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)

OPENING BRIEF FOR THE UNITED STATES

JOHN C. DEMERS
Assistant Attorney General
for National Security

J. BRADFORD WIEGMANN
STUART J. EVANS
Deputy Assistant Attorneys General

JEFFREY M. SMITH
Appellate Counsel
National Security Division
U.S. Department of Justice
950 Pennsylvania Ave, NW
Room 6500
Washington, DC 20530
Telephone: (202) 532-0220
Jeffrey.Smith5@usdoj.gov

Table of Contents

Page:

Table of Citations

Cases: **Page:**

Statutes:

Other Authorities:

JURISDICTIONAL STATEMENT

On January 5, 2018, the Honorable Rosemary M. Collyer, Presiding Judge of the Foreign Intelligence Surveillance Court ("FISC"), certified a question of law to this Court pursuant to 50 U.S.C. § 1803(j). *See* Certification of Question of Law to the Foreign Intelligence Surveillance Court of Review, Misc. 13-08 (Jan. 5, 2018). The certified question is itself a question of subject-matter jurisdiction, and this Court has jurisdiction to determine its own jurisdiction.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the American Civil Liberties Union ("ACLU"), the American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic (collectively, "movants") have adequately established Article III standing to assert their claim of a qualified First Amendment right of public access to FISC judicial opinions.

II. Whether, pursuant to its authority under 50 U.S.C. § 1803(j), this Court should hold that the FISC lacks statutory subject-matter jurisdiction over this case.

III. Whether, pursuant to its authority under 50 U.S.C. § 1803(j), this Court should order this action dismissed because there is no qualified First Amendment right of access to FISC judicial opinions.

INTRODUCTION

Movants request that FISC judges publicly disclose classified national security information by making their own, independent national security assessments of the information under a standard that is considerably less protective of national security than the standard used by the Executive Branch. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 527-29 (1988). Movants seek such relief based on a claimed First Amendment right of public access to FISC proceedings that historically, and by express congressional design, have been closed to the public. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). This legal claim is clearly without merit. Whether it is not just meritless, but "so insubstantial, implausible, . . . or otherwise completely devoid of merit" that movants lack Article III standing, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), is a question that can be likened, in the words of the FISC en banc majority, to "distinguish[ing] a black cat in a coal cellar," *In re Opinions & Orders of This Court*, 2017 WL 5983865, at *1 (FISA Ct. Nov. 9, 2017) (en banc).

Parsing this question, the court below split six to five over whether it saw a feline among the anthracite. The majority's holding that litigants establish an Article III injury if they "allege an invasion related to judicial proceedings [regardless of] how novel or meritless the claim may be," *id.* at *6, is inconsistent

with *Steel Co.* Under that Supreme Court decision, the fact that movants' legal claim is completely devoid of merit *is* a bar to Article III standing. *See id.* at *20 (Collyer, P.J., dissenting) (concluding that because movants' claim is not grounded in any actual source of law, movants fail to "present an injury to a protected legal interest").

If this Court concludes that movants' claims are substantial enough to support Article III standing, the government urges this Court to exercise its statutory power to render a "decision of the entire matter in controversy," 50 U.S.C. § 1803(j), and to find that the FISC lacks statutory subject-matter jurisdiction over this action and, in any event, that movants' claim is meritless. This case has been pending for four and a half years, and at least two other cases raising identical legal arguments, filed in 2013 and 2016, are also pending in the FISC. The government, the movants, and the FISC all have an interest in receiving an answer from this Court as to whether these cases are properly before FISC in the first place and, if they are, whether they have any legal merit.

STATEMENT OF THE CASE

The case currently before this Court is one of a series of cases dating back to 2007 in which movants have asserted a First Amendment right of access to FISC proceedings and/or records.

A. Early Judicial Access Litigation and the FISC's Seminal 2007 Opinion

In 2007, the ACLU filed a motion with the FISC asserting a First Amendment and common law right of access to that court's proceedings. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 485 (FISA Ct. 2007). The ACLU argued that the FISC should order the government "to perform a declassification review of the [FISC's] records" and that the FISC should then "independently review all classification determinations." *Id.* at 485-86. In addition to contesting the ACLU's novel declassification theory on the merits, the government argued that the motion was outside the specialized statutory subject-matter jurisdiction conferred on the FISC by Congress. *Id.* at 486.

