Foreign Intelligence Surveillance Act Litigation

Robert Timothy Reagan
Federal Judicial Center

The Foreign Intelligence Surveillance Act created procedures for judicial oversight of domestic foreign intelligence surveillance. Over time, the purview of the act has expanded from electronic surveillance incidents to surveillance programs encompassing electronic communications and tangible things. The judicial supervision has both become more public and more litigated in other courts.

The Foreign Intelligence Surveillance Act

The Foreign Intelligence Surveillance Act (FISA) was signed by President Carter on October 25, 1978.[1] The eleven sections of FISA's title I became chapter 36, sections 1801 through 1811, of the U.S. Code's title 50 on war and national defense. FISA's title II included conforming amendments, and title III concerned the effective date.

FISA provides for court orders authorizing "electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information [involving] the acquisition of communications of [a] United States person."[2] Foreign powers include foreign governments, foreign factions, and international terrorists.[3] Use of FISA-derived evidence in court requires notice to the person against whom the evidence is used.[4]

FISA orders are issued by a FISA court, sometimes referred to as the Foreign Intelligence Surveillance Court or FISC, that originally consisted of seven district judges from seven circuits appointed by the Chief Justice for nonrenewable seven-year terms.[5]

---

1. Pub. L. 95-511, 92 Stat. 1783 (1978). *See generally* 2 James G. Carr, Patricia L. Bellia & Evan A. Creutz, The Law of Electronic Surveillance 443–54 (Aug. 2016); David S. Kris & J. Douglas Wilson, National Security Investigations and Prosecutions (2d ed. 2012); Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 Harv. J. L. & Pub. Pol'y 757 (2014); International Surveillance, The 2014 Cato Institute Surveillance Conference (Dec. 12, 2014) [hereinafter Cato Conference], www.cato.org/events/2014-cato-institute-surveillance-conference.

2. FISA § 102(b), 50 U.S.C. § 1802(b) (2014).

3. *Id.* § 101(a), 50 U.S.C. § 1801(a).

4. *Id.* § 106(a), 50 U.S.C. § 1806(c).

5. Pub. L. 95-511, §§ 103(a), (d), 92 Stat. 1788. *See generally* Elizabeth Goitein & Faiza Patel, What Went Wrong with the FISA Court (Brennan Ctr. for Justice 2015), www.brennancenter.org/sites/default/files/analysis/What_Went_%20Wrong_With_The_FISA_Court.pdf; Bruce Moyer, *The Most Powerful Court You Have Never Heard Of*, Fed. Law., Mar. 2015, at 6.

Physical Searches

In 1980, President Carter's second attorney general, Benjamin Civiletti, adopted a policy of seeking FISA court permission for some physical searches in service of foreign intelligence, searches that are sometimes called black bag jobs.[6] William French Smith, President Reagan's first attorney general, submitted a black bag petition to the FISA court on June 3, 1981, asking the court to deny the petition and rule that the court did not have jurisdiction over such petitions.[7] Presiding Judge George L. Hart, Jr., District of the District of Columbia, acceded to the government's request in the court's first public opinion.[8] Expressing a judgment in which all judges on the court concurred, Judge Hart observed that the text of FISA applied only to electronic surveillance.[9]

In 1994, FISA was amended to extend the FISA court's jurisdiction to include physical searches for foreign intelligence purposes.[10] The new provisions became FISA's title III,[11] and provisions on effective dates became title IV.

FISA Expansion

In 1998, the FISA court's jurisdiction was further expanded to include pen registers, trap and trace devices, and business records, creating new titles IV[12] and V[13] and moving effective date provisions to title VI.[14]

The USA PATRIOT Act was signed by President George W. Bush on October 26, 2001.[15] It relaxed the standard for issuing a FISA order from "the purpose of the surveillance is to obtain foreign intelligence information" to

---

6. *See* William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 Am. U. L. Rev. 1, 78 (2000); Charlie Savage, Takeover 40 (2007); Benjamin Wittes, Law and the Long War 224 (2008).

7. Brief, *In re* Physical Search, No. 81-___ (FISA Ct. June 3, 1981), *reprinted in* S. Rep. No. 97-280.

8. Opinion, *id.* (June 11, 1981), *reprinted in* S. Rep. No. 97-280.

9. *Id.*

10. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. 103-359, § 807, 108 Stat. 3423, 3443–53 (1994); *see* Wittes, *supra* note 6, at 59–61 (reporting that the Clinton administration sought expansion of FISA court authority over black bag jobs because of uncertainty about whether surveillance of the spy Aldrich Ames, whose prosecution ended in a plea bargain benefitting Ames's wife, would have withstood judicial scrutiny).

11. 50 U.S.C. §§ 1821–1829 (2014) (subchapter II).

12. *Id.* §§ 1841–1846 (subchapter III, on pen registers and trap and trace devices).

13. *Id.* §§ 1861–1862 (subchapter IV, on business records).

14. Intelligence Authorization Act for Fiscal Year 1999, Pub. L. 105-272, §§ 601–603, 112 Stat. 2396, 2404–12 (1998); *see* Donohue, *supra* note 1, at 797 (reporting that the 1998 amendments were triggered by the 1995 Oklahoma City bombing).

15. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. 107-56, 115 Stat. 272 (2001); *see* Charlie Savage, Power Wars 182 (2015) ("The bill contained a grab bag of new and expanded law enforcement and surveillance powers the Justice Department had long coveted, and it made several changes to FISA.").

require that only "a significant purpose" be foreign intelligence.[16] The act also expanded the FISA court from seven to eleven district judges, of whom at least three must reside within twenty miles of D.C.[17] (The FISA Amendments Act of 2008 clarified that the eleven judges must come from "at least" seven circuits.[18])

Section 215 of the Patriot Act expanded FISA's title V for business records to include "any tangible things."[19] Before the Patriot Act, FISA provided for FISA court orders issued to the FBI "*authorizing* a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility to release records in its possession for an investigation to gather foreign intelligence information or *an investigation concerning international terrorism*."[20] The Patriot Act authorized the FISA court to assist the FBI by issuing "an order *requiring* the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or *to protect against international terrorism* or clandestine intelligence activities."[21]

Minimization and the Wall

FISA imposes on the government a requirement for "minimization procedures" to protect persons from unnecessary violations of privacy.[22] Over the years, the FISA court exercised oversight over minimization procedures:

> In order to preserve both the appearance and the fact that FISA surveillances and searches were not being used *sub rosa* for criminal investigations, the Court routinely approved the use of information screening "walls" proposed by the government in its applications. Under the normal "wall" procedures, where there were separate intelligence and criminal *investigations*, or a single counter-espionage investigation with overlapping intelligence and criminal *interests*, FBI criminal investigators and Department prosecutors were not allowed to review all of the raw FISA intercepts or seized materials lest they become defacto partners in the FISA surveillances and searches. Instead, a screening mechanism, or person, usually the chief legal counsel in an FBI field office, or an assistant U.S. attorney not involved in the overlapping criminal investigation, would review all of the raw intercepts and seized materials and pass on only that information which might be relevant evidence. In unusual cases such as where attorney-client intercepts occurred, Justice Department lawyers in [the Office of Intelligence Policy and Review] acted as the "wall." In significant cases, involving major complex investigations such as the bombings of the U.S. Embassies in Africa, and the millennium investigations, where criminal investigations of FISA targets were being conducted concurrently, and prosecution was

16. Pub. L. 107-56, § 218, 115 Stat. 291; 50 U.S.C. §§ 1804(a)(6)(B), 1823(a)(6)(B).

17. *Id.* § 208, 115 Stat. 283; 50 U.S.C. § 1803(a)(1).

18. Pub. L. 110-261, § 109, 122 Stat. 2436, 2464 (2008); 50 U.S.C. § 1803(a)(1).

19. Pub. L. 107-56, § 215, 115 Stat. 287–88; 50 U.S.C. §§ 1861–1862.

20. 50 U.S.C. § 1861(a) (2000) (emphasis added).

21. *Id.* § 1861(a)(1) (2001) (emphasis added). *See generally* U.S. Dep't of Justice Inspector Gen., A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records (Mar. 2007) (redacted), oig.justice.gov/special/s0703a/final.pdf.

22. 50 U.S.C. §§ 1801(h), 1821(4) (2014).

> likely, this Court became the "wall" so that FISA information could not be disseminated to criminal prosecutors without the Court's approval. In some cases where this Court was the "wall," the procedures seemed to have functioned as provided in the Court's orders; however, in an alarming number of instances, there have been troubling results.
>
> . . .
>
> In November of 2000, the Court held a special meeting to consider the troubling number of inaccurate FBI affidavits in so many FISA applications. . . .
>
> . . .
>
> In virtually every instance, the government's misstatements and omissions in FISA applications and violations of the Court's orders involved information sharing and unauthorized disseminations to criminal investigators and prosecutors.[23]

Following the attacks of September 11, 2001, the government proposed relaxed minimization procedures, but all seven members of the court agreed that some of the changes were "designed to enhance the acquisition, retention and dissemination of *evidence for law enforcement purposes*, *instead* of being consistent with the need of the United States to obtain, produce, and disseminate *foreign intelligence information*."[24] One of the court's concerns was that the government would be able to circumvent probable-cause requirements for criminal investigations by characterizing the investigations as for foreign intelligence.[25] So the court modified the submitted minimization procedures.[26]

FISA requires the Chief Justice to appoint three district or circuit judges to a FISA court of review to hear government appeals from FISA court rulings.[27] Hearing its very first appeal, the court of review overruled the FISA court's modifications to the government's minimization procedures.[28] "The FISA court's decision and order not only misinterpreted and misapplied minimization procedures it was entitled to impose, but as the government argues persuasively, the FISA court may well have exceeded the constitutional bounds that restrict an Article III court."[29]

---

23. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 620–21 (FISA Ct. 2002).

24. *Id.* at 623.

25. *Id.* at 624 (quotation marks omitted).

26. *Id.* at 625–27.

27. 50 U.S.C. § 1803(b).

28. *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002); *see* Laura Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv. J.L. & Pub. Pol'y 117, 137 (2014). *See generally* Karen J. Greenberg, Rogue Justice 55–62 (2016) (titling the chapter "Tearing Down the Wall").

"Since the government is the only party to FISA proceedings, we have accepted briefs filed by the American Civil Liberties Union (ACLU) and the National Association of Criminal Defense Lawyers (NACDL) as *amici curiae*." *In re Sealed Case*, 310 F.3d at 719 (footnote omitted).

29. *In re Sealed Case*, 310 F.3d at 731.

Warrantless Wiretaps

On December 16, 2005, the *New York Times* reported that President Bush had secretly authorized in 2002 a program of surveillance that excluded the FISA court from surveillance approval, although the surveillance included international communications with people in the United States.[30] *USA Today* reported on May 11, 2006, that telephone companies were cooperating with government surveillance in possible violation of FISA.[31] Civil suits against the government and against telephone companies followed these revelations, and most of the suits were consolidated by the Judicial Panel on Multidistrict Litigation before District Judge Vaughn R. Walker in the Northern District of California.[32]

Judges were divided in these cases on whether the plaintiffs had standing to challenge the government program.

In an action against the government filed in the Eastern District of Michigan, District Judge Anna Diggs Taylor ruled before the cases were consolidated that the program was unconstitutional and a violation of FISA.[33] On appeal, Circuit Judge Ronald Lee Gilman agreed both that the plaintiffs had standing and that their suit had merit,[34] but he was outvoted by Circuit Judges Alice M. Batchelder and Julia Smith Gibbons, who determined that the plaintiffs' claims were too speculative to afford them standing.[35]

---

30. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

31. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today, May 11, 2006, at 1A.

"President Bush authorized the NSA to (1) collect the contents of certain international communications, a program that was later referred to as the [terrorist surveillance program], and (2) collect in bulk non-content information, or 'metadata,' about telephone and Internet communications." Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 16 (July 2, 2014) [hereinafter Second Privacy Board Report], www.pclob.gov/library/702-Report-2.pdf.

Following the *New York Times* report, the label "terrorist surveillance program" was coined to refer to aspects of a broader program that were revealed by the report. *See* Michael V. Hayden, Playing to the Edge 106 (2016).

32. *In re* NSA Telecomm. Records Litig., 474 F. Supp. 2d 1355 (J.P.M.L. 2007); *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006); Docket Sheet, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Aug. 14, 2006) [hereinafter Warrantless Wiretaps Docket Sheet]. *See generally* Robert Timothy Reagan, National Security Case Studies: Special Case-Management Challenges 505–59 (Federal Judicial Center, 6th ed. 2015).

33. ACLU v. NSA, 438 F. Supp. 2d 754, 775–76, 778–80, 782 (E.D. Mich. 2006).

34. ACLU v. NSA, 467 F.3d 590, 683, 720 (6th Cir. 2006) (Circuit Judge Gilman, dissenting).

35. *Id.* at 653 (opinion for the court); *id.* at 692 (Circuit Judge Gibbons, concurring in the judgment).

Judge Walker dismissed most of the consolidated suits against the government as generalized grievances insufficient to afford the plaintiffs standing.[36] Circuit Judges M. Margaret McKeown, Harry Pregerson, and Michael Daly Hawkins, however, all agreed that the plaintiffs did have standing.[37]

One case against the government had exceptional facts. The government froze the assets of the Al-Haramain Islamic Foundation, a charity headquartered in Ashland, Oregon, on February 19, 2004.[38] On September 9, the Treasury Department designated the charity a global terrorist organization.[39] The Ashland charity was affiliated with the Al-Haramain Islamic Foundation in Saudi Arabia, which was the charitable arm of the Muslim World League, an organization founded in 1962.[40] As part of the charity's challenge to the freezing of its assets and its designation as a terrorist organization, the government mistakenly produced to the charity's attorneys a top secret document that apparently is evidence of surveillance pursuant to President Bush's secret surveillance program.[41] Relying on the top secret document, the attorneys filed a civil action in the District of Oregon on February 28, 2006.[42]

District Judge Garr M. King ruled that the document was protected by the state secrets privilege, so it could not be entered into evidence to support the attorneys' case, but the attorneys' memories of the document's contents could not be expunged, so the attorneys could rely on those.[43] On interlocutory appeal, certified by Judge King and accepted by the court of appeals, Judges McKeown, Pregerson, and Hawkins reversed Judge King's "commendable effort to thread the needle," holding that the plaintiffs' memories of the top secret document were also covered by the state secrets privilege.[44] The court of appeals remanded the case for a determination of whether FISA's remedies for improper surveillance preempted the state secrets privilege.[45] By the time of

---

36. Order, Ctr. for Constitutional Rights v. Obama, No. 3:07-cv-1115 (N.D. Cal. Jan. 31, 2011), D.E. 51; Dismissal Order, Jewel v. NSA, No. 4:08-cv-4373 (N.D. Cal. Jan. 21, 2010), D.E. 57, 2010 WL 235075.

37. Jewel v. NSA, 673 F.3d 902 (9th Cir. 2011).

38. Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 686 F.3d 965, 970–71, 973 (9th Cir. 2012); Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1245 (D. Or. 2008).

39. *Al Haramain Islamic Found.*, 686 F.3d at 970, 973–74, 977; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1243, 1245–46; *see* Reagan, *supra* note 32, at 165.

40. United States v. Sedaghaty, 728 F.3d 885, 893 (9th Cir. 2013); *see* Chris Heffelfinger, Radical Islam in America 57–59 (2011).

41. Opinion at 4, Al-Haramain Islamic Found. v. U.S. Dep't of Treasury, No. 3:07-cv-1155 (D. Or. June 5, 2008), D.E. 69, 2008 WL 2381640; *see* Reagan, *supra* note 32, at 173, 516.

42. Complaint, Al-Haramain Islamic Found. v. Bush, No. 3:06-cv-274 (D. Or. Feb. 28, 2006), D.E. 1 (describing the document as "United States Treasury Office of Foreign Assets Control logs of . . . conversations").

43. Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215, 1217, 1223–24, 1228–29 (D. Or. 2006).

44. Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1204–05 (9th Cir. 2007).

45. *Id.* at 1205–06.

remand, the case had been consolidated with the cases before Judge Walker,[46] who determined that FISA did preempt the state secrets privilege, "but only in cases within the reach of its provisions."[47]

FISA's section 110 provides civil remedies for violations of FISA.[48] Judge Walker determined, however, that the court of appeals unequivocally ruled that the plaintiffs could not rely on the top secret document to establish standing to seek those remedies.[49] In 2010, Judge Walker awarded the plaintiffs summary judgment, because they presented as unrebutted evidence numerous public government statements implying that the charity had been surveilled and the government did not show that the surveillance was authorized by FISA.[50] On appeal, Judges McKeown, Pregerson, and Hawkins concluded that section 110 had not waived the government's sovereign immunity.[51]

Congress amended FISA to provide the telephone companies with retroactive immunity in the consolidated cases before Judge Walker.[52] The Intelligence Reform and Terrorism Prevention Act of 2004 moved FISA's title VI on effective dates to title VII and added a new title VI on requirements for reporting FISA court statistics to Congress.[53] The FISA Amendments Act of 2008 (FAA) substituted a new title VII providing "additional procedures regarding certain persons outside the United States."[54] Subject to FISA court approval or exigent circumstances, "the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information."[55] A new title VIII granted the telephone companies retroactive civil immunity.[56]

---

46. Docket Sheet, Al-Haramain Islamic Found. v. Bush, No. 3:07-cv-109 (N.D. Cal. Jan. 9, 2007).

47. *In re* NSA Telecomm. Records Litig., 564 F. Supp. 2d 1109, 1115–25 (N.D. Cal. 2008).

48. 50 U.S.C. § 1810 (2014).

49. *In re NSA*, 564 F. Supp. 2d at 1134.

50. *In re* NSA Telecomm. Records Litig., 700 F. Supp. 2d 1182 (N.D. Cal. 2010).

51. Al-Haramain Islamic Found. v. Obama, 705 F.3d 845 (9th Cir. 2012).

52. *See In re* NSA Telecomm. Records Litig., 671 F.3d 881 (9th Cir. 2011), *aff'g In re* NSA Telecomm. Records Litig., 633 F. Supp. 2d 949 (N.D. Cal. 2009), *cert. denied*, 568 U.S. ___, 133 S. Ct. 421 (2012); *see* Donohue, *supra* note 28, at 117, 137.

53. Pub. L. 108-458, § 6002, 118 Stat. 3638, 3743–44 (2004); 50 U.S.C. § 1871 (subchapter V); *see* Donohue, *supra* note 28, at 138–39.

54. Pub. L. 110-261, § 101(a), 122 Stat. 2436, 2437 (2008); 50 U.S.C. §§ 1881–1881g (subchapter VI).

55. Pub. L. 110-261, § 101(a), 122 Stat. 2438; 50 U.S.C. § 1881a; *see* Second Privacy Board Report, *supra* note 31, at 19–24; *see also* Wittes, *supra* note 6, at 246 (reporting that this provision, first adopted as part of the Protect America Act, eliminated the difference between wire and radio communications).

56. Pub. L. 110-261, §§ 201–202, 122 Stat. 2467–71; 50 U.S.C. §§ 1885–1885c (subchapter VII).

On January 10, 2007, while the warrantless wiretap litigation was pending, the FISA court issued two negotiated classified orders that resulted in the government's no longer circumventing the FISA court in the surveillance program at issue.[57]

> The new FISA Court orders are innovative and complex and it took considerable time and work for the Government to develop the approach that was proposed to and ultimately accepted by the Court. As a result of the new orders, any electronic surveillance that was conducted as part of the [terrorist surveillance program] is now being conducted subject to the approval of the FISA Court.[58]

The Electronic Frontier Foundation filed an action under the Freedom of Information Act (FOIA) on February 27 in the District of the District of Columbia seeking disclosure of the orders.[59] Judge Thomas F. Hogan ruled on August 14 that the orders satisfied the national defense, statutory, and law enforcement FOIA exemptions.[60]

On August 9, the ACLU filed a motion directly with the FISA court for public release of the orders.[61] On August 16, the court's Presiding Judge Colleen Kollar-Kotelly, District of the District of Columbia, ordered the government to respond to the motion.[62] FISA Court Judge John D. Bates, District of the District of Columbia, determined on December 11 that the FISA court had supervisory power over its records, so it had jurisdiction to hear the ACLU's

---

57. Government Motion for Summary Judgment, Ex. A, Elec. Frontier Found. v. Dep't of Justice, No. 1:07-cv-403 (D.D.C. May 11, 2007), D.E. 7; *see* Offices of Inspectors General, Redacted Classified Report on the President's Surveillance Program 57–58 (July 10, 2009) [hereinafter Redacted PSP Report], oig.justice.gov/reports/2015/PSP-09-18-15-vol-I.pdf; *see also* Government Brief, *In re* ___, No. ___ (FISA Ct. Dec. 13, 2006), www.dni.gov/files/documents/1212/Memo%20of%20Law%20as%20filed%2012%2013%202006%20-%2012-11%20Redacted.pdf (redacted brief making the case for the orders).

58. Redacted Declaration of NSA Director at 3, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. Feb. 22, 2007), D.E. 175.

> In January 2007, the FISC issued orders authorizing the government to conduct certain electronic surveillance of telephone and Internet communications carried over listed communication facilities where, among other things, the *government* made a probable cause determination regarding one of the communicants, and the email addresses and telephone numbers to be tasked were reasonably believed to be used by persons located outside the United States.

Second Privacy Board Report, *supra* note 31, at 17.

