Docket No. 18-01

IN THE

United States Foreign Intelligence Surveillance Court of Review

Washington, D.C.

IN RE: CERTIFICATION OF QUESTIONS OF LAW TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

Upon Certification for Review by the
United States Foreign Intelligence Surveillance Court

MOVANTS' REPLY BRIEF

David A. Schulz
Hannah Bloch-Wehba
John Langford
MEDIA FREEDOM & INFORMATION ACCESS CLINIC
ABRAMS INSTITUTE
Yale Law School
P.O. Box 208215
New Haven, CT 06520
Phone: (203) 436-5827
Fax: (203) 432-3034
david.schulz@ylsclinics.org

Alex Abdo
Jameel Jaffer
KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY
475 Riverside Drive, Suite 302
New York, NY 10115
Phone: (646) 745-8500
alex.abdo@knightcolumbia.org

Patrick Toomey
Brett Max Kaufman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
ptoomey@aclu.org

Arthur B. Spitzer
Scott Michelman
AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA
915 15th Street, N.W., 2nd floor
Washington, D.C. 20005
Phone: (202) 457-0800
Fax: (202) 457-0805
aspitzer@acludc.org

Counsel for Movants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

In the court below, the government argued principally that Movants had failed to establish that denying them access to the requested records would cause them an injury-in-fact. The government now abandons that argument in favor of three others.

First, on standing, the government abandons the theory advanced by the initial single-judge FISC opinion and the en banc dissent: that Movants lack standing unless they demonstrate that they are entitled to prevail on the merits. Instead, the government argues that Movants' First Amendment claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), that Movants' standing is essentially beside the point. *See* Gov't Br. 14–18. This bit of linguistic legerdemain is unavailing; the government is still wrongly conflating standing and the merits. In any event, Movants' claim is far from frivolous. Courts have entertained and upheld claims for public access to judicial records in many contexts, including in those relating to national security.

Second, the government attacks the FISC's jurisdiction over the motion based on the FISA statute and the Freedom of Information Act ("FOIA"), but those attempts also fail. Courts, including the FISC, have inherent power over their records, and accepting the government's strained reading of the FISA statute

would raise serious constitutional concerns. Moreover, Congress did not (as the government contends) strip this power through FOIA, which does not even apply to court records.

And third, the government argues that it is entitled to a favorable ruling on the merits even if Movants have standing. Because the merits question has not been certified to this Court, the argument is improperly presented and Movants do not respond to it. If the Court would like Movants to address it, Movants respectfully request that the Court permit them to do so in a supplemental brief.

ARGUMENT

I. THE GOVERNMENT'S CONTENTION THAT MOVANTS' CLAIM IS FRIVOLOUS RELIES ON A CARICATURE OF MOVANTS' CLAIM.

The government argues that Movants' claim is frivolous and that accordingly the standing issue is beside the point. To describe Movants' claim this way, however, the government must distort it beyond recognition.

The government relies on a line of cases relating to claims that are so utterly insubstantial that the courts lack jurisdiction even to consider them. This line of cases is implicated, however, only where the argument in question has been definitively rejected by the Supreme Court. *See Steel Co.*, 523 U.S. at 89; *Bell v. Hood*, 327 U.S. 678, 684 (1946); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 849–50 (D.C. Cir. 2010). Even when an argument has been rejected by

the Supreme Court, claims are squarely foreclosed only if their "unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Hagans v. Lavine*, 415 U.S. 528, 538 (1974). "[P]revious decisions that merely render claims of doubtful or questionable merit" do not squarely foreclose them. *Id.* This limitation has applied extraordinarily infrequently—and for good reason, lest claims to reconsider precedent, *see, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), be shut out of court at the threshold.

