



Yale Law School

MEDIA FREEDOM AND INFORMATION ACCESS CLINIC
INFORMATION SOCIETY PROJECT

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

2015 DEC -7 AM 9:42

LEE ANN HULL
CLERK OF COURT

Honorable Thomas F. Hogan, Presiding Judge
United States Foreign Intelligence Surveillance Court
c/o Christine Gunning
Litigation Security Group
U.S. Department of Justice
2 Constitution Square
145 N Street N.E., Suite 2W-115
Washington, DC 20530

December 4, 2015

Re: Notice of Supplemental Authority
In re Opinions & Orders of this Court Addressing Bulk Collection of Data
Under the Foreign Intelligence Surveillance Act, Docket No. Misc. 13-08

Dear Judge Hogan:

Movants American Civil Liberties Union, American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic (collectively "Movants") wish to bring to the Court's attention Section 402 of the USA Freedom Act of 2015, Pub. L. No. 114-23 (June 2, 2015), codified at 50 U.S.C. § 1872, which supports Movants' pending motion for the release of court opinions. A copy of the provision is enclosed.

As the Court is aware, on November 6, 2013, Movants filed the motion at issue in this case, asserting a First Amendment right of access to this Court's opinions addressing bulk collection of data under the Foreign Intelligence Surveillance Act. The Government responded that it already had released four heavily redacted Foreign Intelligence Surveillance Court ("FISC") opinions that are responsive to the motion. Movants replied that the redactions to those opinions must be independently reviewed by the Court to determine whether they meet the stringent standard of scrutiny required to overcome the public's right of access. Movants also asked the Court to order declassification and to independently review any other responsive FISC opinions that may exist. The parties concluded briefing on the motion on December 20, 2013, and Movants submitted a first Notice of Supplemental Authority on October 30, 2014. The Court has taken no action on the case since that time.

On June 2, 2015, Congress passed and the President signed into law the USA FREEDOM Act. Pub. Law 114-23. Section 402 of the Act is relevant to this suit. It requires the Director of National Intelligence ("DNI"), in consultation with the Attorney General ("AG"), to conduct a declassification review of "each decision, order, or opinion issued by the [FISC or FISCR] that includes a significant construction or interpretation of any provision of law," and to make such decisions "publicly available to the greatest extent practicable," with redactions if necessary. 50 U.S.C. § 1872(a)-(b). The DNI and AG are permitted to waive the requirement to declassify decisions if they determine "that a waiver of such requirement is necessary to protect the national

security of the United States or properly classified intelligence sources or methods,” but in that case they must publish an unclassified statement “summarizing the significant construction or interpretation of any provision of law.” 50 U.S.C. §1872(c)(2)(A).

As movants previously demonstrated, there is a First Amendment right of access to court records where there is a history of access to the type of record in question, and where public access would improve the functioning of the process in question.¹ Section 402 provides further evidence that these inquiries, particularly the latter, favor disclosure of FISC opinions. Section 402 demonstrates Congress’s judgment that significant FISC opinions should be published to the greatest extent possible, and that public access to FISC opinions supports the proper functioning of the Court. Section 402 thus further strengthens Movants’ claim asserting a First Amendment right of access to the opinions sought.

In light of this development, Movants respectfully ask the Court to rule on the pending motions, to determine that there is a qualified First Amendment right of access to the opinions Movants seek, and to permit redactions of those opinions only to the extent they meet the strict standard of constitutional scrutiny that is required to overcome this right.

Respectfully submitted,



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Encl.

¹ *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986).

² This submission has been prepared with the assistance of Yale Law School students Divya Musinipally, Andy Udelsman, and Yuriy Melnyk. The Media Freedom and Information Access Clinic and Abrams Institute for Freedom of Expression are programs of Yale Law School, but this letter does not purport to represent the institutional views of the school, if any.



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CERTIFICATE OF SERVICE

I, Jonathan Manes, certify that on this day, December 4, 2015, a copy of the foregoing notice of supplemental authority was served on the following persons by the methods indicated:

By email and FedEx overnight delivery:

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Jonathan M. Manes

PUBLIC LAW 114-23—JUNE 2, 2015

**UNITING AND STRENGTHENING AMERICA BY
FULFILLING RIGHTS AND ENSURING
EFFECTIVE DISCIPLINE OVER MONITORING
ACT OF 2015**

Public Law 114-23
114th Congress

An Act

To reform the authorities of the Federal Government to require the production of certain business records, conduct electronic surveillance, use pen registers and trap and trace devices, and use other forms of information gathering for foreign intelligence, counterterrorism, and criminal purposes, and for other purposes.