59. Complaint, *Elec. Frontier Found.*, No. 1:07-cv-403 (D.D.C. Feb. 27, 2007), D.E. 1.

60. Opinion, *id.* (Aug. 14, 2007), D.E. 17; *see* Elec. Frontier Found. v. Dep't of Justice, 532 F. Supp. 2d 22 (D.D.C. 2008) (denying a motion for reconsideration based on new revelations by news media).

61. Motion, *In re* Certain Orders, No. Misc. 07-1 (FISA Ct. Aug. 9, 2007), www.aclu.org/files/images/asset_upload_file968_31228.pdf; *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 485 (FISA Ct. 2007).

62. Scheduling Order, *In re* Motion for Release of Court Records, No. Misc. 07-1 (FISA Ct. Aug. 16, 2007), www.aclu.org/files/pdfs/safefree/fisc_order_08162007.pdf.

motion, contrary to the government's position on that issue.[63] Judge Bates denied the ACLU its requested relief.[64] "Other courts operate primarily in public, with secrecy the exception; the FISC operates primarily in secret, with public access the exception."[65]

The Director of National Intelligence released redacted versions of the two helpful orders on December 12, 2014.[66] Judge Malcolm J. Howard, Eastern District of North Carolina, issued on January 10, 2007, one order covering surveillance of Americans[67] and another order covering foreign surveillance.[68]

Partially declassified declarations released on December 21, 2013, provided some details about the two helpful FISA court orders:

> On January 10, 2007, the FISA Court issued two orders authorizing the Government to conduct certain electronic surveillance that had been occurring under the [surveillance program]. . . . [T]he orders consisted of a [redacted] and a Foreign Telephone and Email Order, which authorized, *inter alia*, electronic surveillance of telephone and Internet communications carried over particularly listed facilities when the Government determines that there is probable cause to believe that (1) one of the communicants is a member or agent of al Qaeda or an associated terrorist organization, and (2) the communication is to or from a foreign country (*i.e.*, a one-end foreign communication to or from the United States). The telephone numbers and email addresses to be targeted under the Foreign Telephone and Email Order were further limited to those that the NSA reasonably believes are being used by persons *outside* the United States.[69]

On April 3, 2007, Judge Roger Vinson, Northern District of Florida, was on FISA court duty, and he narrowed the government's ability to make probable cause determinations without FISA court approval.[70]

---

63. *In re Court Records*, 526 F. Supp. 2d at 486–87.

64. *Id.* at 497.

65. *Id.* at 488.

66. Press Release, Office of the Dir. of Nat'l Intelligence, Dec. 12, 2014, www.odni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1152-the-doj-releases-additional-documents-concerning-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-september-11,-2001?tmpl=component&format=pdf.

67. Order, *In re* Various Known and Unknown Agents, No. ___ (FISA Ct. Jan. 10, 2007), www.dni.gov/files/documents/1212/FISC%20Order%2001%2010%2007%20-%2012-11%20-%20Redacted.pdf.

68. Order, *In re* ___, No. ___ (FISA Ct. Jan. 10, 2007) (redacted), www.dni.gov/files/documents/1212/FISC%20Order%2001%2010%2007%2012-11%20-%20Redacted.pdf.

69. Classified Alexander Declaration at 15, *In re* NSA Telecomm. Records Litig., No. 3:06-md-1791 (N.D. Cal. May 25, 2007), *as redacted,* www.dni.gov/files/documents/1220/NSA%20Alexander%202007%20Shubert%20Declaration.pdf.

70. Opinion, *In re* ___, No. ___ (FISA Ct. Apr. 3, 2007) (redacted), www.dni.gov/files/documents/1212/CERTIFIED%20COPY%20-20Order%20and%20Memorandum%20Opinion%2004%2003%2007%2012-11%20Redacted.pdf; *see* Redacted PSP Report, *supra* note 57, at 57, 59; *see also* Greenberg, *supra* note 28, at 147–48; Charlie Savage, *Documents Shed New Light on Legal Wrangling Over Spying in U.S.*, N.Y. Times, Dec. 13, 2014, at A12; Savage, *supra* note 15, at 204.

Two subsequent FISA court opinions by Judge Vinson were redacted and released on January 26, 2015, in response to an action by the *New York Times* to enforce a FOIA request.

In 2015, *New York Times* journalist Charlie Savage reported that the January 10 orders resulted from an application presented to the FISA court at a time when a judge that the government viewed to be favorably disposed to the government's position was on duty, and the court thereafter adjusted its procedures so that the government would have less access to the court's duty schedule.[71]

Upon Judge Walker's February 28, 2011, retirement, the court assigned the warrantless wiretap cases to Judge Jeffrey S. White.[72] On July 8, 2013, Judge White ruled that FISA displaced the state-secrets privilege in two remaining cases—a case originally filed in Brooklyn on May 17, 2006,[73] and a case filed in San Francisco on September 18, 2008[74]—and that potentially valid constitutional claims remained.[75] An action originally filed in Manhattan on January 17, 2006,[76] was dismissed by the Ninth Circuit's court of appeals on June 10, 2013,[77] in light of a February 26 standing ruling by the Supreme Court in *Clapper v. Amnesty International USA*.[78] An action originally filed in Atlanta on January 20, 2006,[79] was voluntarily dismissed on March 5, 2010.[80]

Statutory Enhancement of Surveillance Authority

President Bush signed the Protect America Act on August 5, 2007.[81] The act was a six-month modification of FISA that excluded from FISA's coverage electronic "surveillance directed at a person reasonably believed to be located

---

Opinion, No. ___ (FISA Ct. Aug. 27, 2007); Opinion, No. ___ (FISA Ct. May 31, 2007); s3.amazonaws.com/s3.documentcloud.org/documents/1509488/nyt-savage-foia-fisc-may-august-2007-orders.pdf (both opinions); Docket Sheet, N.Y. Times Co. v. U.S. Dep't of Justice, No. 1:14-cv-3948 (S.D.N.Y. June 3, 2014); *see* Charlie Savage, *Collection of Foreigners' Data Began Before Congress Backed It, Papers Show*, N.Y. Times, Jan. 28, 2015, at 13.

71. Savage, *supra* note 15, at 199–202; *see* Greenberg, *supra* note 28, at 146 ("Late in 2006 the [Justice Department's National Security Division] settled upon a case to take before FISC Judge Malcolm Howard.").

72. Warrantless Wiretaps Docket Sheet, *supra* note 32; *see* Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

73. Complaint, Shubert v. Bush, No. 1:06-cv-2282 (E.D.N.Y. May 17, 2006), D.E. 1; *see* Docket Sheet, Shubert v. Bush, No. 3:07-cv-693 (N.D. Cal. Feb. 2, 2007).

74. Complaint, Jewel v. NSA, No. 4:08-cv-4373 (N.D. Cal. Sept. 18, 2008), D.E. 1.

75. Jewel v. NSA, 965 F. Supp. 2d 1090 (N.D. Cal. 2013).

76. Complaint, Ctr. for Constitutional Rights v. Bush, No. 1:06-cv-313 (S.D.N.Y. Jan. 17, 2006), D.E. 1; *see* Docket Sheet, Ctr. for Constitutional Rights v. Bush, No. 3:07-cv-1115 (N.D. Cal. Feb. 23, 2007).

77. Ctr. for Constitutional Rights v. Obama, 522 F. App'x 383 (9th Cir. 2013), *aff'g* Order, No. 3:07-cv-1115 (N.D. Cal. Jan. 31, 2011), D.E. 51, *cert. denied*, 571 U.S. ___, 134 S. Ct. 1497 (2014).

78. 568 U.S. ___, 133 S. Ct. 1138 (2013).

79. Complaint, Guzzi v. Bush, No. 1:06-cv-136 (N.D. Ga. Jan. 20, 2006), D.E. 1; *see* Docket Sheet, Guzzi v. Bush, No. 3:06-cv-6225 (N.D. Cal. Oct. 3, 2006).

80. Order, *Guzzi*, No. 3:06-cv-6225 (N.D. Cal. Mar. 5, 2010), 27.

81. Pub. L. 110-55, 121 Stat. 552 (2007); *see* Jacob Sommer, *FISA Authority and Blanket Surveillance*, Litigation, Spring 2014, at 40, 44.

outside of the United States."[82] The act specified a procedure for the FISA court to enforce a directive by the Director of National Intelligence or the Attorney General to a communication service provider for compensated assistance in "the acquisition of foreign intelligence information" concerning "persons reasonably believed to be located outside the United States."[83]

The FISA Court of Review's Second Published Opinion

On August 22, 2008, following closed oral argument held in Providence, Rhode Island, in June, the FISA court of review, in its second published opinion, affirmed an order of compliance issued by the FISA court.[84] Reviewing the constitutionality of the directives, the court held "that a foreign intelligence exception to the Fourth Amendment's warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States."[85] The court determined that the directives satisfied the Fourth Amendment's reasonableness requirement.[86]

Yahoo! complied with the directives.[87] On June 14, 2013, it filed a motion with the FISA court to make public the lower court's opinion and to make public Yahoo!'s identity.[88] Presiding Judge Reggie B. Walton, District of the District of Columbia, after consultation with the other FISA court judges, issued an order on July 15 that the government review the opinion for redaction of classified information.[89] In response to the motion, the government stated that Yahoo!'s identity could be declassified and that the government had no objection to publication of unclassified portions of the opinion and the case file.[90]

---

82. Pub. L. 110-55, § 2, FISA § 105A, 50 U.S.C. § 1805a (2007); *see* Second Privacy Board Report, *supra* note 31, at 19; Donohue, *supra* note 28, at 135–37; Greenberg, *supra* note 28, at 148–50.

83. Pub. L. 110-55, §§ 2–3, FISA §§ 105B–105C, 50 U.S.C. §§ 1805b–1805c (2007).

84. *In re* Directives, 551 F.3d 1004 (FISA Ct. Rev. 2008); *see* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 158–59 (2010); Greenberg, *supra* note 28, at 161–66; Sommer, *supra* note 81, at 40–41. *See generally* Donohue, *supra* note 28, at 234–36.

85. *In re Directives*, 551 F.3d at 1012; *see* Second Privacy Board Report, *supra* note 31, at 90.

86. *In re Directives*, 551 F.3d at 1012–15; *see* Donohue, *supra* note 28, at 137. *See generally* Sommer, *supra* note 81.

87. *In re Directives*, 551 F.3d at 1008; *see* Craig Timberg & Christopher Ingraham, *Fines in NSA Dispute Might Have Bankrupted Yahoo*, Wash. Post, Sept. 16, 2014, at A13.

88. Motion, *In re* Directives, No. 105B(g) 07-1 (FISA Ct. June 14, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Motion-1.pdf.

89. Order, *id.* (July 15, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Order-3.pdf.

90. Government Response, *id.* (June 14, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Motion-2.pdf; *see* Order, *id.* (Oct. 22, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Order-4.pdf (noting the status of the classification review).

On September 11, 2014, the Director of National Intelligence posted on the Internet forty-eight documents including 1,283 pages:[91] the FISA court opinion,[92] a less redacted version of the FISA court of review's opinion,[93] and many documents from the two case files. A redacted transcript of argument before the FISA court of review was released on November 17.[94] Additional documents were released in March 2015[95] and April 2016.[96]

Challenges to the FISA Amendments Act

The ACLU initiated litigation on the FISA Amendments Act on the day that the Act was signed.[97]

---

91. Press Release, Office of the Dir. of Nat'l Intelligence, Sept. 11, 2014 [hereinafter Sept. 11, 2014, DNI Press Release], www.odni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1109-statement-by-the-office-of-the-director-of-national-intelligence-and-the-u-s-department-of-justice-on-the-declassification-of-documents-related-to-the-protect-america-act-litigation?tmpl=component&format=pdf; *see* Government Supplemental Response, *In re* Directives to Yahoo!, Inc., No. 105B(g) 07-1 (FISA Ct. Dec. 12, 2014), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Response-5.pdf; *see also* Vindu Goel & Charlie Savage, *Threat of Daily Fine Shows Government's Aggressive Push for Data*, N.Y. Times, Sept. 12, 2014, at B1; Craig Timberg, *U.S. Threat Led Yahoo to Relent*, Wash. Post, Sept. 12, 2014, at A1; Danny Yadron, *Yahoo Faced Big U.S. Fines*, Wall St. J., Sept. 12, 2014, at B1.

92. Opinion, *In re Directives*, No. 105B(g) 07-1 (FISA Ct. Apr. 25, 2008) (redacted), www.dni.gov/files/documents/0909/Memorandum%20Opinion%2020080425.pdf; *see* Order, *In re* Directives to Yahoo!, Inc., No. 08-1 (FISA Ct. Rev. Sept. 11, 2014), lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2014/09/FISCR-08-01WCB-Order-140911.pdf (ordering the unsealing of declassified portions of the opinion).

A more redacted version of this opinion was also included in the release. www.dni.gov/files/documents/0909/Redacted%20Memo%20Opinion%20and%20Order%2020080425.pdf.

93. Opinion, *In re Directives*, No. 08-1 (FISA Ct. Rev. Aug. 22, 2008), *as redacted*, www.dni.gov/files/documents/0909/FISC%20Merits%20Opinion%2020080822.pdf, 2008 WL 10632524.

94. Transcript, *In re Directives*, No. 08-1 (FISA Ct. Rev. June 19, 2008), www.dni.gov/files/documents/1118/19%20June%202008%20FISCR%20PAA%20Hearing%20Transcript%20-%20Declassified%20FINAL.pdf; *see* Release of Oral Argument Transcript from the Protect America Act Litigation by the Office of the Director of National Intelligence and the U.S. Department of Justice, Nov. 17, 2014, icontherecord.tumblr.com/tagged/declassified.

95. Notice, *In re Directives*, No. 105B(g) 07-1 (FISA Ct. Mar. 4, 2015), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Notice-1.pdf; icontherecord.tumblr.com/tagged/declassified (Mar. 3, 2015); *see* Motion for Enlargement of Time, Electronic Frontier Found. v. Dep't of Justice, No. 1:14-cv-760 (D.D.C. Mar. 4, 2015), D.E. 13 (noting the release of eight out of eleven FOIA documents); *see also* Electronic Frontier Found. v. Dep't of Justice, 141 F. Supp. 3d 51 (D.D.C. 2015) (granting the government summary judgment with respect to a FISA court opinion), *appeal dismissed,* Order, No. 15-5346 (D.C. Cir. Apr. 27, 2016), 2016 WL 3041648.

96. Government Response, *In re Directives*, No. 105B(g) 07-1 (FISA Ct. Apr. 11, 2016), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Response-8_0.pdf.

97. *See Jameel Jaffer, Bob Litt, and William Banks Debate FISA*, Lawfare Podcast 101, Nov. 22, 2014, www.lawfareblog.com/2014/11/lawfare-podcast-episode-101-jameel-jaffer-bob-litt-and-william-banks-debate-fisa/ (noting that the ACLU filed an action forty-five minutes after the statute was signed into law); Greenberg, *supra* note 28, at 226.

The ACLU filed a motion with the FISA court for access to the court's rulings on the constitutionality of the Act's provisions.[98] On August 27, 2008, Judge Mary A. McLaughlin, Eastern District of Pennsylvania, denied the motion.[99]

The ACLU also filed an action in the Southern District of New York challenging the Act's constitutionality.[100] Judge John G. Koeltl ruled that the plaintiffs lacked standing because they could only claim that their communications might be monitored as a result of the amendments.[101] A panel of the U.S. Court of Appeals for the Second Circuit determined that the plaintiffs did have standing and remanded the action for a determination of constitutionality.[102] En banc rehearing was denied by a vote of six to six.[103] In *Clapper*, however, the Supreme Court ruled that Judge Koeltl was correct that the plaintiffs lacked standing because their grievance was too speculative.[104]

Concerns by Senators Wyden and Udall

On May 26, 2011, Senators Ron Wyden and Mark Udall warned that the Justice Department's secret interpretation of surveillance authorized by the Patriot Act did not comport with the Act's text and would trouble citizens.[105] On June 22, Charlie Savage, a reporter for the *New York Times*, submitted a FOIA request to the Department for a report referenced by Senators Wyden and Udall.[106] The reporter and the *Times* filed a complaint to enforce the request in the Southern District of New York on October 5.[107]

On October 26, the ACLU filed an action in the same district to enforce a May 31 FOIA "Request for the release of any and all records concerning the government's interpretation or use of Section 215" of the Patriot Act, which amended FISA's title V on business records and other tangible things.[108] The

98. Motion, *In re* Proceedings Required by § 702(i), No. Misc. 08-1 (FISA Ct. July 10, 2008), www.aclu.org/files/pdfs/safefree/fisc_motion_20080710.pdf.

99. Opinion, *id.* (Aug. 27, 2008), 2008 WL 9487946.

100. Complaint, Amnesty Int'l USA v. McConnell, No. 1:08-cv-6259 (S.D.N.Y. July 17, 2008), D.E. 1.

101. Amnesty Int'l USA v. McConnell, 646 F. Supp. 2d 633 (S.D.N.Y. 2009).

102. Amnesty Int'l USA v. Clapper, 638 F.3d 118 (2d Cir. 2011).

103. Amnesty Int'l USA v. Clapper, 667 F.3d 163 (2d Cir. 2011).

104. 568 U.S. ___, 133 S. Ct. 1138 (2013).

105. N.Y. Times Co. v. U.S. Dep't of Justice, 872 F. Supp. 2d 309, 312–13 (S.D.N.Y. 2012); *see* Savage, *supra* note 15, at 436; Charlie Savage, *Senators Say Patriot Act Is Being Misinterpreted*, N.Y. Times, May 27, 2011, at A17.

106. *N.Y. Times Co.*, 872 F. Supp. 2d at 313; Complaint at 6, N.Y. Times Co. v. U.S. Dep't of Justice, No. 1:11-cv-6990 (S.D.N.Y. Oct. 5, 2011), D.E. 1 [hereinafter *N.Y. Times* Complaint]; *see* Savage, *supra* note 15, at 436.

107. *N.Y. Times* Complaint, *supra* note 106, at 8; *see* Savage, *supra* note 15, at 436.

108. Complaint, ACLU v. FBI, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011), D.E. 1; *N.Y. Times Co.*, 872 F. Supp. 2d at 313; *see* Savage, *supra* note 15, at 436.

case was immediately referred to Judge William H. Pauley III as related to the *Times* case, over which Judge Pauley was presiding.[109]

After an in camera review of the report, Judge Pauley ruled on May 17, 2012, that it was properly withheld.[110] In 2013[111] and 2014,[112] the government released to the ACLU additional documents concerning section 215. Judge Pauley decided to review in camera other documents—FISA court orders and opinions—to resolve the government's FOIA obligations as to them,[113] and he determined that they were properly withheld.[114]

On July 20, 2012, *Wired* posted online a story that the FISA court had ruled on at least one occasion that the government had applied the FISA Amendment Act unconstitutionally.[115] The report derived from a July 20 letter to Senator Wyden from the Office of the Director of National Intelligence granting the senator permission to make three statements, including that "on at least one occasion the Foreign Intelligence Surveillance Court held that some collection carried out pursuant to the [FISA] Section 702 minimization procedures used by the government was unreasonable under the Fourth Amendment."[116] According to the letter,

> The text that you have asked us to review concerns classified opinions of the Foreign Intelligence Surveillance Court (FISC). . . . However, . . . the Director of National Intelligence (DNI), has determined, as an exercise of his discretion, "that the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure." Accordingly, the DNI has taken the exceptional step of declassifying your proposed text and the other information contained in this letter.[117]

The Director's office asked the Senator to report also, "The government has remedied these concerns and the FISC has continued to approve the collection as consistent with the statute and reasonable under the Fourth Amendment."[118]

---

109. Docket Sheet, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011); *see* Savage, *supra* note 15, at 436.

110. *N.Y. Times Co.*, 872 F. Supp. 2d at 315, 318; *see* Savage, *supra* note 15, at 436–37.

111. ACLU v. FBI—FOI Case for Records Relating to Patriot Act Section 215, www.aclu.org/national-security/section-215-patriot-act-foia; Letters, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011), D.E. 74, 78.

112. Letter, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. July 9, 2014), D.E. 101.

113. ACLU v. FBI, 59 F. Supp. 3d 584 (S.D.N.Y. 2014).

114. Opinion, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Mar. 31, 2015), D.E. 117, 2015 WL 1566775.

115. Spencer Ackerman, *U.S. Admits Surveillance Violated Constitution At Least Once*, Wired, July 20, 2012, Danger Room, www.wired.com/dangerroom/2012/07/surveillance-spirit-law/.

116. Letter from Kathleen Turner, director of legislative affairs, to Senator Ron Wyden, July 20, 2012 [hereinafter Turner Letter], www.wired.com/images_blogs/dangerroom/2012/07/2012-07-20-OLA-Ltr-to-Senator-Wyden-ref-Declassification-Request.pdf; *see* Ryan Lizza, *State of Deception*, New Yorker, Dec. 16, 2013, at 48, 60.

117. Turner Letter, *supra* note 116, at 1–2.

118. *Id.* at 2.

