

CUCCINELLI & ASSOCIATES, PLLC.

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LEEANN FLYNN HALL
CLERK OF COURT



June 12, 2015

The Honorable Michael W. Mosman
United States Foreign Intelligence Surveillance Court
Washington, D.C. 20001

Re.: Oral Argument in Docket No. Misc. 15-01

Dear Judge Mosman,

In the Government's filing of today,¹ they argued that this Court should reject our request for oral argument.² Particularly in light of the fact that undersigned counsel has never appeared before this Court prior to this matter, I thought it necessary and appropriate to make certain brief points and assurances to the Court.

The Government suggested in its explanation of its opposition to oral argument that there is nothing meaningfully novel before this Court in this matter. In fact, there are five elements of the arguments exchanged by the parties hereto that are novel:

- 1) The state of the relevant statutes – particularly 50 U.S.C. § 1861 – is very much in question in light of the U.S. Senate's passage and the President's signature of the USA Freedom Act *after*, instead of before, the expiration of the sunset provision of the Patriot Act. This circumstance has never existed before.
- 2) The only Court of Appeals to rule on the question of whether the Government's bulk acquisition is beyond the scope of § 215 of the pre-expiration Patriot Act decided that question in the affirmative only last month.³
- 3) Under oath in other courts and before Congress the Government has retreated from its prior position before this Court that bulk acquisition was a "necessity," which contention on the part of the Government was explicitly noted by this Court to be *the* linchpin of this Court's own earlier rulings upholding bulk acquisition under § 215 of the pre-expiration Patriot Act. This Court has not re-addressed this question following the Government's retreat from its prior position regarding the "necessity" of bulk acquisition.

¹ "Response to Motion In Opposition to Government's Request to Resume Bulk Data Collection Under Patriot Act Section 215" filed with this Court June 12, 2015.

² *Id* at 13 n.7.

³ *ACLU v. Clapper*, 2015 U.S. App. LEXIS 7531 (2d Cir. May 7, 2015).

- 4) Upon information and belief, contract and property-based Fourth Amendment arguments have not been presented to this Court regarding the constitutionality of bulk acquisition.
- 5) Finally, upon information and belief, a number of our arguments distinguishing the circumstances of the Government's bulk acquisition program from *Smith v. Maryland* have not previously been considered by this Court.

Perhaps more importantly, I want this Court to know that I understand and take very seriously the statutory charge to this Court to proceed expeditiously. I want to assure this Court that I will *never* be a cause to this Court to slow any aspect of its consideration of the motions before it. I can and will appear before this Court any day, at any time, prepared to argue with 24 hours notice. More notice is always welcome; however, I am prepared to make any adjustment to my existing schedule to meet any schedule this Court sets.

Given the numerous novel questions before this Court, coupled with the lack of prior adversarial consideration of most if not all of the issues briefed by the parties hereto, I would respectfully suggest that oral argument may help this Court decide the matters before it more quickly and with greater confidence in the correctness of its own decision(s).

I look forward to assisting this Court in analyzing the novel and important questions now before it, and would respectfully request that this Court grant Movants' request for oral argument.

Sincerely,

A handwritten signature in black ink that reads "Ken C II". The signature is stylized, with the first name "Ken" written in a cursive script and the "C II" part being more blocky and distinct.

Hon. Ken Cuccinelli, II

cc: Robert P. Boyer, Jr. (counsel for the Government)

Certificate of Service

I certify that a true and correct signed electronic original, as per Rules 7 & 8 of this Court, of the foregoing Letter dated June 12, 2015 from Movants to Judge Mosman 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 13, 2015:

Robert P. Boyer, Jr.
Deputy Section Chief, Operations
Office of Intelligence
National Security Division
U.S. Department of Justice

A handwritten signature in black ink, appearing to read "Ken C II". The signature is written in a cursive, stylized font. The "K" is large and loops around the "C". The "II" is written as two vertical lines. The signature is positioned above a horizontal line.

Kenneth T. Cuccinelli, II