FISCR Misc. 20-02

IN THE UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

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

ON PETITION FOR REVIEW OF THE UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
MISC. 16-01 (Boasberg, Presiding Judge)

RESPONSE BRIEF FOR THE UNITED STATES REGARDING THE COURT'S ORDER FOR PETITIONER TO SHOW CAUSE

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INTRODUCTION

As petitioner acknowledges, this Court's decision earlier this year in *In re Opinions & Orders* mandates the dismissal of the petition for review in this case for lack of jurisdiction. *See In re Opinions & Orders by the FISC Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, 957 F.3d 1344 (FISA Ct. Rev. 2020) ("*In re Opinions & Orders*"). As in *In re Opinions & Orders*, petitioner here "filed a motion in a *new* 'miscellaneous' case seeking the disclosure of non-public material which has been deemed classified *by the Executive Branch* and to which [petitioner has] not established a factual connection." *Id.* at 1357 (emphasis in original) (footnotes omitted). And as in that earlier case, petitioner asks this Court to "expand [its] jurisdiction in a way that is contrary to so many statutory provisions that limit [its] jurisdiction to a specialized area of national concern, — that is, the governmental electronic surveillance of communications for foreign intelligence purposes." *Id.* at 1358 (footnote and quotation marks omitted). Petitioner cannot distinguish this precedent; indeed, petitioner does not even attempt to. The petition should therefore be dismissed.

This Court should also decline petitioner's request to certify a question of law to the Supreme Court in this case. The Supreme Court has admonished that appellate courts have a duty to decide issues whenever possible, rather than

certifying them to the Supreme Court. Moreover, this case is adversarial, and petitioner can petition the Supreme Court for review if it chooses. And this case does not, in any event, raise an issue worthy of Supreme Court review.

BACKGROUND

In 2016, petitioner filed this miscellaneous action (Misc. No. 16-01) in the Foreign Intelligence Surveillance Court ("FISC") requesting "opinions and orders containing novel or significant interpretations of law issued between September 11, 2001 and . . . June 2, 2015." Mot. for Release of Court Records 1 (filed Oct. 19, 2016). Recognizing that these records contain a substantial amount of classified information, petitioner asked the FISC to take over the task of making declassification decisions, and to do so using a strict-scrutiny standard. *See id.* at 21-24.

That same year, a different public interest organization filed a similar case in district court. *See Electronic Frontier Found. v. U.S. Dep't of Justice*, 376 F. Supp. 3d 1023 (N.D. Cal. 2019). There, the plaintiff requested "all decisions, orders, or opinions issued by [the] FISC or FISCR between 1978 and June 1, 2015, that include a significant construction or interpretation of any law, including a significant construction of a 'specific selection term' under the USA FREEDOM

Act." *Id.* at 1026. In response, the government released 73 FISC opinions in whole or in part and withheld 6 opinions that were classified in full. *Id.*

The government has maintained, in this case and others, that these types of record-request cases may be litigated in district court, as occurred in *Electronic Frontier Foundation*, but fall outside the jurisdiction of the FISC and this Court. Following this Court's decision in *In re Opinions & Orders*, the FISC agreed and dismissed this case. *See In re Opinions & Orders of This Court Containing Novel or Significant Interpretations of Law*, 2020 WL 5637419 (FISA Ct. Sept. 15, 2020). The FISC held that it was "not empowered by Congress to consider constitutional claims generally, First Amendment claims specifically, or freestanding motions filed by persons who are not authorized by FISA to invoke this Court's jurisdiction." *Id.* at *2.

ARGUMENT

1. While petitioner asks this Court to "clarify or revisit its prior ruling," Resp. to Order to Show Cause 2, petitioner merely regurgitates meritless arguments that this Court has already rejected. Petitioner argues that 50 U.S.C. § 1803(b)[1] provides this Court with jurisdiction over this records-request case.

[1] Section 1803(b) provides that this Court "shall have jurisdiction to review the denial of any application made under this chapter." 50 U.S.C. § 1803(b).

This Court has already held that this is wrong "for at least four reasons," and that petitioner's argument would lead to "at least three untenable consequences." *In re Opinions & Orders*, 957 F.3d at 1352, 1354. Petitioner next cites the collateral order doctrine and the doctrine of ancillary jurisdiction, but this case is not collateral or ancillary to anything. *See id.* at 1355-57. It is an independent action that requires its own basis for jurisdiction, and there is none. *See id.* In short, this case "falls outside the class of cases that Congress carefully identified as being subject" to this Court's jurisdiction. *Id.* at 1358.

