

UNITED STATES

SEP 15 2020

FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

U.S. Ann Flynn Hall, Clerk of Court

IN RE MOTION FOR PUBLICATION OF
RECORDS

Docket No. Misc. 19-01

OPINION AND ORDER

Pending before the Court is a motion for the publication of court records that John Solomon and Southeastern Legal Foundation filed on May 23, 2019. The motion invokes Rule 62 of the United States Foreign Intelligence Surveillance Court Rules of Procedure, the qualified First Amendment right of access, and the common-law right of access to compel the Court to disclose “orders, opinions, decisions, sanctions, or other records” relating to attorney misconduct or discipline in certain matters. *See* Mot. at 2, <https://www.fisc.uscourts.gov/sites/default/files/Misc%2019-01%20Motion%20of%20John%20Solomon%20and%20Southeastern%20Legal%20Foundation%20for%20Publication%20of%20Records%20190523.pdf>.

In 2013, the American Civil Liberties Union, the ACLU of the Nation’s Capital, and the Media Freedom and Information Access Clinic jointly filed a motion requesting that the Court disclose 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>. Like the pending motion, the ACLU motion argued that both FISC Rule 62 and the qualified First Amendment right of access authorized this Court to exercise jurisdiction. *Id.* at 1. That motion was finally resolved four months ago when the

United States Foreign Intelligence Surveillance Court of Review issued its decision 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 FISCRC held that it lacked jurisdiction over the petition seeking appellate review of then-Presiding 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 FISCRC 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 FISCRC's jurisdictional categories enumerated in the statute, and the movants were not among the parties authorized by the statute to seek FISCRC review. *Id.* at 1350–51. Noting its “significantly limited powers carefully delineated by Congress,” the FISCRC 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 FISCRC'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 FISCRC 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 FISC’s reasoning to whether this lower Court has jurisdiction over the pending motion leads to the same result. Like the FISC, 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. By the same token, FISA does not grant the FISC jurisdiction over claims asserting a common-law right of access either. Moreover, because all of the above-described reasons why the FISC found it unwarranted to exercise ancillary jurisdiction over the ACLU motion apply to the pending motion, the FISC is foreclosed from doing so here.

Accordingly, it is **ORDERED** that John Solomon and Southeastern Legal Foundation’s Motion for Publication of 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