

SEP 15 2020

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

LeeAnn Flynn Hall, Clerk of Court

IN RE OPINIONS AND ORDERS OF THIS
COURT CONTAINING NOVEL OR
SIGNIFICANT INTERPRETATIONS OF LAW

Docket No. Misc. 16-01

OPINION AND ORDER

Pending before the Court is a motion for the release of court records that the American Civil Liberties Union, the ACLU of the Nation's Capital, and the Media Freedom and Information Access Clinic filed on October 19, 2016. The motion invokes Rule 62 of the United States Foreign Intelligence Surveillance Court Rules of Procedure and the qualified First Amendment right of access to compel the Court to disclose classified opinions and orders that contain novel or significant interpretations of law and were issued between September 11, 2001, and June 2, 2015. *See* ACLU's Mot. at 1, <https://www.fisc.uscourts.gov/sites/default/files/Misc%2016%2001%20Motion%20of%20the%20ACLU%20for%20the%20Release%20of%20Court%20Records%20161019.pdf>.

In 2013, these same movants filed a motion arguing that both FISC Rule 62 and the qualified First Amendment right of access authorized this Court to exercise jurisdiction over their request for the disclosure of classified judicial opinions addressing the legal basis for bulk collection. *See* Mot. of the ACLU, the ACLU of the Nation's Capital, & MFIAC for the Release of Ct. Rs., Misc. No. 13-08 (Foreign Intel. Surv. Ct. 2013), <https://www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Motion-2.pdf>. Four months ago, the United States Foreign Intelligence Surveillance Court of Review dismissed that motion in *In re Opinions and Orders*

by the FISC Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act, 957 F.3d 1344 (Foreign Intel. Surv. Ct. of Review Apr. 24, 2020) (per curiam). The FISC held that it lacked jurisdiction over the petition seeking appellate review of then-President Judge Rosemary M. Collyer's February 11, 2020, decision denying the motion. *Id.* at 1358.

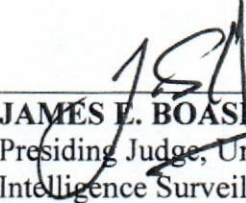
This Court is now convinced that exercising jurisdiction over the pending motion in this matter would be inconsistent with the Foreign Intelligence Surveillance Court of Review's decision. The FISC determined that it lacked statutory subject-matter jurisdiction because Congress did not empower the federal courts established under FISA to consider constitutional claims, a freestanding motion asserting a qualified First Amendment right of access did not fall within any of the FISC's jurisdictional categories enumerated in the statute, and the movants were not among the parties authorized by the statute to seek FISC review. *Id.* at 1350–51. Noting its “significantly limited powers carefully delineated by Congress,” the FISC also declined to rely on the doctrine of ancillary jurisdiction to exercise discretionary authority over the petition. *Id.* at 1356–57. It explained that such authority must be exercised with restraint, discretion, and great caution, *id.* at 1356, n.69 (citing *Ex Parte Burr*, 22 U.S. 529, 531 (1824)), and that the movants had not been involuntarily haled into court, did not seek to assert rights in an ongoing action, did not establish a factual connection to the classified material, and did not present circumstances warranting the exercise of the FISC's inherent judicial power to enforce its mandates and orders or protect the integrity of its proceedings and processes. *Id.* at 1356. In addition, because the “crux” of the movants' claim to disclosure “[lay] within the Executive's clear authority to determine what material should remain classified,” the FISC concluded that “respect for the separation of powers dictates that we dismiss the Petition for lack of jurisdiction,

as we have no business deciding the merits of the Movants' constitutional claim." *Id.* at 1357 (internal quotation marks omitted).

Applying the FISCR's reasoning to whether this lower Court has jurisdiction over the pending motion leads to the same result. Like the FISCR, the FISC is 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. *See id.* at 1355 (stating that "specialized courts like the FISC" are not "empowered to consider claims arising under the First Amendment to the Constitution"), 1350–51; 50 U.S.C. §§ 1801–1885c. And because all of the above-described reasons why the FISCR found it unwarranted to exercise ancillary jurisdiction apply to the pending motion, the FISC is foreclosed from doing so here.

Accordingly, it is **ORDERED** that the Motion of the American Civil Liberties Union for the Release of Court Records is **DISMISSED** for lack of jurisdiction.

SO ORDERED this 15th day of September, 2020.



JAMES E. BOASBERG
Presiding Judge, United States Foreign
Intelligence Surveillance Court