This line of cases plainly has no application here. Many courts have held that judicial opinions are subject to a First Amendment right of access. *Doe v. Pub. Citizen*, 749 F.3d 246, 265, 267–69 (4th Cir. 2014). Many other appellate decisions have likewise recognized that judicial opinions are presumptively public. *See, e.g.*, *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("[I]t should go without saying that the judge's opinions and orders belong in the public domain."); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny."); *accord Hardy v. Equitable Life Assurance Soc'y*, 697 F. App'x 723, 725 (2d Cir. 2017); *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006); *Pepsico, Inc. v. Redmond*, 46 F.3d 29, 31 (7th Cir. 1995)

(Easterbrook, J., as motions judge). Indeed, as this Court's appointed amicus chronicles, access to judicial opinions is part of a deep Anglo-American legal tradition grounded in the recognition that individuals should have access to the official documents—including judicial opinions—that set forth and interpret the law. Br. of Amicus Curiae Laura Donohue 14–19, 24–27.[1]

Attempting to avoid this law and history, the government attacks a straw man: a freewheeling right to access FISC proceedings and classified information in general. But that formulation badly mischaracterizes Movants' actual claim. Movants' argument is focused narrowly on judicial *opinions*—and even with respect to those opinions, Movants acknowledge that compelling government interests may justify redaction in some instances. Though the government obscures it, Movants' argument is simply that the FISC's judicial opinions may be withheld from the public only when and to the extent that a compelling government interest requires it—that is, when redaction or withholding is essential to preserve higher values, when there are no reasonable alternatives, and when redaction or withholding is narrowly tailored. *Press-Enter. II*, 478 U.S. at 13–14; *see* Movants'

[1] The government characterizes Movants' focus on judicial opinions as a "misframing of the issue," but the government is wrong. Gov't Br. 16. The authorities cited by the Court's amicus curiae make clear that Movants' focus under the test articulated in *Press-Enterprise Co. v. Superior Court* (*Press-Enter. II*), 478 U.S. 1, 13–14 (1986), is the correct one. In any event, at the very least, these authorities render the government's "frivolousness" argument inert, and lay bare as premature its attempt to induce this Court to skip to the merits here.

Br. 25–26 (citing cases). There can be no serious argument that Movants' claim, properly understood, is frivolous.

The possibility that the First Amendment might require the release of information in the FISC's opinions is neither outlandish nor unusual, as the government suggests. All four of the opinions at issue have now been partially released with redactions following a declassification review. *See* Movants' Br. 3–4. Congress, in the USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268 (2015), *directed* the government to publicly release significant opinions of the FISC and this Court "to the greatest extent practicable." 50 U.S.C. § 1872.[2] Nor is the government justified in suggesting that the decision of whether to release judicial opinions should be left entirely to the executive branch. The courts have repeatedly recognized that the decision as to whether and to what extent judicial opinions can be withheld from the public is a decision that belongs to the judiciary, not the executive—and the fact that judicial opinions may contain classified information does not change the analysis. *See In re Wash. Post Co.*, 807 F.2d 383, 390–92 (4th Cir. 1986) (classified information); *In re Search Warrant for Secretarial Area*, 855 F.2d 569, 572–75 (8th Cir. 1988) (sealed search warrants); *see generally N.Y.*

[2] The government's position is that its statutory disclosure obligation does not apply to opinions that predate the Act's passage on June 2, 2015. Regardless, the salient point for present purposes is that Congress itself views the release or partial release of FISC opinions as desirable.

Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713 (1971) (per curiam). Likewise, the Court of Military Appeals applies independent judicial review when the government seeks to limit public access to military tribunals for national security reasons. *See United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985); *United States v. Grunden*, 2 M.J. 116, 122 (C.M.A. 1977) (subsequent history omitted).

The government's argument comes down to a claim that its classification authority so completely supplants the FISC's authority over its own judicial opinions that it renders Movants' First Amendment claim a dead letter. That is plainly wrong. The FISC has an important and constitutionally mandated role to play in ensuring that the government does not keep portions of these opinions secret where that secrecy cannot be justified. *See, e.g.*, *In re Orders of this Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02, 2014 WL 5442058, at *3 (FISC Aug. 7, 2014). The FISC has its own specialized knowledge of the national-security sensitivities involved in its rulings, and it has established processes for carefully weighing the government's claims—it plainly has the competence to evaluate the government's justifications for withholding legal analysis from the public. Indeed, as indicated above, the application of the First Amendment right of access in contexts involving national security is nothing new.

