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 15-75

MEMORANDUM OF LAW

The United States of America submits this Memorandum of Law to address issues of law raised by those parts of the recently-enacted USA FREEDOM Act of 2015 (USA FREEDOM Act) that amend 50 U.S.C. § 1861. As described more fully below, the Government submits that Section 1861, as amended by the USA FREEDOM Act, authorizes the Court to approve the Government's application for the bulk production of call detail records for a 180 day transition period. The Government respectfully submits that such authorization is appropriate notwithstanding the Second Circuit's recent panel opinion in ACLU v. Clapper, No. 14-42 (2d Cir. May 7, 2015).

I. Statement of Facts

On February 26, 2015, upon consideration of the Application by the United States pursuant to Section 1861, the Honorable James E. Boasberg of this Court issued orders in docket number BR 15-24 requiring, among other things, the production to the National Security Agency (NSA) of certain call detail records ("telephony metadata" or "BR

metadata"). The Court found that there are reasonable grounds to believe that the call detail records sought are relevant to authorized investigations (other than threat assessments) being conducted by the Federal Bureau of Investigation (FBI) under guidelines approved by the Attorney General under Executive Order 12333 to protect against international terrorism, which investigations are not being conducted solely upon the basis of activities protected by the First Amendment to the Constitution of the United States. Primary Order, docket number BR 15-24, at 2. The Court also found that the call detail records sought are the type of records that could be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things, and that the Government's application includes an enumeration of the minimization procedures the Government proposes to follow with regard to the call detail records sought. Id. The authorization granted in docket number BR 15-24 expired on June 1, 2015, at 5:00 p.m. Eastern Time.

The Primary Order in docket number BR 15-24 directed that, in the event the Government seeks renewed authorization, the Government shall file a memorandum of law to address the state of the law. Specifically, "If Congress has enacted legislation amending 50 U.S.C. § 1861 prior to a request for renewed authorities, the government is directed to provide, along with its request, a legal memorandum pursuant to Rule 11(d) of this Court's Rules of Procedure addressing any issues of law raised by the legislation

and not previously considered by the Court." If, on the other hand, Congress did not enact legislation amending Section 1861 or extending its sunset date, the Primary Order directed the filing of a memorandum of law "addressing the power of the Court to grant such authority beyond June 1, 2015."

Section 215 of the PATRIOT Act had amended Section 1861 and, as amended, was scheduled to sunset on June 1, 2015. Pub. L. 109-177 § 102(b), 120 Stat. 192, 194-95, as amended by Pub. L. 112-14 § 2(a), 125 Stat. 216. Following the June 1, 2015 sunset of Section 215, on June 2, 2015, Congress passed and, later that day the President signed into law, the USA FREEDOM Act. The USA FREEDOM Act, among other things, prohibits the bulk production of tangible things under Section 1861 and provides a new mechanism for the Government to obtain a targeted production of call detail records relating to authorized investigations to protect against international terrorism. The prohibition on bulk production under Section 1861 and the new mechanism for the targeted production of call detail records "shall take effect on the date that is 180 days after the date of the enactment of [the USA FREEDOM Act]." Until then, however, Section 109(b) expressly provides that "[n]othing in this Act shall be construed to alter or eliminate the authority of the Government to obtain an order under title V . . . as in effect prior to the effective date . . . during the period ending on such effective date." Thus, for a 180 day period beginning on June 2, 2015, the Government has specific statutory authorization to seek and obtain an order under Section 1861 as in effect prior to the

effective date. Id. § 109(b) Because the USA FREEDOM Act also extends the sunset date for Section 215 of the PATRIOT Act, as amended, to December 15, 2019, see id. § 705(a), the version of Section 1861 in effect immediately prior to the end of the 180 day period is, in pertinent part, the same version in effect at the time the Court approved the Government's application in docket number BR 15-24 and prior related dockets.

II. Legal Analysis

The USA FREEDOM Act authorizes the Government to seek and this Court to issue an order under Section 1861 for the production of tangible things in bulk for 180 days in the same manner as authorized in docket number BR 15-24 and prior related dockets. The USA FREEDOM Act bans the bulk production of tangible things under Section 1861 effective 180 days from its enactment, which is when Sections 101 through 103 take effect. Id. § 109(a). Its brief lapse notwithstanding, the USA FREEDOM Act also expressly extends the sunset of Section 215 of the USA PATRIOT Act, as amended, until December 15, 2019, id. § 705(a), and provides that, until the effective date of the amendments made by Sections 101 through 103, it does not alter or eliminate the Government's authority to obtain an order under Section 1861 as in effect prior to the effective date of Sections 101 through 103 of the USA FREEDOM Act. Id. § 109(b). Because the USA FREEDOM Act extends the sunset for Section 215 and delays the ban on bulk production under Section 1861 until 180 days from its enactment, the Government respectfully submits that it may seek and this Court may issue an order for

the bulk production of tangible things under Section 1861 as amended by Section 215 of the USA PATRIOT Act as it did in docket number BR 15-24 and prior related dockets.

