the release of certain opinions and orders by the FISC

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[1] The name that was used in the FISC was the "American Civil Liberties Union of the Nation's Capital."

[2] Although the parties filing the Petition for Review or, in the alternative, for a Writ of Mandamus are technically "Petitioners" before this Court, we will refer to them as "Movants" throughout this opinion to ensure uniformity and consistency with our earlier opinions and orders on this matter.

addressing the bulk collection of data[3] under the Foreign Intelligence Surveillance Act ("FISA").[4] In a thoughtful and careful opinion, the FISC rejected the Movants' claim that the withholding of redacted, non-public material classified by the Executive Branch violates the Movants' First Amendment right of public access.[5] The Movants now seek to appeal that decision to our Court in the form of a Petition for Review (the "Petition"); in the alternative, they seek a Writ of Mandamus.

For the reasons stated below, we decline to consider the merits of the Movants' Petition and **DISMISS** the Petition for lack of jurisdiction.

BACKGROUND

On November 7, 2013, the Movants filed a motion seeking disclosure of the FISC's opinions addressing the Government's bulk collection of data under the FISA (the "Motion"). The Government identified four such opinions. Two of the opinions had been made public in redacted form by the FISC prior to the Movants' Motion.[6] The other two opinions were released subsequently, also in redacted form,

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[3] *See In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act* ("*In re Bulk Collection*"), No. Misc. 13-08, 2020 WL 897659, at *1, *16 (Foreign Intel. Surv. Ct. Feb. 11, 2020).

[4] 50 U.S.C. §§ 1801–1885c.

[5] *See In re Bulk Collection*, 2020 WL 897659, at *7–16.

[6] *See id.* at *1.

by the Government.[7] The material that has been redacted in these four opinions consists of highly sensitive information that, following a declassification review, the Executive Branch concluded remains classified and, if released, could be damaging to our country's national security.[8]

On January 25, 2017, then-Presiding Judge Rosemary M. Collyer dismissed the Motion on the basis that the Movants lacked standing under Article III of the Constitution to seek public disclosure of the redacted, classified material in the FISC opinions.[9] On November 9, 2017, the FISC, sitting en banc, concluded otherwise by a vote of six to five.[10] The FISC held that the Movants have Article III standing to bring their First Amendment claim and thus vacated the dismissal.[11]

On January 5, 2018, the FISC certified the question of the Movants' Article III standing to this Court,[12] and on January 9, 2018,

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[7] *See id.* at *2.

[8] *See id.* at *1.

[9] *See In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, 2017 WL 427591 (Foreign Intel. Surv. Ct. Jan. 25, 2017).

[10] *See In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, 2017 WL 5983865 (Foreign Intel. Surv. Ct. Nov. 9, 2017) (en banc).

[11] *Id.* at *9.

[12] *See In re Opinions & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, 2018 WL 396244, at *1 (Foreign Intel. Surv. Ct. Jan. 5, 2018).

we accepted the certification. On March 16, 2018, we issued our decision answering the certified question by agreeing with the standing analysis of the majority of the en banc FISC and concluding that the Movants had established their constitutional standing to raise their First Amendment claim.[13] Specifically, in answering the certified question, we noted that the "denial of access to the redacted material constitutes an injury in fact" and that the Movants thus satisfied the irreducible minimum of Article III standing.[14] We also emphasized that we did not reach, much less decide, any other question beyond the Movants' standing, including whether "other jurisdictional impediments exist to this challenge" or whether the Movants could succeed on the merits of their First Amendment claim.[15] These remaining questions, including the existence of subject matter jurisdiction over the Motion, were left for the FISC to address on remand.

On remand by the FISC en banc, on February 11, 2020, Judge Collyer issued an Opinion concluding primarily that the FISC "has subject matter jurisdiction over the Motion" and that "the First

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[13] *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review* ("*In re Certification*"), No. FISCR 18-01, 2018 WL 2709456 (Foreign Intel. Surv. Ct. of Rev. Mar. 16, 2018).

[14] *Id.* at *4 (explaining that a "plaintiff must satisfy three minimum requirements: First, the plaintiff must have suffered an 'injury in fact.' Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely that the injury will be redressed by a favorable decision" (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

[15] *Id.* at *7.

