UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

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

Docket No. BR 15-75

IN RE MOTION IN OPPOSITION TO GOVERNMENT'S REQUEST TO RESUME BULK DATA COLLECTION UNDER PATRIOT ACT SECTION 215

Docket No. Misc. 15-01

OPINION AND ORDER

"Plus ça change, plus c'est la même chose," well, at least for 180 days. This application presents the question whether the recently-enacted USA FREEDOM Act,[1] in amending Title V of FISA,[2] ended the bulk collection of telephone metadata. The short answer is yes. But in doing so, Congress deliberately carved out a 180-day period following the date of enactment in which such collection was specifically authorized. For this reason, the Court approves the application in this case.

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[1] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (USA FREEDOM Act, another example of the tail of a catchy nickname wagging the dog of a Rube Goldberg official title).

[2] Foreign Intelligence Surveillance Act, codified as amended at 50 U.S.C. §§ 1801-1885c.

Background

The government's application seeks to renew authorities that have been repeatedly granted by the Foreign Intelligence Surveillance Court (FISC) since 2006, and the Court's Primary Order directs the production of the same tangible things to the government on the same terms and subject to the same limitations that have been repeatedly approved by the FISC. In addition, by virtue of the USA FREEDOM Act's 180-day transition period, see pages 10-12 infra, the Court is applying the same provisions of Title V of FISA to this application that were relied upon by prior FISC judges when granting previous applications.

Nevertheless, the context in which the instant case arises is quite extraordinary. The FISC most recently directed production of non-content telephone call detail records in bulk to the National Security Agency (NSA) on an ongoing daily basis in an order that was issued on February 26, 2015, pursuant to Title V of FISA. At the government's request, the authorities granted by that order expired on June 1, 2015. In re Application of the FBI for an Order Requiring the Production of Tangible Things, Docket No. BR 15-24, Application at 14 (FISA Ct. filed Feb. 26, 2015); id. Primary Order at 17 (Feb. 26, 2015).

At 12:01 a.m. on Monday, June 1, 2015, the sunset provisions in section 102(b)(1) of the USA PATRIOT Improvement and Reauthorization Act took effect, and sections 501 and 502 of FISA were amended to read as they read on October 25, 2001 – i.e., as they read prior to the enactment of the USA PATRIOT Act.[3] On June 2, 2015, Section 705(a) of the USA FREEDOM

[3] See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109–177, § 102(b)(1), 120 Stat. 192, 194-95 (2006). Congress extended the sunset date several times, so that prior to the USA FREEDOM Act, the date was June 1, 2015. See Department of Defense Appropriations Act, 2010, Pub. L. No. 111–118, § 1004, 123 Stat. 3409, 3470 (2009); (continued...)

Act amended those same sunset provisions to change the date from June 1, 2015, to December 15, 2019. See USA FREEDOM Act § 705(a). Upon enactment, President Obama announced: "my Administration will work expeditiously to ensure our national security professionals again have the full set of vital tools they need to continue protecting the country." Statement by President Obama on the USA FREEDOM Act, available at https://www.whitehouse.gov/the-press-office/2015/06/02/statement-president-usa-freedom-act.

Later on June 2, 2015, the government filed an Application in the above-captioned matter seeking to re-initiate the authority granted previously by the FISC in Docket Number BR 15-24. The Application was accompanied by a Motion for Relief from FISC Rule 9(a), in which the government requested that the Court entertain the application as soon as practicable.

In response to the President's statement and other indications by government officials that the government would be seeking to renew the authorities granted in FISC Docket Number BR15-24, Movants Kenneth T. Cuccinelli, II, and FreedomWorks, Inc. filed a motion on June 5, 2015, seeking to intervene in any such proceedings, or alternatively, to be appointed as amici curiae pursuant to newly enacted provisions of the USA FREEDOM Act. On June 12, 2015, the government filed its Response and Movants filed a Supplemental Brief pursuant to an order issued by this Court on June 5, 2015.

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[3](...continued)
Act of Feb. 27, 2010, Pub. L. No. 111–141, § 1(a), 124 Stat. 37; FISA Sunsets Extension Act of 2011, Pub. L. No. 112–3, § (2)(a), 125 Stat. 4; and PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112–14, § 2(a), 125 Stat. 216.

Finally, On June 12, 2015, the Center for National Security Studies ("the Center") filed a motion seeking to file a notice bringing to the Court's attention its amicus brief, which was previously filed in Docket Number Misc. 14-01.