On August 30, the Electronic Frontier Foundation filed a FOIA complaint in the District of the District of Columbia to enforce a July 26 FOIA request for any FISA court opinion supporting Senator Wyden's statement.[119] In an April 1, 2013, motion for summary judgment, the government argued that it was properly withholding from the plaintiff a FISA court order otherwise responsive to the FOIA request, and only the FISA court could authorize its publication anyway.[120] On May 21, the plaintiff sought from the FISA court permission for the government to release the order.[121] On June 12, Presiding Judge Walton determined that FISA court rules did not prohibit disclosure of the order.[122]

Judge Bates's Concerns

The FISA court order at issue in the Electronic Frontier Foundation's FOIA action was an October 3, 2011, opinion by FISA Court Presiding Judge Bates.[123] The government publicly released a redacted version of the opinion on August 21, 2013.[124] FISA's section 702, enacted as part of the FAA, provides for FISA court approval of surveillance programs "targeting . . . persons rea-

119. Complaint, Electronic Frontier Found. v. Dep't of Justice, No. 1:12-cv-1441 (D.D.C. Aug. 30, 2012), D.E. 1; Electronic Frontier Found. v. Dep't of Justice, 57 F. Supp. 3d 54, 55–57 (D.D.C. 2014); *see* Ellen Nakashima, *Group Wants Release of Surveillance Ruling*, Wash. Post, May 23, 2013, at A3.

120. Government Summary Judgment Brief at 26, *Electronic Frontier Found.*, No. 1:12-cv-1441 (D.D.C. Apr. 1, 2013), D.E. 11.

121. Motion, *In re* Motion for Consent to Disclosure of Court Records, No. Misc. 13-1 (FISA Ct. June 12, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-01%20Motion-1.pdf.

122. Order, *id.* (June 12, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-01%20Opinion-1.pdf, 2013 WL 5460051.

123. Summary Judgment Motion at 1, *Electronic Frontier Found.*, No. 1:12-cv-1441 (D.D.C. Oct. 2, 2013), D.E. 19 [hereinafter Oct. 2, 2013, *EFF* Summary Judgment Motion]; *see* Second Privacy Board Report, *supra* note 31, at 30–31. *See generally* Donohue, *supra* note 28, at 190–94, 259–63.

124. Opinion, ___, No. ___ (FISA Ct. Oct. 3, 2011) [hereinafter Oct. 3, 2011, Bates Opinion], *attached at* Ex. A, Oct. 2, 2013, *EFF* Summary Judgment Motion, *supra* note 123, *also* www.eff.org/document/october-3-2011-fisc-opinion-holding-nsa-surveillance-unconstitutional, 2011 WL 10945618; *Electronic Frontier Found.*, 57 F. Supp. 3d at 57; *see* Anita Kumar & Lesley Clark, *Surveillance Program Nets Americans' Emails*, Miami Herald, Aug. 22, 2013, at 3A; Charlie Savage & Scott Shane, *Top-Secret Court Castigated N.S.A. on Surveillance*, N.Y. Times, Aug. 22, 2013, at A1.

On November 19, 2013, the government posted on the webpage for the Director of National Intelligence pages of the opinion with a substantially less redacted footnote 14. www.dni.gov/files/documents/October%202011%20Bates%20Opinion%20and%20Order%20Part%202.pdf.

sonably believed to be located outside the United States to acquire foreign intelligence information."[125] Judge Bates held that aspects of some NSA surveillance violated the Fourth Amendment's reasonableness requirement.[126]

> The Court's review of the targeting and minimization procedures submitted with the April 2011 Submissions is complicated by the government's recent revelation that NSA's acquisition of Internet communications through its upstream collection under Section 702 is accomplished by acquiring Internet "transactions," which may contain a single, discrete communication, or multiple discrete communications [multi-communication transactions or MCTs], including communications that are neither to, from, nor about targeted facilities. . . .
>
> . . .
>
> In sum, NSA's collection of MCTs results in the acquisition of a very large number of Fourth Amendment-protected communications that have no direct connection to any targeted facility and thus do not serve the national security needs underlying the Section 702 collection as a whole. Rather than attempting to identify and segregate the non-target, Fourth-Amendment protected information promptly following acquisition, NSA's proposed handling of MCTs tends to maximize the retention of such information and hence to enhance the risk that it will be used and disseminated.[127]

Judge Bates expressed concern that the government's clarifying revelation while the application for Judge Bates's approval was pending was "the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program."[128]

On November 30, 2011, Judge Bates ruled that "the government has adequately corrected the deficiencies identified in the October 3 Opinion."[129]

Presiding over the Electronic Frontier Foundation's FOIA action, Judge Amy Berman Jackson reviewed Judge Bates's unredacted opinion and ordered the government to provide additional justifications for some redactions.[130] The

125. FISA § 702(a), 50 U.S.C. § 1881a(a) (2014); *see* Second Privacy Board Report, *supra* note 31, at 1 ("Under the . . . program implemented under Section 702 of the Foreign Intelligence Surveillance Act ('FISA'), the government collects the contents of electronic communications, including telephone calls and emails, where the target is reasonably believed to be a non-U.S. person [footnote omitted] located outside the United States."). *See generally* Donohue, *supra* note 28, at 139–42.

126. Oct. 3, 2011, Bates Opinion, *supra* note 124, at 78–80. *See generally* U.S. Dep't of Justice Inspector Gen., A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008 (Sept. 2012) (redacted), oig.justice.gov/reports/2015/o1501.pdf; Donohue, *supra* note 28, at 190–94.

127. Oct. 3, 2011, Bates Opinion, *supra* note 124, at 15.

128. *Id.* at 16 n.14; *see* Klayman v. Obama, 957 F. Supp. 2d 1, 19 (D.D.C. 2013).

129. Opinion at 2 (FISA Ct. Nov. 30, 2011), www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB436/docs/EBB-040.pdf, 2011 WL 10947772.

130. Docket Sheet, Electronic Frontier Found. v. Dep't of Justice, No. 1:12-cv-1441 (D.D.C. Aug. 30, 2012) (June 11, 2014, minute order); Electronic Frontier Found. v. Dep't of Justice, 57 F. Supp. 3d 54, 58–59 (D.D.C. 2014).

government responded by removing some redactions; Judge Jackson determined that the less redacted opinion complied with FOIA.[131]

Litigation Following Snowden's Revelations

In January 2013, Edward Snowden, who worked in Hawaii for an NSA contractor, contacted documentarian Laura Poitras, who lived in Berlin, because he was interested in disclosing what he believed to be improper surveillance practices.[132] Poitras brought into the loop journalists Glenn Greenwald, a reporter for the London *Guardian* living in Rio de Janeiro, and Barton Gellman, formerly a reporter for the *Washington Post*, living in New York.[133] Snowden turned to Poitras after Greenwald's cool response to Snowden's December 2012 efforts to interest him.[134]

On June 1, Poitras and Greenwald flew to Hong Kong to meet Snowden.[135] The *Guardian* insisted that one of its veteran journalists, Ewen MacAskill, accompany the other two.[136] Snowden transferred to the journalists files containing classified information about NSA surveillance programs.[137] The impact of

---

131. *Electronic Frontier Found.*, 57 F. Supp. 3d 54; *see* Opinion, *Electronic Frontier Found.*, No. 1:12-cv-1441 (D.D.C. Sept. 30, 2015), D.E. 47 (magistrate judge recommendation that the plaintiffs be awarded $49,474.50 in attorney fees and costs); Notice, *id.* (Nov. 16, 2015), D.E. 50 (notice that the government would not contest the fee award).

132. *See* Ken Auletta, *Freedom of Information*, New Yorker, Oct. 7, 2013, at 46, 52; Suzanna Andrews, Bryan Burrough & Sarah Ellison, *The Snowden Saga*, Vanity Fair, May 2014, at 152, 154; Michael Gurnow, The Edward Snowden Affair 31–33 (2014); George Packer, *The Holder of Secrets*, New Yorker, Oct. 20, 2014, at 50, 55–56.

133. Glenn Greenwald, No Place to Hide 10–16 (2014); *see* Andrews *et al.*, *supra* note 132, at 154, 164, 196–97; Auletta, *supra* note 132, at 52; Gurnow, *supra* note 132, at 33–40.

134. Greenwald, *supra*, note 133, at 7–14, 81–82; *see* Andrews *et al.*, *supra* note 132, at 154, 163; Gurnow, *supra* note 132, at 22, 34, 37–38; Luke Harding, The Snowden Files 66–69 (2014); *see also* Mark Hertsgaard, Bravehearts 31–32 (2016) (reporting that Snowden was interested in contacting Poitras because of her short film, *The Program*).

Snowden "had explicitly avoided *The New York Times*, due to the paper's decision to delay publication for nearly a year of its 2005 story detailing the N.S.A.'s Bush-era warrantless wiretapping." Andrews *et al.*, *supra* note 132, at 202.

135. Greenwald, *supra*, note 133, at 24–33 (noting that they arrived Sunday night, June 2); *see* Savage, *supra* note 15, at 401 (reporting that Snowden selected Hong Kong "because its foreign affairs were controlled by China, which would be less likely to swiftly turn him over to the United States"); *see also* Auletta, *supra* note 132, at 52; Gurnow, *supra* note 132, at 40–41; Harding, *supra* note 134, at 6–13, 78–83. *See generally* James Bamford, *The Most Wanted Man in the World*, Wired, Sept. 2014, at 87.

136. Greenwald, *supra*, note 133, at 24–27, 61–62; *see* Andrews *et al.*, *supra* note 132, at 154–55; Gurnow, *supra* note 132, at 40; Harding, *supra* note 134, at 81–82.

137. *See* Citizenfour (Praxis Films 2014); Barton Gellman, *Man Who Leaked NSA Secrets Steps Forward*, Wash. Post, June 10, 2013, at A1; Glenn Greenwald, *US Orders Phone Firm to Hand Over Data on Millions of Calls*, Guardian (London), June 6, 2013, at 1; Glenn Greenwald & Ewen MacAskill, *The Whistleblower*, Guardian (London), June 10, 2013, at 1; Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, N.Y. Times, June 10, 2013, at A1; Ellen Nakashima, *Report: Verizon Giving Call Data to NSA*, Wash. Post, June 6, 2013, at A1; Charlie Savage & Mark Mazzetti, *Cryptic Overtures and a Clandestine*

Snowden's revelations resulted in his being the first runner-up as *Time* magazine's person of the year for 2013.[138] The *Guardian* and the *Washington Post* won public-service Pulitzer Prizes.[139]

In June 2013, the FISA court created a public docket website for selected matters brought by private parties; the website was later expanded to include other declassified filings.[140]

Judicial Approval of Surveillance Programs

On June 10, the ACLU filed a motion with the FISA court for release of orders approving the newly disclosed surveillance programs,[141] and the ACLU filed a civil action in the Southern District of New York on the following day challenging the constitutionality of the programs.[142] The New York court assigned the case there to Judge Pauley as related to the 2011 FOIA actions by the *New York Times* and the ACLU.[143] On November 20, 2013, FISA Court Judge F.

Meeting Gave Birth to a Blockbuster Story, N.Y. Times, June 11, 2013, at A13; Charlie Savage, Edward Wyatt & Peter Baker, *U.S. Says It Gathers Online Data Abroad*, N.Y. Times, June 7, 2013, at A1; *see also* ACLU v. Clapper, 785 F.3d 787, 795–96 (2d Cir. 2015). *See generally* David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. Nat'l Sec. L. & Pol'y 209 (2014).

138. Michael Scherer, *Edward Snowden: The Dark Prophet*, Time, Dec. 23, 2013, at 78.

139. *See* Paul Farhi, *Washington Post Wins Pulitzer Prize for NSA Spying Revelations*, Wash. Post, Apr. 15, 2014, at A1; Ravi Somaiya, *Pulitzer Prizes Awarded for Coverage of N.S.A. Secrets and Boston Bombing*, N.Y. Times, Apr. 15, 2014, at A18.

140. www.fisc.uscourts.gov/public-filings (remodeled approximately May 1, 2014); *see* Peter Wallsten, Carol D. Leonnig & Alice Crites, *Rare Scrutiny for a Court Used to Secrecy*, Wash. Post, June 23, 2012, at A1.

The Director of National Intelligence posted on the Internet additional FISA court filings. *E.g.*, Primary Order, *In re* Tangible Things, No. BR 14-67 (FISA Ct. Mar. 28, 2014) (Judge Rosemary M. Collyer), www.dni.gov/files/documents/0627/BR_14-67_Primary_Order.pdf; Press Release, Office of the Dir. of Nat'l Intelligence, June 27, 2014, www.dni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1085-joint-statement-from-the-odni-and-the-doj-on-the-declassification-of-renewal-of-collection-under-section-501-offisa?tmpl=component&format=pdf; Sept. 11, 2014, DNI Press Release, *supra* note 91; Primary Order, *In re* Tangible Things, No. BR 09-19 (FISA Ct. Dec. 16, 2009) (Judge Reggie B. Walton), www.dni.gov/files/documents/0708/BR%2009-19%20Primary%20Order.pdf; Primary Order, *In re* Tangible Things, No. BR 09-15 (FISA Ct. Oct. 30, 2009) (Judge Reggie B. Walton), www.dni.gov/files/documents/0708/BR%2009-15%20Primary%20Order.pdf; Primary Order, *In re* Tangible Things, No. BR 09-09 (FISA Ct. July 9, 2009) (Judge Reggie B. Walton), www.dni.gov/files/documents/ 0708/BR%2009-09%20Primary%20Order.pdf.

141. Motion, *In re* Orders Issued by This Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-2 (FISA Ct. June 10, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Motion-1.pdf, www.aclu.org/files/assets/fisc_unsealing_motion.pdf.

142. Complaint, ACLU v. Clapper, No. 1:13-cv-3994 (S.D.N.Y. June 11, 2013), D.E. 1; ACLU v. Clapper, 804 F.3d 617, 619–20 (2d Cir. 2015); *see* Greenberg, *supra* note 28, at 233–34.

143. Assignment Notice, *ACLU*, No. 1:13-cv-3994 (S.D.N.Y. June 14, 2013), D.E. 2; *see* N.Y. Times Co. v. U.S. Dep't of Justice, 872 F. Supp. 2d 309 (S.D.N.Y. 2012).

Dennis Saylor IV, District of Massachusetts, ordered the government to explain why no part of a February 19 opinion by the FISA court could be released.[144]

On December 20, the government submitted to Judge Saylor a proposed redacted opinion for public release.[145] After discussions with court staff on January 23, 2014, the government agreed on February 6 to release a less redacted opinion.[146] On August 7, Judge Saylor approved the government's redactions as achieving "the basic objective sought by the movants: disclosure of the Court's legal reasoning, to the extent that it can reasonably be segregated from properly classified facts."[147]

The government submitted the redacted opinion to Judge Saylor on August 27.[148] In the six-page opinion, Judge Bates addressed the "difficult question [of] whether the [surveillance] application shows reasonable grounds to believe that the investigation of [the target] is not being conducted solely upon the basis of activities protected by the first amendment."[149] Judge Bates was satisfied: "According to the application, the government is investigating [the target] not only on the basis of his own personal words and conduct (which, as noted, suggest sympathy toward, if not support of, international terrorism), but also on the basis of the admitted or suspected [redacted]."[150]

On November 7, 2013, the ACLU filed a motion with the FISA court "to unseal its opinions addressing the legal basis for the 'bulk collection' of data by the United States government under the Foreign Intelligence Surveillance Act."[151] ProPublica filed a similar motion on November 12.[152] On December 5, Presiding Judge Walton granted permission for the Reporters Committee for

144. Order, *In re Section 215 Orders*, No. Misc. 13-2 (FISA Ct. Nov. 20, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-5.pdf, 2013 WL 5460064.

145. Submission, *id.* (Dec. 20, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Response-6.pdf.

146. Submission, *id.* (Feb. 6, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Response-3.pdf.

147. Order, *id.* (Aug. 7, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-7.pdf, 2014 WL 5442058.

148. Submission, *id.* (Aug. 27, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Opinion-1.pdf.

149. Opinion at 4, *In re* Application of the FBI, No. BR 13-25 (FISA Ct. Feb. 19, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-25%20Opinion-1.pdf, 2013 WL 9838183.

150. *Id.* at 5.

151. Motion, *In re* FISA Court Opinions, No. Misc. 13-8 (FISA Ct. Nov. 7, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Motion-2.pdf.

152. Motion, *In re* Release of Court Records, No. Misc. 13-9 (FISA Ct. Nov. 12, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-09%20Motion-2.pdf ("opinions that appear to underlie the government's collection of telephone metadata").

Freedom of the Press and twenty-five other media organizations to file an amicus curiae brief.[153]

Because of FOIA actions by the ACLU and the Electronic Frontier Foundation, the Director of National Intelligence released 1,040 pages of documents, including several FISA court documents, on November 18, 2013.[154] Two long and redacted opinions granted "authority for the [NSA] to collect information regarding e-mail and certain other forms of Internet communications under the pen register and trap and trace provisions of [FISA]."[155] In the press release, the Director stated that the surveillance program granted authority by these opinions had been discontinued for lack of effectiveness pursuant to an evaluation begun in 2011.[156] Additional documents were released in August 2014.[157]

---

153. Order, *In re FISA Court Opinions*, No. Misc. 13-8 (FISA Ct. Dec. 5, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-6.pdf; *see* Brief, *id.* (Nov. 26, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Brief-2.pdf.

154. Press Release, Office of the Dir. of Nat'l Intelligence, Nov. 18, 2013, www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/964-dni-clapper-declassifies-additional-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act-nov [hereinafter Nov. 18, 2013, DNI Press Release]; ACLU, NSA Documents Released to the Public Since June 2013, www.aclu.org/nsa-documents-released-public-june-2013; *see* Ellen Nakashima & Greg Miller, *Intelligence Director Releases About 1,000 Pages of Documents*, Wash. Post, Nov. 19, 2013, at A5.

155. Opinion at 1, No. PR/TT ___ (FISA Ct. ___) [hereinafter Kollar-Kotelly PR/TT Opinion], www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf; *see* Opinion, No. PR/TT ___ (FISA Ct. ___) [hereinafter Bates PR/TT Opinion], www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

156. Nov. 18, 2013, DNI Press Release, *supra* note 154; *see also* Laura K. Donohue, *FISA Reform*, 10 I/S: J. of L. & Pol'y 599, 604 (2014) ("The program appears to have operated until December 2011, when it was discontinued for failure to deliver sufficient operational value to the NSA."); Donohue, *supra* note 28, at 127–28.

In 2015, the *New York Times* reported that the email collection program became less valuable when the NSA developed a program of collecting foreign Internet data, which is not subject to oversight by the FISA court. Charlie Savage, *File Says N.S.A. Found Way to Replace Email Program*, N.Y. Times, Nov. 20, 2015, at A4; *see also* Savage, *supra* note 15, at 565–66.

157. Press Release, Office of the Dir. of Nat'l Intelligence, Aug. 11, 2014, www.dni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1099-newly-declassified-documents-regarding-the-now-discontinued-nsa-bulk-electronic-communications-metadata-pursuant-to-section-401-of-the-foreign-intelligence-surveillance-act?tmpl=component&format=pdf (including links to forty-three documents totaling 990 pages on the NSA's discontinued pen register and trap and trace program, including three documents previously released on November 18, 2013, one of which—orders in FISA Ct. No. BR 09-05—was rereleased with slightly fewer redactions); *see* Status Report, Electronic Privacy Info. Ctr. v. Dep't of Justice, No. 1:13-cv-1961 (D.D.C. Aug. 8, 2014), D.E. 20 (noting the August 7, 2014, production of documents to the plaintiff); Electronic Privacy Info. Ctr. v. Dep't of Justice, 15 F. Supp. 3d 32 (D.D.C. 2014) (denying a preliminary injunction); *see also* Opinion, *Electronic Privacy Info. Ctr.*, No. 1:13-cv-1961 (D.D.C. Feb. 4, 2016, D.E. 32, 2016 WL 447426 (ordering an updated privilege log and submission of withheld documents to the court for in camera review).

The first opinion is eighty-seven pages by Judge Colleen Kollar-Kotelly, with a redacted date of issue.[158] The *Washington Post*, however, concluded, "Although the date was blacked out, the opinion appeared to be the order that placed the NSA's Internet metadata program under court supervision in July 2004, according to an NSA inspector general report leaked this year by former NSA contractor Edward Snowden."[159] According to Judge Kollar-Kotelly, "This application seeks authority for a much broader type of collection than other pen register/trap and trace applications and therefore presents issues of first impression. For that reason it is appropriate to explain why the Court concludes that the application should be granted as modified herein."[160]

"[B]ased on the plain meaning of the applicable definitions, the proposed collection involves a form of both pen register and trap and trace surveillance."[161] Additionally, Judge Kollar-Kotelly found that "such an interpretation would promote the purpose of Congress in enacting and amending FISA regarding the acquisition of non-content addressing information."[162] The surveillance program comports with the Fourth Amendment because "there is no reasonable expectation of privacy under the Fourth Amendment in the meta data to be collected."[163] Additionally, "The weight of authority supports the conclusion that Government information-gathering that does not constitute a Fourth Amendment search or seizure will also comply with the First Amendment when conducted as part of a good-faith criminal investigation."[164]

On the expiration of Judge Kollar-Kotelly's authorization of the email metadata surveillance program, Judge Bates considered an "application to reinitiate in expanded form" such surveillance.[165] In his 117-page opinion, Judge Bates discussed many violations of surveillance restrictions that the government had disclosed.[166] "The history of material misstatements in prior applications and non-compliance with prior orders gives the Court pause before approving such an expanded collection."[167] So, Judge Bates's approval of the surveillance came with some modifications.[168]

158. Kollar-Kotelly PR/TT Opinion, *supra* note 155.

159. Nakashima & Miller, *supra* note 154.

160. Kollar-Kotelly PR/TT Opinion, *supra* note 155, at 1–2.

161. *Id.* at 16–17.

162. *Id.* at 18.

163. *Id.* at 59.

164. *Id.* at 66.

