IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff–Appellee,	)	Case No. 18-1366
v.	)	D. Ct. No. 1:12-cr-00033-JLK-1
	)	District of Colorado
JAMSHID MUHTOROV,	)	
Defendant–Appellant.	)	

APPELLANT'S BRIEF IN RESPONSE TO THE COURT'S MAY 20, 2021 ORDER

Appellant Jamshid Muhtorov, through counsel, respectfully submits this brief in response to the Court's Order dated May 20, 2021. According to the Order, the Classified Information Security Officer ("CISO") assigned to this appeal provided the Court with a publicly available internet article in connection with this case. The article is a blog post that was published on the *Lawfare* website, titled "To Oversee or to Overrule: What is the Role of the Foreign Intelligence Surveillance Court Under FISA Section 702?".[1] It was authored by a former lawyer for the National Security Agency, one of the agencies that conducted the warrantless surveillance Mr. Muhtorov is challenging on appeal.

Mr. Muhtorov appreciates the Court's Order concerning this matter and the opportunity to respond to the contentions in the blog post. As explained below, the post

[1] *Available at* https://bit.ly/3yPzijg.

presents an incorrect and slanted view of Section 702 surveillance, though two of its premises ultimately support Mr. Muhtorov's arguments.

Before addressing the substance of the blog post, however, the defense strongly objects to the CISO's ex parte provision of information to the Court outside of the classified record. This incident represents a fundamental departure from the CISO's role as an impartial officer of the court. Under the Classified Information Procedures Act, CISOs are "to be detailed to the court to serve in a neutral capacity." Security Procedures Established Pursuant to Pub. L. 96–456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information § 2, 18 U.S.C. app. III § 9 note. CISOs "are organizationally quite separate from the government's representatives in court. Their obligation is to help the court protect classified information, not to assist the government's representatives in court." Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers*, Fed. Judicial Center 21 (2d ed. 2013).[2]

The CISO's ex parte provision of information outside the record would be highly irregular in any case, but it is particularly problematic here, where the material is a blog post by a former NSA lawyer addressing many of the legal questions that are contested by the parties in their briefs. At a minimum, the CISO's provision of this article creates the appearance of bias, and it raises concerns that CISOs are not merely facilitating the courts'

[2] *Available at* 2013 WL 1284256 and https://www.fjc.gov/sites/default/files/2016/Keeping-Government-Secrets-2d-Reagan-2013.pdf.

review of classified information with careful neutrality, but in some instances may be seeking to influence the courts' substantive decisions in favor of the Department of Justice. Mr. Muhtorov respectfully requests that the Court ensure it has a full understanding of what occurred in this case, and that it require the Department of Justice's Litigation Security Group to identify in a public submission the policies, procedures, and trainings that will ensure ex parte communication about the merits of this case does not reoccur.

Argument

The blog post makes a series of claims about why the FISC, in its annual review of Section 702 surveillance, lacks the authority to deny the government's applications and to halt this surveillance going forward. The argument it presents is glaringly one-sided but, in the end, it has little bearing here. This Court has a very different role than the FISC—one that involves assessing whether the *past* surveillance of Mr. Muhtorov violated the Constitution and requires suppression. *See* 50 U.S.C. §§ 1806(e)–(g). Regardless of the FISC's authority to halt Section 702 surveillance today, this Court can determine whether the warrantless surveillance of Mr. Muhtorov a decade ago was consistent with the Constitution. It was not. Indeed, on this question, the blog post contains two noteworthy points. First, the recent FISC opinions discussed by the author reinforce Mr. Muhtorov's arguments about why the surveillance used in this case lacked adequate safeguards under the Fourth Amendment. Def. Br. 36–47; Def. Reply 2–7, 20–24; Def. Suppl. Br. 2–7. Second, if the blog post were correct that the FISC does not have the statutory power to

deny Section 702 applications, it would only strengthen Mr. Muhtorov's argument that the FISC's role violates Article III's "case or controversy" requirement. Def. Br. 47–50; Def. Reply 24–26. Beyond that, the post is essentially duplicative of the government's claims: it offers the same exaggerations and it makes the same errors.