June 2, 2015
[H.R. 2048]

Uniting and
Strengthening
America by
Fulfilling Rights
and Ensuring
Effective
Discipline Over
Monitoring Act
of 2015.
50 USC 1801
note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015” or the “USA FREEDOM Act of 2015”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
Sec. 2. Amendments to the Foreign Intelligence Surveillance Act of 1978.

TITLE I—FISA BUSINESS RECORDS REFORMS

- Sec. 101. Additional requirements for call detail records.
Sec. 102. Emergency authority.
Sec. 103. Prohibition on bulk collection of tangible things.
Sec. 104. Judicial review.
Sec. 105. Liability protection.
Sec. 106. Compensation for assistance.
Sec. 107. Definitions.
Sec. 108. Inspector General reports on business records orders.
Sec. 109. Effective date.
Sec. 110. Rule of construction.

TITLE II—FISA PEN REGISTER AND TRAP AND TRACE DEVICE REFORM

- Sec. 201. Prohibition on bulk collection.
Sec. 202. Privacy procedures.

TITLE III—FISA ACQUISITIONS TARGETING PERSONS OUTSIDE THE UNITED STATES REFORMS

- Sec. 301. Limits on use of unlawfully obtained information.

TITLE IV—FOREIGN INTELLIGENCE SURVEILLANCE COURT REFORMS

- Sec. 401. Appointment of amicus curiae.
Sec. 402. Declassification of decisions, orders, and opinions.

TITLE V—NATIONAL SECURITY LETTER REFORM

- Sec. 501. Prohibition on bulk collection.
Sec. 502. Limitations on disclosure of national security letters.
Sec. 503. Judicial review.

TITLE VI—FISA TRANSPARENCY AND REPORTING REQUIREMENTS

- Sec. 601. Additional reporting on orders requiring production of business records; business records compliance reports to Congress.

- Sec. 602. Annual reports by the Government.
 Sec. 603. Public reporting by persons subject to FISA orders.
 Sec. 604. Reporting requirements for decisions, orders, and opinions of the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review.
 Sec. 605. Submission of reports under FISA.

TITLE VII—ENHANCED NATIONAL SECURITY PROVISIONS

- Sec. 701. Emergencies involving non-United States persons.
 Sec. 702. Preservation of treatment of non-United States persons traveling outside the United States as agents of foreign powers.
 Sec. 703. Improvement to investigations of international proliferation of weapons of mass destruction.
 Sec. 704. Increase in penalties for material support of foreign terrorist organizations.
 Sec. 705. Sunsets.

TITLE VIII—SAFETY OF MARITIME NAVIGATION AND NUCLEAR TERRORISM CONVENTIONS IMPLEMENTATION

Subtitle A—Safety of Maritime Navigation

- Sec. 801. Amendment to section 2280 of title 18, United States Code.
 Sec. 802. New section 2280a of title 18, United States Code.
 Sec. 803. Amendments to section 2281 of title 18, United States Code.
 Sec. 804. New section 2281a of title 18, United States Code.
 Sec. 805. Ancillary measure.

Subtitle B—Prevention of Nuclear Terrorism

- Sec. 811. New section 2332i of title 18, United States Code.
 Sec. 812. Amendment to section 831 of title 18, United States Code.

SEC. 2. AMENDMENTS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or a repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

TITLE I—FISA BUSINESS RECORDS REFORMS

SEC. 101. ADDITIONAL REQUIREMENTS FOR CALL DETAIL RECORDS.

(a) APPLICATION.—Section 501(b)(2) (50 U.S.C. 1861(b)(2)) is amended—

(1) in subparagraph (A)—

(A) in the matter preceding clause (i), by striking “a statement” and inserting “in the case of an application other than an application described in subparagraph (C) (including an application for the production of call detail records other than in the manner described in subparagraph (C)), a statement”; and

(B) in clause (iii), by striking “; and” and inserting a semicolon;

(2) by redesignating subparagraphs (A) and (B) as subparagraphs (B) and (D), respectively; and

(3) by inserting after subparagraph (B) (as so redesignated) the following new subparagraph:

“(C) in the case of an application for the production on an ongoing basis of call detail records created before,

(a) shall certify for review to the court established under subsection (b) any question of law that may affect resolution of the matter in controversy that the court determines warrants such review because of a need for uniformity or because consideration by the court established under subsection (b) would serve the interests of justice. Upon certification of a question of law under this subsection, the court established under subsection (b) may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

“(k) REVIEW OF FISA COURT OF REVIEW DECISIONS.—

“(1) CERTIFICATION.—For purposes of section 1254(2) of title 28, United States Code, the court of review established under subsection (b) shall be considered to be a court of appeals.