Prior to and during the drafting, debate and enactment of the USA FREEDOM Act, both Congress and the public knew that this Court interpreted Section 1861 to authorize the bulk production of call detail records to NSA and that this bulk production was, until June 1, 2015, a current, ongoing production. Accordingly, when expressly providing for a 180 day delay in the effective date for Sections 101 through 103, and thereby authorizing continued orders under Section 1861 for the production of tangible things in bulk for 180 days, Congress did so in order to allow for the orderly termination of the current bulk production program and implementation of the technical capabilities required for the targeted production under the new provisions of Sections 101 through 103. Indeed, the recent legislative debate expressly noted the continuation of the bulk collection program during this transition period. See, e.g., 161 CONG. REC. S3303 (daily ed. May 22, 2015) (statement of Sen. Grassley) ("[The USA FREEDOM Act] would end the bulk collection of telephony metadata in 6 months, and transition the program to a system where the phone companies hold the data for targeted searching by the government."). See also, 161 CONG REC. S3275 (daily ed. May 22, 2015) (statement of Sen. Leahy) ("Just this week, the NSA Director stated in a letter to Leaders McConnell and Reid that the NSA only needs 180 days to transition to the new targeted program

established by the USA FREEDOM Act. Not 2 years. The 180-day transition has been part of the USA FREEDOM Act for more than a year.").

This purpose is plain from the USA FREEDOM Act as a whole, and Section 109 in particular. The USA FREEDOM Act prohibits bulk collection under a number of authorities, see §§ 103 (tangible things), 201 (pen register and trap and trace), and 501 (national security letters). The prohibitions against bulk production under Titles II and V of the USA FREEDOM Act (FISA Pen Register and Trap and Trace Reform, and National Security Letter Reform, respectively) take effect immediately upon enactment. But the prohibition on bulk collection of call detail records under Section 1861 allows for a 180-day orderly transition of the program. The extension of the sunset date of the USA PATRIOT Act coupled with the USA FREEDOM Act's provision for an orderly transition of the bulk metadata program would be meaningless if Congress did not also intend for the USA FREEDOM Act to authorize the existing program during the transition. See, e.g., INS v. Stanisic, 395 U.S. 62, 78 (1969) (rejecting an interpretation of a statutory provision that "would, as a practical matter, render [it] useless for the very function it was designed to perform"). Congress recognized the need for an orderly transition period that preserves an important foreign intelligence collection capability until the Government may effectively avail itself of the new provisions for a targeted production.

The Second Circuit's recent panel opinion in ACLU v. Clapper, No. 14-42 (2d Cir. May 7, 2015) does not bar this Court from authorizing the production in bulk of call

detail records, notwithstanding its holding that Section 1861 does not authorize the bulk production of call detail records. The Government believes that this Court's analysis of Section 215 reflects the better interpretation of the statute, see, e.g., In Re Application of the FBI for an Order Requiring the Production of Tangible Things, docket no. BR 13-109, Amended Mem. Op., 2013 WL 5741573 (FISA Ct. Aug. 29, 2013) (Eagan, J.) and In Re Application of the FBI for an Order Requiring the Production of Tangible Things, docket no. BR 13-158, Mem. (FISA Ct. Oct. 11, 2013) (McLaughlin, J.), disagrees with the Second Circuit panel's opinion, and submits that the request for renewal of the bulk production authority is authorized under the statute as noted above.[1]

This Court may certainly consider ACLU v. Clapper as part of its evaluation of the Government's application, but Second Circuit rulings do not constitute controlling precedent for this Court. With respect to application of Section 1861 of FISA, as amended by Section 215 of the USA PATRIOT Act, following careful consideration of the law by nineteen different judges, this Court has authorized the bulk production of call detail records to NSA forty-one times since May 2006. Although each such request sought a large number of call detail records, the vast majority of which ultimately will not be terrorist-related, the Government has argued and this Court has agreed, including in separate declassified opinions written by Judges Eagan, McLaughlin and Zagel, see

[1] The Government is currently in the process of weighing its variouslitigation options in light of the opinion, including whether to petition for rehearing (panel and/oren banc) and/or petition for a writ of certiorari.

