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

IN RE APPLICATION OF THE FEDERAL BUREAU OF INVESTIGATION FOR AN ORDER REQUIRING THE PRODUCTION OF TANGIBLE THINGS

Docket No. BR 13-109
(or successor docket)

MOTION TO ESTABLISH A PUBLIC BRIEFING SCHEDULE INCLUDING THE FILINGS OF BRIEFS BY AMICI CURIAE, FOR LEAVE FOR THE CENTER FOR NATIONAL SECURITY STUDIES TO FILE AN AMICUS CURIAE BRIEF, AND A SUGGESTION FOR HEARING EN BANC

Pursuant to Rule 6(d) of the Rules of the United States Foreign Intelligence Surveillance Court, the Center for National Security Studies moves this Court to establish procedures to ensure that the most recent or next reauthorization of the bulk telephone metadata collection previously authorized in Docket No. BR 13-109 is given plenary consideration by the full Court that includes an opportunity for amici curiae to submit a brief or briefs setting forth reasons why section 501 of the Foreign Intelligence Surveillance Act, 50 USC § 1861, does not authorize that bulk collection.

1. The Center for National Security Studies is a project of the National Security Archive Fund, Inc., a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code. The Center is dedicated to the defense of civil liberties, human rights and constitutional limits on government power. Since being founded in 1974, one of the Center's principal concerns has been the prevention of illegal government surveillance.

To that end, the Center participated as amicus curiae in *In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002).

2. On September 25, 2013, the Center submitted a letter to the Presiding Judge of this Court concerning the procedures the Court may use to ensure plenary consideration on a public record of the significant legal issues concerning the legality of bulk telephony metadata collection. Specifically, the letter requested that the procedures include three elements. First, if the Government seeks reauthorization of the collection, the Government should file on the public record a supporting brief that sets forth its argument on the legality of the collection. The letter recognized the Government might have supplemental classified information that has been or would be submitted to the Court under seal. Second, the letter sought a briefing schedule that enables interested persons or organizations to submit briefs amicus curiae responding to the Government's submission. Third, the letter expressed the belief that this is an appropriate case for the Court to hear en banc. The letter asked that if a formal motion should be made that the letter be treated as a motion or that the Center be advised that a motion should be filed. Copies of the letter were sent to the Acting Assistant Attorney General for National Security and the General Counsel of the Office of the Director of National Intelligence with the hope expressed that they would join in these requests.

3. On October 9, 2013, this Court entered an order that a formal motion is required and that the Center may resubmit its requests in that form. The order directed that any such submission address whether the Center's requests are foreclosed in whole or in part by the language and structure of Section 1861, the section of Title 50 of the

U.S. Code that sets forth the provisions of section 501 of FISA and is commonly referred to as section 215 of the USA PATRIOT Act.

4. On October 11, 2013, the Office of the Director of National Intelligence announced that this Court has approved the Government's application to renew the court authorization for the telephony metadata program that expired on October 11, 2013.

5. Pursuant to the Court's invitation, the Center hereby moves for entry of an order granting the requests set forth in its letter of September 25, 2013. Since then, authority for bulk telephony metadata collection expired on October 11 and has been renewed at the Government's request, presumably for another 90 days. We accordingly ask the Court to establish the recommended procedures for plenary briefing by providing for reconsideration and briefing on reconsideration of the ex parte order that has been entered reauthorizing the collection as of October 11, 2013. In the alternative, we ask that the Court now establish a docket for the next application for a successor 90-day bulk telephony metadata order and provide for the procedures requested in this motion for the consideration of that application. If the Court chooses that alternative, we request that the Court begin the schedule for that briefing as soon as possible in order to assure over the next three months that there is sufficient time for briefing and consideration.

a) The Government should file on the public record, or declassify if it has submitted on the closed record, its current argument on the legality of the bulk telephony collection. On September 19, 2013, the Court published an opinion by Judge Claire Eagan on this collection that had been entered on August 22, 2013 (amended on August 29, 2013) and declassified in substantial part by the Executive Branch. In that opinion, the Court noted in footnote 4 that it explicitly did not consider the Administration White

Paper on Bulk Collection of Telephony Metadata under Section 215 of the USA PATRIOT Act (August 9, 2013) which was released after the Court's ex parte hearing with the Government. There are differences, both in the ground covered and the manner in which points are stated, among the Court's opinion and the Government's publicly released arguments in the White Paper, the merits portion of the Department of Justice's memoranda of law in the Southern District of New York (*American Civil Liberties Union v. Clapper*, Case No. 13 Civ. 3994), and the merits portion of the Solicitor General's brief for the United States in response to the petition for mandamus pending in the Supreme Court (*In re Electronic Privacy Information Center*, Petitioner, No. 13-58). It is important, therefore, that the Government state clearly, in one public brief, the arguments it is now asking this Court to consider and to which amici can now respond.