In a ruling that set the stage for future FISC litigation on this issue, the FISC rejected the government's contention that the motion was outside the FISC's subject-matter jurisdiction and then rejected the ACLU's claims on the merits. In finding jurisdiction, the FISC acknowledged that the ACLU's claim fell outside the jurisdiction granted to the FISC by statute, but claimed for itself "inherent" jurisdiction "to adjudicate a claim of right to the [FISC's] very own records and files." *Id.* at 486-87.

Reaching the merits, the FISC rejected the ACLU's claimed common law and First Amendment rights of access to FISC records and files. The FISC found that

the common law right of access "does not apply to documents 'which have traditionally been [kept] secret for important policy reasons.'" *Id.* at 490 (quoting *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989)). The court found that this reasoning clearly applied to FISC records because they are "maintained under a comprehensive statutory scheme designed to protect FISC records from routine public disclosure," demonstrating an "unquestioned tradition of secrecy, based on the vitally important need to protect national security." *Id.* at 490-91. The FISC observed that, under the law, "there is no role for [the FISC] independently to review, and potentially override, Executive Branch classification decisions." *Id.* at 491. Indeed, "if the FISC were to assume the role of independently making declassification and release decisions in the probing manner requested by the ACLU, there would be a real risk of harm to national security interests and ultimately to the FISA process itself." *Id.*

Turning to the First Amendment claim, the FISC applied the two-part framework set forth in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). There, the Supreme Court held that, where a judicial proceeding "passes" both the "logic" test and the "experience" test, "a qualified First Amendment right of public access attaches." *Id.* at 8-9. The FISC found that neither test was met in the

context of FISC proceedings and that either of these failures was a sufficient basis to deny the ACLU's claim.

Regarding the experience test, the FISC held that "the ACLU's First Amendment claim runs counter to a long-established and virtually unbroken practice of excluding the public from FISA applications and orders." 526 F. Supp. 2d at 493. Applying the logic test, the FISC found that the "detrimental consequences" that would follow from public access to FISC proceedings "would greatly outweigh any" benefits of disclosure. *Id.* at 494. The FISC found that harms to national security, such as assisting adversaries in avoiding surveillance, seriously harming those targeted by surveillance, chilling cooperation, and damaging relations with foreign governments, "are real and significant, and, quite frankly, beyond debate." *Id.* The FISC further found that applying the ACLU's proposed standard of independent review of Executive Branch classification decisions could lead to errors that would damage national security, while simultaneously threatening "the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decisionmaking and effective oversight." *Id.* at 495-96.

B. The First 2013 Case, Before Judge Saylor

For nearly five years, no claims of this type were filed in the FISC. In 2013, however, movants filed two new cases that led to inconsistent decisions by two different FISC judges, leading to the en banc proceeding below.

In June 2013, movants filed a motion arguing that the First Amendment "compels" the FISC to release certain legal opinions and citing FISC Rule of Procedure 62(a). Motion, Misc. 13-02 (June 10, 2013).[1] That rule, added in its current form in 2010, provides that "[t]he judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published," and "[u]pon such request, the Presiding Judge, after consulting with the other Judges of the Court, may direct that an order, opinion or other decision be published." FISC R. of P. 62(a).

The government argued that the First Amendment claim was barred by the holding in the FISC's 2007 opinion. Gov't Opp., Misc. 13-02 (July 5, 2013).[2] Regarding Rule 62, the government argued that movants had "no standing to bring

---

[1] Available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Motion-1.pdf.

[2] Available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Opposition.pdf.

such a motion because [they were] not a party to any relevant opinion." *Id.* at 1; *see also id.* at 12 (arguing that "the Motion should be denied because only a party to an underlying opinion may move the Court for publication").

The case was assigned to Judge Saylor, who issued an opinion for the FISC. *See In re Orders of This Court*, Misc. 13-02, 2013 WL 5460064 (FISA Ct. Sept. 13, 2013). The opinion first addressed Article III standing to bring the action, an issue that neither movants nor the government had briefed. *Id.* at *2-4. Focusing on whether movants' claimed injury was "sufficiently concrete and particularized," Judge Saylor found that the ACLU's "active participation in the legislative and public debates" regarding FISA was sufficient for it to have Article III standing. *Id.* at *2, *4.[3]

Judge Saylor declined at that time to address the First Amendment claim, finding that Rule 62(a) made such adjudication unnecessary. While Judge Saylor