Amendment does not confer a qualified right of public access to the material sought by the Movants."[16] Accordingly, she rejected the Movants' First Amendment claim and dismissed the Motion. This appeal followed.

DISCUSSION

It is beyond dispute that all federal courts, including our own, "are courts of limited jurisdiction."[17] Federal courts "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree."[18] A lower federal court's power to resolve legal disputes is limited in at least three independent and equally important ways.[19] *First*, an action invoking our "judicial Power" must involve a "Case[ ]" or "Controvers[y]" within the meaning of Article III of the Constitution[20]—a requirement that the

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[16] *In re Bulk Collection*, 2020 WL 897659, at *3.

[17] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see In re Certification*, 2018 WL 2709456, at *4 (noting that we "have held that the FISC's authority and inherent secrecy is cabined by—and consistent with—Article III of the Constitution" and that we "assume the FISC's jurisdiction is governed by Article III, section 2, of the Constitution" (citing *In re Sealed Case*, 310 F.3d 717, 731, 732 n.19 (Foreign Intel. Surv. Ct. of Rev. 2002))).

[18] *Kokkonen*, 511 U.S. at 377 (citations omitted).

[19] *See Baker v. Carr*, 369 U.S. 186, 198 (1962).

[20] U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States

Supreme Court has defined through various jurisdictional doctrines, such as standing, ripeness, mootness, and the prohibition against advisory opinions. *Second*, the action must arise under the Constitution, a law, or a treaty, of the United States, "or fall within one of the other enumerated categories of Art[icle] III, § 2."[21] *Third*, the action must be "described by any jurisdictional statute"[22] as the kind of action that Congress intended to be subject to "a court's adjudicatory authority."[23]

It is this third limitation that is directly implicated here. Because federal courts have an independent duty to ensure that jurisdiction exists at all stages of a case, and because we must determine that we

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shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); *see Doremus v. Bd. of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952) ("[B]ecause our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute [a true case or controversy].").

[21] *Baker*, 369 U.S. at 198.

[22] *Id.*

[23] *Eberhart v. United States*, 546 U.S. 12, 16 (2005) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)).

have jurisdiction before proceeding to the merits of a claim,[24] we first address our own authority to consider the Movants' Petition.

I.

At the crux of the instant appeal is the question of whether we have been authorized by Congress to review the Movants' First Amendment claim. In other words, we must decide whether the Movants' Petition falls within the class of cases carefully delineated by the FISA as within our authority as a court of appellate review. We conclude that it does not.

We begin by recognizing the well-settled principle that Congress has the exclusive authority to invest all courts inferior to the Supreme Court "with jurisdiction . . . in the exact degrees and character which to Congress may seem proper for the public good."[25] As creatures of Congress, all courts inferior to the Supreme Court, including our own, are empowered to adjudicate only those disputes prescribed by Congress in its "relevant jurisdictional statutes."[26] If a dispute is not of the kind that Congress has determined should be adjudicated, we "have no business deciding it, or expounding the law

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[24] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (internal quotation marks omitted)).

[25] *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (quoting *Cary v. Curtis*, 44 U.S. 236, 245 (1845) (other citations omitted)).

[26] *Id.*

in the course of doing so."[27] That is especially so where it is clear from the text of the relevant federal statute that Congress has considered carefully the scope of the court's jurisdiction.[28]

That is the case here. In comparison with other federal courts, the nature of the FISC's work is strictly limited in scope. The FISC is tasked primarily with "reviewing applications for surveillance and other investigative activities relating to foreign intelligence collection."[29] Equally limited, if not more so, is the work of our Court of Review, which, like the FISC, is "a unique court" within the federal judiciary and our system of government.[30]

A.

The FISA clearly delineates the types of disputes that fall within our appellate jurisdiction. Generally, the statute provides for the creation of "a court of review which shall have jurisdiction to review the denial of any application made under this chapter [36 of Title 50 of the United States Code]."[31] More specifically, the statute provides that

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[27] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (making the statement in the context of Article III's case-or-controversy requirement).

[28] *Cf. Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 107 (2d Cir. 2018) ("The Supreme Court has made clear that, for a provision to define a federal court's jurisdiction, there must be a 'clear statement' from Congress to that effect." (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)).

[29] *In re Certification*, 2018 WL 2709456, at *1.

