United States
Foreign Intelligence Surveillance
Court of Review

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LeeAnn Flynn Hall, Clerk of Court

FISCR 20-01

IN THE UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

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

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

RESPONSE BRIEF FOR THE UNITED STATES REGARDING JURISDICTION

JOHN C. DEMERS
Assistant Attorney General
for National Security

J. BRADFORD WIEGMANN
MELISSA MacTOUGH
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

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INTRODUCTION

This Court lacks jurisdiction over the petition seeking review of the decision of the Foreign Intelligence Surveillance Court ("FISC") dated February 11, 2020 ("FISC Op.") holding that there is no First Amendment right of access to FISC proceedings. An Article III court inferior to the Supreme Court possesses only that subject-matter jurisdiction that Congress has granted to it, and the scope of a court's statutory jurisdiction must be strictly enforced. The petition does not fall within the scope of the jurisdiction granted to this Court by Congress.

Petitioners rely on 50 U.S.C. § 1803(b), but that provision does not apply. Section 1803(b) provides this Court jurisdiction to review the denial of "applications" made under the Foreign Intelligence Surveillance Act ("FISA"). FISA defines the applications that can be made under it—government filings seeking court orders permitting the use of certain investigative techniques in foreign intelligence investigations—and petitioners' motion to the FISC does not fit this definition. It was not an "application," as that term is used in FISA, and it was made pursuant to the First Amendment and not under any provision of FISA.

The petition also does not fall within this Court's ancillary jurisdiction. Ancillary jurisdiction applies only to claims and not to cases, and requires a predicate case with an independent source of jurisdiction. *Peacock v. Thomas*, 516 U.S. 349,

355-56 (1996). Unless the ancillary claim involves the enforcement of a judgment, the predicate case must be open and pending at the time a court asserts ancillary jurisdiction. *Id.* None of these requirements were satisfied here, as there was and is no predicate case, let alone an open case so closely related as to make the predicate case and the ancillary claim part of the same Article III case or controversy.

Given that this Court has no present appellate jurisdiction over the petition nor any prospective appellate jurisdiction over this case, it lacks jurisdiction to entertain a writ of mandamus. The All Writs Act, which authorizes extraordinary writs such as mandamus, does not provide jurisdiction. *United States v. Denedo*, 556 U.S. 904, 911 (2009). It merely authorizes certain writs in aid of existing or potential jurisdiction, both of which are lacking here. Mandamus jurisdiction is lacking for the additional reason that petitioners have an adequate alternative remedy for seeking review of the government's classification decisions: the process provided by the Freedom of Information Act.

ARGUMENT

It is axiomatic that "[f]ederal courts are courts of limited subject-matter jurisdiction," *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 317 (D.C. Cir. 2012), and "'[w]ithout jurisdiction [a] court cannot proceed at all in any cause,'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte*

McCardle, 74 U.S. 506, 514 (1868)). "The requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception.'" *Steel Co.*, 523 U.S. at 94-95 (citation omitted).

As the Supreme Court has held, "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004). Congress possesses "'the sole power of creating the tribunals (inferior to the Supreme Court) and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (quoting *Cary v. Curtis*, 44 U.S. 236, 245 (1845)).

Thus, while courts may have inherent power that is exercisable in cases properly before them, a lower court can have no inherent jurisdiction—jurisdiction over a particular case or controversy can only be conferred by Congress. The category of cases assigned by Congress to a particular court is found in "the relevant jurisdictional statutes," *id.*, and "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). Rather, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the

contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (internal citation omitted).

I. 50 U.S.C. § 1803 Does Not Provide Jurisdiction over the Petition

In an attempt to meet their burden of establishing this Court's jurisdiction, petitioners cite 50 U.S.C. § 1803(b), but that provision does not apply here. Section 1803(b) provides this Court with jurisdiction "to review the denial of any application *made under this chapter*." (Emphasis added). The term "this chapter" refers to Chapter 36 of Title 50, which is FISA. FISA contains detailed provisions governing applications to the FISC for orders permitting surveillance. *See* 50 U.S.C. §§ 1804 (entitled "Applications for Court Orders" and describing applications for electronic surveillance orders); 1823 (entitled "Application for Order" and describing applications for physical search orders); *see also United States v. El-Mezain*, 664 F.3d 467, 564 (5th Cir. 2011). These are the "application[s] made under this chapter" to which Section 1803(b) applies.

Notably, these applications may only be made by the government, and they are made *ex parte* and *in camera*. This is why Section 1803(b) provides appellate jurisdiction to review the denial of applications but not the grant of applications. In cases where the FISC finds that an issue is of sufficient importance that this Court

should review even in the absence of a party capable of filing an appeal, this Court's review may be obtained pursuant to FISC certification under 50 U.S.C. § 1803(j).