165. Bates PR/TT Opinion, *supra* note 155, at 1.

166. *Id.* at 9–22; *see* Devlin Barrett, *Surveillance Court Judge Criticized NSA "Overcollection" of Data*, Wall St. J., Aug. 12, 2014, at A4.

167. Bates PR/TT Opinion, *supra* note 155, at 72; *see* Savage, *supra* note 15, at 564–65 (reporting that the opinion was issued in July 2010).

168. *Id.* at 117; *see* Savage, *supra* note 15, at 564–65 (reporting that the opinion was issued in July 2010).

Disclosing Surveillance Cooperation

On June 18 and 19, 2013, respectively, Google and Microsoft sought permission from the FISA court to disclose aggregate statistics on FISA orders that they had received.[169] Yahoo!, Facebook, and LinkedIn filed similar motions in September.[170] Apple joined the litigation as an amicus curiae in November.[171] On January 27, 2014, the government settled the motions by granting permission to the carriers to report the number of FISA orders received in bands of 250, or in bands of 1,000 if broken down into category of FISA order.[172]

The Electronic Privacy Information Center filed a petition for a writ of mandamus with the Supreme Court on July 8, 2013, seeking review of a leaked FISA court order requiring Verizon to provide the NSA with telephony metadata for all communications in which at least one party is within the United States.[173] On July 19, the day that the leaked order expired, the Director

169. Motion, *In re* Motion to Disclose Aggregate Data Regarding FISA Orders, No. Misc. 13-4 (FISA Ct. June 19, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-04%20 Motion-10.pdf; Motion, *In re* Motion for Declaratory Judgment of Google Inc.'s First Amendment Right to Publish Aggregate Information About FISA Orders, No. Misc. 13-3 (FISA Ct. June 18, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20 Motion-10.pdf.

170. Motion, *In re* Motion for Declaratory Judgment That LinkedIn Corp. May Report Aggregate Date Regarding FISA Orders, No. Misc. 13-7 (FISA Ct. Sept. 17, 2013), www.fisc. uscourts.gov/sites/default/files/Misc%2013-07%20Motion-3.pdf; Motion, *In re* Motion for Declaratory Judgments to Disclose Aggregate Data Regarding FISA Orders and Directives, No. Misc. 13-6 (FISA Ct. Sept. 9, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%20 13-06%20Motion-3. pdf; Motion, *In re* Motion for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Orders and Directives, No. Misc. 13-5 (FISA Ct. Sept. 9, 2013), www.fisc.uscourts.gov/sites/ default/files/Misc%2013-05%20Motion-12.pdf.

171. Amicus Curiae Brief, Nos. Misc. 13-3 to 13-7 (FISA Ct. Nov. 5, 2013), www.fisc. uscourts.gov/sites/default/files/Misc%2013-03%20Brief-1.pdf; Order, *id.* (Nov. 13, 2013) (granting leave to file the brief), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20 Order-15. pdf.

172. Notice, Nos. Misc. 13-3 to 13-7 (FISA Ct. Jan. 27, 2014), www.fisc.uscourts.gov/ sites/default/files/Misc%2013-03%20Notice.pdf; Dismissal Stipulation, *id.* (Jan. 27, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Action.pdf; *see* googleblog. blogspot.ca/2014/02/shedding-some-light-on-foreign.html (public report by Google); blogs. technet.com/b/microsoft_on_the_issues/archive/2014/02/03/providing-additional-transparency-on-us-government-requests-for-customer-data.aspx (Microsoft); yahoo. tumblr.com/post/75496314481/more-transparency-for-u-s-national-security-requests (Yahoo!); newsroom.fb.com/News/797/Facebook-Releases-New-Data-About-National-Security-Requests (Facebook); help.linkedin.com/app/answers/detail/a_id/41878 (LinkedIn); *see also* Timothy B. Lee, *Tech Firms Publicize Data on NSA Requests*, Wash. Post, Feb. 4, 2014, at A9; Zoe Tillman, *Tech Companies Reach Deal in Data Fight*, Nat'l L.J., Feb. 3, 2014, at 21; *U.S., Web Firms Reach Deal*, Miami Herald, Jan. 28, 2014, at 3A.

173. Petition, *In re* Electronic Privacy Info. Ctr., No. 13-58 (U.S. July 8, 2013); *see* Primary Order, *In re* FBI Application for an Order Requiring the Production of Tangible Things, No. BR 13-80 (FISA Ct. Apr. 25, 2013), www.dni.gov/files/documents/PrimaryOrder_Collection_ 215.pdf, 2013 WL 5460137.

of National Intelligence reported that the FISA court had renewed authorization for NSA's "telephony metadata collection program."[174] The Supreme Court denied mandamus review on November 18.[175]

The Electronic Frontier Foundation had filed a FOIA complaint in the Northern District of California on October 26, 2011, to enforce a June 2 FOIA request for records concerning the government's interpretation of the Patriot Act's section 215, which amended FISA's tangible things title.[176] In response to that suit and the ACLU's 2011 FOIA suit in the Southern District of New York, and in light of Snowden's revelations, the government released on September 10, 2013, fourteen previously classified documents, with redactions.[177] Eight of the documents are FISA court orders—a 2006 order by Judge Howard, a 2008 opinion by Judge Walton, and six 2009 orders and opinions by Judge Walton—and two of the documents are government submissions to the FISA court.

The released documents illustrate the FISA court's supervision, through its business records or BR docket, of telecommunication metadata surveillance. They also include concerns by Judge Walton that government surveillance was departing from approved procedures:

> In summary, since January 15, 2009, it has finally come to light that the FISC's authorizations of this vast collection program have been premised on a flawed depiction of how the NSA uses BR metadata. This misperception by the FISC existed from the inception of its authorized collection in May 2006, buttressed by repeated inaccurate statements made in the government's submissions, and despite a government-devised and Court-mandated oversight regime. The minimization procedures proposed by the government in each successive application and approved and adopted as binding by the orders of the FISC have been so frequently and systematically violated that it can fairly be said that this critical element of the overall BR regime has never functioned effectively.[178]

---

174. Press Release, Office of the Dir. of Nat'l Intelligence, July 19, 2013, www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/898-foreign-intelligence-surveillance-court-renews-authority-to-collect-telephony-metadata?tmpl=component&format=pdf; *see* Joby Warrick, *NSA Cellphone Surveillance Program Renewed, Officials Say*, Wash. Post, July 20, 2013, at A2.

175. *In re* Electronic Privacy Info. Ctr., 571 U.S. ___, 134 S. Ct. 638 (2013).

176. Complaint, Electronic Frontier Found. v. Dep't of Justice, No. 4:11-cv-5221 (N.D. Cal. Oct. 26, 2011), D.E. 1; *see* Amended Complaint, *id.* (Nov. 3, 2011), D.E. 9.

177. Press Release, Office of the Dir. of Nat'l Intelligence, Sept. 10, 2013, www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/927-draft-document (providing links to the documents); *see* Paul Elias, *Records: Officials Abused Spying Program*, Miami Herald, Sept. 11, 2013, at 1A; Siobhan Gorman & Devlin Barrett, *NSA Admits It Violated Privacy Rules*, Wall St. J., Sept. 11, 2013, at A3; Carol D. Leonnig, *Judge Questioned NSA Program*, Wash. Post, Sept. 12, 2013, at A3; Ellen Nakashima, Julie Tate & Carol Leonnig, *NSA Broke Privacy Rules for 3 Years, Documents Say*, Wash. Post, Sept. 11, 2013, at A1; Scott Shane, *N.S.A. Violated Rules on Use of Phone Logs, Intelligence Court Found in 2009*, N.Y. Times, Sept. 11, 2003, at A14.

178. Order at 10–11, *In re* Production of Tangible Things, No. BR 08-13 (FISA Ct. Mar. 2, 2009), www.dni.gov/files/documents/section/pub_March%202%202009%20Order%20from

> The Court is deeply troubled by the incidents [disclosed by the government], which have occurred only a few weeks following the completion of an "end to end review" by the government of NSA's procedures and processes for handling the BR metadata, and its submission of a report intended to assure the Court that NSA had addressed and corrected the issues giving rise to the history of serious and widespread compliance problems in this matter and had taken the necessary steps to ensure compliance with the Court's orders going forward.[179]

> [T]he Court . . . continues to be concerned about the likelihood that these queries could reveal communications of United States person users of the telephone identifier who are not the subject of FBI investigations.[180]

A version of one document released on March 28, 2014, with considerably fewer redactions than in the September 2013 release, revealed Judge Walton's specific concerns about the NSA's general counsel's oversight of pen register and trap and trace surveillance:

> The court is gravely concerned . . . that NSA analysts, cleared and otherwise, have generally *not* adhered to the dissemination restrictions proposed by the government, repeatedly relied upon by the Court in authorizing the collection of the PR/TT metadata, and incorporated into the Court's orders in this matter [redacted] as binding on NSA. Given the apparent widespread disregard of these restrictions, it seems clear that NSA's Office of General Counsel has failed to satisfy its obligation to ensure that all analysts with access to information derived from the PR/TT metadata "receive appropriate training and guidance regarding the querying standard set out in paragraph c. above, *as well as other procedures and restrictions regarding the retrieval, storage, and dissemination of such information*." Docket No. PR/TT [redacted] Order at 11 (emphasis added).[181]

On January 17, 2014, the Director of National Intelligence released twenty-four redacted orders in twenty BR cases before the FISA court in 2006 through

%20FISC.pdf, 2009 WL 9150913; *see* Klayman v. Obama, 957 F. Supp. 2d 1, 18–19 & n.23 (D.D.C. 2013).

> On January 15, 2009, the Department of Justice notified the Court in writing that the government has been querying the business records acquired pursuant to Docket BR 08-13 in a manner that appears to the Court to be directly contrary to the [court's] Order and directly contrary to the sworn attestations of several Executive Branch officials.

Order at 2, *In re Production of Tangible Things*, No. BR 08-13 (FISA Ct. Jan. 28, 2009), www.dni.gov/files/documents/section/pub_Jan%2028%202009%20Order%20Regarding%20Prelim%20Notice%20of%20Compliance.pdf, 2009 WL 9157881; *see* Lizza, *supra* note 116, at 56.

179. Order at 4, *In re* FBI Application, No. BR 09-13 (FISA Ct. Sept. 25, 2009), www.dni.gov/files/documents/section/pub_Sept%2025%202009%20Order%20Regarding%20Further%20Compliance%20Incidents.pdf, 2009 WL 9150896.

180. Order at 6, *In re* FBI Application, No. BR 09-15 (FISA Ct. Nov. 5, 2009), www.dni.gov/files/documents/section/pub_Nov%205%202009%20Supplemental%20Opinion%20and%20Order.pdf, 2009 WL 9150915.

181. Order at 6, *In re* Production of Tangible Things, No. BR 09-06 (FISA Ct. June 22, 2009), www.dni.gov/files/documents/0328/101.%20Order%20and%20Supplemental%20Order.Redacted%2020140327.pdf.

2011.[182] The orders are periodic approvals of a program to collect "all call detail records or 'telephony metadata'" for periods typically a few days short of ninety days, ranging from eighty-four days to eighty-nine days, but sometimes for shorter periods—forty-two, fifty-seven, or sixty-four days—and once for a longer period—115 days. The orders do not cover the period from July 10, 2009, to February 26, 2010. In addition to Judges Kollar-Kotelly, Bates, Howard, Vinson, and Walton, orders were signed by Judges Frederick J. Scullin, Jr., Northern District of New York; Robert C. Broomfield, District of Arizona; Nathaniel M. Gorton, District of Massachusetts; and James B. Zagel, Northern District of Illinois.

In the Northern District of California FOIA action, Judge Yvonne Gonzalez Rogers decided on June 13, 2014, that she would review in camera and ex parte five FISA court orders and opinions "to assure that the agency is complying with its obligations to disclose non-exempt material."[183] "The evidence in the record shows that some documents, previously withheld in the course of this litigation and now declassified, had been withheld in their entirety when a disclosure of reasonably segregable portions of those documents would have been required."[184]

On August 11, Judge Gonzalez Rogers determined that the government "has established a proper basis for withholding, in full, the FISC orders and opinions at issue."[185] Judge Gonzalez Rogers, however, found that the plaintiffs were entitled to a memorandum from the Office of Legal Counsel to the Department of Commerce, which was "prepared to aid the Department of Commerce in determining its legal obligations with respect to disclosure of census information to federal law enforcement of national security officers," concluding that "it can no longer be withheld because it has become a controlling statement of the executive branch's legal position and, specifically, has been adopted as the opinion of the executive branch in proceedings before the FISC."[186] The government voluntarily dismissed an appeal.[187]

---

182. DNI Clapper Declassifies Additional Documents Regarding Collection Under Section 401 of the Foreign Intelligence Surveillance Act, Jan. 17, 2014, www.dni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1001-dni-clapper-declassifies-additional-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act (including links to the twenty-four orders).

183. Order at 3, Electronic Frontier Found. v. Dep't of Justice, No. 4:11-cv-5221 (N.D. June 13, 2014), D.E. 85.

184. *Id.* at 2.

185. Opinion at 3, *id.* (Aug. 11, 2014), D.E. 90, 2014 WL 3945646; *id.* at 7 ("The FISC orders are properly withheld to protect intelligence sources and methods used by the government to gather intelligence data. . . . [B]ased upon the Court's review, the documents must be withheld in full and contain no reasonably segregable information.").

186. *Id.* at 10–13.

187. Voluntary Dismissal, Electronic Frontier Found. v. U.S. Dep't of Justice, No. 14-17098 (9th Cir. Jan. 29, 2015), D.E. 9; Order, *id.* (Feb. 4, 2015), D.E. 10.

Smith and *Jones*

On September 17, 2013, the FISA court released a public redacted version of an August 22 opinion by FISA Judge Claire V. Eagan, Northern District of Oklahoma, holding in an ex parte application for surveillance authorization that the FBI's obtaining a large volume of telephony metadata was consistent with the Fourth Amendment as interpreted by the Supreme Court in 1979 in *Smith v. Maryland*.[188]

In *Smith*, the Supreme Court held by a vote of five to three that installation and use of a pen register, to record the numbers dialed on a specific telephone, was not a search because it did not violate reasonable expectations of privacy.[189] In 1975, a robbery victim reported "threatening and obscene phone calls from a man identifying himself as the robber."[190] Michael Lee Smith was identified as a suspect, so "the telephone company, at police request, installed a pen register at its central offices to record the numbers dialed from the telephone at [his] home."[191] Justice Blackmun, writing on behalf of himself, Chief Justice Burger, and Justices White, Rehnquist, and Stevens, reasoned that "All subscribers realize . . . that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills."[192] In dissent, Justice Stewart responded, "The telephone conversation itself must be electronically transmitted by telephone company equipment, and may be recorded or overheard by the use of other company equipment."[193] He concluded, "I think that the numbers dialed from a private telephone—like the conversations that occur during a call—are within the constitutional protection recognized in [*Katz v. United States*]."[194] Justice Marshall, also in dissent, and joined by Justice Brennan, observed, "Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes."[195]

---

188. Opinion, *In re* FBI Application for Tangible Things, No. BR 13-109 (FISA Ct. Aug. 29, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf, 2013 WL 5741573 (amending an August 22, 2013, opinion to correct numbering errors among the footnotes); *see* Order, *id.* (Aug. 29, 2013), www.fisc.uscourts.gov/sites/default/files/BR%20 13-109%20Order-3.pdf (Judge Eagan's order amending her opinion to renumber footnotes); Order, *id.* (Aug. 23, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20 Order-2.pdf (presiding judge's order for a classification review upon Judge Eagan's sua sponte request for publication of her opinion); *see also* Smith v. Maryland, 442 U.S. 735 (1979).

189. *Smith*, 442 U.S. at 736 & n.1, 745–46.

190. *Id.* at 737.

191. *Id.*

192. *Id.* at 742.

193. *Id.* at 746 (Justice Stewart, dissenting).

194. *Id.* at 747; *see* Katz v. United States, 389 U.S. 347 (1967).

195. *Smith*, 442 U.S. 749 (Justice Marshall, dissenting).

On October 18, 2013, the FISA court released a public redacted October 11 opinion by FISA Judge McLaughlin that adopted Judge Eagan's analysis.[196] Judge McLaughlin also addressed the Supreme Court's 2012 case, *United States v. Jones*.[197]

In *Jones*, Justice Scalia concluded for the court, in an opinion joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, that installation of a GPS tracking device on a vehicle to monitor the vehicle's movements is a Fourth Amendment search because it is a trespass onto property.[198]

Concurring, Justice Sotomayor observed, "Of course, the Fourth Amendment is not concerned only with trespassory intrusions on property."[199] Respecting *Smith*, she observed further,

> [I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.[200]

Concurring in the judgment, Justice Alito wrote for himself and Justices Ginsburg, Breyer, and Kagan that they "would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove."[201] Respecting older precedents, Justice Alito observed, "In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical."[202]

Judge McLaughlin decided that the concerns expressed by the concurring justices in *Jones* did not suggest a conclusion in the telephony surveillance applications, because non-content metadata are not the same as location information.[203]

On December 18, 2013, Judge McLaughlin granted a motion by the Center for National Security Studies to submit an amicus curiae brief on whether FISA authorizes the collection of telephony metadata in bulk, but she denied the Center's request for en banc rehearing.[204]

---

196. Opinion at 3, *In re* FBI Application for Tangible Things, No. BR 13-158 (FISA Ct. Oct. 11, 2013) [hereinafter McLaughlin Opinion], www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-1.pdf; *see* Order, *id.* (Oct. 15, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Order-1.pdf (presiding judge's order for a classification review upon Judge McLaughlin's sua sponte request for publication of her opinion).

197. McLaughlin Opinion, *supra* note 196, at 4–6; *see* United States v. Jones, 565 U.S. ___, 132 S. Ct. 945 (2012).

198. *Jones*, 565 U.S. at ___, 132 S. Ct. at 949–50.

199. *Id.* at ___, 132 S. Ct. at 954 (Justice Sotomayor, concurring).

200. *Id.* at ___, 132 S. Ct. at 957 (citations omitted).

201. *Id.* at ___, 132 S. Ct. at 958 (Justice Alito, concurring in the judgment).

202. *Id.* at ___, 132 S. Ct. at 963.

203. McLaughlin Opinion, *supra* note 196, at 5.

204. Order, *In re* FBI Application for Tangible Things, No. BR 13-158 (FISA Ct. Dec. 18, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-2.pdf.

Judge Zagel endorsed the analyses of Judges Eagan and McLaughlin in a June 19, 2014, FISA court opinion.[205]

Conflicting Rulings on Surveillance Constitutionality

On June 6, Larry Klayman and two other persons filed a class action in the U.S. District Court for the District of the District of Columbia against the government and Verizon challenging the newly disclosed surveillance methods.[206] Five days later, an overlapping collection of four individuals filed a similar action against the government and ten other telecommunication companies.[207] On December 16, Judge Richard J. Leon granted the plaintiffs a preliminary injunction against bulk metadata collection.[208]

Judge Leon found that the plaintiffs had standing, because "[t]he Government . . . describes the advantages of bulk collection in such a way as to convince me that plaintiffs' metadata—indeed *everyone's* metadata—is analyzed, manually or automatically."[209] Judge Leon found the metadata collection constituted an unreasonable search, despite the Supreme Court's 1979 decision in *Smith*:

> In *Smith*, the Supreme Court was actually considering whether local police could collect one person's phone records for calls made after the pen register was installed and for the limited purpose of a small-scale investigation of harassing phone calls. The notion that the Government could collect similar data on hundreds of millions of people and retain that data for a five-year period, updating it with new data every day in perpetuity, was at best, in 1979, the stuff of science fiction.
>
> . . .
>
> . . . I cannot imagine a more "indiscriminate" and "arbitrary invasion" than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval. Surely, such a program infringes on "that degree of privacy" that the Founders enshrined in the Fourth Amendment. Indeed, I have little doubt that the author of our Constitution, James Madison, who cautioned us to beware "the abridgment of

205. Opinion, *In re* Production of Tangible Things, No. BR 14-96 (FISA Ct. June 19, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-96%20Opinion-1.pdf, 2014 WL 5463290.

206. Complaint, Klayman v. Obama, No. 1:13-cv-851 (D.D.C. June 6, 2013), D.E. 1; Klayman v. Obama, 957 F. Supp. 2d 1, 7, 11 (D.D.C. 2013); *see* Second Amended Complaint, *Klayman*, No. 1:13-cv-851 (D.D.C. Nov. 23, 2013), D.E. 37; Amended Complaint, *id.* (June 9, 2013), D.E. 4; *see also* Jerry Markon, *Classified Programs Challenged in Court*, Wash. Post, July 16, 2013, at A1; James Risen, *Privacy Group to Ask Supreme Court to Stop N.S.A.'s Phone Spying Program*, N.Y. Times, July 8, 2013, at A9.

The plaintiffs voluntarily dismissed Verizon as a defendant on January 31, 2014. Stipulation, *Klayman*, No. 1:13-cv-851 (D.D.C. Jan. 31, 2014), D.E. 75; *see* Third Amended Complaint, *id.* (Feb. 10, 2014), D.E. 77.

207. Complaint, Klayman v. Obama, No. 1:13-cv-881 (D.D.C. June 11, 2013), D.E. 1; Third Amended Complaint, *id.* (Feb. 11, 2016), D.E. 112; Second Amended Complaint, *id.* (Jan. 30, 2014), D.E. 55; Amended Complaint, *id.* (Nov. 23, 2013), D.E. 30; *see also* Markon, *supra* note 206; *Klayman*, 957 F. Supp. 2d at 7 n.1, 11.