[3] In the same opinion, Judge Saylor found that a co-movant, a clinic at Yale University, lacked standing because it had "submitted no information as to how the release of the opinions would aid its activities" and Judge Saylor's "review of the public record ha[d] not revealed any indication that [the clinic] ha[d] participated in [relevant] public debate." *Id.* at *4 & n.13. The clinic subsequently filed a motion for reconsideration, *see* www.fisc.uscourts.gov/sites/default/files/Misc% 2013-02%20Motion-5.pdf, which was granted after Judge Saylor concluded that the clinic's submission "provide[d] information that remedies the deficiency." www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-6_0.pdf.

agreed with the government's position that "the term 'party' in Rule 62(a) refers to a party to the proceeding that resulted in the [document] being considered for publication," thus excluding movants from the rule's ambit, he nevertheless cited Rule 62(a) as justification to give movants partial relief due to what he found to be "extraordinary circumstances." *Id.* at *5. This led to further litigation that resulted in the public disclosure of one earlier FISC opinion (of which Judge Saylor was not the authoring judge), with classified material redacted. *See In re Orders of This Court*, Misc. 13-02, 2014 WL 5442058 (FISA Ct. Aug. 7, 2014); *see also* Submission of the United States, Misc. 13-02 (Aug. 27, 2014)[4] (attaching redacted opinion from February 19, 2013). In response to movants' claim that the FISC should independently review the classified information for potential release, Judge Saylor found that, even applying the standard advocated by movants, he would reach the same conclusion as the government as to what material should be redacted. *See* 2014 WL 5442058, at *4. He thus found it unnecessary to rule on the merits of the First Amendment claim, although he observed that "[t]here is substantial reason to doubt" its merit. *Id.* at *4 n.10.

[4] Available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Opinion-1.pdf.

C. The Second 2013 Case, Before Presiding Judge Collyer

Less than two months after Judge Saylor's September 2013 opinion, movants filed another case, this time asking the FISC "to unseal its opinions addressing the legal basis for the 'bulk collection' of data" by the government pursuant to FISA. Motion, Misc. 13-08, at 1 (Nov. 6, 2013).[5] Movants once again advanced a First Amendment claim and cited Rule 62(a). Movants argued that they stated a constitutionally sufficient injury because "[d]enial of access to court opinions alone constitutes an injury sufficient to satisfy Article III." *Id.* at 10.

Movants asked the FISC to release information even if the government had properly classified it, arguing that "executive-branch decisions cannot substitute for the judicial determination" movants sought—a determination movants contended should lead to the public release, by the FISC, of information the Executive has determined to be classified. *Id.* at 25. Movants sought to have the FISC make its own release decisions, using a different, less protective standard than the classification standard used by the Executive Branch. *Id.* at 22-23, 25-27.

In a short response, the government explained that all FISC opinions addressing the legal basis for bulk collection of data had been publicly released with

---

[5] Available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Motion-2.pdf.

only classified material redacted. Gov't Opp., Misc. 13-08, at 1-2 (Dec. 6, 2013).[6] The government further argued that movants lacked standing to seek declassification because "FISA does not provide third parties with the right to seek disclosure of classified FISC records." *Id.* at 2. Moreover, the government explained that Rule 62(a) only provides parties to the underlying proceedings with a right to move for publication. *Id.* at 3. Movants were "not a party to any of the proceedings that generated the relevant opinions and, therefore, [they do] not have standing to move for publication of the opinions." *Id.*

The case was assigned to Presiding Judge Collyer, who addressed for the first time the question whether, in the absence of any First Amendment or other right of access to FISC opinions, movants can establish an injury to a legally protected interest as is required by the injury prong of the Article III standing inquiry. Surveying numerous cases from the Supreme Court and circuit courts, Presiding Judge Collyer observed that "the Supreme Court and a majority of federal jurisdictions have concluded that an interest is not 'legally protected' or cognizable for the purpose of establishing standing when its asserted legal source—whether constitutional, statutory, common law or otherwise—does not apply or does not

[6] Available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opposition-1.pdf.

exist." *In re Opinions & Orders of This Court*, 2017 WL 427591, at *8 (Jan. 25, 2017). As the FISC had previously held that there is no First Amendment right of access to its proceedings, records, and rulings, and movants had identified no other legal right to the classified material sought, movants could identify no injury to a legally protected interest and thus lacked Article III standing. *Id.* at *9-15.

