Filed
United States Foreign Intelligence
Surveillance Court of Review

MAR 0 5 2018

LeeAnn Flynn Hall, Clerk of Court

2:23 p.m.

FISCR 18-01

IN THE UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

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

ON CERTIFICATION FOR REVIEW BY THE UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT
MISC. 13-08 (Collyer, Presiding Judge)

UNITED STATES' REPLY BRIEF

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INTRODUCTION

The en banc FISC's conclusion that movants established Article III standing was premised on a finding that the mere assertion of a right of access to FISC proceedings is sufficient to support standing, no matter "how novel or meritless the claim may be." *In re Opinions & Orders of This Court*, 2017 WL 5983865, at *6 (FISA Ct. Nov. 9, 2017). Movants have now conceded that the FISC's premise was erroneous. Movants' Op. Br. 10 (conceding that to support standing a claim must be "non-frivolous"); *id.* at 22 (conceding that "unorthodox or frivolous" claims may not be "judicially cognizable").

That concession, however, is incomplete. Not only frivolous or unorthodox claims, but also claims that are "insubstantial, implausible, . . . or otherwise completely devoid of merit," fail the standing inquiry. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). While this jurisdictional bar is not high, movants fail to clear it here for two independent reasons. First, the constitutional right of access that they assert does not even arguably apply to FISC proceedings, as the relevant Supreme Court caselaw demonstrates; their assertion of such a right is therefore insubstantial. Second, the remedy movants seek—that FISC judges publicly disclose classified national security information based on their own assessments of national security needs using a standard considerably less protective

of national security than that used by the Executive Branch—does not flow from a First Amendment right of access even in proceedings, unlike those in the FISC, where that right applies. To the contrary, movants' attempt to transfer constitutional national security functions from the Executive to the judiciary is completely devoid of merit.

ARGUMENT

I. Movants Have Failed To Establish Article III Standing

Whether a plaintiff asserting a right of access to court proceedings can establish Article III standing depends on whether the plaintiff states a legal claim that is substantial, plausible, and not completely devoid of merit. *Compare Carlson v. United States*, 837 F.3d 753, 758 (7th Cir. 2016) (plaintiff established standing because he raised "a colorable claim of a right to obtain access"), *with Bond v. Utreras*, 585 F.3d 1061, 1073-74 (7th Cir. 2009) (plaintiff lacked standing because she had not asserted a "colorable *claim* to such a right") (quotation marks omitted; emphasis in original).[1] Movants have not stated such a claim.

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[1] Movants relegate *Bond v. Utreras* to a footnote and imply that it was overruled or disagreed with by *Carlson*. Movants' Op. Br. 14 n.14. It was not. As the *Carlson* court concluded: "Our decision in *Bond v. Utreras* is not to the contrary—indeed, it supports this position." 837 F.3d at 760. The different standing rulings in the two cases resulted solely from the fact that the legal claim in *Carlson* was "colorable," while the legal claim in *Bond v. Utreras* was not. 837 F.3d at 760. Movants identify no case outside the FISC in which any court has

A. The Claim of a First Amendment Right of Access to FISC Proceedings and Records Is Insubstantial

The government demonstrated in its opening brief that there is no substantial argument that the First Amendment right of access recognized in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), applies to the FISC. Gov't Op. Br. 16-18. The proceedings that Congress has assigned to the FISC do not meet either the experience or logic tests laid out by the Supreme Court. *See id.*

To avoid the implausible argument that FISC proceedings meet either of the *Press-Enterprise* tests, movants seek to rewrite the inquiry from one that examines the pertinent "place and process," *Press-Enterprise*, 478 U.S. at 8, to a test focused on "the category of document" sought. Movants' Op. Br. 26 (emphasis omitted). This sleight of hand is unavailing. The test for whether a particular document is subject to a right of access is whether that document relates to a *proceeding* where the right applies. *See In re Application of the United States for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 707 F.3d 283, 290-92 (4th Cir. 2013) (holding that Stored Communications Act orders and related documents are not subject to a First

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recognized standing to pursue a claim as insubstantial as the one asserted here. Moreover, none of the right-of-access Supreme Court cases cited by movants address Article III standing. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.").