“(2) AMICUS CURIAE BRIEFING.—Upon certification of an application under paragraph (1), the Supreme Court of the United States may appoint an amicus curiae designated under subsection (i)(1), or any other person, to provide briefing or other assistance.”.

SEC. 402. DECLASSIFICATION OF DECISIONS, ORDERS, AND OPINIONS.

(a) DECLASSIFICATION.—Title VI (50 U.S.C. 1871 et seq.) is amended—

(1) in the heading, by striking “REPORTING REQUIREMENT” and inserting “OVERSIGHT”; and

(2) by adding at the end the following new section:

“SEC. 602. DECLASSIFICATION OF SIGNIFICANT DECISIONS, ORDERS, AND OPINIONS.

“(a) DECLASSIFICATION REQUIRED.—Subject to subsection (b), the Director of National Intelligence, in consultation with the Attorney General, shall conduct a declassification review of each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review (as defined in section 601(e)) that includes a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term ‘specific selection term’, and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion.

“(b) REDACTED FORM.—The Director of National Intelligence, in consultation with the Attorney General, may satisfy the requirement under subsection (a) to make a decision, order, or opinion described in such subsection publicly available to the greatest extent practicable by making such decision, order, or opinion publicly available in redacted form.

“(c) NATIONAL SECURITY WAIVER.—The Director of National Intelligence, in consultation with the Attorney General, may waive the requirement to declassify and make publicly available a particular decision, order, or opinion under subsection (a), if—

“(1) the Director of National Intelligence, in consultation with the Attorney General, determines that a waiver of such requirement is necessary to protect the national security of the United States or properly classified intelligence sources or methods; and

“(2) the Director of National Intelligence makes publicly available an unclassified statement prepared by the Attorney General, in consultation with the Director of National Intelligence—

50 USC
prec. 1871.

Consultation.
Public
information.
50 USC 1872.
Review.

“(A) summarizing the significant construction or interpretation of any provision of law, which shall include, to the extent consistent with national security, a description of the context in which the matter arises and any significant construction or interpretation of any statute, constitutional provision, or other legal authority relied on by the decision; and

“(B) that specifies that the statement has been prepared by the Attorney General and constitutes no part of the opinion of the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review.”.

(b) TABLE OF CONTENTS AMENDMENTS.—The table of contents in the first section is amended—

(1) by striking the item relating to title VI and inserting the following new item:

“TITLE VI—OVERSIGHT”;

and

(2) by inserting after the item relating to section 601 the following new item:

“Sec. 602. Declassification of significant decisions, orders, and opinions.”.

TITLE V—NATIONAL SECURITY LETTER REFORM

SEC. 501. PROHIBITION ON BULK COLLECTION.

(a) COUNTERINTELLIGENCE ACCESS TO TELEPHONE TOLL AND TRANSACTIONAL RECORDS.—Section 2709(b) of title 18, United States Code, is amended in the matter preceding paragraph (1) by striking “may” and inserting “may, using a term that specifically identifies a person, entity, telephone number, or account as the basis for a request”.

(b) ACCESS TO FINANCIAL RECORDS FOR CERTAIN INTELLIGENCE AND PROTECTIVE PURPOSES.—Section 1114(a)(2) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414(a)(2)) is amended by striking the period and inserting “and a term that specifically identifies a customer, entity, or account to be used as the basis for the production and disclosure of financial records.”.

(c) DISCLOSURES TO FBI OF CERTAIN CONSUMER RECORDS FOR COUNTERINTELLIGENCE PURPOSES.—Section 626 of the Fair Credit Reporting Act (15 U.S.C. 1681u) is amended—

(1) in subsection (a), by striking “that information,” and inserting “that information that includes a term that specifically identifies a consumer or account to be used as the basis for the production of that information,”;

(2) in subsection (b), by striking “written request,” and inserting “written request that includes a term that specifically identifies a consumer or account to be used as the basis for the production of that information,”; and

(3) in subsection (c), by inserting “, which shall include a term that specifically identifies a consumer or account to be used as the basis for the production of the information,” after “issue an order ex parte”.

(d) DISCLOSURES TO GOVERNMENTAL AGENCIES FOR COUNTER-TERRORISM PURPOSES OF CONSUMER REPORTS.—Section 627(a) of