docket numbers BR 13-109, BR 13-158, and BR 14-96, that the NSA bulk telephony metadata collection program is authorized by Section 215 of the USA PATRIOT Act. Each of these judges has concluded that the call detail records in bulk are "relevant," as that term is defined in Section 1861, to FBI investigations of the targeted foreign powers because NSA can effectively conduct metadata analysis, identifying contacts between known and unknown agents of the targeted foreign powers, only by having a bulk repository of such records. See, e.g., In Re Application of the FBI for an Order Requiring the Production of Tangible Things, docket no. BR 13-109, Amended Mem. Op., at 22–, 2013 WL 5741573, at *7 (FISA Ct. Aug. 29, 2013) (Eagan, J.) ("Because the subset of terrorist communications is ultimately contained within the whole of the metadata produced, but can only be found after the production is aggregated and then queried using identifiers determined to be associated with identified international terrorist organizations, the whole production is relevant to the ongoing investigation out of necessity."). See also In Re Application of the FBI for an Order Requiring the Production of Tangible Things, Docket No. BR 13-158, Memorandum at 3 (FISA Ct. Oct. 11, 2013) (McLaughlin, J.); and In Re Application of the FBI for an Order Requiring the Production of Tangible Things, Docket No. BR 14-96, Mem. Op. at 3 (FISA Ct. June 19, 2014) (Zagel, J.). The Government submits that this Court's analysis continues to reflect the better reading of Section 1861.

Moreover, in issuing its May 7, 2015 opinion, the Second Circuit panel declined to conclude that any preliminary injunction against the Government was required immediately, instead leaving it to the district court to reconsider on remand the propriety of injunctive relief in light of its opinion. The panel continued by noting that in light of Section 215's then-scheduled sunset and the Government's stated national security justification to continue the program, "allowing the program to remain in place for a few weeks while Congress decides whether and under what conditions it should continue is a lesser intrusion on appellants' privacy than they faced at the time this litigation began," such that it is prudent "to pause to allow an opportunity for debate in Congress that may (or may not) profoundly alter the legal landscape." Id. at 95. In doing so, the Second Circuit panel recognized that "Congress is better positioned than the courts to understand and balance the intricacies and competing concerns involved in protecting our national security, and to pass judgment on the value of the telephone metadata program as a counterterrorism tool."[2] Id. at 95. Through enactment of the

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[2] Congress was aware of the Second Circuit's opinion at the time it passed the USA FREEDOM Act. See H. Rep. 114-109, Part 1, at 18-19 ("These changes restore meaningful limits to the 'relevance' requirement of Section 501, consistent with the opinion of the U.S. Court of Appeals for the Second Circuit in ACLU v. Clapper."). The Second Circuit panel stated that "[i]f Congress fails to reauthorize § 215 itself, or reenacts § 215 without expanding it to authorize the telephone metadata program, there will be no need for prospective relief, since the program will end . . . ." ACLU v. Clapper, No. 14-42 at 96. However, for the reasons discussed above, the "changes" made by the USA FREEDOM Act in regard to the bulk production of tangible things become effective 180 days after enactment, and can be interpreted only as leaving in place until that time the relevance standard previously interpreted to authorize orders for the bulk production of call detail records.

USA FREEDOM Act, Congress engaged in the sort of deliberative process that the Second Circuit panel envisioned and, as outlined above, authorized the Government to continue to seek and this Court to continue to authorize an order under Section 1861 for the production of tangible things in bulk for 180 days.

Because the Second Circuit declined to order the issuance of an injunction against the Government, its ruling has no immediate effect, even as to the parties to that proceeding. And the nature and scope of any injunction would remain to be considered by the district court in the first instance following a remand.[3] As noted above, the Government is considering its litigation options in regard to the Second Circuit's opinion. Furthermore, unless an extension is granted, any petition for rehearing, panel and/or en banc, would be due on June 22, 2015, and the Second Circuit's mandate would not issue until seven days after the deadline for a petition for rehearing has passed, if none is filed, or seven days after any denial of a petition for rehearing. Thus, at the earliest, the mandate would issue on June 29, 2015. If and when the mandate issues, the case will be remanded to the district court to determine whether to issue an injunction and, if so, the nature and scope of any such relief.

[3] In the event an injunction of some sort were to issue by the district court,the Government would need to assess, in light of the nature and scope of whatever injunction the district court issued, its ability to carry out authority granted under an order issued by this Court.

III. Conclusion

For the foregoing reasons, the Government respectfully submits that this Court may approve the Government's application for the ongoing production of certain call detail records to NSA under Section 1861 of FISA, as amended by the USA FREEDOM Act.

Respectfully submitted,

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