Amendment public right of access because the associated "proceedings" are not subject to that right).[2]

In some instances, there may be a reasonable dispute as to the nature of the proceedings with which a document is associated. *Compare, e.g., In re Search Warrant for Secretarial Area*, 855 F.2d 569, 573 (8th Cir. 1988) (holding that qualified right of access attaches to search warrant applications because they are "part of a criminal prosecution"), *with Times Mirror Co. v. United States*, 873 F.2d 1210, 1217 (9th Cir. 1989) (holding that there is no qualified right of access to search warrant applications because they relate to "warrant *proceedings*," which are not subject to a public right of access) (emphasis in original). But here, there is no such dispute—it is clear that FISC proceedings, based on both "experience" and "logic" pursuant to congressional design, are not subject to a First Amendment public right

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[2] The cases relied on by movants are not to the contrary. *See Doe v. Public Citizen*, 749 F.3d 246, 267 (4th Cir. 2014) (First Amendment right of access applies to summary judgment proceedings and associated documents); *Lugosch v. Pyramid Co.*, 435 F.3d 110, 124 (2d Cir. 2006) (right applies to "civil proceedings," including "adjudication" by "summary judgment") (quotation marks omitted); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1029-31 (11th Cir. 2005) (advisory opinion based on "supervisorial authority" stating that right applies to docket sheets concerning "criminal proceedings"); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93-94 (2d Cir. 2004) (holding that "the right to inspect documents derives from the public nature of particular tribunals"); *Rushford v. New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir. 1988) (right applies to filings relating to summary judgment proceedings).

of access. *See* Gov't Op. Br. 16-18. Thus, a claim by non-parties and members of the public[3] of a right to access documents associated with classified FISC proceedings is insubstantial and therefore insufficient to support Article III standing.

B. The Demand that the FISC Release Classified Information Based on Its Own Independent National Security Judgments Is Completely Devoid of Merit

Even in proceedings where it applies, the First Amendment right of access does not require the publication or disclosure of classified information contained in judicial opinions arising out of such proceedings. *E.g.*, *New York Times Co. v. Dep't of Justice*, 806 F.3d 682, 687-88 (2d Cir. 2015); *see also id.* at 690; Gov't Op. Br. 19-20 (citing cases). Indeed, movants cite no case where a court has found a right of public access to classified information contained in any judicial document. Movants baldly assert that "courts have not hesitated to review claims of access involving classified information," Movants' Op. Br. 27, but they cite only one case that relates to classified information—one that does not support their assertion. In that case, the Fourth Circuit held that a district court must follow "procedural requirements," including making factual findings, before it closes a plea hearing. *In re Washington Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986). The court of appeals

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[3] Movants are not intervenors in a pre-existing action, nor would they have any right to be. *See In re Proceedings Required by § 702(i) of FISA Amendments Act of 2008*, 2008 WL 9487946, at *4-5 (FISA Ct. Aug. 27, 2008).

did not doubt that, after following the proper procedures, a district court could close a hearing to avoid "dangerous consequences [that] may result from the inappropriate disclosure of classified information." *Id.* at 391. Of course, unlike plea hearings, FISC proceedings under FISA are closed to the public by statutory requirement. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 487-90 (FISA Ct. 2007) (describing secrecy provisions of FISA).[4]

Finally, movants' brief fails to acknowledge the reassignment of constitutional powers they seek. Movants would place in the FISC the power to make independent national security judgments and to order the release of information that the Executive Branch has properly classified pursuant to its constitutional power. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 527-29 (1988). As the government explained in its opening brief, this claim of unilateral FISC power

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[4] Movants also assert that in "prior FISC cases," "the FISC expressly held that the movants had standing" to seek access. Movants' Op. Br. 27. But neither case cited by movants supports this assertion, as neither discussed Article III standing. *See In re Proceedings Required by § 702(i) of FISA Amendments Act of 2008*, 2008 WL 9487946 (FISA Ct. Aug. 27, 2008); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007). The only FISC opinions that have addressed Article III standing in this context are Judge Saylor's 2013 opinion, which movants conceded below was incorrect, *see* Motion 11 n.27, and the opinions in this case.

to override the Executive's classification decisions is completely devoid of merit. *See* Gov't Op. Br. 20-22.[5]

II. Amicus Donohue's Brief Does Not Establish Movants' Standing

Substantial portions of Amicus Donohue's brief are devoted to the common law right of access, a doctrine that is distinct from the First Amendment right of access relied on by movants. *See* Donohue Op. Br. 10-19; *see also, e.g., In re Application*, 707 F.3d at 290 (discussing differences between the two doctrines). As the government explained in its opening brief, *see* Gov't Op. Br. 4-5, the FISC, in an earlier opinion, found that the common law right of access does not apply to FISC proceedings and records. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 490-91 (FISA Ct. 2007). In this case, movants do not assert a common law claim; they rely entirely on the First Amendment.