Movants' Request to Intervene Is Dismissed Under the "First-to-File" Rule and Their Request For Appointment as Amici Curiae Is Granted

Movants ask this Court to deny the government's renewal application, to declare that the collection is illegal, to enjoin the government from further implementing its metadata program, to order the government to destroy the metadata it has collected to date, and to award Movants fees and costs. Motion in Opposition at 40. In effect, Movants seek to participate as parties in the Court's consideration of the Application. In the alternative, Movants request to be appointed amici curiae for the purpose of arguing against the lawfulness of the bulk telephone metadata program. Id. at 6. For the reasons explained below, the Motion in Opposition is dismissed insofar as it seeks leave for the Movants to join this proceeding as parties. The request for appointment as amici curiae is granted.

The parties and issues involved in the Motion in Opposition, as well as the relief sought by Movants in this Court, extensively overlap with a suit previously commenced in the United States District Court for the District of Columbia. See Paul v. Obama, Docket No. 1:14-cv-262-RJL (D.D.C.., filed Mar. 26, 2014) ("District Court case"). Movant FreedomWorks is a plaintiff and Movant Cuccinelli is plaintiffs' counsel in the District Court case. First Amended Class Action Complaint for Declaratory and Injunctive Relief ("First Amended Complaint") at 3, 17. The complaint in the District Court case names the President, the Director of National Intelligence, the Director of the Federal Bureau of Investigation (FBI), and the Director of the

National Security Agency (NSA) as defendants, id. at 4, while the Movants name the holders of the same offices as "respondents" in this Court. Motion in Opposition at 3-4.

In the District Court case, FreedomWorks claims to have standing under Article III of the Constitution, based on allegations that are very similar to those made in this Court by Movants in support of Article III standing. Compare First Amended Complaint at 3 with Motion in Opposition at 3. As a plaintiff and plaintiff's counsel in the District Court case, Movants challenge on Fourth Amendment grounds the lawfulness of the bulk production of telephone metadata under section 501 of FISA, codified at 50 U.S.C. § 1861, just as they do before this Court, making similar contentions in both courts in support of that challenge. Compare, e.g., First Amended Complaint at 9-11, with Motion in Opposition at 8-17. And both courts are asked to declare the same program unlawful, enjoin its implementation, and order the government to destroy telephone metadata previously obtained under the program. First Amended Complaint at 16-17; Motion in Opposition at 40.

"As a matter of comity, and in order to conserve judicial resources and avoid inconsistent judgments, federal courts do not engage in parallel adjudications involving the same parties and issues." Docket No. Misc. 13-02, In Re Orders of This Court Interpreting Section 215 of the Patriot Act, Mem. Op. at 13 (FISA Ct. Sept. 13, 2013). Ordinarily, the court in which the later action is brought will defer to the court in which the prior action is pending – a principle called the "first-to-file" rule. Application of the first-to-file rule does not require "exact identity of parties, as long as some 'parties in one matter are also in the other matter.'" Id. at 14 (quoting Intersearch Woldwide, Ltd. v. Intersearch Group, Inc., 544 F. Supp.2d 949, 959 n.6 (N.D. Cal. 2008)).

With regard to the merits of the government's application, considerable overlap with the substantive legal challenges brought by the plaintiffs in the District Court case is unavoidable. With that overlap comes some degree of duplicative effort and risk of inconsistent outcomes. Specifically, Movants' request to join this proceeding as parties presents essentially the same questions of Article III standing as are presented in the District Court case. Whether the requirements of Article III standing are indeed satisfied is a substantial question. Resolving it would be at least a potential source of delay in a proceeding this Court is charged with handling "as expeditiously as possible." FISA § 103(c), codified at 50 U.S.C. § 1803(c). Moreover, as implied by Movants' request in the alternative for appointment as amici curiae, the Court may receive the benefit of their substantive arguments without having to decide whether they are permitted under Article III and the provisions of FISA to join this proceeding as parties and seek from this Court the full range of declaratory and injunctive relief described in their Motion in Opposition (and simultaneously pursued in the District Court case).

Accordingly, the Court exercises its discretion sua sponte[4] to dismiss the Movants' request to intervene as parties in this matter. The Court need not and does not reach whether Movants have standing under Article III of the Constitution to bring the claims they allege, whether the FISC has jurisdiction to entertain a challenge to an application for an order under section 501 of FISA, notwithstanding the "ex parte" nature of the order, see §501(c)(1),[5] or

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[4] A court may raise issues of comity sua sponte. United States v. AMC Entertainment, Inc., 549 F.3d 760, 771 n.5 (9th Cir. 2008).

