IN THE UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT

In Re Motion In Opposition To Government's Imminent Or Recently-Made Request To Resume Bulk Data Collection Under Patriot Act § 215	)))))	Docket No. Misc. 15-01

MOVANT'S SUPPLEMENTAL BRIEF ADDRESSING EFFECT OF § 109 OF USA FREEDOM ACT ON BULK ACQUISITION OF CALL-DETAIL RECORDS

In accordance with this Court's Order of June 5, 2015, Movants submit this supplemental brief to address the effect of § 109 of the USA FREEDOM Act on whether the bulk acquisition of non-content call-detail records ("bulk acquisition") is lawful under Title V of FISA during the 180-day period ("180-day period") before §§ 101 - 103 of the USA FREEDOM Act take effect.

Argument #1: Amendments to the Patriot Act Arguably Allowing for Bulk Collection Fail Because the Patriot Act's 2001 Expanded Business Records Authority Has Permanently Lapsed[1]

The USA Freedom Act of 2015 ("Freedom Act") is not a standalone bill; rather, it purports to amend various portions of the United States Code relating to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) ("FISA"). However, upon the expiration of the USA Patriot Act of 2001 ("Patriot Act") at midnight, June 1, 2015, various code sections reverted to the form in which they existed on October 25, 2001, including Patriot Act § 215.[2]

Prior to the expansion of the Government's authority to collect business records under the Patriot Act, there was no arguable basis for the Government to execute its bulk acquisition program; thus, any such authority the Government may have had under § 215 of the Patriot Act ceased to exist at midnight on June 1, 2015, which authority was not re-instated by the Freedom

[1] Movants do not concede the Government ever had proper legal authority to conduct its bulk acquisition program.
[2] The House Judiciary Committee, under the heading "Correcting the Record on Section 215" on its webpage providing information on the Freedom Act, refers to the notion that Congress can simply reauthorize or amend § 215 on or after June 1, 2015 as a "myth," and goes on to state the same legal position as Movants are advancing herein. http://judiciary.house.gov/index.cfm/usa-freedom-act.

Act.[3] Instead, the Freedom Act effectively amended the U.S. Code sections as they were on October 25, 2001 – leaving no arguable basis for bulk acquisition.[4]

While this argument would not apply had the Freedom Act been signed into law prior to midnight on June 1, 2015, Congress was fully aware of the problems associated with passing the expiration date and they chose to do nothing to fix those problems. There is no lack of clarity regarding the foregoing, *see* CRS Memo, and it is not this Court's proper role to do other than implement the law as Congress and the President have delivered it.

Argument #2: Previous Findings by This Court that Bulk Acquisition Was Legal "Crucially Depended" on the Government's Assertions of Necessity, Which It Has Abandoned[5]

In its earlier findings that bulk acquisition was legal and constitutional, this Court firmly planted its flag in reliance on the Government's sworn declarations of the irreplaceable necessity of the program, using words and phrases such as "vital," "necessary," and "the only effective means." In his March 2, 2009, opinion addressing the NSA's "frequent[] and systemic[]" violations of the required minimization requirements, Judge Walton stated:

> On December 12, 2008, the [FISC] re-authorized the government to acquire the tangible things sought ... in its application in the above-captioned docket ("BR 08-13"). . . . The Court found reasonable grounds to believe that the tangible things sought are relevant to authorized investigations being conducted by the [FBI] to protect against international terrorism. . . . In making this finding, the Court relied on the assertion of the [NSA] that having access to the call detail records "is vital to NSA's counterterrorism intelligence mission" because "[t]he only effective means by which NSA analysts are able continuously to keep track of all affiliates of one of the aforementioned entities [who are

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[3] P.L. 109-177, § 102(a) as amended by P.L. 112-14. *See also* Congressional Research Service May 19, 2015 Memorandum on "Sunset of § 215 of the USA PATRIOT Act of 2001" to House Judiciary Committee (available at http://judiciary.house.gov/_cache/files/b8bc7204-c0eb-49a2-afdf-076f575f3f9a/crs-memo.pdf) ("CRS Memo"). The sunset provision of the Patriot Act did provide that specific, ongoing investigations commenced prior to expiration could continue. P.L. 109-177, § 102(b).