See Movants' Br. 27–29. There is no question that Movants have standing to ask the FISC to apply that right of access here.

II. NEITHER THE FISA STATUTE NOR THE FREEDOM OF INFORMATION ACT DEPRIVES THE FISC OF JURISDICTION.

For the first time, the government contends on appeal that the FISC lacks subject-matter jurisdiction to entertain Movants' access motion, either because Congress did not explicitly grant the FISC power to hear such motions or because it intended FOIA as a substitute. Neither argument withstands scrutiny.

A. Courts, including the FISC, have inherent authority to entertain claims for access to their records.

Like every Article III court, the FISC has inherent power to adjudicate a claim to access its records. "[C]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quotation marks omitted). Among those inherent powers, "[e]very court has supervisory power over its own records and files"—a power that includes entertaining claims for access to court records. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *see Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004).

The FISC is no exception. The "FISA court retains all the inherent powers that any court has." *Matter of Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985),

aff'd, 788 F.2d 566 (9th Cir. 1986). Indeed, Congress recognized as much in FISA, providing that the FISC "may establish such rules and procedures, and take such actions, as are reasonably necessary to administer [its] responsibilities under this chapter," 50 U.S.C. § 1803(g)(1). FISC Rule 62 preserves the court's power to exercise control over its records, and the FISC has recognized its inherent power to entertain a motion for access to those records. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486–87 (FISC 2007).

The government does not seriously dispute either the FISC's inherent power to control its records or its jurisdiction to adjudicate third-party claims of access. Instead, it contends that the FISC's inherent power extends only to cases "before it," not to "new cases." Gov't Br. 23–24. But the courts' power to adjudicate claims for access to their records derives from their authority and control over those records and thus persists even after the underlying dispute has ended. *See, e.g.*, *Carlson v. United States*, 837 F.3d 753, 756–57 (7th Cir. 2016) (adjudicating request to unseal 70-year-old grand jury records). "So long as [records] remain under the aegis of the court, they are superintended by the judges who have dominion over the court." *Gambale*, 377 F.3d at 141. Courts thus routinely

entertain motions to intervene and to unseal judicial records after a case has been resolved.[3]

The government's argument reduces to the formalistic claim that the FISC lacks jurisdiction simply because Movants did not style their motion as one to intervene in a particular case. Gov't Br. 24. But if the FISC has jurisdiction to entertain Movants' access request through separate intervention motions, then the FISC also has jurisdiction to entertain the combined request made here. Moreover, the government's form-over-substance argument is plainly impractical, given the obstacles to identifying individual cases in the FISC.

B. FOIA does not, and could not, strip the FISC of jurisdiction to entertain claims for access to its records.

The government is also wrong that Congress interposed FOIA as the only vehicle for seeking access to FISC opinions. In fact, Congress carefully limited FOIA's disclosure mandates to "agency" records, 5 U.S.C. § 552(a)(1)–(3), and made clear that an "agency" subject to FOIA "does *not include* . . . the courts of the United States," *id.* § 551(1) (emphasis added). FOIA plainly "was not intended to restrict the federal courts—either by mandating disclosure or by requiring non-

[3] *See, e.g., Pub. Citizen*, 749 F.3d at 253 (directing district court to unseal records requested in post-judgment motion); *Oregonian Pub. Co. v. U.S. District Court*, 920 F.2d 1462, 1468 (9th Cir. 1990) (directing district court to unseal plea agreement after defendant pleaded guilty and was sentenced); *United States v. Alcantara*, 396 F.3d 189, 201 (2d Cir. 2005) (remanding criminal case for new plea and sentencing hearing after objection to closed proceedings).

disclosure" of judicial records. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983); *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 672 (D.C. Cir. 2017).