[5] Unless stated otherwise, citations to section 501 refer to the text of that section that is currently in effect.

whether the FISC has the authority to furnish injunctive or declaratory relief or to award fees and costs.[6]

The Court now turns to the Movants' alternative request to participate as amici curiae. Congress, through the enactment of the USA FREEDOM Act, has expressed a clear preference for greater amicus curiae involvement in certain types of FISC proceedings. Pursuant to section 103(i)(2)(A) of FISA, as amended by section 401 of the USA FREEDOM Act, the Court, consistent with the requirement that it act expeditiously or within a stated time, "shall appoint an individual [designated by the presiding judges of the FISC and FISCR] to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate." FISA § 103(i)(2)(A). In addition, section 103(i)(2)(B) provides that the court "may appoint an individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate or, upon motion, permit an individual or organization leave to file an amicus curiae brief." Id. § 103(i)(2)(B) (emphasis added).

The Court finds that the government's application "presents a novel or significant interpretation of the law" within the meaning of section 103(i)(2)(A). Because, understandably, no one has yet been designated as eligible to be appointed as an amicus curiae under section

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[6] It is permissible for a federal court to dismiss an action under the first-to-file rule without considering Article III standing or other requirements for subject-matter jurisdiction. Furniture Brands Int'l, Inc. v. United States Int'l Trade Comm'n, 804 F. Supp.2d 1, 4-6 (D.D.C. 2011); see also Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 431 (2007) (federal courts have "leeway to choose among threshold grounds for denying audience to a case on the merits") (internal quotation marks omitted).

103(i)(2)(A), appointment under that provision is not appropriate. Instead, the Court has chosen to appoint the Movants as amici curiae under section 103(i)(2)(B) for the limited purpose of presenting their legal arguments as stated in the Motion in Opposition and subsequent submissions to date.[7] The Court will also treat the brief previously filed by the Center as an amicus brief in Docket Number BR 15-75.

The Contentions of Amici Curiae in Opposition to the Application Lack Merit

Having reviewed the Motion in Opposition, Movant's Supplemental Brief Addressing Effect of § 109 of USA FREEDOM Act on Bulk Acquisition of Call-Detail Records, filed on June 12, 2015 (Supplemental Brief), and the Brief of Amicus Curiae Center for National Security Studies on the Lack of Statutory Authority for This Court's Bulk Telephony Metadata Orders, filed by the Center in Docket Number Misc. 14-01 (Center's Brief), the Court now turns to consider the merits of the Application.

The Effect of the USA FREEDOM Act

On June 1, 2015, the language of section 501 reverted to how it read on October 25, 2001. See page 2 supra. The government contends that the USA FREEDOM Act, enacted on June 2, 2015, restored the version of section 501 that had been in effect immediately before the June 1 reversion, subject to amendments made by that Act. Response at 4. Movants contend that

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[7] Courts have broad discretion to determine the nature and extent of the participation of an amicus curiae. See, e.g., Jin v. Ministry of State Security, 557 F. Supp.2d 131, 136 (D.D.C. 2008); Waste Management of Pennsylvania, Inc. v. City of York, 162 F.R.D. 34, 36 (M.D. Pa. 1995). Given the substantial briefing on the merits received from Movants already, and the Court's statutory obligation to conduct this (and all of its proceedings) "as expeditiously as possible," section 103(c), the Court denies Movants' requests to submit additional briefing and for oral argument. See Motion in Opposition at 6.

the USA FREEDOM Act had no such effect. Supplemental Brief at 1-2. The Court concludes that the government has the better of this dispute.

Another judge of this Court recently held that the USA FREEDOM Act effectively restored the version of section 501 that had been in effect immediately before the June 1 sunset. See In re Application of the FBI for Orders Requiring the Production of Tangible Things, Docket Nos. BR 15-77, 15-78, Mem. Op. (June 17, 2015). In reaching that conclusion, the Court noted that, after June 1, Congress had the power to reinstate the lapsed language and could exercise that power "by enacting any form of words" making clear "its intention to do so." Id. at 9 (internal quotation marks omitted). The Court found that Congress indicated such an intention through section 705(a) of the USA FREEDOM Act, which amended the pertinent sunset clause[8] by striking the date "June 1, 2015," and replacing it with "December 15, 2019." Id. at 7-9. Applying fundamental canons of statutory interpretation, the Court determined that understanding section 705(a) to have reinstated the recently-lapsed language of section 501 of FISA was necessary to give effect to the language of the amended sunset clause, as well as to amendments to section 501 of FISA made by sections 101 through 107 of the USA FREEDOM Act, and to fit the affected provisions into a coherent and harmonious whole. Id. at 10-12. The Court adopts the same reasoning and reaches the same result in this case.