[4] The business records provisions of FISA resided in 50 U.S.C. § 1862, not § 1861, prior the 2001 Patriot Act. Thus, the Freedom Act amendments to § 1861 are actually amendments to a provision of the law as of October 25, 2001 that contained definitions of terms and did not address the collection of business records.

[5] *See* Jaffer, J., *The Basis for the NSA's Call-Tracking Program Has Disappeared, If It Ever Existed* (Nov. 7, 2013), available as of June 9, 2015 at http://justsecurity.org/2982/basis-nsas-call-tracking-program-disappeared-existed/.

> taking steps to disguise and obscure their communications and identities], is to obtain and maintain an archive of metadata that will permit these tactics to be uncovered."

(emphasis added). Judge Eagan of this Court stated the following relating the Government's assurances of necessity to her 2013 conclusion of the relevance of the bulk acquisition program:

> As this Court noted in 2010, the "finding of relevance most crucially depended on the conclusion that bulk collection is *necessary* for NSA to employ tools that are likely to generate useful investigative leads to help identify and track terrorist operatives." Indeed, in [redacted] this Court noted that bulk collections such as these are "necessary to identify the much smaller number of [international terrorist] communications." As a result, it is this showing of necessity that led the Court to find that "the entire mass of collected metadata is relevant to investigating [international terrorist groups] and affiliated persons."

In Re Application of the FBI for an Order Requiring the Production of Tangible Things, docket no. BR 13-109, Amended Mem. Op. (FISA Ct. Aug. 29, 2013)(internal citations redacted) (second emphasis added)(hereafter "Eagan Order"). For this Court, mere utility or helpfulness of the proposed bulk acquisition was not enough – the "necessity" of bulk acquisition was *the* determining factor in its finding of relevance to an authorized investigation. However, the Government has since abandoned claims of necessity, now describing the program more commonly as one method that is a useful tool in its efforts. For example, in *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013),[6] the Government's supporting declaration from the FBI described the program variously as "one method that the NSA has developed to accomplish the objective" of "[d]etecting threats by exploiting terrorist communications;"[7] and by noting mildly that "experience has shown that NSA metadata analysis, in complement with other FBI investigatory and analytical capabilities, produces information pertinent to FBI counter-terrorism investigations, and can contribute to the prevention of terrorist attacks."[8] The NSA was no more

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[6] This case was appealed, resulting in the holding by the Second Circuit that § 215 of the Patriot Act does not authorize bulk acquisition. *ACLU v. Clapper*, 2015 U.S. App. LEXIS 7531 (2d Cir. May 7, 2015).
[7] *Id.* Declaration of FBI Acting Assistant Director Robert J. Holley at ¶5 (emphasis added).
[8] *Id* at ¶9 (emphasis added).

firm, stating that the bulk acquisition program is "[o]ne method that the NSA has developed" to "detect any terrorist threat inside the U.S."[9] NSA went on to declare that "[w]ithout the ability to obtain and analyze bulk metadata, the NSA would lose a tool for detecting communications chains that link to identifiers associated known and suspected terrorist operatives."[10]

Either the Government has changed its mind after years of experience or more recent expectations of public oversight and adversarial proceedings have led it to tone its declarations down to a more realistic and accurate level. Regardless, this Court's earlier rulings rested on the necessity of the bulk acquisition program. It is clear from Government filings in a variety of cases, that the Government cannot[11] – and does not[12] – stand by such assertions of necessity any longer; therefore, in the absence of the crucial underpinning of this Court's earlier rulings, this Court should now rule that the Government does not meet the relevance requirement for issuance of a bulk acquisition order under § 215 of the Patriot Act.[13]

Argument #3: The State of the Law Regarding Bulk Acquisition Did Not Change During the 180-Day Period, Because It Was Not Legal Prior to the Freedom Act

Movants would argue in the alternative that the law during the 180-day period did not change from prior to expiration. Crucially, contrary to the Government's position, Movants argue that bulk acquisition was not legal prior to the Freedom Act. In taking this position, Movants' adopt the rationale of the Second Circuit in *ACLU v. Clapper*.