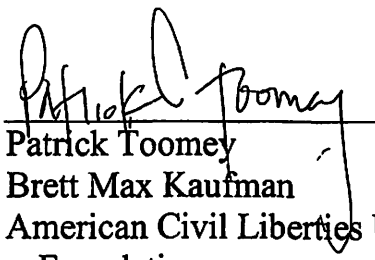
Nor could the statutory disclosure procedures of FOIA displace the public's First Amendment right of access to court records, even if Congress had so intended. "Obviously, a statute cannot override a constitutional right." *In re N.Y. Times Co.*, 828 F.2d 110, 115–16 (2d Cir. 1987) (Wiretap Act does not supplant First Amendment access right). In addition, to hold that FOIA has displaced the FISC's Article III authority over its own records would also raise separation-of-powers concerns by preventing courts from exercising authority over access to their own precedential opinions—*the* quintessential judicial documents—and reassigning that authority to the executive branch. That result would run afoul of the foundational principle that the "'judicial Power of the United States' must be reposed in an independent Judiciary." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59–60 (1982) (quoting U.S. Const., art. III, § 1). One would not expect Congress to test the boundaries of the Constitution's division of power "without saying so." *Metlife, Inc.*, 865 F.3d at 675. It did not do so, in FISA or in FOIA.

CONCLUSION

The Court should affirm the judgment that Movants have standing.

Dated: March 5, 2018

Respectfully submitted,



Patrick Toomey
Brett Max Kaufman
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
ptoomey@aclu.org

Arthur B. Spitzer
Scott Michelman
American Civil Liberties Union of the District of Columbia
915 15th Street, N.W., 2nd floor
Washington, D.C. 20005
Phone: (202) 457-0800
Fax: (202) 457-0805
aspitzer@acludc.org

Counsel for Movants

David A. Schulz
Hannah Bloch-Wehba
John Langford
Media Freedom & Information Access Clinic*
Abrams Institute
Yale Law School
P.O. Box 208215
New Haven, CT 06520
Phone: (203) 436-5827
Fax: (203) 432-3034
david.schulz@ylsclinics.org

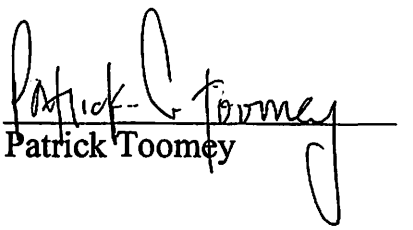
Alex Abdo
Jameel Jaffer
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
Phone: (646) 745-8500
alex.abdo@knightcolumbia.org

* This memorandum has been prepared with the assistance of Yale Law School students, Meenakshi Krishnan ('18) and Paulina Perlin ('19). This brief does not purport to present the institutional views of Yale Law School, if any.

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation set out in the Order of the Foreign Intelligence Surveillance Court of Review dated January 9, 2018, 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.



Patrick Toomey

CERTIFICATE OF SERVICE

I, Patrick Toomey, certify that on this day, March 5, 2018, a copy of the foregoing brief was served on the following persons by the methods indicated:

By email and UPS delivery

Maura L. Peterson
Litigation Security Group
U.S. Department of Justice
2 Constitution Square
145 N Street, N.E.
Suite 2W-115
Washington, DC 20530
Maura.L.Peterson@usdoj.gov

By email and UPS delivery

Jeffrey Smith
Counsel, Appellate Unit
U.S. Department of Justice
National Security Division
950 Pennsylvania Ave., N.W.
Washington, DC 20530
Jeffrey.Smith5@usdoj.gov

By email and UPS delivery

Laura Donohue
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, DC 20001
ldk@georgetown.edu

By email and UPS delivery

Caitlin Vogus
Reporters Committee for Freedom of the Press
1156 15th St. N.W.

Suite 1250
Washington, DC 20005
cvogus@rcfp.org

Patrick Toomey