The next question, then, is whether the language of section 501, as reinstated and further amended by the USA FREEDOM Act, permits an order for the bulk production of call detail

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[8] That sunset clause now reads: "Effective December 15, 2019, the Foreign Intelligence Surveillance Act is amended so that title V and section 105(c)(2) read as they read on October 25, 2001." USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 102(b)(1), 120 Stat. 192, 194-95 (2006), as amended most recently by USA FREEDOM Act § 705.

records, as requested in the Application. The USA FREEDOM Act prohibits the FISC from issuing an order for production of tangible things without the use of a "specific selection term." USA FREEDOM Act § 103(b), amending FISA § 501(c). This amendment and the related amendments set forth in sections 101 through 103 of the USA FREEDOM Act prohibit the government from acquiring tangible things in bulk under a FISA business records order. Crucially for purposes of this case, however, section 109(a) of the USA FREEDOM Act states that these amendments do not take effect until 180 days after enactment (November 29, 2015).

The question, therefore, is whether Congress has authorized bulk acquisition of call detail records during the interim 180-day period. The Court finds that it has. The delayed effect of the bulk-collection prohibition for Title V of FISA stands in sharp contrast to otherwise similar provisions prohibiting bulk acquisitions under the pen register and trap and trace provisions in Title IV of FISA, which took effect immediately upon their enactment on June 2. See USA FREEDOM Act § 201. By making similar amendments to Title V of FISA, but delaying their implementation for 180 days, Congress put bulk acquisition under Title V on a different footing during that 180-day period.

And if that was not clear enough, the USA FREEDOM Act also states that "[n]othing in this Act shall be construed to alter or eliminate the authority of the Government to obtain an order [under the business records provisions of FISA] as in effect prior to [the ban on bulk acquisition taking effect after 180 days]." USA FREEDOM Act §109(b).

In passing the USA FREEDOM Act, Congress clearly intended to end bulk data collection of business records and other tangible things. But what it took away with one hand, it gave back – for a limited time – with the other. Congress could have prohibited bulk data

collection under Title V of FISA effective immediately upon enactment of the USA FREEDOM Act, as it did under Title IV. Instead, after lengthy public debate, and with crystal clear knowledge of the fact of ongoing bulk collection of call detail records, as repeatedly approved by the FISC under section 501 of FISA, it chose to allow a 180-day transitional period during which such collection could continue.

If there is any ambiguity about Congress's intent in delaying the effective date of section 103, the legislative history confirms this conclusion. To be sure, there were statements that criticized the FISC's interpretation of "relevance" that underlay previous orders for the bulk production of call detail records and expressions of approval of the contrary decision of the United States Court of Appeals for the Second Circuit in ACLU v. Clapper, 785 F.3d 787 (2d Cir. 2015), discussed infra at pages 14-19.[9] But statements addressing the 180-day delay of the effective date of the prohibition on bulk collection under Title V of FISA acknowledged that bulk production of call detail records could continue during the 180-day transition period. Senator Grassley understood that the USA FREEDOM Act "would end the bulk collection of telephone metadata in 6 months." 161 Cong. Rec. S3303 (daily ed. May 22, 2015) (emphasis added). On the day the Senate passed the legislation, Senator Leahy stated: "[W]hen we drafted the USA FREEDOM Act, we included a provision to allow the government to collect call detail records, CDRs, for a 180-day transition period, just as it was doing pursuant to Foreign Intelligence Surveillance Court orders prior to June 1, 2015." 161 Cong. Rec. S3440 (daily ed. June 2, 2015)

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[9] See, e.g., H.R. Rep. 114-109, pt. 1, at 18-19 (May 8, 2015); 161 Cong. Rec. H2920 (daily ed. May 13, 2015) (statement of Rep. DelBene).

(emphasis added).[10] To some degree, finding supportive legislative history for a proposition is a little like stumbling upon a multi-family garage sale: if you rummage around long enough, you will find something for everybody, and none of it is worth much. But in this case, the clear impact of a statutory exegesis is amply supported by the views of the drafters.