b) The Court should establish a briefing schedule that enables interested persons or organizations to submit briefs amicus curiae responding to the Government's submission. This would be in accord with the procedures used by the Court of Review in *In re Sealed Case*, 310 F.3d 717 (Foreign Intel. Surv. Ct. Rev. 2002). There are substantial questions whether Congress intended in 2001 or in the amendments enacted in 2006 to authorize bulk collection of the telephony metadata of U.S. citizens. There are substantial questions whether, notwithstanding its lack of intent to do so, the language enacted may fairly be construed to allow for that bulk collection. And there are substantial questions whether the sunset extension in 2011, which occurred prior to the Administration's 2013 White Paper and this Court's 2013 opinion, may properly be read to authorize that previously unauthorized collection. Now that the fact of the collection has been publicly disclosed there is no reason for this Court to delay what any court of

the United States should do in a case that no longer involves a national secret: decide after hearing both points of view. The Administration should agree. At page 9 of his testimony before the Senate Judiciary Committee on October 2, 2013, Director of National Intelligence James Clapper stated the Administration's openness to discussing legislation to authorize this Court to appoint an amicus in cases "that present novel and significant questions of law and that involve the acquisition and retention of information concerning a substantial number of U.S. persons." If the Court presently has the authority to receive amicus briefs, as we believe it does and as the Court of Review has done, there is no need to wait for legislation before hearing competing legal arguments on bulk telephony collection. Movant requests that it be granted leave to file a brief amicus curiae and that the schedule permit other proposed amici to seek leave to file in accordance with that schedule.

c) The Court should consider hearing this matter en banc. Pursuant to section 103(a)(2) of FISA (50 USC § 1803(a)(2)) and this Court's implementing rules a majority of the judges of the Court may order en banc consideration when "the proceeding involves a question of exceptional importance," as this matter does. The Government reiterates the point that fourteen judges of this Court have approved bulk telephony orders. Perhaps the impression sought to be conveyed is that the full Court has weighed the legal issues and unanimously reached the same conclusion. But as far as the public record is concerned, this Court, as a full Court, has never considered the matter in the manner that the Congress has authorized, by hearing it en banc in a proceeding in which all the judges of the Court hear the same arguments and then deliberate together. While en banc proceedings might understandably be rare, the difficulty and significance

of the legal issues and their practical and potential import for the surveillance authorities of the Government warrant the judges of the Court coming together for the first time pursuant to the en banc authority granted by Congress in 2008.

6. The Court directed the Center to address whether its requests are foreclosed in whole or in part by the language and structure of the Act. The answer is that these requests are not foreclosed by either the language or structure of the Act, even if some details of process should be adjusted in harmonizing the requests with particular features of the statute. As a starting point, section 103(g)(1) of FISA (50 USC § 1803(g)(1)) provides that this Court and the Court of Review "may establish such rules and procedures, and take such actions, as are reasonably necessary to administer their responsibilities under this Act." An invitation to amici to address legal arguments that have been declassified by the Executive Branch, and published by this Court, in order to inform the Court about competing arguments may certainly be deemed to be "reasonably necessary" to enable the Court to carry out its function of determining whether proposed collection is lawful. Under section 103(g)(1), the Court does not need a formal rule on amicus briefs – it may "take such actions" without a rule, although, of course, the Court may wish to adopt a rule on amicus briefs for future matters. Not only does the Court have this affirmative authority to take such actions, there is also no conflict between the receipt of amicus briefs on unclassified matters and the provisions in section 501 of FISA (50 USC § 1861) on the potential party status of the recipients of business record orders. The amici will not be parties. For example, they will not have the right to seek review in the Court of Review. Their only role would be to provide arguments to the Court in response to arguments that have been declassified by the Executive Branch. The other

provisions identified in the Court's October 9 order pose no problem. If there is a concern about whether documents need to be filed under seal, there is a ready accommodation for that. Briefs can be filed under seal, subject to a prompt review for declassification. This Court's order and opinion can also be filed under seal, subject likewise to prompt review for declassification. And, of course, any order issued by this Court would remain an ex parte order even if amici are permitted to present competing viewpoints. *In re Sealed Case*, 310 F.3d at 719 ("Since the government is the only party to FISA proceedings, we have accepted briefs filed by [listing] as amici curiae.")

7. The Court's order drew attention to the rules of this Court on security clearances for counsel. Undersigned counsel for the movant Center for National Security Studies do not hold a security clearance. The briefing proposed by this motion will not require counsel for amici obtaining access to or using any classified information.

8. Undersigned counsel certifies that they are licensed to practice law by the Bar in the District of Columbia, that Kate A. Martin and Joseph Onek are members in good standing of the bar of the United States Court of Appeals for the District of Columbia Circuit, and that Kate A. Martin is a member in good standing of the bar of the United States District Court for the District of Columbia.

Conclusion

For the foregoing reasons, the Center for National Security Studies requests that the Court establish the procedures requested in this motion.

Respectfully submitted,

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Date: *October 17, 2013*

Counsel for Movant Center for National Security Studies

CERTIFICATE OF SERVICE

I, Kate A. Martin, hereby certify that on October 17, 2013, pursuant to procedures established by the Security and Emergency Planning Staff, United States Department of Justice under FISC Rule 8, I caused copies of the Motion To Establish a Public Briefing Schedule Including the Filings of Briefs by Amici Curiae, for Leave for the Center for National Security Studies to File an Amicus Curiae Brief, and a Suggestion for Hearing En Banc to be hand-delivered to:

Christine Gunning
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Litigation Security Group
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Kate A. Martin