[30] *Id.*

[31] 50 U.S.C. § 1803(b).

the Court of Review "shall have jurisdiction to consider" a petition for review of a decision by the FISC[32] on: (1) a FISA "production" or "nondisclosure order";[33] (2) "directives" issued in writing by the Attorney General and the Director of National Intelligence to an "electronic communication service provider";[34] (3) orders approving

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[32] *Id.* § 1861(f)(3) (jurisdictional provision for appellate review of FISA production and nondisclosure orders); *id.* § 1881a(i)(6)(A) (jurisdictional provision for appellate review of a FISA directive); *id.* § 1881a(j)(4)(A) (jurisdictional provision for appellate review of FISA certifications and procedures); *id.* § 1881b(f)(1) (jurisdictional provision for appellate review of an order approving the targeting of a United States person reasonably believed to be located outside the United States for the acquisition of foreign intelligence information utilizing means that constitute electronic surveillance or the acquisition of stored electronic data that requires an order under [Chapter 36 of Title 50], and conducted in the United States); *id.* § 1881c(e)(1) (jurisdictional provision for appellate review of an order approving the targeting of a United States person reasonably believed to be located outside the United States for acquisitions of foreign intelligence information utilizing other means).

[33] A "production order" is "an order to produce any tangible thing[, such as books, records, papers, and other items] under [§ 1861]," which governs the access to certain business records for foreign intelligence and international terrorism investigations. *Id.* § 1861(f)(1)(A). A "nondisclosure order" is "an order imposed under [§ 1861(d)]" to prohibit the disclosure that the Government has sought or obtained tangible things pursuant to, for example, a production order. *Id.* § 1861(f)(1)(B). We note, however, that many of the provisions in § 1861, including those authorizing judicial review and nondisclosure orders, are no longer effective, as they were subject to certain amendments that Congress allowed to expire on March 15, 2020. As a result, § 1861 now reads as it read on October 25, 2001. *See* Pub. L. 116–69, Div. B, Title VII, § 1703(a), Nov. 21, 2019, 133 Stat. 1143 (providing that, effective March 15, 2020, with certain exceptions, this section was amended to read as it read on October 25, 2001).

[34] A "directive" refers to a governmental instruction provided in writing to an electronic communication service provider to undertake certain actions relating

the "certification" and the "targeting, minimization, and querying procedures" for "acquisitions" of non-United States persons abroad;[35] and (4) orders approving the targeting of United States persons abroad to acquire foreign intelligence information.[36] The FISA also authorizes our consideration of questions of law that are certified by the FISC in certain circumstances.[37]

Furthermore, the FISA identifies the relevant parties that are authorized to file a petition for review in our Court. It makes clear, for example, that the Government may file a petition for review of a decision or order by the FISC with respect to each of the four enumerated categories mentioned above.[38] In addition to the Government, the FISA also authorizes "any person receiving" a

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to the acquisition of foreign intelligence information under § 1881a(a). *See id.* § 1881a(i)(1). And an "electronic communication service provider" refers to a "telecommunications carrier," "a provider of electronic communication service," "a provider of a remote computing service," "any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored," or "an officer, employee, or agent" of the aforementioned entities. *Id.* § 1881(b)(4).

[35] *See id.* § 1881a(g)–(h) (explaining the requirements for a "certification"); § 1881a(d)–(f) (defining the various "procedures" for acquisitions under this subsection).

[36] *See id.* § 1881b(f)(1); *id.* § 1881c(e)(1).

[37] *See id.* § 1803(j) (providing in relevant part that the FISC "shall certify for [our] review. . . any question of law that may affect resolution of the matter in controversy that the court determines warrants such review because of a need for uniformity or because consideration by [us] would serve the interests of justice").

[38] *See* ante, note 32.

production or nondisclosure "order" (*i.e.*, the first enumerated category),[39] as well as an "electronic communication service provider" receiving a "directive" (*i.e.*, the second enumerated category),[40] to file a petition for review.

There can be no question that the Movants' Petition does not fall within any of the categories of jurisdiction enumerated above. By the same token, it is equally clear that the Movants are not one of the petitioners authorized by Congress to seek review before our Court. Instead, the Movants simply assert a constitutional violation with respect to the withholding of information that the Executive has deemed classified and that is contained in FISC opinions in closed cases—cases in which the Movants were not a party. Although Congress has empowered most other federal courts to consider claims arising under the federal Constitution,[41] such as the Movants' First Amendment claim, Congress did not do so here, and, we are not aware of any statutory basis that can support our jurisdiction over the Movants' putative appeal.