208. *Klayman*, 957 F. Supp. 2d 1; *see* ACLU v. Clapper, 785 F.3d 787, 799 (2d Cir. 2015).

209. *Klayman*, 957 F. Supp. 2d at 26–29.

> freedom of the people by gradual and silent encroachments by those in power," would be aghast.[210]

Moreover, "the Government does *not* cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent attack, or otherwise aided the Government in achieving any objective that was time-sensitive in nature."[211]

Judge Leon stayed his injunction pending appeal.[212] While the district court case otherwise moved forward,[213] the prevailing plaintiffs unsuccessfully sought a writ of certiorari from the Supreme Court so that the high court could quickly consider the plaintiffs' concerns.[214] The plaintiffs filed a third related case, a class action, in the district court on January 23, 2014.[215] The injunction appeals were heard on November 4.[216]

Judge Pauley issued an opinion on December 27, 2013, finding bulk collection authorized by FISA.[217] Judge Pauley's opinion includes two important observations: (1) "[T]he Government acknowledged that it has collected metadata for substantially every telephone call in the United States since May 2006."[218] (2) "This blunt tool only works because it collects everything. Such a program, if unchecked, imperils the civil liberties of every citizen."[219] Judge Pauley determined that *Smith* compelled a decision in favor of the government.[220] The court of appeals declined to consider a constitutional challenge to the surveillance program, because the court determined that the program

---

210. *Id.* at 33, 42 (citation omitted).

211. *Id.* at 40.

212. *Id.* at 10, 43.

213. Docket Sheet, Klayman v. Obama, No. 1:13-cv-881 (D.D.C. June 11, 2013); Docket Sheet, Klayman v. Obama, No. 1:13-cv-851 (D.D.C. June 6, 2013).

214. Klayman v. Obama, 572 U.S. ___, 134 S. Ct. 1795 (2014) (denying certiorari).

215. Complaint, Klayman v. Obama, No. 1:14-cv-92 (D.D.C. Jan. 23, 2014), D.E. 1; *see* Notice of Related Case, *id.* (Jan. 24, 2014), D.E. 2.

216. Docket Sheets, Klayman v. Obama, No. 14-5016 and 14-5017 (D.C. Cir. Jan. 15, 2014) (cross-appeals); Docket Sheets, Klayman v. Obama, Nos. 14-5004 and 14-5005 (D.C. Cir. Jan. 9, 2014) (appeals); www.cadc.uscourts.gov/recordings/recordings2015.nsf/B35F13E83B42FB8485257D860062C672/$file/14-5004.mp3 (audio recording of oral argument); *see* Devlin Barrett, *NSA Data Collection Gets Day in Court*, Wall St. J., Nov. 1, 2014, at A5; Ellen Nakashima & Victoria St. Martin, *Privacy of Phone Records Debated*, Wash. Post, Nov. 5, 2014, at A2; Zoe Tillman, *D.C. Circuit Readies for NSA Case*, Nat'l L.J., Oct. 13, 2014, at 37.

217. ACLU v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013), *rev'd*, 785 F.3d 787 (2d Cir. 2015); *see* Greenberg, *supra* note 28, at 242; Adam Liptak & Michael S. Schmidt, *Judge Upholds N.S.A.'s Bulk Collection of Data on Calls*, N.Y. Times, Dec. 30, 2013, at A1; Andrew Ramonas, Todd Ruger & Tony Mauro, *Courts Join NSA Fight*, Nat'l L.J., Jan. 6, 2014, at 1; Jennifer Smith & Jacob Gershman, *Judge Backs the NSA's Surveillance*, Wall St. J., Dec. 28, 2013, at A1; Sari Horwitz, *Judge: NSA's Action Lawful*, Wash. Post, Dec. 28, 2013, at A1.

218. *ACLU*, 959 F. Supp. 2d at 735.

219. *Id.* at 730.

220. *Id.* at 749–52.

exceeded congressional authorization.[221] Vast bulk collection cannot be "relevant to an authorized investigation."[222]

On June 3, 2014, Judge B. Lynn Winmill dismissed a complaint filed in the District of Idaho alleging that comprehensive metadata collection violates the Fourth Amendment.[223] Judge Winmill relied on *Smith*, circuit law, and Judge Pauley's decision.[224] Judge Winmill urged, however, that "Judge Leon's decision should serve as a template for a Supreme Court opinion."[225] An expedited appeal was heard on December 8,[226] but because of the change in law resulting from Congress's passing the Freedom Act in June 2015, the court of appeals remanded the case back to Judge Winmill on March 22, 2016.[227]

District court rulings remain pending elsewhere.

On July 16, 2013, a collection of eighteen organizations, including the First Unitarian Church of Los Angeles, Greenpeace, the California Association of Federal Firearms Licensees, and the National Organization for the Reform of Marijuana Laws, filed a complaint against the government in the Northern District of California alleging "an illegal and unconstitutional program of dragnet electronic surveillance."[228] Judge White accepted the case as related to the warrantless wiretap litigation.[229]

---

221. ACLU v. Clapper, 785 F.3d 787, 792 (2d Cir. 2015); ACLU v. Clapper, 804 F.3d 617, 618–20 (2d Cir. 2015); *see* Docket Sheet, ACLU v. Clapper, No. 14-42 (2d Cir. Jan. 6, 2014); www.c-span.org/ video/?321163-1/aclu-v-clapper-oral-argument-phone-record-surveillance (video recording of oral argument); *see also* Devlin Barrett & Damian Paletta, *Judges Say NSA Program Is Illegal*, Wall St. J., May 8, 2015, at A1; Michael Doyle, *NSA Phone Surveillance Is Illegal, Court Rules*, Miami Herald, May 8, 2015, at 1A; Greenberg, *supra* note 28, at 259–61; Ellen Nakashima, *Bulk Records Collection Nearing Endgame*, Wash. Post, May 9, 2015, at A3; Ellen Nakashima, *NSA Collection of Phone Data Ruled Unlawful*, Wash. Post, May 8, 2015, at A1; Charlie Savage & Jonathan Weisman, *N.S.A. Collection of Bulk Call Data Is Ruled Illegal*, N.Y. Times, May 8, 2015, at A1; Jonathan Weisman & Jennifer Steinhauer, *Court Ruling on N.S.A.'s Data Collection Jolts Both Defenders and Reformers*, N.Y. Times, May 9, 2015, at A13.

222. *ACLU*, 785 F.3d at 810–21 (2d Cir. 2015); *see* 50 U.S.C. § 1861(b)(2)(A) (2014).

223. Smith v. Obama, 24 F. Supp. 3d 1005 (D. Idaho 2014); *see* Complaint, Smith v. Obama, No. 2:13-cv-257 (D. Idaho June 12, 2013), D.E. 1; *see also ACLU*, 785 F.3d at 799; David Cole, *Cd'A Attorneys Sue Obama Over NSA Surveillance*, Coeur d'Alene Press, June 13, 2013, at 4A; Markon, *supra* note 206; Betsy Z. Russell, *CdA Woman's Lawsuit Over NSA Data Tossed*, Spokane Spokesman-Review, June 4, 2014, at 6A.

224. *Smith*, 24 F. Supp. 3d at 1007–08.

225. *Id.* at 1009.

226. Docket Sheet, Smith v. Obama, No. 14-35555 (9th Cir. July 1, 2014); Order, *id.* (July 14, 2014), D.E. 20 (granting an expedited appeal); www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006844 (video recording of oral argument).

227. Smith v. Obama, 816 F.3d 1239 (9th Cir. 2016).

228. Complaint, First Unitarian Church of L.A. v. NSA, No. 4:13-cv-3287 (N.D. Cal. July 16, 2013), D.E. 1; *see* Second Amended Complaint, *id.* (Aug. 20, 2014), D.E. 119; Amended Complaint, *id.* (Sept. 10, 2013), D.E. 9 (adding six additional plaintiff organizations); *see also* Bob Egelko, *Suit Seeks Limit on Government Data Collection*, S.F. Chron., July 16, 2013, at D1.

229. Order, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. July 24, 2013), D.E. 7.

Senator Rand Paul filed an action in the District of the District of Columbia challenging bulk surveillance on February 18, 2014.[230]

On August 6, 2015, Western District of Texas Judge Kathleen Cardone stayed and administratively closed a February 18, 2014, action filed in El Paso, noting the plaintiffs' heavy reliance on pending appeals in other circuits for authority.[231]

Data Retention

In a January 3, 2014, FISA court order, Judge Hogan specified that the metadata authorized for collection by his order must be destroyed within five years of collection.[232] On March 7, Judge Walton denied[233] a February 25 motion by the government to extend the five-year limit to permit the government to comply with evidence-preservation obligations in the civil suits challenging the legality of broad metadata surveillance pursuant to section 215.[234] "Extending the period of retention for these voluminous records increases the risk that information about United States persons may be improperly used or disseminated."[235] "Further, there is no indication that any of the plaintiffs have sought discovery of this information or made any effort to have it preserved . . . ."[236]

Plaintiffs in the San Francisco post-Snowden challenge before Judge White responded to Judge Walton's Friday decision with a Monday motion for a temporary restraining order enjoining the government "from destroying any evidence relevant to the claims at issue in this action, including but not limited

230. Complaint, Paul v. Obama, No. 1:14-cv-262 (D.D.C. Feb. 18, 2014), D.E. 3; Amended Complaint, *id.* (Mar. 26, 2014), D.E. 17; *see also* Dana Milbank, *In Rand Paul's NSA Sideshow, a Plaintiffs Tiff*, Wash. Post, Feb. 20, 2014, at A2.

The court of appeals dismissed as frivolous appeals from denials of intervention by a pro se litigant in Senator Paul's case and Klayman's cases. Orders, Nos. 14-5207 to 14-5209 and 14-5212 (D.C. Cir. Mar. 4, 2015).

231. Order, Perez v. Clapper, No. 3:14-cv-50 (W.D. Tex. Aug. 6, 2015), D.E. 79; *see* Third Amended Complaint, *id.* (Oct. 31, 2014), D.E. 26; Second Amended Complaint, *id.* (Sept. 12, 2014), D.E. 21; Amended Complaint, *id.* (May 27, 2014), D.E. 12; Complaint, *id.* (Feb. 5, 2014), D.E. 1; *see*.

232. Order at 14, *In re* Production of Tangible Things, No. BR 14-1 (FISA Ct. Jan. 3, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-02%20Order-2.pdf.

233. Opinion, *id.* (Mar. 7, 2014) [hereinafter Mar. 7, 2014, FISA Ct. Opinion], www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-1.pdf; *see* Corrected Notice, Smith v. Obama, No. 2:13-cv-257 (D. Idaho. Mar. 8, 2014), D.E. 20; Notice, ACLU v. Clapper, No. 1:13-cv-3994 (S.D.N.Y. Mar. 8, 2014), D.E. 79; Notice, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. Mar. 7, 2014), D.E. 85; Notice, *Paul*, No. 1:14-cv-262 (D.D.C. Mar. 7, 2014), D.E. 14.

234. Motion, *In re Production of Tangible Things*, No. BR 14-1 (FISA Ct. Feb. 25, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Motion-2.pdf.

235. Mar. 7, 2014, FISA Ct. Opinion, *supra* note 233, at 6.

236. *Id.* at 8–9.

to prohibiting the destruction of any telephone metadata or 'call detail' records."[237] Judge White ordered a response from the government by 2:00 that afternoon[238] and then ordered the data retained, pending further hearing on the issue set for March 19.[239]

On Wednesday, March 12, Judge Walton issued an order permitting the government to comply with Judge White's order.[240] Judge White issued a permanent preservation order on March 21.[241]

Judge Walton scolded the government for failing to inform him of preservation orders remaining in effect from the multidistrict warrantless wiretap litigation that had been transferred to Judge White; the existence of these orders was brought to Judge Walton's attention by the plaintiffs in Judge White's cases.[242] "As the government is well aware, it has a heightened duty of candor to the Court in *ex parte* proceedings."[243] In response to Judge Walton's order that the government explain its behavior,[244] the government acknowledged on April 2 that it should have behaved differently, with "the benefit of hindsight," but it "has always understood [the warrantless wiretap litigation] to be limited to certain presidentially authorized intelligence collection activities outside FISA."[245] The government advised, "no additional corrective action on the part

237. Evidence Preservation Motion, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. Mar. 10, 2014), D.E. 86.

At a subsequent hearing, a plaintiffs' attorney acknowledged the irony: "It's a very strange position to be in, to be arguing for the preservation for the very records we think they shouldn't have gotten in the first place." Transcript at 14, *id.* (Mar. 19, 2014, filed Mar. 20, 2014), D.E. 101.

238. Order, *id.* (Mar. 10, 2014), D.E. 87; *see* Government Response, *id.* (Mar. 10, 2014), D.E. 88.

239. Order, *id.* (Mar. 10, 2014), D.E. 89.

240. Order, *In re* Production of Tangible Things, No. BR 14-1 (FISA Ct. Mar. 12, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Motion-2.pdf.

241. Preservation Order, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. Mar. 21, 2014), D.E. 103, *also filed as* Ex., Notice, *In re Production of Tangible Things*, No. BR 14-1 (FISA Ct. Mar. 27, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20 Notice-4. pdf; *see* Bob Egelko, *S.F. in Spotlight as Legal Battles Over NSA Widen*, S.F. Chron., Mar. 22, 2014, at A1.

On June 6, 2014, Judge White denied plaintiffs a preservation order respecting section 702 claims in the earlier warrantless wiretap actions on a finding that the complaint did not encompass a challenge to section 702. Transcript at 50–53, Jewel v. NSA, No. 4:08-cv-4373 (N.D. Cal. June 6, 2014, filed Aug. 5, 2014), D.E. 275; Minutes, *id.* (June 6, 2014), D.E. 246.

242. Opinion, *In re Production of Tangible Things*, No. BR 14-1 (FISA Ct. Mar. 21, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-3.pdf.

243. *Id.* at 8.

244. *Id.* at 9–10.

245. Response at 1–2, *id.* (Apr. 2, 2014), www.fisc.uscourts.gov/sites/default/files/BR%20 14-01%20Response-2.pdf.

of the Government or this Court is necessary."[246] A deputy assistant attorney general provided additional clarifying information one week later.[247]

Meanwhile, on March 20, Judge Rosemary M. Collyer denied Verizon's challenge to the legality of Judge Hogan's January 3 telephony metadata surveillance order, concluding, "this Court finds Judge Leon's analysis in *Klayman* to be unpersuasive."[248]

The Privacy and Civil Liberties Oversight Board

The Privacy and Civil Liberties Oversight Board, "an independent bipartisan agency within the executive branch established by the Implementing Recommendations of the 9/11 Commission Act of 2007," issued a report on January 23, 2014, concluding that surveillance authorized by the FISA court violated FISA.[249] Although the Privacy Board was established in 2007, all five members were not appointed by the President and confirmed by the Senate until May 7, 2013, shortly before the Snowden revelations.[250] The report analyzed the legality of surveillance conducted pursuant to FISA's title V on business records and other tangible things, as expanded by section 215 of the Patriot Act.[251]

---

246. *Id.* at 2.

247. Letter, *id.* (Apr. 9, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Notice-6.pdf.

248. Opinion, *id.* (Mar. 20, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion%20and%20Order-1.pdf, 2014 WL 5463097; *see* Ellen Nakashima, *Court Rejects Challenge to NSA Program*, Wash. Post, Apr. 26, 2014, at A3; Charlie Savage, *Phone Company Bid to Keep Data from N.S.A. Is Rejected*, N.Y. Times, Apr. 26, 2014, at A13.

249. Privacy and Civil Liberties Oversight Board, Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court (Jan. 23, 2014) [hereinafter First Privacy Board Report], www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf; *see* www.pclob.gov/; Pub. L. 110-53, § 801(a), 121 Stat. 266, 352–58 (2007), *as amended*, 42 U.S.C. § 2000ee (2014); *see also* Donohue, *supra* note 156, at 613–14; Siobhan Gorman & Jared A. Favole, *Watchdog Urges NSA to End Phone Program*, Wall St. J., Jan. 24, 2014, at A4; Greenberg, *supra* note 28, at 242–44; Ellen Nakashima, *Board: NSA Phone Program Should End*, Wash. Post, Jan. 23, 2014, at A4; Todd Ruger, *Privacy Board Divided Over NSA Program*, Nat'l L.J., Jan. 27, 2014, at 15; Savage, *supra* note 15, at 603–04; Charlie Savage, *Watchdog Report Says N.S.A. Program Is Illegal and Should End*, N.Y. Times, Jan. 23, 2014, at A14.

250. First Privacy Board Report, *supra* note 249, at 3–4; *see* Jeremy W. Peters, *G.O.P. Delays On Nominees Raise Tension*, N.Y. Times, May 12, 2013, at A1; *see also* § 2000ee(h)(1) ("The Board shall be composed of a full-time chairman and 4 additional members, who shall be appointed by the President, by and with the advice and consent of the Senate.").

> Members of the Board shall be selected solely on the basis of their professional qualifications, achievements, public stature, expertise in civil liberties and privacy, and relevant experience, and without regard to political affiliation, but in no event shall more than 3 members of the Board be members of the same political party.

§ 2000ee(h)(2); *see* First Privacy Board Report, *supra* note 249, at 3.

251. First Privacy Board Report, *supra* note 249, at 8; *see* Second Privacy Board Report, *supra* note 31, at 2.

> There are four grounds upon which we find that the telephone records program fails to comply with Section 215. First, the telephone records acquired under the program have no connection to any specific FBI investigation at the time of their collection. Second, because the records are collected in bulk—potentially encompassing all telephone calling records across the nation—they cannot be regarded as "relevant" to any FBI investigation as required by the statute without redefining the word relevant in a manner that is circular, unlimited in scope, and out of step with the case law from analogous legal contexts involving the production of records. Third, the program operates by putting telephone companies under an obligation to furnish new calling records on a daily basis as they are generated (instead of turning over records already in their possession)—an approach lacking foundation in the statute and one that is inconsistent with FISA as a whole. Fourth, the statute permits only the FBI to obtain items for use in its investigations; it does not authorize the NSA to collect anything.
>
> In addition, we conclude that the program violates the Electronic Communications Privacy Act. That statute prohibits telephone companies from sharing customer records with the government except in response to specific enumerated circumstances, which do not include Section 215 orders.[252]

Two board members dissented from the majority's conclusion that the section 215 surveillance program violates FISA.[253]

The board issued a report on the use of FISA's section 702 on July 2, 2014.[254] "[T]he Board has found no evidence of intentional abuse."[255] The board concluded that section 702 could be used constitutionally:

> In the Board's view, the core of this program—acquiring the communications of specifically targeted foreign persons who are located outside the United States, upon a belief that those persons are likely to communicate foreign intelligence, using specific communications identifiers, subject to FISA court-approved targeting rules that have proven to be accurate in targeting persons outside the United States, and subject to multiple layers of rigorous oversight—fits within the totality of the circumstances test for reasonableness as it has been defined by the courts to date.
>
> . . .
>
> [Some features of the program, however,] push the entire program close to the line of constitutional reasonableness. At the very least, too much expansion in the collection of U.S. persons' communications or the uses to which those communications are put may push the program over the line.[256]

252. First Privacy Board Report, *supra* note 249, at 10; *see* Electronic Communications Privacy Act, Pub. L. 99-508, 100 Stat. 1948 (1986), *relevant sections as amended*, 18 U.S.C. §§ 2701–2712 (2014); *see also* ACLU v. Clapper, 785 F.3d 787, 798–99 (2d Cir. 2015).

253. First Privacy Board Report, *supra* note 249, at 208–18.

254. Second Privacy Board Report, *supra* note 31; *see* Ellen Nakashima, *Panel: NSA Program That Targets Foreigners Is Lawful*, Wash. Post, July 2, 2014, at A13; David E. Sanger, *U.S. Privacy Panel Backs N.S.A.'s Internet Tapping*, N.Y. Times, July 3, 2014, at A11; Ali Watkins, *Panel: Little Wrong with NSA Surveillance*, Miami Herald, July 3, 2014, at 3A.

255. Second Privacy Board Report, *supra* note 31, at 2.

256. *Id.* at 96–97.

New Notices to Criminal Defendants

In 2013, the Justice Department revised its policy on notice to criminal defendants of FISA surveillance to bring its behavior in line with representations previously made by the Solicitor General to the Supreme Court in *Clapper*.[257]

The issue in *Clapper* was standing to challenge the constitutionality of FISA's section 702, which is section 1881a of the U.S. Code's title 50. The plaintiffs argued "that they should be held to have standing because otherwise the constitutionality of § 1881a could not be challenged."[258] The Court observed that "if the Government intends to use or disclose information obtained or derived from a § 1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition."[259] Solicitor General Donald B. Verrilli, Jr., said in his reply brief, "the government must provide advance notice of its intent to use information obtained or derived from Section 1881a-authorized surveillance against a person in judicial or administrative proceedings and that person may challenge the underlying surveillance."[260]

On learning, subsequent to the Snowden revelations, that Justice Department practice did not conform to the government's representations in *Clapper*, Solicitor General Verrilli persuaded the department that the proper course was to provide defendants with section 702 surveillance notice.[261] On December 24, 2013, the Justice Department informed senators who had inquired about the issue,

> Based on a recent review, the Department has determined that information obtained or derived from Title I FISA collection may, in particular cases, also be derived

257. *See* Donohue, *supra* note 28, at 245–52; Human Rights Watch, Illusion of Justice 102–03 (2014); Greenberg, *supra* note 28, at 226–29, 238, 243–44.