D. The En Banc Proceeding and Certification to This Court

In light of inconsistency between the two Article III standing rulings, the FISC, acting *sua sponte*, issued an order calling for en banc review. Order, Misc. 13-08, at 1 (Mar. 22, 2017).[7] The question before the en banc court was "whether Movants established Article III standing notwithstanding that a First Amendment qualified right of access does not apply to the judicial opinions they seek." *Id.*

The six-judge en banc majority found that movants had established standing, holding that to establish an injury to a legally-protected right, a plaintiff need only "allege an invasion related to judicial proceedings [regardless of] how novel or meritless the claim may be." 2017 WL 5983865, at *6. The en banc majority found this bar cleared by movants' claim that they were injured by "lack of access to the proceedings of a court." *Id.* at *8.

[7] Available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Order.pdf.

Writing for five judges, Presiding Judge Collyer disagreed that what movants sought was properly characterized as "'access to judicial proceedings,' as the Majority would have it." *Id.* at *9. Rather, the en banc dissent found that the actual claim was a demand for classified information: "Movants want us to rule that they have a 'right' of access to the information classified by the Executive Branch and that Executive Branch agencies must defend each redaction in the face of Movants' challenges." *Id.* Because this claim was not grounded in any source of law, the en banc dissent would have held that movants failed to "present an injury to a protected legal interest." *Id.* at *20.

Ten of the eleven FISC judges then voted to certify the question of movants' standing to this Court.[8]

SUMMARY OF THE ARGUMENT

Contrary to the holding of the en banc majority, Article III does not grant jurisdiction to adjudicate an insubstantial or implausible claim. Movants' First

[8] Two additional actions based on the same First Amendment right-of-access theory remain pending in the FISC. *See* Motion, Misc. 13-09 (Nov. 8, 2013) (available at www.fisc.uscourts.gov/sites/default/files/Misc%2013-09%20Motion-2.pdf); Motion, Misc. 16-01 (Oct. 18, 2016) (available at www.fisc.uscourts.gov/sites/default/files/Misc%2016%2001%20Motion%20of%20the%20ACLU%20for%20the%20Release%20of%20Court%20Records%20161019.pdf). The FISC has not issued any substantive rulings in either of those cases.

Amendment claim is constitutionally insubstantial both because application of Supreme Court precedent demonstrates that there is no First Amendment right of access to FISC proceedings and because, even where such a right exists, it does not extend to classified information or empower a court to release information properly classified by the Executive based on the court's own national security judgments.

In addition to this constitutional jurisdiction flaw, the FISC lacks statutory subject-matter jurisdiction over this case. This case falls outside the classes of cases assigned by statute to the FISC. The "inherent power" cited by movants does not extend to the adjudication of a new case brought by a new party. And this case does not fall within the narrow ancillary jurisdiction recognized by the Supreme Court. Therefore, this Court should exercise its authority under 50 U.S.C. § 1803(j) to order this case dismissed.

Finally, even if this Court finds that the FISC has constitutional and statutory jurisdiction over this matter, this Court should render a "decision of the entire matter," 50 U.S.C. § 1803(j), and hold that movants' claim lacks merit.

ARGUMENT

I. Movants Have Failed To Establish Article III Standing

Contrary to the en banc majority's holding that a litigant can establish standing by any claim of right, no matter how "novel or meritless the claim may be," 2017

WL 5983865, at *6, the Supreme Court has explained that a court properly dismisses a claim for want of jurisdiction if the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *see also id.* at 97 n.2 (indicating that "the Article III requirement of remediable injury in fact" can depend on the underlying merits in the context of "entirely frivolous claims"). Thus, in the context of "Article III standing," Supreme Court "cases make clear that frivolous claims are themselves a jurisdictional defect." *Id.* at 108 n.9.

The claim asserted by movants here, which the en banc dissent correctly describes as a claimed First Amendment "'right' of access to the information classified by the Executive Branch," 2017 WL 5983865, at *9, is constitutionally insubstantial for two independent reasons. First, application of the *Press-Enterprise* framework, which movants agree is the applicable test, makes clear that there is no First Amendment right of access to the FISC's proceedings. Second, movants' demand that the FISC undertake an independent review of classified information based on its own analysis of national security needs is not based in any source of law and fundamentally misunderstands the respective roles of the Executive and judicial branches in our constitutional system.