B.

The Movants contend that the statute that establishes our Court, 50 U.S.C. § 1803(b), gives us jurisdiction over their Petition. That

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[39] *Id.* § 1861(f)(3). A "person" is defined as "any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power." *Id.* § 1801(m).

[40] *Id.* § 1881a(i)(6)(A).

[41] *See* 28 U.S.C. § 1331.

statute provides, in relevant part, that "[t]he Chief Justice [of the United States] shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, . . . who together shall comprise a court of review which *shall have jurisdiction to review the denial of any application made under this chapter.*"[42] The Movants assert that their Motion is an "application" that "arose under 'this chapter' because the FISC was created by, and issues opinions pursuant to authority it receives from, the [FISA]."[43] The Movants misread the provision.

1.

The phrase "application made under this chapter" in § 1803(b) generally refers to an application made by the Government *ex parte* and *in camera* for foreign intelligence surveillance. We reach this conclusion for at least four reasons.

First, because we are a court of *review*, the term "application" in § 1803(b) must be construed in light of how the same term is used in the provision that establishes the court that denies the applications that we are authorized to review. Section 1803(a)(1) provides for the creation of the FISC and states in relevant part that the FISC "shall have jurisdiction to hear applications for and grant orders approving electronic surveillance."[44] Section 1803(a)(1) also makes clear that if the

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[42] 50 U.S.C. § 1803(b) (emphasis added).

[43] Movants' Br. at 3.

[44] 50 U.S.C. § 1803(a)(1).

FISC "denies an *application for an order authorizing electronic surveillance* under this chapter," the FISC "shall provide immediately for the record a written statement of each reason for [its] decision and, on motion of the United States, the record shall be transmitted, under seal, to the court of review established in subsection (b)."[45]

Because § 1803(b) refers to the "review [of] the denial of any application under this chapter"[46] and the FISC is authorized to deny the application in the first instance, it follows that our court has jurisdiction to review the denial of those applications that the FISC has the authority to deny under § 1803(a)[47]—namely, an application for "surveillance."[48] After all, the "chapter" to which § 1803(b) refers is chapter 36 of Title 50 of the United States Code, which is entitled "Foreign Intelligence Surveillance."

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[45] *Id.* (emphasis added).

[46] *Id.* § 1803(b).

[47] As the Movants concede, the FISC did not rely on any FISA provision to establish its own jurisdiction over the Motion. To the contrary, the FISC noted that the "Movants' First Amendment right of access claim falls outside the jurisdictional provisions" of the FISA, including § 1803(a)(1). *In re Bulk Collection*, 2020 WL 897659, at *3 (relying instead on the doctrine of ancillary jurisdiction).

[48] By "surveillance," we do not refer exclusively to "electronic surveillance," but also to the various investigative techniques authorized under the FISA, including "physical searches." In other words, we use the term "surveillance" in the same manner as it is used to identify chapter 36 of Title 50 of the United States Code.

Second, as the text of § 1803(b) makes clear, our Court can only review the "denial," not the grant, of an "application."[49] That limited authorization reinforces our conclusion that the term "application" refers to applications for surveillance, and not to any request for relief relating to the FISC. Indeed, Congress's reason for authorizing review *only* in cases where an "application" is denied by the FISC is clear from the text and structure of the statute: applications are made *ex parte* and *in camera* by the Government. As a result, only the Government would have the statutory right to appeal its denial. If the application were granted, the Government would have nothing to appeal.

Third, the use of the term "application" in another subparagraph of § 1803, which authorizes the appointment of an "amicus curiae," further demonstrates that the term "application" refers to an application for surveillance under the FISA. Section 1803(i)(2)(A) requires the designation of "an individual . . . to serve as amicus curiae to assist . . . in the consideration of any *application* for an order or review that, in the opinion of the [FISC or this Court], presents a novel or significant interpretation of the law, unless the [FISC or this Court] issues a finding that such appointment is not appropriate."[50] In other words, the FISA requires the appointment of an amicus or a finding that the appointment is not appropriate only where there is: (1) an

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[49] 50 U.S.C. § 1803(b).