Petitioner contends that there is a constitutional concern with a finding of no jurisdiction, but that is precisely backwards. The relevant constitutional principle is "the well-settled principle that Congress has the exclusive authority to invest all courts inferior to the Supreme Court 'with jurisdiction in the exact degrees and character which to Congress may seem proper for the public good.'" *Id.* at 1349 (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992)); *accord Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("It 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." (citation omitted)). It is petitioner who asks this Court to ignore a well-settled constitutional rule and to

assert jurisdiction that Congress has not granted to it. This Court has declined such an invitation before, and it should do so again.

2. Unable to distinguish this Court's precedent, petitioner next asks this Court to certify a question of law to the Supreme Court pursuant to 50 U.S.C. § 1803(k) and 28 U.S.C. § 1254(2).[2] But petitioner "presents no basis for this court to 'invok[e] so exceptional a jurisdiction of [the Supreme] Court as that on certification.'" *Simon v. Bickell*, 2011 WL 1770138, at *1 (D.C. Cir. Apr. 22, 2011) (quoting *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam)). The Supreme Court has stressed that it is "the task of a Court of Appeals to decide all properly presented cases coming before it, except in the rare instances, as for example the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and expedition of judicial business." *Wisniewski*, 353 U.S. at 902; *accord In re Hill*, 777 F.3d 1214, 1225 (11th Cir. 2015) ("The Supreme Court has discouraged the use of [the Section 1254(2)] certification procedure" and "admonished" that it "is

[2] Section 1803(k) provides that this Court is a "court of appeals" for purposes of 28 U.S.C. § 1254(2). Section 1254(2) provides that "[b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy." 28 U.S.C. § 1254(2).

proper only in 'rare instances.'"). Because this Court is capable of addressing the jurisdictional issue before it—indeed it already has—certification to the Supreme Court would be inappropriate. *Wisniewski*, 353 U.S. at 902; *see also United States v. Seale*, 558 U.S. 985 (2009) (dismissing question certified pursuant to Section 1254(2)); *United States v. Penaranda*, 543 U.S. 1117 (2005) (same); *In re Slagle*, 504 U.S. 952 (1992) (same) (citing *Wisniewski*). Moreover, because this matter is adversarial, petitioner is capable of seeking Supreme Court review on its own, which is another reason why certification is inappropriate. *See Taylor v. Atlantic Maritime Co.*, 181 F.2d 84, 85 (2d Cir. 1950) (rejecting a request for certification because there is "no reason for imposing an appeal upon the Supreme Court, which it does not choose to take of its own motion, except in cases when no petition for certiorari is available to the aggrieved party").

This case, in any event, does not raise an issue that would merit Supreme Court review. The issue that it presents—whether the FISC and this Court have jurisdiction over cases seeking FISC records that are non-public due to Executive Branch classification decisions—is not a sufficiently important question of law for Supreme Court adjudication. Petitioner places importance on this question only because it would like the FISC to usurp the Executive Branch's declassification function. But that effort is contrary to well-established law. *See, e.g.*, *Dep't of the*

Navy v. Egan, 484 U.S. 518, 527-30 (1988); *CIA v. Sims*, 471 U.S. 159, 179-80 (1985); *see also In re Opinions & Orders*, 957 F.3d at 1357 (explaining that "the crux of the Movants' claim to disclosure here lies within the Executive's clear authority to determine what material should remain classified"); *In re Certification of Questions of Law to the Foreign Intelligence Surveillance Court of Review*, 2018 WL 2709456, at *1 (FISA Ct. Rev. Mar. 16, 2018) (observing 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"). Indeed, when the FISC mistakenly believed that it had jurisdiction over this type of case, it persuasively and repeatedly rejected petitioner's claim on the merits. *See, e.g.*, *In re Opinions & Orders of This Court Addressing Bulk Collection of Data under the Foreign Intelligence Surveillance Act*, 2020 WL 897659, at *7-16 (FISA Ct. Feb. 11, 2020), *appeal dismissed*, 957 F.3d 1344 (FISA Ct. Rev. 2020); *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 490-97 (FISA Ct. 2007). Given that the underlying legal claim is clearly without merit, the jurisdictional question lacks sufficient importance to justify Supreme Court review.

CONCLUSION

This Court should deny the petition for review for want of jurisdiction, and this Court should also deny petitioner's request to certify a question of law to the Supreme Court pursuant to 50 U.S.C. § 1803(k) and 28 U.S.C. § 1254(2).

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation in this Court's October 16, 2020 Order because it is eight 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.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response Brief of the United States Regarding Jurisdiction was sent via e-mail on November 10, 2020 to counsel of record listed below.

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