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[9] *Id.* Dec. of NSA Signals Intelligence Dir. Teresa H. Shea, National Security Agency at ¶7 (emphasis added).
[10] *Id* at ¶58 (emphasis added).
[11] *See* Brief of *Amici Curiae* Senators Wyden, Udall, and Heinrich in Support of Movants, *First Unitarian Church of L.A. v. Nat'l Security Agency*, No. 3:13-cv-03287-JSW (N.D. Cal.), Docket Entry 63-2 (filed Nov. 18, 2013) (hereafter "Senators' Brief"), and discussion in Movants' Motion In Opposition to Government's Imminent or Recently-Made Request to Resume Bulk Data Collection Under Patriot Act §215 at 35-36 (hereafter "Movants' Br."). Also, the Freedom Act represents legislative rejection of the Government's original claims of necessity.
[12] The President and intelligence community supported the Freedom Act because they concluded that bulk acquisition was not a necessity. *See, e.g.*, May 11, 2015 Letter to Senators Lee and Leahy from Attorney General Lynch and Director of National Intelligence Clapper ("The Intelligence Community believes that the bill preserves the essential operational capabilities of the telephone metadata program and enhances other intelligence capabilities needed to protect our nation and its partners.") (Attached as Exhibit A).
[13] This rationale is also relevant to this Court's consideration of the Fourth Amendment arguments.

The U.S. Congress viewed itself (and those supporting the Freedom Act) as agreeing with the position of the Second Circuit. The House Judiciary Committee Report stated: "Congress' decision to leave in place the 'relevance' standard for Section 501 orders should not be construed as Congress' intent to ratify the FISA Court's interpretation of that term. These changes restore meaningful limits to the 'relevance' requirement of Section 501, consistent with the opinion of the [] Second Circuit in *ACLU v. Clapper*."[14] The policy(ies) they deemed themselves to be continuing during the 180-day period clearly did not include bulk acquisition.

The Government declares, *ipse dixit*, that Congress provided the 180-day period strictly to provide for a) an orderly termination of bulk acquisition, and b) a reasonable time to implement new targeted production procedures. Gov. Memo at 5. Among possible interpretations of Congress' actions includes that it was unclear whether bulk acquisition was (or should be) legal under the Patriot Act, and the 180-day period was nothing more than a political compromise. However, based on the view of Congress that *ACLU v. Clapper* was correctly decided, the best view is that the 180-day period was strictly to start up the new targeted procedures.

Conclusion

For the reasons cited herein, this Court should deny the Government's request to re-institute bulk acquisition. Additionally, Movants request oral argument in this matter.[15]

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[14] H. Rep. 114-109, Part 1, pp. 18-19. *See also* Letter of Patriot Act author, Cong. Sensenbrenner, to U.S. Attorney General Eric H. Holder, Jr., at 2 (June 6, 2013) ("I do not believe the released FISA order is consistent with the requirements of the Patriot Act. How could the phone records of so many innocent Americans be relevant to an authorized investigation as required by the Act?"); 161 Cong. Rec. H2915 (daily ed. May 13, 2015)(statement of Rep. Conyers)(affirming that the long-held view of Members is consistent with the Second Circuit's ruling); 161 Cong. Rec. S3170 (daily ed., May 20, 2015)(statement of Sen. Lee)(noting that the FISC's rationale "cannot reflect a proper understanding of this concept of relevance that is in § 215 of the Patriot Act. It can't, and it doesn't").

It is separately worth noting that the foregoing demonstrates that the doctrine of legislative ratification is inapposite as previously relied upon by this Court as it relates to any application prior to Edward Snowden's June 5, 2013 revelations (*e.g.*, Cong. Sensenbrenner's letter was sent the *next day*). *Cf.* Eagan Order at 23-28.