[50] 50 U.S.C. § 1803(i)(2)(A) (emphasis added).

"application for an order" or an "application for . . . review," (2) that "presents a novel or significant interpretation of the law."[51]

Section 1803(i)(2)(A) is premised on the principle that, since the litigation involving an "application" for electronic surveillance is *ex parte*, the FISC and this Court could benefit from having someone who can provide an independent comment on the Government's asserted interest in intelligence collection. Accordingly, that principle—namely, that having an amicus could be beneficial in light of the *ex parte* character of an application for electronic surveillance—further reinforces our conclusion that the term "application" in § 1803 refers to an application for surveillance, and not just any request for relief relating to the FISC.[52] If the FISC or this Court needs assistance from an amicus in resolving an issue of law that does not involve an "application" for surveillance, that designation could be made pursuant to § 1803(i)(2)(B)'s authorization to appoint an amicus "in

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[51] *Id.* Such "application for an order or review" could include, for example, the Government's efforts to secure an order approving the targeting of United States persons abroad to acquire foreign intelligence information, *see id.* §§ 1881b, 1881c, or to obtain the review and approval of "certification" and "procedures" for "acquisitions" of non-United States persons abroad, *id.* § 1881a.

[52] For this same reason, the Movants' argument that we are required under § 1803(i)(2)(A) to designate an individual or organization to serve as *amicus curiae* in this case, *see* Movants' Br. at 2 n.1, lacks merit. Because the Movants' Petition is not an "application" subject to our review, the mandatory-appointment requirement of § 1803(i)(2)(A) is not triggered here.

any instance [that the FISC or this Court] deems appropriate or, upon motion," regardless of whether it involves an "application" or not.[53]

Fourth, the term "application" is used in other sections in chapter 36 also to refer to *ex parte* and *in camera* applications made by the Government for surveillance. For instance, § 1804 describes the Government's applications for an order by the FISC approving electronic surveillance.[54] And § 1823 describes the Government's applications for an order by the FISC approving physical searches.[55]

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[53] 50 U.S.C. § 1803(i)(2)(B). Our earlier designation of Professor Laura Donahue as *amicus curiae* in the case that certified the question of the Movants' Article III standing—a fact relied on by the Movants in their brief, *see* Movants' Br. at 2 n.1 (citing Order at 2, *In re Certification*, FISCR No. 18-01 (Foreign Intel. Surv. Ct. of Rev. Jan. 9, 2018))—is consistent with our interpretation of the text. That designation was made pursuant to § 1803(i), which includes the discretionary-appointment provision in § 1803(i)(2)(B).

We acknowledge that the FISC invoked § 1803(i)(2)(A) to appoint Professor Donahue to assist in its disposition of the Movants' Motion, *see* Order at 2, *In re Bulk Collection*, No. Misc. 13-08 (Foreign Intel. Surv. Ct. May 1, 2018). That single citation of § 1803(i)(2)(A), however, does not undermine our foregoing analysis of the text and structure of the FISA. To be sure, the citation was likely inadvertent in light of the fact that the FISC did not conclude that the Movants' Motion was an "application" for purposes of § 1803 and, instead, relied on the doctrine of ancillary jurisdiction to adjudicate the merits of the Movants' claim. And, to be sure, the *same* appointment could have been made by the FISC pursuant to § 1803(i)(2)(B), so there was nothing improper about the FISC's designation of Professor Donahue in that instance.

[54] *See* 50 U.S.C. § 1804 (entitled "Applications for Court Orders" relating to electronic surveillance).

[55] *See id.* § 1823 (entitled "Application for Court Order" relating to physical searches).

2.

By contrast, the Movants' reading of § 1803(b) produces at least three untenable consequences. *First*, under the Movants' reading, the Court of Review would be empowered to review rulings *on the merits* that the FISC would not be empowered to make. The Movants argue that although the statute that establishes the FISC, § 1803(a)(1), authorizes that court to adjudicate *only* applications for electronic surveillance, the statute that establishes this Court, § 1803(b), authorizes our review of *any* request for relief that relates to the FISC or the FISA.[56] In other words, the Movants suggest that while the FISA authorizes the FISC to undertake the limited task of considering applications for surveillance, the FISA authorizes our Court to undertake the comparatively broader task of reviewing the denial of *any* request for relief relating to the FISC or the FISA—including a request that the FISC would lack the statutory authority to deny, whatever the request may be. This creates an anomalous situation: our reviewing authority under the FISA would exceed the FISC's adjudicatory authority under the same statute, turning our court into something more than just a specialized court of review.