Amicus Donohue ultimately reaches the First Amendment claim and accurately observes that "the test is 'whether the place and process have historically been open to the press and general public,' and 'whether public access plays a

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[5] Movants' argument that the inquiry required by *Steel Co.* "would essentially bar novel legal claims from the courts," Movants' Op. Br. 21, is incorrect. The jurisdictional flaw here is not the novelty of movants' claim; it is the claim's complete insubstantiality. Movants assert a longstanding and well-defined right in a context where, under Supreme Court caselaw, that right clearly does not apply.

significant positive role in the functioning of the particular process in question.'" Donohue Op. Br. 23 (quoting *Press-Enterprise*, 478 U.S. at 8-10). She then concedes that proceedings "undertaken by [the] FISC[] are necessarily ex parte," *id.* (quotation marks omitted), a correct observation that answers the *Press-Enterprise* questions in a way that precludes a First Amendment right of access.

Amicus Donohue attempts to elide the necessary implication of her analysis by drawing a distinction between opinions, which she argues are at issue here, and orders, which she claims are not being sought. *Id.*; *see also id.* at 8 ("Movants are *not* seeking access to applications, orders, or proceedings.") (emphasis in original). But this is a distinction without a difference, as movants' claim applies equally to opinions and orders. Their motion before the FISC was "for the release of court records" and was captioned by movants as *In re Opinions & Orders of This Court Addressing Bulk Collection of Data under* [*FISA*]. The documents responsive to movants' motion include orders as well as opinions. *See* Amicus Appendix 266 ("Opinion and Order"), 359 ("Primary Order"), 405 ("Primary Order").

Amicus Donohue asserts that the "[f]ailure to recognize Movant[s'] right of access would undermine rule of law" and the "[f]ailure to find standing would enable executive branch malfeasance and override separation of powers." Donohue Op. Br. 24, 27. To the contrary, the system that Congress established in FISA plays a

crucial role in maintaining the rule of law and in providing judicial oversight of the Executive Branch in conformance with the separation of powers. For that system to function properly, the government must be able to share classified national security information with the FISC secure in the understanding that such information will be protected from public disclosure, which could aid our adversaries and undermine our national security. And the FISC must be able to use that information, including by describing and discussing it in the FISC's opinions and orders, without compromising the secrecy necessary to our national security. As the FISC recognized in 2007, the right of access claimed by movants would threaten "the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decisionmaking and effective oversight." *In re Motion for Release*, 526 F. Supp. 2d at 495-96. Indeed, it is movants' position, not the government's, that would create "a real risk of harm to national security interests and ultimately to the FISA process itself." *Id.* at 491.

III. This Court Should Decide the Entire Matter in Controversy

As Amicus Donohue observes, in the posture of this case, the standing "inquiry engages the merits." Dohohue Op. Br. 2. In the event that this Court finds that movants' claim might clear the *Steel Co.* substantiality bar, this Court should exercise its authority under 50 U.S.C. § 1803(j) to determine whether the FISC

lacked statutory subject-matter jurisdiction over this case (which would avoid the adjudication of constitutional issues, *see* Movants' Op. Br. 20) and, if necessary, to resolve the merits. *See* Gov't Op. Br. 22-28. This case has been pending for four and a half years, and it is one of three pending cases raising identical legal issues in the FISC. The FISC, the government, and movants need a final determination that only this Court can provide.

CONCLUSION

For the reasons stated above and in the government's opening brief, this Court should order this case dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length requirement set forth in the Court's January 9, 2018 Order as the brief is 10 pages long.

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

/s/ Jeffrey M. Smith
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing United States' Reply Brief was mailed via Federal Express this 5th day of March, 2018 to counsel of record listed below, and that, on the same day, the foregoing brief was electronically mailed to ptoomey@aclu.org, bkaufman@aclu.org, and lkdonohue@georgetown.edu.

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