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

As movants concede, *see* Motion 12, the First Amendment right of access to judicial proceedings applies only to proceedings that satisfy both the "experience" and "logic" tests set forth by the Supreme Court. *Press-Enterprise*, 478 U.S. at 8-9. The FISC's unique and sensitive national security proceedings do not remotely satisfy either test.

The experience test asks "whether the place and process have historically been open to the press and general public." *Press-Enterprise*, 478 U.S. at 8. There is no serious argument that either the place—the FISC—or the process—proceedings that relate to applications made by the Executive Branch for the issuance of court orders approving foreign intelligence authorities—has been subject to a tradition or history of public access. *See, e.g.*, *In re Motion for Release*, 526 F. Supp. 2d at 493 (finding that "the FISC is not a court whose place or process has historically been open to the public").

Unable to dispute the FISC's long history as a non-public forum, movants sought to reframe the question as one about "judicial rulings and opinions interpreting the Constitution and the laws." Motion 13. But this is an obvious misframing of the issue, as rulings interpreting law constitute neither a "place" nor

a "process." *Press-Enterprise*, 478 U.S. at 8. Properly applied, the experience test examines "a particular kind of hearing," *In re Washington Post*, 807 F.2d 383, 389 (4th Cir. 1986), such as, for example, district court proceedings ancillary to grand jury operations. *See In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502-03 (D.C. Cir. 1998); *United States v. Smith*, 123 F.3d 140, 148-50 (3d Cir. 1997).[9] With this understanding, there is no substantial argument that the FISC or the foreign intelligence authorization proceedings it conducts have "have historically been open to the press and general public." *Press-Enterprise*, 478 U.S. at 8.

There is similarly no substantial argument that it is logical to open up the FISC's proceedings to public view. The FISC's "entire docket relates to the collection of foreign intelligence by the federal government." *In re Motion for Release*, 526 F. Supp. 2d at 487. Its operations are governed "by FISA, by Court rule, and by statutorily mandated security procedures issued by the Chief Justice of the United States," which together "represent a comprehensive scheme for the safeguarding and handling of FISC proceedings and records." *Id.* at 488. The

[9] *See also In re Application of New York Times Co. To Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 410-11 (2d Cir. 2009) (no right of access to sealed wiretap applications); *United States v. El-Sayegh*, 131 F.3d 158, 160-61 (D.C. Cir. 1997) (no First Amendment right of access to unconsummated plea agreements); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213-14 (9th Cir. 1989) (no history of public access to search warrant proceedings and materials).

FISC has thus correctly found that "the detrimental consequences of broad public access to FISC proceedings or records would greatly outweigh any" benefits, and that these harms "are real and significant, and, quite frankly, *beyond debate*." *Id.* at 494 (emphasis added). In short, given the national security sensitivities attendant to foreign intelligence collection, FISC proceedings "would be totally frustrated if conducted openly." *Press-Enterprise*, 478 U.S. at 8-9.

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

Movants' claim is more than an ordinary demand for access to judicial proceedings. They do not seek access to ongoing or recent judicial proceedings, and their motion does not identify any particular FISC proceeding. Rather, movants' claim is a broad records request seeking classified information. Movants demand access to information even if the government has properly classified it. *See* Motion 25; 2017 WL 5983865, at *9 (Collyer, P.J., dissenting) ("Movants want [a court ruling] that they have a 'right' of access to the information classified by the Executive Branch."). And they seek to enlist the FISC in an independent review of classified national security information, followed by release of information by the FISC, based on the FISC's supposed authority to override (or ignore) the government's classification decisions. Motion 22, 25.

This demand for classified information is completely devoid of merit. Even where the First Amendment right of access to judicial proceedings applies, that right does not include access to national security information that has been classified by the Executive Branch. And it certainly does not involve a court usurping the Executive's constitutional function by conducting an independent review of national security interests and making its own disclosure decisions.