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[56] *See* Movants' Br. at 3 (noting that the statute specifying the FISC's jurisdiction refers to "applications for electronic surveillance," whereas the statute specifying the Court of Review's jurisdiction refers to "any application" made under the FISA, which includes a request for "access to FISC opinions" given that the "FISC was created by, and issues opinions pursuant to authority it receives from, the [FISA]").

Second, under the Movants' reading, other provisions in § 1803 would be rendered meaningless. For example, the FISA requires an *amicus* designated by the FISC or our Court to have access to "any legal precedent, application, certification, petition, motion, or such other materials that the court determines are relevant to the duties of the amicus curiae."[57] If the Movants' Motion to the FISC or the Petition to our Court were considered an "application" for purposes of § 1803, as the Movants contend, then Congress would not have identified the term "application" as a separate category from other terms like "petition" or "motion." Only by interpreting the term "application" as we do, could terms like "petition" and "motion" preserve their ordinary meaning.

Third, under the Movants' reading, some, if not all, of the specific jurisdictional bases provided in the FISA also would be rendered meaningless or superfluous. In fact, it would make little sense for Congress to carefully delineate specific types of decisions that could be appealed by carefully delineated parties—as it did in sections 1861, 1881a, 1881b, and 1881c[58]—if any other person could appeal the denial of any request that relates to the FISC or the FISA.

C.

The Movants also argue that "Article III appellate courts [have] fashioned multiple procedural mechanisms for non-parties to assert

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[57] 50 U.S.C. § 1803(i)(6)(A)(i).

[58] *See* ante, note 32.

their constitutional access right in the first instance and to later obtain appellate review."[59] One of those mechanisms is the "collateral order doctrine, which has supplied authority to entertain appeals in other public access cases in the federal appellate courts."[60] In those cases, the doctrine was invoked to review an interlocutory order disposing of an important collateral issue prior to the final resolution of the case—*e.g.*, access to records in an ongoing criminal case.[61]

That doctrine has no application here. Among other things, there is no question that the non-specialized federal courts of appeals have jurisdiction over appeals of final and interlocutory decisions by district courts,[62] which are, in turn, empowered to consider claims arising under the First Amendment to the Constitution.[63] That is not true of specialized courts like the FISC or our Court.[64] The collateral

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[59] Movants' Br. at 5 (identifying "direct intervention," "collateral order doctrine," and the "writ of mandamus" as examples of procedural mechanisms used to consider claims for access to records in criminal cases) (collecting cases).

[60] *Id.* at 4 (collecting cases).

[61] *See, e.g., In re N.Y. Times Co.*, 828 F.2d 110, 113 (2d Cir. 1987) (explaining that the collateral order doctrine applied "since deferral of a ruling on appellants' claims until a final judgment in the underlying criminal prosecution is entered would effectively deny appellants much of the relief they seek, namely, prompt public disclosure of the motion papers").

[62] *See* 28 U.S.C. § 1291 ("Final Decisions"), *id.* § 1292 ("Interlocutory Orders").

[63] *See id.* § 1331 ("Federal-Question Jurisdiction").

[64] Our Court is not a "court of appeals" for purposes of 28 U.S.C. § 1291, which is the subject of the collateral order doctrine. *Cf.* 50 U.S.C. 1803(k)(1)

order doctrine, or any other judicially-created procedural mechanism, cannot be used to manufacture subject matter jurisdiction where none exists.

II.

To salvage their Petition, the Movants invoke the common-law doctrine of ancillary jurisdiction as an alternative jurisdictional basis for our review of the dismissal of their Motion. Under that discretionary doctrine, "a federal court may exercise ancillary jurisdiction '(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.'"[65] This "ancillary" common-law authority, while not necessarily confirmed or conferred by Congress,[66] is said to be inherent in the courts' judicial power derived from Article III of the Constitution.[67] But because this

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(providing that the Court of Review is a "court of appeals" for purposes of 28 U.S.C. § 1254, which authorizes review of a case by the Supreme Court by writ of certiorari or certification).