1. The FBI's warrantless querying of Americans' communications, including Mr. Muhtorov's, violated the Fourth Amendment.

The starting point for the blog post is a series of opinions issued by the FISC in 2018, 2019, and 2020 that describe widespread and persistent surveillance violations by the FBI, especially with respect to warrantless queries of Americans' communications. As the post acknowledges, in the FISC's 2018 opinion, the court concluded that the procedures used by the FBI "did not comply with the Fourth Amendment" because they did not adequately safeguard Americans. In short, they were "unreasonable" under the Fourth Amendment. *See* [*Redacted*], 402 F. Supp. 3d 45, 73–88 (FISC 2018); Def. Reply 2–7. Although the FBI subsequently adopted strengthened rules at the FISC's insistence, the 2019 and 2020 opinions describe how those rules are frequently violated, and how the FBI's systems are designed in ways that continue to multiply, rather than diminish, the intrusions on Americans' communications. *See* [*Redacted*], Mem. Op. 65–73 (FISC Dec. 6, 2019) ("FISC 2019 Op."), https://bit.ly/3wGLMYA; [*Redacted*], Mem. Op. 39–52 (FISC Nov. 18, 2020) ("FISC 2020 Op."), https://bit.ly/3vCGixR.

The blog post attempts to answer the question of why, in the face of these repeated violations, the FISC has not simply denied the government's Section 702 applications. The

reason, according to the author, is that the FISC has no statutory authority to deny Section 702 surveillance applications outright, but can only order the government to "correct" deficiencies. *See* 50 U.S.C. § 1881a(j)(3). Right or not, the blog post's view of the FISC's authority has little bearing on *this* Court's Fourth Amendment analysis. This Court is not being asked to approve or deny a new Section 702 application, or even to evaluate the government's current Section 702 procedures, but to determine whether the surveillance of Mr. Muhtorov under the old procedures satisfied the Fourth Amendment.[3]

On that score, the FISC's opinions are an indictment. They highlight chronic weaknesses in the procedures used to surveil Mr. Muhtorov, which encouraged FBI agents to conduct "maximal" warrantless queries of Americans' private communications. *See* [*Redacted*], 402 F. Supp. 3d at 80, 87–88. They show that agents have performed *millions* of queries of Section 702 databases per year, including in domestic criminal investigations, yet up until 2019 the rules did not even require agents to document their reason for combing through an American's communications. *Id.* at 52–53, 75, 79. And as a whole, the FISC's opinions show how a surveillance program nominally directed at hundreds of thousands of foreign "targets" has been engineered to give agents easy access to Americans'

[3] As Mr. Muhtorov has explained, the FBI's backdoor searches of his communications bear on the reasonableness of the surveillance under the Fourth Amendment, regardless of the government's belated claim that its evidence was not "derived from" those searches. Def. Suppl. Br. 1–8. The Supreme Court has expressly held that, when evaluating the lawfulness of broad electronic searches, a court must consider even those elements of the privacy intrusion that do not lead to the government's evidence at trial. *See Scott v. United States*, 436 U.S. 128, 142–43 (1978); *Berger v. New York*, 388 U.S. 41, 55, 58–60 (1967).

communications, which would otherwise be off-limits to them absent a warrant. *See, e.g.*, FISC 2020 Op. at 42 (discussing the use of warrantless Section 702 queries in health-care fraud, bribery, and public corruption investigations that have no nexus to national security).

Although it has taken nearly a decade for this evidence to emerge, the FISC's opinions confirm that, at the time Mr. Muhtorov was surveilled, the government's rules did not adequately protect Americans' communications. For years, the complexity of the rules obscured that reality, providing the illusion of protection on paper while licensing broad invasions of Americans' privacy in practice. The government (and the blog post) continue to promote this illusion, *see* Def. Reply 20–21, but the FISC's findings about the scale of this surveillance and its impact on Americans demonstrate just how permissive the rules have been.

The FISC was right in 2018 to find the FBI's procedures unreasonable under the Fourth Amendment and to insist on stronger protections. The blog post does not dispute that. Because the FBI's procedures suffered from the same flaws when Mr. Muhtorov was surveilled and subjected to backdoor searches, *see* Def. Reply 6–7, the Court should similarly find that the warrantless surveillance in this case was unreasonable.

2. If the blog post is correct, it is further evidence that Section 702 surveillance violates Article III.

As Mr. Muhtorov has explained, Section 702 assigns the FISC a role that is fundamentally incompatible with Article III's case-or-controversy requirement. Def. Br. 47–

50; Def. Reply 24–26. It requires the FISC to issue advisory opinions on the constitutionality of general procedures absent concrete facts about the individual searches that will be undertaken—including the people who will be targeted, the information the government expects to obtain, or the communications facilities that will be tapped. As the blog post emphasizes, "Surveillance conducted under the authority of Section 702 is programmatic collection on a vast scale." The FISC's role is programmatic, too. It considers whether the government's annual certification complies with FISA's statutory requirements, and whether the general procedures for carrying out hundreds of thousands of searches comply the Fourth Amendment. *See* 50 U.S.C. § 1881a(j). Although the FISC has recently probed how the government is implementing some of its procedures, given the persistent problems that have emerged, the court's review remains programmatic, divorced from the circumstances of any individual search. No other Article III court engages in such a free-floating legal exercise.