Petitioners have never before referred to their motion before the FISC as an "application," and the motion did not "apply" for court approval in the way that term is commonly understood. Nor was their motion "made under" FISA. It was not an application by the government for an order permitting electronic surveillance, physical search or any other investigative technique, and it was not made under any provision of FISA. Rather, it was a motion by private parties arguing that they possessed a right provided by the First Amendment to the Constitution, not FISA. It was thus not an "application made under this chapter" under Section 1803(b).

Petitioners claim that this Court has already recognized this case as concerning an "application" under Section 1803 by appointing an amicus curiae in the earlier proceeding before this Court, but petitioners are wrong. The Order appointing an amicus in that proceeding stated that the appointment was made "[p]ursuant to 50 U.S.C. § 1803(i)." Order, *In re: Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. FISCR 18-01, (Jan. 9, 2018). That provision permits this Court or the FISC to appoint an amicus curiae "in any instance as such court deems appropriate." 50 U.S.C. § 1803(i)(2)(B). Thus, in making that appointment, this Court in no way recognized the case as

concerning an application made under FISA. This Court found only that the appointment of an amicus was "appropriate."

Similarly, petitioners' resort to the "collateral order doctrine" does nothing to advance their argument. That doctrine is an interpretation of 28 U.S.C. § 1291, which provides courts of appeals with jurisdiction over appeals from "all final decisions of the district courts of the United States." Under the collateral order doctrine, certain district court decisions that might appear to be interlocutory are nevertheless considered "final" for purposes of appellate review under Section 1291. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009).

As petitioners recognize, Section 1291 does not apply here, as this Court is not a "court of appeals" under that provision,[1] and the FISC is not a "district court," *see* 28 U.S.C. ch. 5 (listing the district courts). Moreover, finality is not at issue here. This Court lacks jurisdiction because the petition does not fall within any jurisdictional grant provided to this Court by Congress. This lack of jurisdiction has nothing to do with the finality of the FISC's decision, and the collateral order doctrine thus has no relevance.

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[1] The term "court of appeals" refers to the thirteen Circuit Courts, *see* 28 U.S.C. § 41 (although the Federal Circuit is expressly excluded from Section 1291's coverage). Congress has designated this Court as a "court of appeals" solely for purposes of 28 U.S.C. § 1254(2) and not for purposes of Section 1291 or any other provision. *See* 50 U.S.C. § 1803(k)(1).

Finally, this Court's earlier ruling in *In re Certification* does not suggest jurisdiction over the current petition. That ruling was made pursuant to a FISC certification under 50 U.S.C. § 1803(j), a provision that indisputably does not apply here. Moreover, that ruling concerned only a jurisdictional question—whether petitioners had established Article III standing—and this Court specifically reserved a second jurisdictional question—statutory subject-matter jurisdiction—for future litigation in the FISC. *See In re: Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, No. FISCR 18-01, 2018 WL 2709456, at *3 (FISA Ct. Rev. Mar. 16, 2018). Then, as now, this Court had jurisdiction to determine its own jurisdiction. Now, this Court should find that it lacks subject-matter jurisdiction over the petition because this Court, like all Article III lower courts, has "only [the] jurisdiction [that] Congress has chosen to confer." *Moms Against Mercury v. FDA*, 483 F.3d 824, 827 (D.C. Cir. 2007).

II. This Court Does Not Possess Ancillary Jurisdiction over the Petition

This Court also lacks ancillary jurisdiction over the petition. Ancillary jurisdiction is one subspecies of supplemental jurisdiction (the other being pendant jurisdiction), a doctrine that allows a federal court to exercise jurisdiction over certain claims that are closely related to a case already before it. Supplemental jurisdiction relates only to claims, not cases, and a court must have an independent

basis for jurisdiction over a predicate case before it can have ancillary jurisdiction over interrelated claims. *See* 13 Charles Alan Wright et al., Federal Practice & Procedure § 3523 (3d ed.); *cf.* 28 U.S.C. § 1367 (codifying the common-law supplemental jurisdiction of district courts).

As the Supreme Court has explained, a "court must have jurisdiction over a case or controversy *before* it may assert jurisdiction over ancillary claims." *Peacock*, 516 U.S. at 355 (emphasis added). That initial case or controversy must be before the court at the time the ancillary claim is asserted, as "claims alleged to be factually interdependent with and, hence, ancillary to claims brought in an earlier federal lawsuit will not support federal jurisdiction over a subsequent suit." *Id.* (holding that "once judgment was entered in the original . . . suit, the ability to resolve simultaneously factually intertwined issues vanished"). The use of "ancillary jurisdiction in subsequent proceedings" is reserved to "the exercise of a federal court's inherent power to enforce its judgments." *Id.* at 356.