258. Clapper v. Amnesty Int'l USA, 568 U.S. ___, ___, 133 S. Ct. 1138, 1154 (2013).

259. *Id.*

260. Reply Brief at 15, Clapper v. Amnesty Int'l USA, No. 11-1025 (U.S. Oct. 17, 2012), www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-1025_pet_reply.authcheckdam.pdf; *see* Transcript at 4, *id.* (Oct. 29, 2012), www.supremecourt.gov/oral_arguments/argument_transcripts/11-1025.pdf (referring to "notice that the government intends to introduce information in a proceeding against" an aggrieved person).

"There was, in hindsight, something very odd about Verrilli's assertion. By then, the warrantless surveillance program had been operating under FISA for nearly six years. And yet, in all that time, federal prosecutors had *never given such a notice to any criminal defendant*." Savage, *supra* note 15, at 559.

261. *See* Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times, Oct. 17, 2013, at A3; Savage, *supra* note 15, at 586–93; *see also* Donohue, *supra* note 28, at 245–50 ("The government is required, *prior* to legal proceedings, to notify the aggrieved person and the court (or other authority), that information is to be disclosed or used.").

"The national security prosecutors explained that their division had long used a narrower definition of what *derived from* means for FISA wiretaps than for ordinary criminal-law wiretaps." Savage, *supra* note 15, at 587; *see id.* at 588 (noting that Justice Department practice shielded section 702 from judicial review).

> from prior Title VII FISA collection, such that notice concerning both Title I and Title VII should be given in appropriate cases with respect to the same information. Based on this determination, the government has provided notice concerning Section 702-derived information in two criminal cases.[262]

On October 17, 2013, the ACLU filed a complaint in the Southern District of New York based on a March 29, FOIA request for "records related to the government's use of evidence derived from surveillance authorized by the FISA Amendments Act."[263] After examining withheld documents in camera and ex parte, Judge Gregory H. Woods ruled on March 3, 2015, that five documents were properly withheld pursuant to the deliberative process privilege, but the government's search had been improperly narrow.[264]

James Clapper, the Director of National Intelligence, provided Senator Wyden with a letter on March 28, 2014, explaining that "NSA sought and obtained the authority to query information collected under Section 702 of the Foreign Intelligence and Surveillance Act (FISA), using U.S. person identifiers," and "[t]hese queries were performed pursuant to minimization procedures approved by the FISA Court as consistent with the statute and the Fourth Amendment."[265]

---

262. Letter from Principal Deputy Assistant Attorney General Peter J. Kadzik to Senator Mark Udall, Dec. 24, 2013, www.documentcloud.org/documents/1159182-122413-doj-response.html.

263. Complaint, ACLU v. U.S. Dep't of Justice, No. 1:13-cv-7347 (S.D.N.Y. Oct. 17, 2013), D.E. 1; *see* Donohue, *supra* note 28, at 250.

264. ACLU v. U.S. Dep't of Justice, 90 F. Supp. 3d 201 (S.D.N.Y. 2015); *see* 5 U.S.C. § 552(b)(5) (2015).

265. Letter from James R. Clapper to Senator Ron Wyden, Mar. 28, 2014, s3.amazonaws.com/s3.documentcloud.org/documents/1100298/unclassified-702-response.pdf; *see* Ellen Nakashima, *Clapper Confirms Warrantless Searches by NSA*, Wash. Post, Apr. 2, 2014, at A3; Charlie Savage, *Letter Tells of Searches for Emails and Calls*, N.Y. Times, Apr. 2, 2014, at A20.

Historically, federal courts frequently reviewed FISA evidence concerning criminal defendants to determine whether any of the evidence was discoverable as helpful to the defense[266] and whether any FISA evidence should be suppressed.[267] Courts also found prosecutions based on FISA evidence to be constitutional.[268] No court reviewing the use of section 702 evidence in a criminal case has found a constitutional infirmity.

According to the *New York Times* on February 26, 2014, the government had filed section 702 notices in three cases.[269]

266. United States v. Amawi, 695 F.3d 457, 474–75 (6th Cir. 2012), *aff'g* 531 F. Supp. 2d 832 (N.D. Ohio 2008); United States v. El-Mezain, 664 F.3d 467, 563–70 (5th Cir. 2011); United States v. Duggan, 743 F.2d 59, 78 (2d Cir. 1984), *aff'g* United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982); United States v. Belfield, 692 F.2d 141, 146–47 (D.C. Cir. 1982); United States v. Thomson, 752 F. Supp. 75, 78 (W.D.N.Y. 1990); United States v. Spanjol, 720 F. Supp. 55 (E.D. Pa. 1989).

267. United States v. Aldawsari, 740 F.3d 1015, 1017–19 (5th Cir. 2014); United States v. Campa, 529 F.3d 980, 988–89, 993–94 (11th Cir. 2009); United States v. Ning Wen, 477 F.3d 896, 897 (7th Cir. 2006); United States v. Dumeisi, 424 F.3d 566, 578–79 (7th Cir. 2005); United States v. Damrah, 412 F.3d 618, 623–25 (6th Cir. 2005); United States v. Hammoud, 381 F.3d 316, 331–34 (4th Cir. 2004) (en banc), *reinstated in relevant part*, 405 F.3d 1034 (4th Cir. 2005); United States v. Squillacote, 221 F.3d 542, 552–54 (4th Cir. 2000); United States v. Johnson, 952 F.2d 565, 571–73 (1st Cir. 1991); United States v. Isa, 923 F.2d 1300 (8th Cir. 1991); United States v. Badia, 827 F.2d 1458, 1462–64 (11th Cir. 1987); United States v. Ott, 827 F.2d 473 (9th Cir. 1987); United States v. Cavanagh, 807 F.2d 787 (9th Cir. 1987); *Duggan*, 743 F.2d at 76–80; United States v. Mahamud, 838 F. Supp. 2d 881 (D. Minn. 2012); United States v. Sherifi, 793 F. Supp. 2d 751 (E.D.N.C. 2011), *aff'd sub nom.* United States v. Hassan, 742 F.3d 104, 137 (4th Cir. 2014); United States v. Warsame, 547 F. Supp. 2d 982 (D. Minn. 2008); United States v. Mubayyid, 521 F. Supp. 2d 125, 131–41 (D. Mass. 2007); United States v. Rosen, 447 F. Supp. 2d 538, 547–53 (E.D. Va. 2006); United States v. Abdel Rachman, 861 F. Supp. 247 (S.D.N.Y. 1994); United States v. Falvey, 540 F. Supp. 1306 (E.D.N.Y. 1982).

268. *Ning Wen*, 477 F.3d at 897–99; United States v. Duka, 671 F.3d 329, 342–47 (3d Cir. 2011); United States v. Abu-Jihaad, 630 F.3d 102 (2d Cir. 2010), *aff'g* 531 F. Supp. 2d 299 (D. Conn. 2008); United States v. Stewart, 590 F.3d 93, 126–29 (2d Cir. 2009); *Isa*, 923 F.2d 1300; United States v. Posey, 864 F.2d 1487, 1490–91 (9th Cir. 1989) (noting, "As an initial matter, we think it clear that appellant may not make a facial challenge to the FISA without arguing that the particular surveillance *against him* violated the Fourth Amendment."); United States v. Pelton, 835 F.2d 1067, 1074–75 (4th Cir. 1987); *Cavanagh*, 807 F.2d 787; *Duggan*, 743 F.2d at 71–76; *Belfield*, 692 F.2d at 148–49; *Mahamud*, 838 F. Supp. 2d at 888–89; *Warsame*, 547 F. Supp. 2d at 992–97; *Mubayyid*, 521 F. Supp. 2d at 135–41; United States v. Benkahla, 437 F. Supp. 2d 541, 554–55 (E.D. Va. 2006); United States v. Nicholson, 955 F. Supp. 588 (E.D. Va. 1997); *Falvey*, 540 F. Supp. 1306; *see Damrah*, 412 F.3d at 625 ("FISA has uniformly been held to be consistent with the Fourth Amendment"); *Johnson*, 952 F.2d at 573 (noting, "We suspect . . . that appellants have waived this claim for purposes of their appeal.").

269. Charlie Savage, *Justice Dept. Informs Inmate of Pre-Arrest Surveillance*, N.Y. Times, Feb. 26, 2014, at A3; *see* Donohue, *supra* note 28, at 251–52; Greenberg, *supra* note 28, at 238.

Jamshid Muhtorov

The FBI arrested Jamshid Muhtorov at Chicago's O'Hare airport on January 21, 2012, interrupting his trip to Turkey.[270] He was indicted in the District of Colorado, and the court assigned his case to Judge John L. Kane.[271]

The government filed a section 702 notice on October 25, 2013.[272] On November 19, 2015, following "an exhaustive *in camera* and *ex parte* review of all relevant . . . classified materials provided to me by the government, including supplemental classified materials prepared at my request," Judge Kane denied a motion to suppress evidence derived via section 702.[273]

Pretrial activity continues.[274]

Mohamed Osman Mohamud

Mohamed Osman Mohamud was convicted on January 31, 2013, of an attempt to use a weapon of mass destruction for attempting to detonate a car bomb, which was a fake provided by the FBI in a sting, at Portland, Oregon's November 26, 2010, Christmas tree lighting ceremony.[275] Judge Garr M. King presided over the case.[276]

---

270. *See* Bruce Finley & Felisa Cardona, *"I Knew Him as a Good Guy, Praying,"* Denver Post, Jan. 31, 2012, at 1A; *see also* Complaint, United States v. Muhtorov, No. 1:12-cr-33 (D. Colo. Jan. 19, 2012), D.E. 1; Partially Translated Complaint, *id.* (Feb. 6, 2012), D.E. 22 (Russian translation).

271. Indictment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 23, 2012) D.E. 5; Translated Indictment, *id.* (Feb. 6, 2012), D.E. 21 (Russian translation); *see* Second Superseding Indictment, *id.* (Mar. 22, 2012), D.E. 59; Superseding Indictment, *id.* (Mar. 20, 2012), D.E. 50.

272. FISA Notice, *id.* (Oct. 25, 2013), D.E. 457; *see* ACLU v. U.S. Dep't of Justice, 90 F. Supp. 3d 201, 209 (S.D.N.Y. 2015); Charlie Savage, *U.S. Prosecutors Cite Warrantless Wiretaps*, N.Y. Times, Oct. 27, 2013, at 21.

273. Opinion, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Nov. 19, 2015) D.E. 885. "While I am convinced the [FISA Amendments Act] is susceptible to unconstitutional application as an end-run around the Wiretap Act and the Fourth Amendment's prohibition against warrantless or unreasonable searches, I am equally convinced that it was not unconstitutionally applied to Mr. Muhtorov." *Id.* at 4–5.

274. Docket Sheet, *id.* (Jan. 23, 2012); *see* Transcript at 8–9, *id.* (Nov. 15, 2013, filed Dec. 20, 2013), D.E. 487 (noting Judge Kane's amenability to participation by amici curiae).

275. Verdict, United States v. Mohamud, No. 3:10-cr-475 (D. Or. Jan. 31, 2013), D.E. 428; United States v. Mohamud, 941 F. Supp. 2d 1303, 1307 (D. Or. 2013) (denying motions for acquittal or a new trial); Opinion at 3, *Mohamud*, No. 3:10-cr-475 (D. Or. June 24, 2014), D.E. 517 [hereinafter *Mohamud* Section 702 Opinion], 2014 WL 2866749; *see* Indictment, *id.* (Nov. 29, 2010), D.E. 2; *see also* Colin Miner, Liz Robbins & Erik Eckholm, *F.B.I. Says Oregon Suspect Planned "Grand" Attack*, N.Y. Times, Nov. 28, 2010, at A1; Wadie E. Said, Crimes of Terror 41 (2015).

276. Docket Sheet, *Mohamud*, No. 3:10-cr-475 (D. Or. Nov. 29, 2010).

On November 19, 2013, before Mohamud had been sentenced, the government filed a section 702 notice.[277] On June 24, 2014, Judge King denied Mohamud's motions for a new trial.[278]

> Clearly a lot of time has passed, but otherwise suppression and a new trial would put defendant in the same position he would have been in if the government notified him of the § 702 surveillance at the start of the case. Moreover, the government has apparently changed its practice in making this type of notification, so dismissal is not needed as a deterrence.[279]

Judge King rejected various constitutional challenges to FISA's new title VII, section 702 in particular. Respecting separation of powers, "[r]eview of § 702 surveillance applications is as central to the mission of the judiciary as the review of search warrants and wiretap applications."[280] With respect to the Fourth Amendment, "§ 702 surveillance falls within the foreign intelligence exception to the warrant requirement."[281] Mohamud's "communications were collected incidentally during intelligence collection targeted at one or more non-U.S. persons outside the United States."[282] Acknowledging the issue as presenting "a very close question," Judge King concluded that a warrant was not required for the examination of evidence incidentally collected on Mohamud.[283] Finally,

> I made a careful de novo, ex parte review of the § 702 applications and conclude the certification required by 50 U.S.C. § 1881a(g)(2)(A) [FISA § 702(g)(2)(A)] was in place. I also find that the government agents followed appropriate targeting and minimization procedures. Thus I conclude the § 702 surveillance at issue here was lawfully conducted.[284]

On October 1, 2014, Judge King sentenced Mohamud to thirty years in prison.[285] An appeal was heard on July 6, 2016.[286]

---

277. FISA Notice, *id.* (Nov. 19, 2013), D.E. 486; *Mohamud* Section 702 Opinion, *supra* note 275, at 3; *see* Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, N.Y. Times, Jan. 30, 2014, at A15.

In briefing, the government acknowledged that the notice was untimely. Government Discovery Opposition Brief at 9 n.5, 12, *Mohamud*, No. 3:10-cr-475 (D. Or. Feb. 13, 2014), D.E. 491.

278. *Mohamud* Section 702 Opinion, *supra* note 275; *see* Charlie Savage, *Clashing Rulings Weigh Security and Liberties*, N.Y. Times, June 25, 2014, at A15.

279. *Mohamud* Section 702 Opinion, *supra* note 275, at 8.

280. *Id.* at 18; *see* Savage, *supra* note 278 ("The constitutionality of the 2008 law had never been tested in court before Judge King's ruling.").

281. *Mohamud* Section 702 Opinion, *supra* note 275, at 27.

282. *Id.* at 25.

283. *Id.* at 42–45.

284. *Id.* at 47.

285. Judgment, United States v. Mohamud, No. 3:10-cr-475 (D. Or. Oct. 3, 2014), D.E. 524; Transcript at 56, *id.* (Oct. 1, 2015, filed Dec. 8, 2014), D.E. 529; *see* Nigel Duara, *Ore. Man Caught in Bomb-Plot Sting Gets 30-Year Term*, Bos. Globe, Oct. 2, 2014, at A8.

286. Docket Sheet, United States v. Mohamud, No. 14-30217 (9th Cir. Oct. 14, 2014) (noting that the appeal was heard by Circuit Judges Harry Pregerson, Carlos T. Bea, and John B.

Agron Hasbajrami

On January 8, 2013, Agron Hasbajrami received a sentence of fifteen years in prison from Judge John Gleeson, Eastern District of New York, on a plea of guilty to charges of providing material support to terrorism.[287] Five days after the September 8, 2011, indictment, the government filed a notice that the government had collected FISA evidence against Hasbajrami.[288]

On February 24, 2014, the government informed Hasbajrami that the FISA evidence against him was obtained pursuant to orders based on section 702 FISA evidence.[289] "In the government's view, this supplemental notification does not afford you a basis to withdraw your plea or to otherwise attack your conviction or sentence because you expressly waived those rights, as well as the right to any additional disclosures from the government, in your plea agreement."[290]

Judge Gleeson ruled on October 2 that Hasbajrami could withdraw his guilty plea, because, "When the government provided FISA notice without FAA notice, Hasbajrami was misled about an important aspect of his case."[291]

The section 702 evidence complied with the Fourth Amendment, Judge Gleeson ruled.[292] The Constitution permits "warrantless surveillance of non-U.S. persons who are abroad," so "the incidental interception of non-targeted U.S. persons' communications with the targeted persons is also lawful."[293]

Owens); http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009917 (video recording of oral argument).

287. Minutes, United States v. Hasbajrami, No. 1:11-cr-623 (E.D.N.Y. Jan. 8, 2013), D.E. 44; Judgment, *id.* (Jan. 16, 2013), D.E. 45; *see* Superseding Indictment, *id.* (Jan. 26, 2012), D.E. 20; Indictment, *id.* (Sept. 8, 2011), D.E. 1; *see also* Mosi Secret, *15-Year Sentence in Terror Case*, N.Y. Times, Jan. 9, 2013, at A22.

288. FISA Notice, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Sept. 13, 2011), D.E. 9.

289. Letter, *id.* (Feb. 24, 2014), D.E. 65 [hereinafter Feb. 24, 2014, *Hasbajrami* Letter]; *see* Greenberg, *supra* note 28, at 257–59; Ellen Nakashima, *No Warrant, Inmate Is Told*, Wash. Post, Feb. 26, 2014, at A4; Charlie Savage, *Justice Dept. Informs Inmate of Pre-Arrest Surveillance*, N.Y. Times, Feb. 26, 2014, at A3.

290. Feb. 24, 2014, *Hasbajrami* Letter, *supra* note 289, at 2.

291. Opinion, Hasbajrami v. United States, No. 1:13-cv-6852 (E.D.N.Y. Oct. 2, 2014), D.E. 30, 2014 WL 4954596 (noting that withdrawal of the plea was against advice of counsel); *see* Barrett, *supra* note 216.

292. Opinion, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Mar. 8, 2016), D.E. 165, 2016 WL 1029500.

293. *Id.* at 17.

Hasbajrami pleaded guilty to a superseding information on June 26, 2015.[294] On August 13, Judge Gleeson sentenced Hasbajrami to sixteen years in prison[295] followed by deportation to Albania.[296]

Reaz Qadir Khan

A fourth case arose in April 2014.

A grand jury in the District of Oregon returned a sealed indictment against Reaz Qadir Khan on December 27, 2012, for providing advice and financial assistance to Ali Jaleel and his family; Jaleel perished in a suicide attack against Pakistan's Inter-Services Intelligence headquarters in Lahore on May 27, 2009.[297] Khan, who worked at Portland's wastewater treatment plant, was arrested on March 5, 2013.[298] The court assigned Khan's case to Judge Michael W. Mosman.[299]

On the day that Khan was arrested, the government filed a notice that it would use against the defendant evidence collected pursuant to FISA.[300] On April 3, 2014, just over one year later, the government filed a notice that evidence against Khan was acquired pursuant to FISA's section 702.[301] Judge Mosman scheduled FISA motions for hearing on July 27, 2015.[302] On June 17, 2014, Judge Mosman ruled that his 2013 appointment to the FISA court[303] did not require recusal.[304]

---

294. Minutes, *id.* (June 26, 2015), D.E. 142; Superseding Information, *id.* (June 26, 2015), D.E. 141; *see* Waiver of Indictment, *id.* (June 26, 2015), D.E. 140.

Hasbajrami filed a pro-se motion to withdraw his plea and fire his attorney a few weeks later. Motion, *id.* (July 20, 2015), D.E. 146. Judge Gleeson denied these motions. Docket Sheet, *id.* (Sept. 8, 2011).

295. Minutes, *id.* (Aug. 13, 2015), D.E. 151; Amended Judgment, *id.* (Nov. 3, 2015), D.E. 161; Amended Judgment, *id.* (Oct. 23, 2015), D.E. 160; Amended Judgment, *id.* (Sept. 4, 2015), D.E. 158; Judgment, *id.* (Aug. 17, 2015), D.E. 152; Transcript, *id.* (Aug. 13, 2015, filed Nov. 19, 2015), D.E. 163; *see* www.bop.gov (noting a release date of August 14, 2025, reg. no. 65794-053).

296. Order, *id.* (Aug. 17, 2015), D.E. 150; *see* Zachary R. Dowdy, *Terror Suspect Gets 16 Years*, Newsday, Aug. 14, 2015, at A35.

297. Indictment, United States v. Khan, No. 3:12-cr-659 (D. Or. Dec. 27, 2012), D.E. 1.

298. Arrest Warrant, *id.* (Mar. 6, 2013), D.E. 11; *see* Helen Jung, *Indictment Ties Portland Man to Pakistan Attack*, Oregonian, Mar. 6, 2013.

299. Docket Sheet, *Khan*, No. 3:12-cr-659 (D. Or. Dec. 28, 2012) [hereinafter D. Or. *Khan* Docket Sheet].

300. Notice, *id.* (Mar. 5, 2013), D.E. 7.

301. Notice, *id.* (Apr. 3, 2014), D.E. 59.

302. Litigation Schedule, *id.* (Dec. 22, 2014), D.E. 175.

303. www.fisc.uscourts.gov/current-membership.

304. D. Or. *Khan* Docket Sheet, *supra* note 299 (D.E. 91); *see* Motion, *Khan*, No. 3:12-cr-659 (D. Or. May 5, 2014), D.E. 73; Transcript at 26–28, *id.* (Apr. 25, 2014, filed June 12, 2014), D.E. 89 (oral order, in an abundance of caution, by Judge Mosman to Khan's attorneys for briefing on reasons for Judge Mosman's recusal).

The case was resolved by a plea agreement filed on February 13, 2015.[305] On June 19, Judge Mosman sentenced Khan to seven years and three months.[306]

Adel Daoud

Litigation over section 702 arose in a fifth case because it was championed by Senator Dianne Feinstein on December 27, 2012, as a success story for the FISA Amendments Act.[307] The defendant did not demonstrate the use of section 702 in his case.

