Docket No. 20-02

IN THE

United States Foreign Intelligence Surveillance Court of Review

Washington, D.C.

IN RE OPINIONS AND ORDERS OF THE FISC CONTAINING NOVEL OR SIGNIFICANT INTERPRETATIONS OF LAW

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

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union is a non-profit corporation. It has no parent corporations and does not issue stock. As a result, Movant does 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

Despite a line of decisions from the Foreign Intelligence Surveillance Court ("FISC") uniformly holding that the FISC has jurisdiction to entertain a motion for the release of its records,[1] the court recently reversed course—holding that it lacked jurisdiction to hear Movant's motion for release of opinions containing novel or significant interpretations of law. *See* No. Misc. 16-01, 2020 WL 5637419 (FISC Sept. 15, 2020). This Court has subject-matter jurisdiction to review that ruling.

The Foreign Intelligence Surveillance Act ("FISA") gives this Court jurisdiction to hear petitions from the denial of "application[s]," 50 U.S.C. § 1803(b), including Movant's motion. But even if the statute did not, the FISC's and FISCR's inherent authority over their own judicial records—as Article III courts—places this petition squarely within both the ancillary and mandamus jurisdiction of this Court. A court's supervisory power over its own opinions is so fundamental to its judicial function that it would violate the separation of powers for Congress to strip the FISC and FISCR of jurisdiction to consider motions for access to their opinions. Moreover, denying Movant a forum in which to claim a First Amendment right of access to the FISC's and FISCR's opinions would raise a "serious constitutional question." *Webster v. Doe*, 486 U.S. 592, 603 (1988). But

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[1] *E.g.*, *In re Opinions & Orders of this Court Addressing Bulk Collection*, No. Misc. 13-08, 2020 WL 897659, at *3–*6 (FISC Feb. 11, 2020); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486–87 (FISC 2007).

that is the implication of the FISC's ruling and this Court's prior decision in *In re Opinions & Orders by the FISC Addressing Bulk Collection*, 957 F.3d 1344 (FISCR 2020).

The FISCR should clarify or revisit its prior ruling. The FISCR's holding that it lacked appellate jurisdiction over a motion for release of FISC records did not closely examine either the FISC's or the FISCR's inherent powers as Article III tribunals, nor did it fully consider the constitutional implications of its holding. *Compare In re Opinions*, No. Misc. 13-08, 2020 WL 897659, at *4. Alternatively, the jurisdictional questions raised by this litigation are of such consequence that the Court should certify them to the Supreme Court. *See* 50 U.S.C. § 1803(k).

ARGUMENT

I. FISA grants this Court jurisdiction to review the dismissal of Movant's access motion.

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 indiscriminately of whatever kind."). Movant's 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, FISA.

The Court rejected this reading of the statute in *In re Opinions*, 957 F.3d at 1351. Movant respectfully submits that the Court's interpretation is inconsistent with the statute as a whole. Where Congress intended to refer only to applications "for electronic surveillance," it was specific. *See, e.g.*, 50 U.S.C. § 1803(a)(1) ("application for electronic surveillance"). By contrast, the term "any application made under this chapter" encompasses applications like Movant's. *Id.* § 1803(b). Indeed, the Court's narrow reading of "any application" is likely to frustrate appellate review in ways Congress could not have intended. For example, that reading could prevent the government from appealing a variety of FISC orders, such as orders exercising the FISC's discretion to publish its opinions, and orders sanctioning government officials for misconduct. Similarly, a narrow reading of "application" could 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.

More generally, Congress intended the FISC and FISCR to have jurisdiction over matters—like Movant's motion for access or like a motion for contempt—that are inextricably intertwined with the FISC's proceedings. *See id.* § 1803(g)(1) (authorizing the FISC and FISCR to "take such actions, as are reasonably necessary to administer their responsibilities under this chapter"); *id.* § 1803(h).

If FISA leaves any doubt as to this Court's statutory authority to review the

FISC's jurisdictional holding, the Court can resolve that doubt by analogy 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, permitting appeals from interlocutory 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." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

This Court has reasoned that the collateral-order doctrine applies solely to the jurisdiction conferred by § 1291. *In re Opinions*, 957 F.3d at 1355. But nothing about the Supreme Court's reasoning was limited to § 1291, and the same practical considerations should guide this Court's interpretation of § 1803. Namely: 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." *Cohen*, 337 U.S. at 546.

II. This Court also has ancillary jurisdiction.

As Article III courts, the FISC and FISCR have inherent supervisory power

over their own records and dockets. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). That power is especially essential to the FISC and FISCR in light of the sensitive nature of their proceedings. Given the need to ensure uniform rules for public access, the FISCR necessarily has ancillary jurisdiction to review a FISC ruling on a motion for access to court records.

Federal courts may exercise ancillary jurisdiction over claims outside of their explicit statutory grants when doing so "enable[s]" them "to function successfully." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 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.

A court's control over its own opinions, records, and proceedings is "fundamental." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004). Yet the FISCR's prior ruling concluded that a motion for access to FISC opinions was too far removed from this Court's essential functions to support ancillary jurisdiction. *See In re Opinions*, 957 F.3d at 1356. Respectfully, that ruling did not consider the FISC's and FISCR's inherent power to control access to their own records, nor did it reckon with the consequences of ruling that jurisdiction lies instead in a coordinate court. *Cf. In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 486–87 (FISC 2007) ("[I]t would be quite odd if the FISC did not

have jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files."). There is no evidence, let alone a clear statement, that Congress intended to strip the FISC and FISCR of this inherent power. To the contrary, FISA expressly preserves such powers. 50 U.S.C. § 1803(g)(1), (h) ("Nothing in this chapter shall be construed to reduce or contravene the inherent authority of a court established under this section . . . .").