Classification of national security information "is within the privilege and prerogative of the executive," and there is no right "to compel a breach in the security which that branch is charged to protect." *NCRI v. Dep't of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001). Indeed, "from the beginning of the republic to the present day, there is no tradition of publicizing secret national security information in civil cases, or for that matter, in criminal cases," as the "tradition is exactly the opposite." *Dhiab v. Trump*, 852 F.3d 1087, 1094 (D.C. Cir. 2017) (op. of Randolph, S.J.). Courts routinely provide for classified material to be withheld from the public without conducting an independent review of national security needs or of the public interest in release. *E.g.*, *Bismullah v. Gates*, 501 F.3d 178, 194-204 (D.C. Cir. 2007) (providing for non-public filing of classified information through the Court Security Officer and prohibiting disclosure of classified information to unauthorized person), *vacated on other grounds*, 554 U.S. 913 (2008); *Northrop Corp. v.*

McDonnell Douglas Corp., 751 F.2d 395, 401 (D.C. Cir. 1984) (entering protective order sealing classified information); *United States v. Poindexter*, 732 F. Supp. 165, 167 (D.D.C. 1990) (holding that the right of access does not extend to classified proceedings in a criminal case). Sometimes the contents of classified proceedings and filings are withheld even from the opposing party. *E.g.*, *United States v. Daoud*, 761 F.3d 678 (7th Cir. 2014) (reversing district court order requiring disclosure of classified material to defense counsel); *United States v. Sedaghaty*, 728 F.3d 885, 908 (9th Cir. 2013); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003). When court opinions contain classified information, that information is redacted from any public release, or the opinion is withheld in full. *E.g.*, *Daoud*, 761 F.3d at 678 (redacted opinion); *Sedaghaty*, 728 F.3d at 891 ("we are filing concurrently, under appropriate seal, a classified opinion"); *United States v. Mohamud*, 2014 WL 2866749, at *2 (D. Or. June 24, 2014) ("I am also filing an accompanying classified opinion to explain some of my reasoning."), *aff'd*, 843 F.3d 420 (9th Cir. 2016). Thus, even where a First Amendment right of access applies, it does not provide access to classified national security information.

Additionally, movants' contention that the FISC should make independent assessments about national security needs and interests contravenes the

constitutional allocation of national security powers. While a court may, in the proper context (which does not include this one), review Executive Branch assertions that material has been properly classified, it may not make independent national security assessments; rather, it must defer to the Executive Branch's national security judgments so long as the government's assertions are "plausible." *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). This is because the powers "to classify and control access to information bearing on national security" are constitutionally committed to the Executive Branch, necessarily granting the Executive "broad discretion to determine who may have access" to national security information. *Dep't of the Navy v. Egan*, 484 U.S. 518, 527, 529 (1988).

The Constitution assigns responsibility for classifying and controlling access to national security information to the Executive rather than the judiciary because only the former has the expertise and resources to make the necessary national security determinations. *Id.* at 529 (holding that predictive judgments related to national security risks "must be made by those with the necessary expertise in protecting classified information"); *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007) (observing that "the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information"); *In re Motion for Release*, 526

F. Supp. 2d at 495 n.31 (finding that FISC judges cannot "equal [the expertise] of the Executive Branch"). Movants' attempt to upset this constitutional balance is completely devoid of merit.

II. The FISC Lacks Statutory Subject-Matter Jurisdiction

In addition to the lack of Article III jurisdiction, the FISC also lacks statutory subject-matter jurisdiction over this matter—another threshold issue that the Court should address pursuant to its authority under 18 U.S.C. § 1803(j).[10] As the Supreme Court has repeatedly observed, "'[o]nly Congress may determine a lower federal court's subject-matter jurisdiction.'" *Greenlaw v. United States*, 554 U.S. 237, 257-58 (2008) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004)). The category of cases assigned to a particular court "is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *accord Gunn v. Minton*, 568 U.S. 251, 256-58 (2013). And it "is to be presumed that a cause lies outside this limited jurisdiction." *Kokkonen*, 511 U.S. at 377.

The FISC's statutory subject-matter jurisdiction is limited to certain applications and certifications that may be filed by the government, *see* 50 U.S.C.

[10] This Court may address jurisdictional issues in any order and thus may rule on statutory subject-matter jurisdiction without first addressing Article III standing. *See Sinochem Int'l v. Malaysia Int'l Shipping*, 549 U.S. 422, 431 (2007).

§§ 1804, 1823, 1842, 1861, 1881b, 1881c, 1881d, and certain petitions that a recipient of FISA process may file, *see* 50 U.S.C. §§ 1861(f), 1881a. It is undisputed that the FISC's statutory subject-matter jurisdiction cannot be invoked by parties such as movants who do not claim to have received FISA process. Movants instead rely on the FISC's 2007 decision that it had inherent "'jurisdiction in the first instance to adjudicate a claim of right to the court's very own records and files.'" Motion 9 (quoting *In re Motion for Release*, 526 F. Supp. 2d at 487).