Adel Daoud was arrested in Chicago on September 14, 2012, for attempting to bomb a bar with a fake bomb provided by the FBI.[308] The court assigned the case to Judge Sharon J. Coleman.[309] The government filed a notice on September 18 that it would use against Daoud evidence derived pursuant to FISA.[310] On May 22, 2013, Daoud filed a motion for clarification from the government whether the FISA evidence against Daoud derived from traditional pre-FAA FISA surveillance or FAA FISA surveillance, often referred to as section 702 FISA surveillance.[311] The government responded on June 12 that "the information the government intends to use was acquired pursuant to a traditional FISA order . . . as opposed to a Section 702 Order."[312] In sur-reply on August 8, the government said that it would "provide notice to the defense and this Court if the government intended to use in this case any information obtained or derived from surveillance authorized under Title VII of FISA . . . as to which the defendant is an aggrieved person."[313] On the following day, Daoud's attorneys moved to examine and suppress all FISA evidence because "there is no indication that the prerequisites for a FISA warrant were present in this case."[314]

305. Plea Agreement, *Khan*, No. 3:12-cr-659 (D. Or. Feb. 13, 2015), D.E. 187; Superseding Information, *id.* (Feb. 13, 2015), D.E. 182.

306. Judgment, *id.* (June 19, 2015), D.E. 193; *see* www.bop.gov (noting a release date of November 19, 2021, reg. no. 74926-065).

307. *See* Ellen Nakashima, *NSA Surveillance Questioned in Plot Case*, Wash. Post, June 22, 2013, at A2.

308. United States v. Daoud, 755 F.3d 479, 480 (7th Cir. 2014); Minutes, United States v. Daoud, No. 1:12-cr-723 (N.D. Ill. Sept. 15, 2012), D.E. 2; *see* Michael Schwirtz & Marc Santora, *Chicago-Area Teenager Accused of Terrorism Plot*, N.Y. Times, Sept. 16, 2012, at 20; Annie Sweeney, Dawn Rhodes & Ryan Haggerty, *FBI: Car Bomb Plan Foiled*, Chi. Trib., Sept. 16, 2012, at 4. *See generally* Human Rights Watch, Illusion of Justice 6, 28–30, 192–93 (2014).

309. Docket Sheet, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Sept. 20, 2012).

310. Notice, *id.* (Sept. 18, 2012), D.E. 9; *Daoud*, 755 F.3d at 480.

311. FISA Clarification Motion, *Daoud*, No. 1:12-cr-723 (N.D. Ill. May 22, 2013), D.E. 43.

312. FISA Clarification Motion Response, *id.* (June 12, 2013), D.E. 46.

313. FISA Clarification Motion Sur-Reply, *id.* (Aug. 8, 2013), D.E. 49.

314. FISA Suppression Motion at 2, *id.* (Aug. 9, 2013), D.E. 52.

On January 29, 2014, Judge Coleman ruled that Daoud's secured counsel should be able to review FISA application materials pertaining to Daoud's case.[315]

> Here, counsel for defendant Daoud has stated on the record that he has top secret SCI (sensitive compartmented information) clearance. Assuming that counsel's clearances are still valid and have not expired, top secret SCI clearance would allow him to examine the classified FISA application material, if he were in the position of the Court or the prosecution. Furthermore, the government had no meaningful response to the argument by defense counsel that the supposed national security interest at stake is not implicated where defense counsel has the necessary security clearances. The government's only response at oral argument was that it has never been done. That response is unpersuasive where it is the government's claim of privilege to preserve national security that triggered this proceeding. Without a more adequate response to the question of how disclosure of materials to cleared defense counsel pursuant to protective order jeopardizes national security, this Court believes that the probable value of disclosure and the risk of nondisclosure outweigh the potential danger of disclosure to cleared counsel. Upon a showing by counsel, that his clearance is still valid, this Court will allow disclosure of the FISA application materials subject to a protective order consistent with procedures already in place to review classified materials by the court and cleared government counsel.
>
> While this Court is mindful of the fact that no court has ever allowed disclosure of FISA materials to the defense, in this case, the Court finds that the disclosure may be necessary. This finding is not made lightly, and follows a thorough and careful review of the FISA application and related materials. The Court finds however that an accurate determination of the legality of the surveillance is best made in this case as part of an adversarial proceeding. The adversarial process is the bedrock of effective assistance of counsel protected by the Sixth Amendment. *Anders v. California*, 386 U.S. 738, 743 (1967). Indeed, though this Court is capable of making such a determination, the adversarial process is integral to safeguarding the rights of all citizens, including those charged with a crime. "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984).[316]

On June 4, 2014, the court of appeals—Circuit Judges Richard A. Posner, Michael S. Kanne, and Ilana Diamond Rovner—heard the government's appeal from Judge Coleman's order granting Daoud's attorneys access to FISA application materials.[317] Following a public argument, the court held a closed

315. Opinion, *id.* (Jan. 29, 2014), D.E. 92 [hereinafter Jan. 29, 2014, N.D. Ill. *Daoud* Opinion], 2014 WL 321384; *Daoud*, 755 F.3d at 481; *see* Andrew Grossman, *Lawyers Win Right to See Secret Court Files*, Wall St. J., Jan. 30, 2014, at A5; Jason Meisner, *Defense to Get Terrorism Files*, Chi. Trib., Jan. 30, 2014, at 11; Ellen Nakashima, *Terrorism Suspect Challenges Warrantless Surveillance Program*, Wash. Post, Jan. 30, 2014, at A13; Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, N.Y. Times, Jan. 30, 2014, at A13.

316. Jan. 29, 2014, N.D. Ill. *Daoud* Opinion, *supra* note 315, at 4–5.

317. United States v. Daoud, 755 F.3d 479 (7th Cir. 2014); Docket Sheet, United States v. Daoud, No. 14-1284 (7th Cir. Feb. 11, 2014) [hereinafter 7th Cir. *Daoud* Docket Sheet]; *see* Jason Meisner, *Secret Appeals Hearing Held*, Chi. Trib., June 5, 2014, at 12.

ex parte session with the government.[318] Daoud's attorneys were not notified in advance that the court would hold part of the proceeding ex parte.[319]

Because of an error by court staff, the public argument was not recorded as it should have been.[320] Court staff members misinterpreted security precautions for the ex parte session as a signal that the public session should not be recorded.[321] The ex parte session was recorded by a cleared court reporter, however.[322] The court agreed to ask the government to approve a redacted transcript for defense counsel's use.[323] Attached to a motion to remove some redactions, the defense filed the redacted transcript on the public docket.[324]

To remedy the recording error the court ordered a second argument session at the beginning of the following week.[325] Daoud was represented by a different attorney at the second argument.[326]

At the second argument, Judges Posner and Rovner explained to the defense attorney that the purpose of the ex parte proceeding was to provide the court with an opportunity to cross-examine the government about the government's representations to the court.[327] At the closed proceeding, the government assured the court that Senator Feinstein's comment about Daoud "was not meant to be understood as a statement that the FAA was used in this case."[328] Following the ex parte proceeding, the court issued a "Classified *Ex Parte* Order Requiring Additional Submission from the Government."[329]

On June 16, the court of appeals reversed Judge Coleman's discovery order, because she had not adequately established Daoud's attorneys' "need to know" the classified FISA application materials.[330]

---

318. *Daoud*, 755 F.3d at 479 n.*, 485; *see* Defendant's Objection, *Daoud*, No. 14-1284 (7th Cir. June 8, 2014) [hereinafter *Daoud* Defendant's Objection]; *see also* Meisner, *supra* note 317.

319. *See Daoud* Defendant's Objection, *supra* note 318; *see also* Meisner, *supra* note 317.

320. *Daoud*, 755 F.3d at 479 n.*; *see* Jason Meisner, *Court Didn't Record Terror Case Arguments*, Chi. Trib., June 6, 2014, at 4.

321. *See* Meisner, *supra* note 320.

322. *Daoud*, 755 F.3d at 479 n.*; *see* Meisner, *supra* note 320.

323. *Daoud*, 755 F.3d at 485; 7th Cir. *Daoud* Docket Sheet, *supra* note 317; media.ca7.uscourts.gov/sound/2014/rs.14-1284.14-1284_06_09_2014.mp3 [hereinafter June 9, 2014, 7th Cir. Oral Argument].

324. Transcript Motion, United States v. Daoud, No. 14-1284 (7th Cir. June 25, 2014) [hereinafter 7th Cir. *Daoud* Transcript Motion].

325. *Daoud*, 755 F.3d at 479 n.*; Orders, *Daoud*, No. 14-1284 (7th Cir. June 6, 2014); *see* Jason Meisner, *Court Will Redo Terror Case Oral Arguments*, Chi. Trib., June 7, 2014, at 4.

326. 7th Cir. *Daoud* Docket Sheet, *supra* note 317.

327. June 9, 2014, 7th Cir. Oral Argument, *supra* note 323; *see Daoud*, 755 F.3d at 485; *see also* Steve Schmadeke, *Attorney, Judge Trade Shots in Terror Case*, Chi. Trib., June 10, 2014, at 9.

328. Transcript at 7, *attached to* 7th Cir. *Daoud* Transcript Motion, *supra* note 324.

329. Order, *Daoud*, No. 14-1284 (7th Cir. June 6, 2014) (cover page).

330. *Daoud*, 755 F.3d at 484, *cert. denied*, 574 U.S. ___, 135 S. Ct. 1456 (2015); *see* Ellen Nakashima, *Landmark Surveillance Disclosure Order Reversed*, Wash. Post, June 17, 2014, at A2.

The court of appeals also ruled that the investigation of Daoud did not violate FISA.[331] The court determined that Senator Feinstein had not identified Daoud's case as an FAA success story; the court concluded that Senator Feinstein meant to list thwarted attacks as evidence of needed vigilance, only some of which were FAA success stories.[332]

Also pending against Daoud are indictments for attempted murder following detention.[333] On August 25, 2016, Judge Coleman found Daoud "icompetent to stand trial at this time," noting that "his rational understanding of the proceedings is significantly undermined by his pervasive belief that the Court and the prosecution are members of the Illuminati and that his attorneys are Freemasons."[334]

The Qazi Brothers

In another case highlighted by Senator Feinstein, the court determined that section 702 was not at issue.

Raees Alam Qazi and Sheheryar Alam Qazi, brothers who were born in Pakistan and who became naturalized U.S. citizens, were indicted on November 30, 2012, in the Southern District of Florida for a plot to use a weapon of mass destruction somewhere in the United States.[335] On December 6, the government filed notices that it would use FISA evidence against the defendants.[336]

On April 22, 2013, the defendants moved for notice whether any of the FISA evidence was obtained pursuant to the FAA.[337] The defendants observed that their capture also was championed by Senator Feinstein as an FAA success.[338] On May 6, Magistrate Judge John J. O'Sullivan granted the defendants'

331. *Daoud*, 755 F.3d at 485.

332. United States v. Daoud, 761 F.3d 678, 682–83 (7th Cir. 2014).

333. Indictment, United States v. Daoud, No. 1:15-cr-487 (N.D. Ill. Aug. 13, 2015), D.E. 1; Indictment, United States v. Daoud, No. 1:13-cr-703 (N.D. Ill. Aug. 29, 2013), D.E. 1.

334. Opinion at 1–2, United States v. Daoud, No. 1:12-cr-723 (N.D. Ill. Aug. 25, 2016), D.E. 216; *id.* at 4 ("it is in the best interest of the defendant to be immediately paced in a secure psychiatric treatment facility where persistent treatment for an initial period of three months may assis in a finding of competency"); *see id.* at 2–3 (noting that the government's forensic psychologist "appeared to be conflicted about Daoud's sincerity in his espoused beliefs").

335. Indictment, United States v. Qazi, No. 0:12-cr-60298 (S.D. Fla. Nov. 30, 2012), D.E. 1; *see* Scott Hiaasen, *Broward Brothers Held on Terror Charges*, Miami Herald, Dec. 1, 2012, at 1B.

336. Notice, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Dec. 6, 2012), D.E. 10 (Sheheryar); Notice, *id.* (Dec. 6, 2012), D.E. 9 (Raees).

337. Amended FAA Motion, *id.* (Apr. 22, 2013), D.E. 67 [hereinafter *Qazi* Amended FAA Motion] (motion by Sheheryar); *see* Order, *id.* (Apr. 24, 2013), D.E. 73 (granting Raees permission to join Sheheryar's motion).

338. *Qazi* Amended FAA Motion, *supra* note 337, at 3–4.

motion so that they could challenge the lawfulness of any FAA surveillance, as promised by *Clapper*.[339]

On September 5, 2014, Judge O'Sullivan issued a report and recommendation advising (1) that after "a thorough *in camera*, *ex parte* review of the classified Foreign Intelligence Surveillance Act ("FISA") materials, the undersigned respectfully recommends that the defendants' motions to disclose FISA materials and to suppress evidence of FISA intercepts be DENIED"[340] and (2) because "the government does not intend to introduce or otherwise use or disclose evidence obtained or derived from FAA surveillance,"[341] deciding the constitutionality of the FAA would be an impermissible advisory opinion.[342]

District Judge Beth Bloom adopted Judge O'Sullivan's opinion.[343] The Qazis pleaded guilty to some counts of a superseding indictment on March 12, 2015.[344] On June 12, Judge Bloom sentenced Raees Alam Qazi to thirty-five years, and she sentenced Sheheryar Alam Qazi to twenty years.[345]

---

339. Opinion, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. May 6, 2013), D.E. 77; *see* Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. Times, July 16, 2013, at A11.

> I would like to have someone here maybe, you know, from the Solicitor General's Office who took the position in front of the Supreme Court that, "Hey, Supreme Court, don't rule on this now because, you know, these people don't have standing," but some day there is going to be somebody who is going to have standing, and they are going to be able to come before the Supreme Court, and now we have got some folks here who may have standing, but you don't want to tell them they have standing.

Transcript at 5, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. July 26, 2013, filed July 30, 2013), D.E. 129 (remarks by Judge O'Sullivan).

340. Redacted Report and Recommendation at 5, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Sept. 5, 2014), D.E. 245 [hereinafter Sept. 5, 2014, *Qazi* Redacted Report and Recommendation]; *see* Redacted Report and Recommendation, *id.* (Sept. 3, 2014, filed Sept. 19, 2014), D.E. 250 (showing the locations in the document of the redactions).

341. Sept 5, 2014, *Qazi* Redacted Report and Recommendation, *supra* note 340, at 9.

342. *Id.* at 17.

343. Opinion, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Oct. 29, 2014), D.E. 259.

344. Plea Agreement, *id.* (Mar. 12, 2015), D.E. 283 (Sheheryar Alam Qazi); Plea Agreement, *id.* (Mar. 12, 2015), D.E. 282 (Sheheryar Alam Qazi); Transcript, *id.* (Mar. 12, 2015, filed Sept. 17, 2015), D.E. 304; *see* Factual Basis, *id.* (Mar. 12, 2015), D.E. 284; Superseding Indictment, *id.* (Jan. 15, 2015), D.E. 267.

345. Judgments, *id.* (June 12, 2015), D.E. 301, 302; *see* Curt Anderson, *Brothers Sentenced for Plot to Bomb NYC Landmarks*, Bos. Globe, June 12, 2015, at A7; Jay Weaver, *Brothers Get Long Terms for "Evil" Plot*, Miami Herald, June 12, 2015, at 1B; *see also* www.bop.gov (noting release dates of May, 3, 2030, for Sheheryan, reg. no. 01224-104, and May 28, 2043, for Raees, reg. no. 01223-104).

Moalin, Mohamud, Doreh, and Taalil

Judge Jeffrey T. Miller, Southern District of California, denied a new trial motion on November 14, 2013, a motion based in part on postconviction Snowden revelations.[346] "Here, when Defendant Moalin used his telephone to communicate with third parties, whether in Somalia or the United States, he had no legitimate expectation of privacy in the telephone numbers dialed."[347]

The defendants were indicted in San Diego late in 2010 for sending money to support Al-Shabaab in Somalia.[348] A jury found them guilty on February 22, 2013.[349] Appeals will be heard on November 10, 2016.[350]

Najibullah Zazi

While sentencing was pending, the government filed a section 702 notice in Najibullah Zazi's case on July 27, 2015.[351] Zazi was indicted in the Eastern District of New York on September 23, 2009, for conspiracy to use weapons of mass destruction.[352] Upon Zazi's agreement to plead guilty and cooperate in other prosecutions, the indictment was converted to an information on February 22, 2010.[353]

Zazi was under federal surveillance when he was stopped on September 10, 2009, by New York authorities on the George Washington Bridge during a drive from Colorado to New York.[354] A recipe for explosives was found on his computer.[355] Because of several signs of surveillance in New York, Zazi flew

346. Amended Opinion, United States v. Moalin, No. 3:10-cr-4246 (S.D. Cal. Nov. 18, 2013), D.E. 388, 2013 WL 6079518.

347. *Id.* at 12; *see* Smith v. Maryland, 442 U.S. 735 (1979).

348. Indictment, United States v. Mohamud, No. 3:10-cr-4645 (S.D. Cal. Nov. 19, 2010), D.E. 1; Indictment, *Moalin*, No. 3:10-cr-4246 (S.D. Cal. Oct. 22, 2010), D.E. 1; *see* Second Superseding Indictment, *id.* (June 8, 2012), D.E. 147; Superseding Indictment, *id.* (Jan. 14, 2011), D.E. 38.

349. Jury Verdict, *Moalin*, No. 3:10-cr-4246 (S.D. Cal. Feb. 22, 2013), D.E. 303.

350. Docket Sheet, United States v. Mohamud, No. 14-50051 (9th Cir. Feb. 7, 2014) (Taalil); Docket Sheet, United States v. Doreh, No. 13-50580 (9th Cir. Dec. 2, 2013); Docket Sheet, United States v. Mohamud, No. 13-50578 (9th Cir. Nov. 29, 2013) (Mohamud); Docket Sheet, United States v. Moalin, No. 13-50572 (9th Cir. Nov. 26, 2013).

351. Notice, United States v. Zazi, No. 1:09-cr-663 (E.D.N.Y. July 27, 2015), D.E. 59.

352. Indictment, *id.* (Sept. 23, 2009), D.E. 1; *see* William K. Rashbaum, *Terror Suspect Is Charged with Preparing Explosives*, N.Y. Times, Sept. 25, 2009, at A1. *See generally* Simon Akam, Alison Leigh Cowan, Michael Wilson & Karen Zraick, *From Smiling Coffee Vendor to Terror Suspect*, N.Y. Times, Sept. 26, 2009, at A1.

353. Information, *Zazi*, No. 1:09-cr-663 (E.D.N.Y. Feb. 22, 2010), D.E. 29; Cooperation Agreement, *id.* (Feb. 22, 2010, filed June 30, 2010), D.E. 44; *see* A.G. Sulzberger & William K. Rashbaum, *Guilty Plea Made in Plot to Bomb New York Subway*, N.Y. Times, Feb. 23, 2010, at A1; *see also* United States v. Medunjanin, 752 F.3d 576 (2d Cir. 2014); Mosi Secret, *Man Convicted of a Terrorist Plot to Bomb Subways Is Sent to Prison for Life*, N.Y. Times, Nov. 17, 2012, at A19.

354. *See* Al Baker & Karen Zraick, *F.B.I. Searches Colorado Home of Man in Terror Inquiry That Reached Queens*, N.Y. Times, Sept. 17, 2009, at A27; Greenberg, *supra* note 28, at 191.

355. *See* Carrie Johnson & Spencer S. Hsu, *U.S. Resident Held Without Bail in Terrorism Case*, Wash. Post., Sept. 22, 2009, at A6.

back to Colorado on September 12.[356] He and his father were arrested in Colorado on September 21 and initially charged with making false statements.[357]

The father was indicted on January 28, 2010, in the Eastern District of New York for conspiracy to obstruct justice, and six related counts were added on November 29.[358] Following a jury verdict of guilty, the father was sentenced on February 15, 2012, by Judge John Gleeson to four years for the Eastern District indictment and to an additional six months for a Southern District of New York indictment for visa fraud, to which the father pleaded guilty.[359]

Yaha Farooq Mohammad

A December 21, 2015, notice of intent to use section 702 evidence[360] was filed in a case against Yaha Farooq Mohammad on a September 30 indictment in the Northern District of Ohio against two pairs of brothers for conspiracy to provide material support to terrorism.[361]

Following a report that Mohammad was seeking the murder of Judge Jack Zouhary, to whom Mohammad's case was assigned, a second indictment was filed against Mohammad on July 6, 2016.[362] The circuit's chief judge reassigned the two cases to Judge Edmund A. Sargus, Jr., in Ohio's other district.[363]

Aws Mohammed Younis al-Jayab

Aws Mohammed Younis al-Jayab received a section 702 notice on April 8, 2016,[364] in a material-support case filed in the Northern District of Illinois on

356. *See* William K. Rashbaum & Al Baker, *How Using Imam in Terror Inquiry Backfired on New York Police*, N.Y. Times, Sept. 23, 2009, at A1; Karen Zraick & David Johnston, *Man in Queens Raids Denies Any Terrorist Link*, N.Y. Times, Sept. 16, 2009, at A24.

357. Complaint, United States v. Zazi, No. 1:09-mj-3001 (D. Colo. Sept,. 19, 2009), D.E. 1 (Najibullah Zazi); Complaint, United States v. Zazi, No. 1:09-mj-3000 (D. Colo. Sept. 19, 2009), D.E. 1 (Mohammed Wali Zazi); *see* William K. Rashbaum & David Johnston, *U.S. Agents Arrest Father and Son in Terror Inquiry*, N.Y. Times, Sept. 21, 2009, at A28.