[15] Movants suggest that consideration of this matter *en banc* may be appropriate under Rules 45-46 of this Court.

Respectfully Submitted,

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Certificate of Service

I certify that a true and correct signed electronic original, as per Rules 7 & 8 of this Court, of the foregoing MOVANT'S SUPPLEMENTAL BRIEF ADDRESSING EFFECT OF § 109 OF USA FREEDOM ACT ON BULK ACQUISITION OF CALL-DETAIL RECORDS was filed with the Court and served on the following by e-mail sent to Joan Kennedy, Associate Director, Security and Emergency Planning Staff, Litigation Security Group, United States Department of Justice, as prearranged in accordance with Rule 8 of this Court on June 11, 2015:

James B. Comey, Jr.
Director of the Federal Bureau of Investigation
FBI Headquarters
935 Pennsylvania Avenue, N.W.,
Washington, D.C. 20535-0001

Kenneth T. Cuccinelli, II

Exhibit A

May 11, 2015 Letter
from Attorney General Lynch and Director of National Intelligence Clapper
to Senators Lee and Leahy

May 11, 2015

Senator Patrick J. Leahy
United States Senate
Washington, DC 20510

Senator Mike S. Lee
United States Senate
Washington, DC 20510

Dear Senators Leahy and Lee,

Thank you for your letter of May 11, 2015, asking for the views of the Department of Justice and the Intelligence Community on S. 1123, the USA FREEDOM Act of 2015. We support this legislation.

This bill is the result of extensive discussion among the Congress, the Administration, privacy and civil liberties advocates, and industry representatives. We believe that it is a reasonable compromise that preserves vital national security authorities, enhances privacy and civil liberties and codifies requirements for increased transparency. The Intelligence Community believes that the bill preserves the essential operational capabilities of the telephone metadata program and enhances other intelligence capabilities needed to protect our nation and its partners. In the absence of legislation, important intelligence authorities will expire on June 1. This legislation would extend these authorities, as amended, until the end of 2019, providing our intelligence professionals the certainty they need to continue the critical work they undertake every day to protect the American people.

The USA FREEDOM Act bans bulk collection under Section 215 of the USA PATRIOT Act, FISA pen registers, and National Security Letters, while providing a new mechanism to obtain telephone metadata records to help identify potential contacts of suspected terrorists inside the United States. The Intelligence Community believes, based on the existing practices of communications providers in retaining metadata, that these provisions will retain the essential operational capabilities of the existing bulk telephone metadata program while eliminating bulk collection by the government.

The bill also codifies requirements for additional transparency by mandating certain public reporting by the government, authorizing additional reporting by providers, and establishing a statutory mechanism for declassification and release of FISA Court opinions consistent with national security. It establishes a process for appointment of an amicus curiae to assist the FISA Court and FISA Court of Review in appropriate matters. It provides reforms to national security letters, requiring review of the need for their secrecy. The bill also closes potential gaps in collection authorities and increases the maximum criminal penalty for materially supporting a foreign terrorist organization.

Overall, the significant reforms contained in this legislation will provide the public greater confidence in how our intelligence activities are carried out and in the oversight of those activities, while ensuring vital national security authorities remain in place. You have our commitment that we will notify Congress if we find that provisions of this law significantly impair the Intelligence Community's ability to protect national security. We urge the Congress to pass this bill promptly.

Sincerely,

Loretta E. Lynch
Attorney General

James R. Clapper
Director of National Intelligence

cc:
The Honorable Mitch McConnell, Majority Leader, United States Senate
The Honorable Harry Reid, Minority Leader, United State Senate
The Honorable Richard Burr, Chairman, Select Committee on Intelligence
The Honorable Dianne Feinstein, Vice Chairman, Select Committee on Intelligence
The Honorable Chuck Grassley, Chairman, Committee on the Judiciary