But if the blog post is correct, the FISC's opinions are all the more advisory because the FISC lacks statutory authority to deny a government application for Section 702 surveillance outright. In other words, according to the author, even if the FISC concluded that the surveillance fundamentally violates the Fourth Amendment—for instance, because it involves the warrantless collection, querying, and use of Americans' communications—the FISC could not simply deny the application. Instead, it is required to offer the government a way to "correct any deficiency identified." 50 U.S.C. § 1881a(j)(3)(B)(i). This

framework is problematic for two reasons. First, the FISC's opinions are plainly advisory if it cannot effectuate a decision that the surveillance is unlawful by ordering the surveillance to stop. Second, requiring the FISC to seek "accommodation" of government surveillance requests, as the post says, presses the FISC into an even more advisory role. It suggests that the FISC, not the executive branch or Congress, must identify the specific changes that *would* allow the surveillance to pass muster. That may appear innocuous when only minor deficiencies arise, but where the FISC finds fundamental constitutional defects, requiring it to propose a hypothetical, alternative scheme is inconsistent with the case-or-controversy requirement. It is not a court's role to devise a lawful surveillance scheme for the government. *Cf. United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 322–24 (1972) ("We do not attempt to detail the precise standards for domestic security warrants any more than our decision in *Katz* sought to set the refined requirements for the specified criminal surveillances which now constitute Title III."); *Berger*, 388 U.S. at 58–60, 64 (similar).

3. Several of the post's key premises are wrong.

The post contains a number of broad assertions about Section 702 surveillance that are wrong for reasons addressed by Mr. Muhtorov in his briefs. Mr. Muhtorov highlights three of those errors here.

First, the blog post barely notes the Fourth Amendment warrant requirement, even as it is quite open about the government's effort to amass and exploit huge quantities of Americans' communications. It assumes that the warrant requirement is irrelevant simply

because the government says it is "targeting" foreigners. But the warrant requirement does not depend on whom the government claims to be targeting—it applies when agents are seizing or searching private communications that they know involve Americans. Def. Br. 29–32, 40–45; Def. Reply 13–18. Indeed, the government's logic has no limit: if accepted, it would expose *any* communication between an American and a person abroad to a warrantless government search. While the government points to the incidental overhear rule, that rule has never operated as one of the jealously and carefully drawn exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967) (Warrantless searches are "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."); Elizabeth Goitein, *The Ninth Circuit's Constitutional Detour in Mohamud*, Just Security (Dec. 8, 2016), https://goo.gl/G8wT3X. Even in the intelligence context, "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *Keith*, 407 U.S. at 317–18.

Second, in its "reasonableness" analysis, the post's description of the competing interests that courts must balance here is cursory and one-sided. The post regards Americans' interests in the privacy of their communications and in security against warrantless government surveillance as negligible, even though the collected communications can contain medical records, family photos, and intimate personal correspondence. *See* Barton Gellman et al., *In NSA-Intercepted Data, Those Not Targeted Far*

Outnumber the Foreigners Who Are, Wash. Post (Jul. 5, 2014), http://wapo.st/1MVootx. At the same time, the post ignores the fact that many of these communications have no foreign intelligence value, *see id.*, yet sit in massive government databases for years at a time where they may be freely searched for other purposes by FBI agents around the country.

Finally, the blog post's analogy to the DNA matching analyzed in *Maryland v. King*, 569 U.S. 435, 464 (2013) is misguided, as Mr. Muhtorov has already explained. Def. Reply 10–11. Indeed, both the Second Circuit and the FISC have forcefully rejected the argument that once Americans' private communications are in the government's hands, the Fourth Amendment has nothing more to say about how that data is searched and used. *See United States v. Hasbajrami*, 945 F.3d 641, 670–71 (2d Cir. 2019); [*Redacted*], 402 F. Supp. 3d at 80, 87–88 ("The government is not at liberty to do whatever it wishes with those U.S.-person communications.").

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE AND SERVICE

As required by Fed. R. App. P. 32(g)(1) and consistent with this Court's order of May 20, 2021, I certify that this ***Appellant's Brief in Response to the Court's May 20, 2021 Order*** is ten pages (2,311 words), proportionally spaced in size 13-point font.

I also certify that on June 1, 2021, I electronically filed the foregoing ***Appellant's Brief in Response to the Court's May 20, 2021 Order*** using the CM/ECF system, which will send notification of this filing to counsel for the government, James C. Murphy, at james.murphy3@usdoj.gov, and Joseph Palmer, at joseph.palmer@usdoj.gov. I further certify that I also will send a copy of this filing by email to Caleb Kruckenberg, counsel for Appellant Bakhtiyor Jumaev, at caleb.kruckenberg@ncla.legal.

/s/ John C. Arceci
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