358. Superseding Indictment, United States v. Zazi, No. 1:10-cr-60 (E.D.N.Y. Nov. 29, 2010), D.E. 42; Indictment, *id.* (Jan. 28, 2010), D.E. 1; *see* Order, United States v. Zazi, No. 1:09-cr-438 (D. Colo. Feb. 1, 2010), D.E. 50 (dismissing without prejudice an indictment in Colorado).

359. Judgment, *Zazi*, No. 1:10-cr-60 (E.D.N.Y. Feb. 15, 2012), D.E. 195; *see* Jury Verdict, *id.* (July 22, 2011), D.E. 169; Consent to Transfer, United States v. Zazi, No. 1:11-cv-718 (E.D. N.Y. Oct. 21, 2011), D.E. 1; Indictment, United States v. Zazi, No. 1:11-cr-604 (S.D.N.Y. July 15, 2011), D.E. 1.

360. Notice, United States v. Mohammad, No. 3:15-cr-358 (N.D. Ohio Dec. 21, 2015), D.E. 27; *see* Charlie Savage, *Disclosures in Cases Put Surveillance in Question*, N.Y. Times, Apr. 27, 2016, at A14.

361. Indictment, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio Sept. 30, 2015), D.E. 1.

362. Indictment, United States v. Mohammad, No. 3:16-cv-222 (N.D. Ohio July 6, 2016), D.E. 1.

363. Order, *id.* (July 12, 2016), D.E. 3; Order, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio July 12, 2016), D.E. 108.

364. Notice, United States v. Al-Jayab, No. 1:16-cr-181 (N.D. Ill. Apr. 8, 2016), D.E. 14; *see* Savage, *supra* note 360.

March 17.[365] Also pending is a January 14 indictment in the Eastern District of California for failure to disclose travel to Syria to recruit terrorists.[366]

Reform

On December 12, 2013, the President's Review Group on Intelligence and Communications Technologies issued a 303-page report presenting forty-six recommendations for surveillance reform.[367] One month later, Judge Bates, who served as Director of the Administrative Office of the U.S. Courts from July 1, 2013, to January 5, 2015, submitted to Congress a report on behalf of the judiciary urging moderation in any reforms that would substantially change the work of the FISA court.[368]

At a televised address to the Justice Department on January 17, 2014, President Obama announced that he was "ordering a transition that will end the Section 215 Bulk metadata program as it currently exists, and establish a mechanism that preserves the capabilities we need without the government holding this bulk metadata."[369]

Among the ordered changes, the President decided that the NSA's extensive database of who has called whom now "can be queried only after a judicial

365. Indictment, *Al-Jayab*, No. 1:16-cr-181 (N.D. Ill. Mar. 17, 2016), D.E. 1.

366. Indictment, United States v. Al-Jayab, No. 2:16-cv-8 (E.D. Cal. Jan. 14, 2016), D.E. 13.

367. Liberty and Security in a Changing World (Dec. 12, 2013), www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf; *see* Donohue, *supra* note 156, at 611–12; Siobhan Gorman, *Panel Pushes Revamp of NSA*, Wall St. J., Dec. 13, 2013, at A1; Siobhan Gorman, Devlin Barrett & Carol E. Lee, *Obama Urged to Curb NSA Spying*, Wall St. J., Dec. 19, 2013, at A1; Ellen Nakashima & Ashkan Soltani, *Panel Urges New Curbs on Surveillance by U.S.*, Wash. Post, Dec. 19, 2013, at A1; David E. Sanger, *Obama Panel Said to Urge N.S.A. Curbs*, N.Y. Times, Dec. 13, 2013, at A1; David E. Sanger & Charlie Savage, *Obama Is Urged to Sharply Curb N.S.A. Data Mining*, N.Y. Times, Dec. 19, 2013, at A1.

368. Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act, Jan. 10, 2014, www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=70bed5e2-c28f-4f3c-ad94-7cb6d647f328; Letter from John D. Bates to Senator Dianne Feinstein, Jan. 13, 2014, www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=3bcc8fbc-d13c-4f95-8aa9-09887d6e90ed; *see* Peter Baker & Charlie Savage, *Obama to Place Some Restraints on Surveillance*, N.Y. Times, Jan. 15, 2014, at A1; Ellen Nakashima, *Judges Oppose Secret-Court Changes*, Wash. Post, Jan. 15, 2014, at A3; Mike Scarcella, *FISA Judges' Concerns*, Nat'l L.J., Jan. 20, 2014, at 16; *see also* Federal Judicial Center Biographical Directory of Federal Judges, www.fjc.gov/history/home.nsf/page/judges.html.

369. Remarks by the President on Review of Signals Intelligence, Jan. 17, 2014 [hereinafter President's Jan. 17, 2004, Remarks], www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence; *see* ACLU v. Clapper, 785 F.3d 787, 798 (2d Cir. 2015); Anita Kumar, *Days Later, Obama's Speech on Surveillance Perplexes*, Miami Herald, Jan. 23, 2014, at 3A; Mark Landler & Charlie Savage, *Obama Outlines Calibrated Curbs on Phone Spying*, N.Y. Times, Jan. 18, 2014, at A1; Carol E. Lee & Siobhan Gorman, *Obama Shakes Up Surveillance Program*, Wall St. J., Jan. 18, 2014, at A1; Ellen Nakashima & Greg Miller, *Obama Moves to Rein in Surveillance: Orders Limits on Phone Data*, Wash. Post, Jan. 18, 2014, at A1.

finding or in the case of a true emergency."[370] On February 6, the Director of National Intelligence reported that the FISA court had approved such a change in procedures.[371]

President Obama ordered the Attorney General and the intelligence community to present by March 28 alternatives to the NSA's maintaining the metadata database.[372] On March 25, newspapers reported that a proposal in development would cease the government's bulk harvesting of metadata and rely on individual orders for metadata customarily held by telecommunication companies.[373]

The Freedom Act

The House of Representatives' Permanent Select Committee on Intelligence proposed to the House on May 8 a Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet Collection, and Online Monitoring Act (USA FREEDOM Act), which would modify the NSA's surveillance authority.[374] Judge Bates, on May 13, asked that the committee's report include another letter by him on behalf of the judiciary recommending that Congress not impose on the FISA court "a permanent institution of a public advocate or impose[e] an adversarial process in the general run of cases" or create a requirement for public summaries of secret FISA court opinions, because summaries in the absence of access to the originals could be misleading.[375] Judge Bates expressed similar sentiments in an August 5 letter to Senate Judiciary Committee Chair Patrick Leahy, explaining that while occasional amicus curiae participation in FISA court proceedings could be helpful,

370. President's Jan. 17, 2004, Remarks, *supra* note 369.

371. FISC Approves Government's Request to Modify Telephony Metadata Program, Feb. 6, 2014, icontherecord.tumblr.com/post/75842023946/fisc-approves-governments-request-to-modify.

372. President's Jan. 17, 2004, Remarks, *supra* note 369.

373. Ellen Nakashima, *Bill Will Target NSA Phone Program*, Wash. Post, Mar. 25, 2014, at A3; Charlie Savage, *Obama Will Seek Limits for N.S.A. on Call Records*, N.Y. Times, Mar. 25, 2014, at A1; *see* Andrews *et al.*, *supra* note 132, at 203.

374. 160 Cong. Rec. D486 (May 8, 2014); *see ACLU*, 785 F.3d at 799; *see* Greenberg, *supra* note 28, at 261; Ellen Nakashima, *NSA Reform Measure to Move to House Floor*, Wash. Post, May 9, 2014, at A3; Charlie Savage, *House Panel Passes Bill to Replace N.S.A. Program*, N.Y. Times, May 9, 2014, at A17; *see also* sensenbrenner.house.gov/legislation/theusafreedomact.htm (information on the 2014 proposed bill by Representative Jim Sensenbrenner); Savage, *supra* note 15, at 600 (reporting that the initial spell-out for the acronym was created by a Republican congressional staffer and two high school friends). *See generally* Thomas Massie, Opening Remarks, Cato Conference, *supra* note 1.

375. Letter from John D. Bates to Representative Mike Rogers, May 13, 2014, *in* Committee Report for H.R. 3361, intelligence.house.gov/sites/intelligence.house.gov/files/documents/HR3361commrep.pdf. *See generally The Case For and Against a FISA Advocate*, Lawfare Podcast No. 79 (June 14, 2014), www.lawfareblog.com/2014/06/lawfare-podcast-episode-79-the-case-for-and-against-a-fisa-advocate/.

a special advocate would interfere with the court's special ex parte relationship with the government.[376]

President Obama signed the USA FREEDOM Act on June 2, 2015.[377] By then, the acronym stood for "Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring," which changed what the letters EDO stood for.

The new act ended bulk metadata surveillance by the government, and the act requires telecommunication companies to maintain metadata for at least eighteen months.[378] The act also requires the FISA court and the FISA court of review to jointly appoint at least five persons to act as occasional amici curiae in cases deemed by the courts to involve novel or significant interpretations of the law.[379]

The new act provided for a delay of 180 days, from June 2 until November 29, before curtailment of bulk metadata surveillance.[380] On June 17, FISA Judge Saylor determined that although bulk metadata surveillance authority

---

376. Letter from John D. Bates to Senator Patrick J. Leahy, Aug. 5, 2014, online.wsj.com/public/resources/documents/Leahyletter.pdf; *see* Siobhan Gorman, *Federal Judge Blasts Bill to Revamp Surveillance*, Wall St. J., Aug. 7, 2014, at A2.

On August 14, 2014, the Ninth Circuit's Chief Circuit Judge Alex Kozinski, ex officio a member of the Judicial Conference of the United States, wrote to Senator Leahy to state, "I was not aware of Director Bates's letter before it was sent, nor did I receive a copy afterwards. I first learned of the letter this past weekend when a copy was sent to me by a distinguished law professor." Letter from Alex Kozinski to Senator Patrick J. Leahy, Aug. 14, 2014, images.politico.com/global/2014/08/20/kozinski_to_leahy.html. Judge Kozinski concluded, "I have serious doubts about the views expressed by Judge Bates. Insofar as Judge Bates's August 5th letter may be understood as reflecting my views, I advise the Committee that this is not so." *Id.*

Retired District Judge Nancy Gertner, District of Massachusetts, opposed Judge Bates's letter in a *National Law Journal* op-ed on September 22. Nancy Gertner, Op-Ed, *One Voice on Surveillance Doesn't Make a Chorus*, Nat'l L.J., Sept. 22, 2014, at 34.

On November 18, retired District Judge Michael B. Mukasey, Southern District of New York, who also was President George W. Bush's third Attorney General, co-authored with Michael V. Hayden, a former director of both the NSA and the CIA, a newspaper column opposing the USA FREEDOM Act. Michael V. Hayden & Michael B. Mukasey, Op-Ed, *NSA Reform That Only ISIS Could Love*, Wall St. J., Nov. 18, 2014, at A19; *see* Ellen Nakashima & Ed O'Keefe, *NSA Reform Measure's Shifting Fortunes*, Wash. Post, Nov. 20, 2014, at A2.

377. Pub. L. 114-23, 129 Stat. 268 (2015) [hereinafter Freedom Act]. *See generally* Savage, *supra* note 15, at 616–20.

378. *See* Mike DeBonis, *Senate Vote Rolls Back a Post-9/11 Spy Power*, Wash. Post, June 3, 2015, at A1; Ellen Nakashima, *Two Years After Snowden's Leaks, Law Marks a Milestone*, Wash. Post, June 3, 2015, at A2; Jennifer Steinhauer & Jonathan Weisman, *U.S. Surveillance in Place Since 9/11 Is Sharply Limited*, N.Y. Times, June 3, 2015, at A1.

379. Freedom Act, § 401; *see* 50 U.S.C. § 1803(i) (2014).

380. Pub. L. 114-23, Freedom Act § 109(a), 50 U.S.C. § 1861 note; Opinion at 10, *In re* Application of FBI for Order Requiring Production of Tangible Things, Nos. BR 15-75 and Misc. 15-1 (FISA Ct. June 29, 2015) [hereinafter Mosman Freedom Act Opinion], www.fisc.uscourts.gov/sites/default/files/BR%2015-75%20Misc%2015-01%20Opinion%20and%20Order.pdf, 2015 WL 5662641.

had sunsetted on June 1, the Freedom Act's establishment of December 15, 2019, as a new sunset date revived bulk surveillance authority.[381] On June 29, 2015, Judge Mosman agreed with Judge Saylor and disagreed with the Second Circuit conclusion that bulk metadata collection was not authorized by FISA.[382]

On October 29, 2015, the Second Circuit's court of appeals agreed that Congress had authorized bulk collection for the Freedom Act's first 180 days, as a transition period.[383] The court also declined to enjoin bulk collection during the transition period on constitutional grounds.[384]

> We need not, and should not, decide such momentous constitutional issues based on a request for such narrow and temporary relief. To do so would take more time than the brief transition period remaining for the telephone metadata program, at which point, any ruling on the constitutionality of the demised program would be fruitless.[385]

On November 24, Judge Mosman determined that metadata collected before November 29 could be retained only pursuant to evidence preservation obligations in the warrantless wiretap litigation in the Northern District of California and for limited data-quality purposes to expire on February 29, 2016.[386]

A key document leaked in 2013 by Edward Snowden and made public by journalists was an April 25, 2013, secondary FISA court order issued by Judge Vinson requiring Verizon Business Network Services to continue to provide "all call detail records or 'telephony metadata' created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls."[387] On August 28, 2015, the U.S.

---

381 Opinion, *In re* Applications of FBI for Order Requiring Production of Tangible Things, Nos. BR 15-77 and BR 15-78 (FISA Ct. June 17, 2015), www.fisc.uscourts.gov/sites/default/files/BR%2015-77%2015-78%20Memorandum%20Opinion.pdf.

382. Mosman Freedom Act Opinion, *supra* note 380; ACLU v. Clapper, 804 F.3d 617, 621 (2d Cir. 2015); *see* Charlie Savage, *Surveillance Court Rules That N.S.A. Can Resume Bulk Data Collection*, N.Y. Times, July 1, 2015, at A14.

383. *ACLU*, 804 F.3d at 625–26; *see* Charlie Savage, *No Early End to Collection of Records by the N.S.A.*, N.Y. Times, Oct. 30, 2015, at A16.

"Such a transitional period would likely have been appropriate even had we held § 215 unconstitutional in our earlier decision in the instant matter." *ACLU*, 804 F.3d at 626.

384. *ACLU*, 804 F.3d at 623–25.

385. *Id.* at 626 (footnote omitted).

386. Opinion, *In re* Application of FBI for Order Requiring Production of Tangible Things, No. BR 15-99 (FISA Ct. Nov. 24, 2015), www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Opinion%20and%20Order.pdf; *see* Order, *id.* (Sept. 17, 2015), http://www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Order%20Appointing%20Amicus%20Curiae.pdf (order appointing amicus curiae); *see also* Ellen Nakashima, *NSA's Bulk Collection of Americans' Phone Records to End*, Wash. Post, Nov. 28, 2015, at A2; Damian Paletta, *NSA Won't Extend Phone Program*, Wall St. J., Nov. 28, 2015, at A3.

387. Secondary Order at 2, *In re* FBI Application for an Order Requiring the Production of Tangible Things, No. BR 13-80 (FISA Ct. Apr. 25, 2013), www.theguardian.com/world/

Court of Appeals for the District of Columbia Circuit reversed Judge Leon's injunction against bulk surveillance for lack of standing because "plaintiffs are Verizon *Wireless* subscribers and not Verizon *Business Network Services* subscribers. Thus, the facts marshaled by plaintiffs do not fully establish that their own metadata was ever collected."[388] Although Judge David Sentelle would have ordered the case dismissed, Judges Janice Rogers Brown and Stephen Williams agreed to remand the case to Judge Leon for a possible standing cure.[389]

Following amendment of the complaint to include Verizon Business customers,[390] Judge Leon again enjoined the surveillance program on November 9.[391] On November 16, the court of appeals stayed the injunction pending another appeal,[392] and the court of appeals vacated Judge Leon's injunction as moot on April 4, 2016.[393]

Recent Rulings

Judge Hogan issued an opinion on November 6, 2015, which was publicly released in redacted form on April 19, 2016, that blessed law enforcement searches of foreign intelligence surveillance collected pursuant to section 702.[394] FISA section 101 defines minimization procedures to include "the retention and dissemination of information that is evidence of a crime which

---

interactive/2013/jun/06/verizon-telephone-data-court-order; *see* Savage, *supra* note 15, at 168.

388. Obama v. Klayman, 800 F.3d 559, 563 (D.C. Cir. 2015) (Circuit Judge Janice Rogers Brown); *id.* at 565 (Circuit Judge Stephen F. Williams, "plaintiffs are subscribers of Verizon Wireless, not of Verizon Business Network Services, Inc.—the sole provider that the government has acknowledged targeting for bulk collection."); *see* Devlin Barrett, *Panel Rules Collection of Phone Data Legal*, Wall St. J., Aug. 29, 2015, at A4; Ellen Nakashima, *Court Deals Blow to NSA Call Records Suit*, Wash. Post, Aug. 29, 2015, at A2; James Risen, *N.S.A. Phone Program Can Go On, Court Says*, N.Y. Times, Aug. 29, 2015, at A13.

389. *Obama*, 800 F.3d 559.

390. Fourth Amendment Complaint, Klayman v. Obama, No. 1:13-cv-851 (D.D.C. Sept. 8, 2015), D.E. 145-1.

391. Klayman v. Obama, 142 F. Supp. 3d 172 (D.D.C. 2015); *see* Spencer S. Hsu, *Judge Again Hits NSA Program*, Wsh. Post, Nov. 10, 2015, at A7; Charlie Savage, *Judge Curbs N.S.A. Data Collection*, N.Y. Times, Nov. 10, 2015, at A17.

392. Order, Klayman v. Obama, No. 15-5307 (D.C. Cir. Nov. 16, 2015); *see* Klayman v. Obama, 805 F.3d 1148 (2015) (Circuit Judge Brett M. Kavanaugh concurring in the denial of rehearing en banc).

393. Order, *Klayman*, No. 15-5307 (D.C. Cir. Apr. 4, 2016).

394. Opinion, ___, No. ___ (FISA Ct. Nov. 6, 2015) (redacted) [hereinafter Nov. 6, 2015, Hogan Opinion], www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf; *see* Ellen Nakashima, *Court Rejects Assessment of FBI Use of Surveillance Data*, Wash. Post, Apr. 21, 2016, at A3; Charlie Savage, *Judge Rejects Challenge to Searches of Emails Gathered Without a Warrant*, N.Y. Times, Apr. 20, 2016, at A7; *cf.* Donohue, *supra* note 28, at 265 ("The best example of practice beyond the pale is in the query of Section 702 data using U.S. person information for potential violations of criminal law.").

has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes."[395] Judge Hogan reasoned,

> It would be a strained reading of the definition of minimization procedures to permit FBI personnel to retain and disseminate Section 702 information constituting evidence of a crime implicating a United States person for law enforcement purposes, but to prohibit them from querying Section 702 data in a manner designed to identify such evidence.[396]

The FISA court of review issued an opinion on April 14, 2016,[397] which was made public in redacted form on August 22,[398] that validated an interpretation of pen register authority by FISA court judges that differed from the consensus of judges in the district courts.[399] A pen register is a surveillance device that records the digits entered when initiating a phone call.[400] Digits entered after a call is established are post-cut-through digits, which might (1) be entered to complete the intended call if the first digits merely establish access to a long-distance service and additional digits are required to establish access to the intended recipient of the call or (2) be communication content, such as a password, account number, or instruction.[401] The FISA court of review determined that "a court can authorize the use of a pen register to collect post-cut-through digits, as long as the collecting agency takes all reasonably available steps to minimize the collection of content information and is prohibited from making use of any content information that may be collected."[402]

The question came to the court of review as a certified question of law from FISA court Judge Hogan on February 12 following a discussion of the issue by the FISA court judges at their semi-annual conference in October 2015.[403]

Transition

The twentieth century FISA court approved surveillance warrants for foreign intelligence. In the twenty-first century, the court also assesses the propriety of surveillance programs and interprets surveillance statutes, sometimes in secret and sometimes publicly.

---

395. 50 U.S.C. §1801(h)(3) (2014).

396. Nov. 6, 2015, Hogan Opinion, *supra* note 394, at 33.

397. Opinion, *In re* Certified Question of Law, No. 16-1 (FISA Ct. Rev. Apr. 14, 2016) (redacted) [hereinafter *In re Certified Question* Opinion], www.fisc.uscourts.gov/sites/default/files/FISCR%20Opinion%2016-01%20Redacted.pdf.

398. Release of FISC Question of Law & FISCR Opinion, icontherecord.tumblr.com/post/149331352323/release-of-fisc-question-of-law-fiscr-opinion.

399. Certification of Question at 9–10, *In re* A U.S. Person, No. PR/TT 2016-___ (FISA Ct. Feb. 12, 2016) (redacted), www.fisc.uscourts.gov/sites/default/files/PCTD%20FISC-R%20Certification%20Redactions%2020160818%20pdf.pdf.

400. 18 U.S.C. § 3127(3) (2015).

401. *E.g.*, *In re* Pen Register and Trap and Trace Device or Process, 411 F. Supp. 2d 816, 818 (S.D. Tex. 2006).

402. *In re Certified Question* Opinion, *supra* note 397, at 13.

403. Certification of Question, *supra* note 399, at 5.