To function successfully, this Court must have authority to review the FISC's decisions concerning access to its opinions. One of the Court's responsibilities under FISA is the proper handling of records that contain classified information. 50 U.S.C. § 1803(c). Accordingly, this Court's rules require it to comply with a set of statutes regarding information security. FISCR R. P. 3. To ensure such compliance, this Court must be able to control its own docket and papers, and it must be able to supervise the FISC's exercise of the same power—both to ensure consistency and because, in practice, the record in any given FISC proceeding is likely to substantially overlap with that in a related FISCR proceeding. As a result, this Court has ancillary jurisdiction to rule on motions for access to its *own* records, and it also has ancillary jurisdiction to review petitions for access to FISC records.[2]

[2] Where court records are at issue, ancillary jurisdiction remains even after the underlying proceeding has concluded. *See* Movants' Br. 8–12, *In re Opinions*, No. Misc. 13-08 (FISC June 13, 2018), https://perma.cc/UDY4-YD8B.

III. The Court may review the FISC's decision through Movant's petition for a writ of mandamus.

"[S]upervisory 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). The Supreme Court and federal appeals courts have long 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, e.g.*, 50 U.S.C. § 1803(b), (j); *id.* § 1881a(i)(6).

Accordingly, this Court may issue writs of mandamus under the All Writs Act, which authorizes "[t]he Supreme Court and all courts established by Act of Congress" to "issue all writs necessary or 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 has the power to issue writs of mandamus, *see* FISCR R. P. 8.

Here, there are at least two sources of authority permitting the FISCR to entertain Movant's petition for a writ. First, as noted above, Congress has 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). This responsibility, as well as the Court's inherent authority over its own records, requires that the Court have the power to review FISC rulings on motions for access to classified records.

Second, because this Court is a supervisory Article III court, it has authority to ensure that the FISC neither exceeds its jurisdictional remit nor fails to adjudicate cases within that remit. Even if this supervisory authority is not explicitly granted by statute, it is a longstanding function of the writ of mandamus. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) ("The traditional use of the writ in aid of appellate jurisdiction . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.").

Finally, review here would serve the purposes of mandamus review. 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 appeals have exercised their mandamus authority to consider otherwise unreviewable petitions that pit "important constitutional rights" against pressing issues of "court administration." *In re Globe Newspaper Co.*, 920 F.2d 88, 90–91 (1st Cir. 1990); *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999). This case involves both considerations.

IV. A ruling that the FISCR lacks subject-matter jurisdiction over Movant's petition would raise serious constitutional concerns.

Appellate review is especially important because the FISC's holding raises at least two serious constitutional questions. First, the FISC has interpreted FISA to strip an Article III court of jurisdiction over claims invoking the court's Article III authority to control its own records. As Professor Laura Donohue has explained, such a limitation violates the separation between the legislative and judicial powers. *See* Reply Br. of Amicus Curiae 30–33, *In re Opinions*, No. Misc. 13-08 (FISC Aug. 1, 2018), https://perma.cc/9AJ6-66R7.

Second, the FISC's ruling might effectively deny Movant a forum in which to claim a constitutional right of access to the FISC's and FISCR's opinions, which would raise a "serious constitutional question." *Webster v. Doe*, 486 U.S. at 603 (quoting *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 681, n.12 (1986)). For reasons Movant has previously explained, it is not clear whether any other federal court can grant relief as to Movant's First Amendment claim. *See* Movants' Br. 12–16, *In re Opinions*, No. Misc. 13-08, https://perma.cc/UDY4-YD8B. This Court has suggested otherwise, *see In re Opinions*, 957 F.3d at 1355, but it would be inconsistent with the FISC's inherent powers to require that claims for access to the *FISC's* opinions be brought in an entirely different court. *Cf. Flynt v. Lombardi*, 782 F.3d 963, 967 (8th Cir. 2015) (collecting cases holding that intervention, not filing a separate action, is the appropriate procedural vehicle for

claims seeking judicial records). In effect, then, the FISC's holding may foreclose the only judicial forum capable of reviewing Movant's constitutional claim.

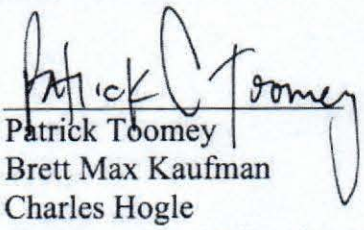
Forty years ago, the Supreme Court explained that when representatives of the press and general public assert a First Amendment right of access to judicial proceedings, they "*must* be given an opportunity to be heard on the question of their exclusion." *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) (emphasis added). Appellate courts have since recognized multiple procedural mechanisms for non-parties to assert their constitutional access right and obtain appellate review. *E.g.*, *United States v. Aref*, 533 F.3d 72 (2d Cir. 2008) (direct intervention); *N.Y. Times Co.*, 828 F.2d at 113 (collateral-order doctrine); *United States v. Brooklier*, 685 F.2d 1162, 1165–66 (9th Cir. 1982) (mandamus). 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.

CONCLUSION

The Court should hold that it has authority to entertain Movant's appeal or Movant's petition for a writ of mandamus. Alternatively, the Court should certify the jurisdictional questions raised herein to the Supreme Court. 50 U.S.C. § 1803(k).

Dated: October 30, 2020

Respectfully submitted,



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This brief complies with the page limitation set out in the Order of the Foreign Intelligence Surveillance Court of Review dated October 16, 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).

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I, Patrick Toomey, certify that on this day, October 30, 2020, a copy of the foregoing document was served on the following persons by the methods indicated:

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