[65] *Peacock v. Thomas*, 516 U.S. 349, 354 (1996) (quoting *Kokkonen*, 511 U.S. at 379–80).

[66] To be sure, "Congress codified much of the common-law doctrine of ancillary jurisdiction as part of 'supplemental jurisdiction' in 28 U.S.C. § 1367." *Peacock*, 516 U.S. at 354 n.5.

[67] *See United States v. Hudson*, 11 U.S. 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution."); *accord Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980) ("The

authority lacks an explicit statutory basis and is therefore "shielded from direct democratic controls," the Supreme Court repeatedly has warned the inferior courts that this authority "must be exercised with restraint and discretion,"[68] and with "great caution."[69]

In the circumstances presented here, we decline to rely on any "ancillary" authority to consider the Movants' Petition. As a Court of Review of significantly limited powers carefully delineated by Congress, we are especially reluctant—"cautio[us]" in the admonition of the Supreme Court[70]—to consider issues beyond our jurisdictional competence on the basis of a doctrine "that can hardly be criticized for being overly rigid or precise."[71] The Movants' Petition simply does not present a circumstance that warrants the exercise of our discretionary, ancillary authority. The Movants have not been haled into court against their will, nor do they seek to assert rights in an ongoing action.[72] Nor is this an instance in which the application of our inherent

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inherent powers of federal courts are those which 'are necessary to the exercise of all others.'" (quoting *Hudson*, 11 U.S. at 34)); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 58 (1991) (Scalia, J., dissenting).

[68] *Roadway Exp.*, 447 U.S. at 764.

[69] *Ex parte Burr*, 22 U.S. 529, 531 (1824).

[70] *Id.*

[71] *Kokkonen*, 511 U.S. at 379.

[72] *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978) ("[A]ncillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he

judicial power is appropriate, let alone "necessary," to enforce one of our own mandates or orders,[73] or to protect the integrity of our own proceedings and processes.[74] Accordingly, we do not consider here, let alone decide, questions that the Movants fear would not be reviewable if their Motion were dismissed—sanctions imposed by the FISC against "government officials for misconduct," or findings of "contempt" by the Government or by electronic communication service providers,[75] both of which are much more consistent with the inherent authority recognized by the doctrine of ancillary jurisdiction.

Rather, here, the Movants filed a motion in a *new* "miscellaneous" case[76] seeking the disclosure of non-public material

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could assert them in an ongoing action in a federal court."); *accord Peacock*, 516 U.S. at 355.

[73] *Hudson*, 11 U.S. at 34 ("To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others. . . ."); *cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795–801 (1987) (recognizing the courts' inherent authority to appoint private counsel to investigate and initiate contempt proceedings for violation of an order); *Young*, 481 U.S. at 819–20 (Scalia, J., concurring in judgment) (noting that a court's inherent powers include only those "*necessary* to permit the courts to function" (emphasis added)).

[74] *Cf. Chambers*, 501 U.S. at 44–45 (explaining that among the various powers of a federal court is the power "to vacate its own judgment upon proof that a fraud has been perpetrated upon the court," to "bar from the courtroom a criminal defendant who disrupts a trial," and "to fashion an appropriate sanction for conduct which abuses the judicial process" (collecting cases)).

[75] Movants' Br. at 4.

[76] *In re Bulk Collection*, No. Misc. 13-08.

which has been deemed classified *by the Executive Branch* and to which the Movants have not established a factual connection.[77] Because the crux of the Movants' claim to disclosure here lies within the Executive's clear authority to determine what material should remain classified, we recall the Supreme Court's admonition that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion."[78]

In the absence of a clear grant of reviewing authority in the FISA or a need to protect the integrity of our own judicial processes, respect for the separation of powers dictates that we dismiss the Petition for lack of jurisdiction, as we "have no business deciding" the merits of the Movants' constitutional claim.[79]

III.

Perhaps recognizing that the FISA does not authorize their Petition for Review in this instance, the Movants also characterize their Petition as one seeking, in the alternative, the extraordinary writ of

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[77] To clarify, we do not consider or decide here whether the Movants have a cause of action in a federal district court against an executive agency for the disclosure of the relevant non-public material that the Executive Branch has determined to be classified. We note that the Government has acknowledged that the Freedom of Information Act, 5 U.S.C. § 552, may provide for judicial review of a claim seeking access to such material. *See* Government's Br. at 10.