That holding is erroneous. The FISC's 2007 ruling conflates the concepts of inherent power and ancillary jurisdiction. Inherent power permits a court to take certain necessary actions in conjunction with cases that are before the court; it is not the power to adjudicate a new case or controversy that is not within the court's statutory jurisdiction. Ancillary jurisdiction permits a court to adjudicate certain disputes, but ancillary jurisdiction is a strictly limited concept that does not apply here.

A. The FISC Has Neither Inherent Power Nor Ancillary Jurisdiction To Adjudicate This Action

The FISC based its assumption of jurisdiction on inherent power cases such as *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), where the Supreme Court held that a district court has an inherent power to deny public access to records

in its cases that would otherwise be public. *See id.* at 598. Movants also cite *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), where the Court held that a district court has an inherent power to sanction parties in cases before it. *See id.* at 44. As these cases indicate, inherent powers are powers a court has to manage the cases before it, not powers to assume and adjudicate new cases.

The present action is not a motion filed within a preexisting case nor one filed by a party to a relevant preexisting case. And while it is styled as a motion "to unseal," Motion 1, none of the opinions at issue has ever been under court seal. *See In re Motion for Consent to Disclosure of Court Records*, Misc. 13-01, 2013 WL 5460051, at *3-4 (FISA Ct. June 12, 2013). Rather, the relevant opinions were unavailable to the public, and portions remain unavailable to the public, solely because of government classification decisions made "to safeguard sensitive national security information." *Id.* The instant case is thus a broad records request that challenges the government's authority to protect national security information in multiple, separate FISC opinions issued in different proceedings. As such, it is an independent action requiring its own basis for subject-matter jurisdiction.

Rather than inherent power, which relates to the power to take certain actions within cases already before the court, the applicable doctrine for determining whether a court may adjudicate a new case or controversy that is not within its

explicitly enumerated statutory subject-matter jurisdiction is the doctrine of ancillary jurisdiction. But that doctrine does not apply here. Ancillary jurisdiction is a narrow doctrine that exists only "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent" or "(2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 379-80.

The case here is not at all factually interdependent with the FISC's earlier cases considering whether FISA process should be authorized. It is not apparent that any fact-finding at all is necessary in this action, and any such fact-finding would not be the type the FISC ordinarily engages in, such as determining whether there is probable cause to believe a target is an agent of a foreign power or a facility is used by a target. Nor is the adjudication of this case or similar cases necessary for the proper functioning of the FISC or the effectuation of its orders. To the contrary, the adjudication sought here "is quite remote from what [the FISC] require[s] in order to perform [its] functions." *Id.* at 380.

Because "[t]he facts to be determined," if any, in this action "are quite separate from the facts" determined in earlier FISC proceedings, and adjudication of movants' claims "is in no way essential to the conduct of [the FISC's] business," ancillary jurisdiction does not lie. *Id.* at 381.

B. Congress Has Expressly Assigned Disputes over Classification Determinations to the District Courts

Congress's decision not to assign to the FISC the type of records access litigation at issue here is clear from the text of FISA. Congress has explicitly assigned such cases to the district courts.

Classified national security information, such as that sought in this case, is information that "is owned by, produced by, or [under] the control of the United States Government." Exec. Order No. 13,526 § 1.1(a)(2), 3 C.F.R. 298 (2009). Congress has provided a process for seeking such records—a request under the Freedom of Information Act ("FOIA") to the agency having custody of the material sought (here, the Department of Justice, which possesses unredacted and classified FISC orders and opinions). 5 U.S.C. § 552(a)(3).

If the FOIA requester does not receive the material it seeks, it may file a complaint in "the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia." 5 U.S.C. § 552(a)(4)(B). That district court is granted subject-matter jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Id.* Where the government declines

to release records or portions of records on the grounds that they are "properly classified" and withheld "in the interest of national defense or foreign policy," 5 U.S.C. § 552(b)(1), the dispute is resolved by the district court applying an established and appropriate standard of review that recognizes the Executive Branch's constitutional authority with respect to the protection of national security information.[11] *E.g.*, *Morley*, 508 F.3d at 1124.