The petition is not related to an ongoing matter already within the jurisdiction of this Court, and it does not seek the exercise of a court's inherent power to enforce its judgment. Thus, there can be no ancillary jurisdiction over the petition.[2]

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[2] While petitioners suggest that it is anomalous that the FISC exercised ancillary jurisdiction over the underlying case while this Court cannot exercise jurisdiction over the petition, there is no such anomaly here. The FISC's holding

III. This Court Does Not Possess Jurisdiction To Issue a Writ of Mandamus

That this case falls outside of this Court's statutory jurisdiction means that the Court may not entertain a request for mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651. "As the text of the All Writs Act recognizes, a court's power to issue any form of relief—extraordinary or otherwise—is contingent on that court's subject-matter jurisdiction over the case or controversy." *Denedo*, 556 U.S. at 911. But "the All Writs Act and the extraordinary relief the statute authorizes are not a source of subject-matter jurisdiction." *Id.* at 913 (citing *Clinton* v. *Goldsmith*, 526 U.S. 529, 534-35 (1999)). Rather, there must be an "independent" statute granting the Court jurisdiction before a writ of mandamus can "aid" that jurisdiction. *Goldsmith*, 526 U.S. at 534-35.

In limited circumstances, the All Writs Act empowers an appellate court to "issue a writ of mandamus *now* to protect the exercise of [its] appellate jurisdiction *later*." *In re Al-Nashiri*, 791 F.3d 71, 76 (D.C. Cir. 2015) (emphasis in original). But it has no application where, as here, the appellate court has no appellate

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that it had ancillary jurisdiction over the underlying case was simply incorrect, as there was no pending case within the jurisdiction of the FISC to which petitioners' claims were ancillary. *See Peacock*, 516 U.S. at 355-56. Even if the FISC had jurisdiction over the motion, that would not provide jurisdiction over the petition to this Court. This Court and the FISC are subject to different jurisdictional provisions, and each court is limited to the jurisdiction provided to it by Congress.

jurisdiction over the case now or later. *See, e.g., Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943).

Mandamus is unavailable for the additional reason that petitioners have an adequate alternative remedy. *See In re Stone*, 940 F.3d 1332, 1334 (D.C. Cir. 2019) ("Where a mandamus petitioner has an adequate alternative remedy[,] . . . we lack jurisdiction to grant the petition."); *accord Goldsmith*, 526 U.S. at 540. As this Court has explained, petitioners in this case seek "access to the redacted portions of the four FISC opinions at issue over the government's objection (in the form of a refusal to declassify those materials)." *In re Certification*, 2018 WL 2709456, at *4. Petitioners have an adequate means for challenging the government's classification decisions—the Freedom of Information Act, which provides a process that involves judicial review. *See* 5 U.S.C. § 552.[3]

CONCLUSION

The petition should be dismissed for want of jurisdiction.

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[3] Petitioners complain about the deferential standard of review utilized by district courts reviewing classification decisions, but this standard of review derives from the separation of powers mandated by the Constitution, *see Dep't of the Navy v. Egan*, 484 U.S. 518, 527-30 (1988), and the fact that courts are "not well equipped to make the sometimes difficult determinations as to whether portions of [court] orders may be released without posing a risk to national security or compromising ongoing investigations." *In re Certification*, 2018 WL 2709456, at *1; *accord CIA v. Sims*, 471 U.S. 159, 179-80 (1985). These constitutional principles will apply in any court regardless of the cause of action asserted.

Respectfully submitted,

JOHN C. DEMERS
Assistant Attorney General
for National Security

J. BRADFORD WIEGMANN
MELISSA MacTOUGH
Deputy Assistant Attorneys General

/s/ 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 limitation set in this Court's April 10, 2020 Order because it is ten pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(t).

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 Response Brief of the United States Regarding Jurisdiction was sent via e-mail on April 22, 2020 to counsel of record listed below.

Patrick Toomey
Brett Kaufman
ACLU Foundation
ptoomey@aclu.org
bkaufman@aclu.org

Arthur B. Spitzer
ACLU Foundation of D.C.
aspitzer@acludc.org

David A. Schulz
Media Freedom & Information Access Clinic
david.schulz@ylsclinics.org

Alex Abdo
Knight First Amendment Institute
at Columbia University
alex.abdo@knightcolumbia.org

Counsel for Petitioners

/s/ Jeffrey M. Smith
Jeffrey M. Smith