[78] *Chambers*, 501 U.S. at 44 (citing *Roadway Exp.*, 447 U.S. at 764).

[79] *Cuno*, 547 U.S. at 341.

mandamus. This alternative effort to establish jurisdiction fares no better.

The common-law writ of mandamus directed at a lower court is codified in the All Writs Act[80] and in our Rules of Procedure.[81] The writ is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'"[82] And "only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion will justify the invocation of this extraordinary remedy"[83] for the purpose of confining a lower court "to a lawful exercise of its prescribed jurisdiction."[84]

In the nature of things, the writ is available only to assist an existing basis for jurisdiction. Indeed, "the action must . . . involve subject matter to which our appellate jurisdiction could in some manner, at sometime, attach," and to which "the issuance of the writ

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[80] "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added).

[81] "All writs that may be issued by United States courts of appeals shall be available to the FISCR." FISCR. Proc. 8.

[82] *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

[83] *Id.* (internal quotation marks and citations omitted).

[84] *Id.* (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)).

might assist."[85] The Movants recognize this point by conceding that the "All Writs Act does not provide 'an independent grant of appellate jurisdiction,'" and that "courts may only consider mandamus petitions if 'an independent statute . . . grants [the court] jurisdiction.'"[86] But as noted, the Movants have not identified an independent basis for subject matter jurisdiction over their Petition.[87] And our Rules of Procedure, which are said to authorize the issuance of the writ by

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[85] *United States v. Christian*, 660 F.2d 892, 894 (3d Cir. 1981) (quoting *United States v. RMI Co.*, 599 F.2d 1183, 1186 (3d Cir. 1979)); *accord Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018) (citing *Marbury v. Madison*, 5 U.S. 137, 175 (1803)); *In re Al Baluchi*, 952 F.3d 363, 367–68 (D.C. Cir. 2020).

[86] Movants' Br. at 8 (quoting *In re al-Nashiri*, 791 F.3d 71, 75–76 (D.C. Cir. 2015) (internal citations and quotation marks omitted)).

[87] The Movants cite two other provisions of the FISA to assert that we have subject matter jurisdiction to consider their mandamus petition: (1) § 1803(g)(1), which authorizes the court to establish rules and procedures and to "take such actions . . . as are reasonably necessary to administer [its] responsibilities under this chapter [36]"; and (2) § 1803(j), which establishes a certification procedure for certain questions of law and which the FISC invoked to ask this Court to answer the question relating to the Movants' Article III standing. *See* Movants' Br. at 9.

Neither section provides an independent basis for subject matter jurisdiction in this instance. Section 1803(g)(1), by its own terms, does not create subject matter jurisdiction over any kind of case, let alone over an action involving a party that has not received any FISA process. And § 1803(j) only authorizes the FISC to certify certain questions of law to our Court; it does not create an independent basis of reviewing authority over cases that fall outside of our own subject matter jurisdiction. Even if it did, the Movants have not relied upon the certification procedure in this case. To be sure, when we accepted the FISC's certification relating to the Movants' Article III standing, we only agreed to answer the question certified to us and specifically refused to consider if there was subject matter jurisdiction over the Motion. *See In re Certification*, 2018 WL 2709456, at *7.

impliedly referring to the All Writs Act,[88] certainly do not provide that jurisdictional basis.

In sum, we lack jurisdiction to grant the extraordinary relief that the Movants request.

CONCLUSION

As Judge Collyer aptly observed in an earlier proceeding, our faithful adherence to Congress's limited mandate requires that we decline the Movants' invitation to "expand [our own] jurisdiction" in a way that is contrary to so many "statutory provisions that limit [our] jurisdiction to a specialized area of national concern,"[89]—that is, the "governmental electronic surveillance of communications for foreign intelligence purposes."[90]

Because the Movants' Petition falls outside of the class of cases that Congress carefully identified as being subject to our reviewing authority, the March 10, 2020 Petition is **DISMISSED** for lack of jurisdiction.

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[88] *See* ante, note 81.

[89] *In re Opinions & Orders*, 2017 WL 5983865, at *21 (Collyer, P.J., dissenting).

[90] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013).