Congress's assignment of such disputes to the district courts and not to the FISC flows naturally from the respective nature of the courts. District courts are broadly open to litigants bringing cases based on federal law. The FISC, by contrast, is a specialized court with a crucial but statutorily limited focus. Congress has assigned to the FISC only matters that involve the government seeking authorization to use foreign intelligence collection tools set forth in FISA and challenges to FISA-authorized process brought by recipients of that process.[12]

---

[11] Movants may argue that a statutory FOIA cause of action is different from a First Amendment claim. But the fact that movants have concocted a legal argument that Congress did not specifically anticipate does not alter the evident fact that Congress intended for disputes over access to classified information to be adjudicated by the district courts and not by the FISC. Movants are free to assert their First Amendment argument in district court, for example by arguing that the First Amendment requires a particular standard of review in deciding whether the government's national security classification determinations should be sustained.

[12] Even targets of FISA-authorized surveillance can challenge that surveillance only in district court. *See* 50 U.S.C. § 1806(f).

There is no basis to infer that Congress intended that the FISC's jurisdiction be broadened to allow third parties to interject themselves into the FISC's highly sensitive, non-public proceedings, let alone the type of clear statement that would be expected if Congress intended such an expansion of the FISC's jurisdiction.[13] *Cf. Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) ("In traditionally sensitive areas, . . . the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (quotation marks omitted).

Disputes over access to national security information that has been classified by the Executive have been assigned to the district courts, and not to the FISC. The FISC thus lacks subject-matter jurisdiction over this case.

[13] To the extent Congress has mandated transparency regarding FISC opinions, it has directed that the government, not the FISC, redact and release opinions, and it has not created a cause of action beyond that provided by FOIA. *See* 50 U.S.C. § 1872.

III. Even if This Court Finds that the FISC Has Jurisdiction, This Court Should Adjudicate the Entire Matter and Hold that Movants' Claim Lacks Merit

Movants may argue that the government is conflating Article III standing with the merits. As explained above, in the case of an insubstantial or implausible claim, *Steel Co.* mandates dismissal on jurisdictional, rather than merits, grounds. But even if this Court finds that the FISC has both Article III jurisdiction and statutory jurisdiction to address movants' underlying claim, that legal claim fails on the merits. *See supra* Part I. Because the standing and merits issues here present interrelated questions of law, and no further development of the record is needed, this Court is well-positioned, pursuant to its authority under 50 U.S.C. § 1803(j), to provide needed finality by adjudicating the merits of movants' claimed right of access in the event that this Court finds that the FISC has jurisdiction.

Finally, to the extent that movants advance a separate "claim" pursuant to FISC Rule 62, that claim is without merit and should be dismissed. By its plain terms, Rule 62 can only be invoked by a party to an underlying case or by a judge presiding in such a case. It thus provides movants with no cause of action and no right to any relief.

CONCLUSION

As the en banc dissent accurately observed, there is "no basis in law for the FISC to expand its jurisdiction contrary to Supreme Court guidance, statutory provisions that limit its jurisdiction to a specialized area of national concern, and the evident congressional mandate that the [FISC] conduct its proceedings *ex parte* and in accord with prescribed security procedures." 2017 WL 5983865, at *21. The claim that movants advance is both jurisdictionally deficient and lacking in merit.

This Court should order this case dismissed.

Respectfully submitted,

JOHN C. DEMERS
Assistant Attorney General
for National Security

J. BRADFORD WIEGMANN
STUART J. EVANS
Deputy Assistant Attorneys General

Jeffrey M. Smith
JEFFREY M. SMITH
National Security Division
U.S. Department of Justice
950 Pennsylvania Ave, NW
Room 6500
Washington, DC 20530
Telephone: (202) 532-0220
Jeffrey.Smith5@usdoj.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the length requirement set forth in the Court's January 9, 2018 Order as the brief is 30 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
Jeffrey M. Smith

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opening Brief for the United States was mailed via Federal Express this 23rd day of February, 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.

Patrick Toomey
ACLU Foundation
125 Broad St., 18th Floor
New York, NY 10004

Arthur B. Spitzer
ACLU Foundation of D.C.
4301 Connecticut Ave., N.W.
Suite 434
Washington, DC 20008

David A. Schulz
Media Freedom & Information Access Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520

Counsel for Movants

Professor Laura K. Donohue
Georgetown University Law Center
McDonough 504
600 New Jersey Avenue, N.W.
Washington, DC 20001

Designated Amicus Curiae

/s/ Jeffrey M. Smith
Jeffrey M. Smith