Additional Statutory and Constitutional Arguments

Amici raise a number of additional statutory and constitutional challenges to this bulk call detail record program. The Court emphasizes that it is by no means writing on a blank slate in addressing these arguments. As Congress and the public are well aware, the FISC has repeatedly concluded on numerous occasions that NSA's acquisition of call detail records under the terms set forth in the government's application satisfies the requirements of section 501 of FISA and comports with the Fourth Amendment to the Constitution. In addition, three FISC judges have written opinions setting forth sound reasons for authorizing an application for orders requiring the production of bulk call detail records. See In re Application of the FBI for an Order Requiring the Production of Tangible Things, Docket No. BR 13-109, Amended Mem. Op., 2013 WL 5741573 (FISA Ct. Aug. 29, 2013) (Eagan, J.) (Eagan Opinion); In re Application of the FBI for an Order Requiring the Production of Tangible Things, Docket No. BR 13-158, Mem. (FISA Ct. Oct. 11, 2013) (McLaughlin J.) (McLaughlin Opinion); and In re Application of the FBI for an Order Requiring the Production of Tangible Things, Docket No. BR 14-96, Mem. Op. (FISA Ct. June 19, 2014) (Zagel J.) (Zagel Opinion). A fourth judge has written a detailed analysis

[10] In addition, a defeated amendment to provide for a transition period longer than 180 days was criticized as a proposal to "unnecessarily extend bulk production programs." See id. at S3441 (statement of Sen. Franken). Senator Leahy noted the possibility that a one-year transition period could prompt the Second Circuit to enjoin the bulk production of call detail records. Id. at S3442.

explaining why this production of records comports with the Fourth Amendment, notwithstanding the contrary analysis in Klayman v. Obama, 957 F. Supp.2d 1 (D.D.C. 2013), appeal docketed, (D.C. Cir. Jan. 9, 2014). In re Application of the FBI for an Order Requiring the Production of Tangible Things, Docket No. BR 14-01, Op. and Order, 2014 WL 5463097 (FISA Ct. Mar. 20, 2014) (Collyer J.) (Collyer Opinion). In approving the government's application, the Court adopts the reasoning set forth in those opinions.

The Center argues that Congress's decision to authorize the FBI to file applications under section 501 of FISA indicates that Congress "never intended that section to be the foundation of the NSA's bulk collection program . . . ." Center's Brief at 6. The Center made this argument before passage of the USA FREEDOM Act, and the Court disagrees that this program was inconsistent with Congressional intent as expressed prior to that Act. See Eagan Opinion at 9-28. And importantly, as explained at pages 8-12 supra, the USA FREEDOM Act permits continuation of this program until November 29, 2015.

Moreover, the Application satisfies the applicable requirements of section 501 of FISA. Section 501(c)(1) of FISA states that a judge "shall enter an ex parte order" directing the production of tangible things if the judge finds that the application meets the requirements of subsections (a) and (b) and the minimization procedures meet the definition of minimization procedurs under subsection (g). Section 501(a)(1) requires that the application be filed by the Director of the FBI or his designee – which has been done here. Application at 25. Further, the investigations for which the tangible things are relevant are FBI terrorism investigations. Id. at 8-9. While the NSA implements the program, the Court has reviewed NSA's implementation of the minimization procedures and found them to be adequate. Beyond that, this Court's authority

to consider the Executive Branch's implementation of Court orders is limited. In re Sealed Case, 310 F.3d 717, 731-32 (FISA Ct. Rev. 2002).

The Center and Movants argue that the tangible things at issue cannot be relevant to an authorized investigation given the large volume of the collection. The Court disagrees. As the FISC has previously stated,

> [t]he fact that international terrorist operatives are using telephone communications, and that it is necessary to obtain the bulk collection of a telephone company's metadata to determine those connections between known and unknown international terrorist operatives as part of authorized investigations, is sufficient to meet the low statutory hurdle set out in [section 501] to obtain a production of records.

Eagan Opinion at 22-23. And, contrary to Movants' assertion, see Supplemental Brief at 3, the government continues to believe that it is necessary to acquire all of the call detail records sought in order to identify those specific records that contain information about the targets of the FBI investigations. See Application at Exhibit A ¶ 8.[11]

The Court is aware that, prior to enactment of the USA FREEDOM Act, the Second Circuit in Clapper rejected the government's arguments that the call detail records acquired under the NSA program were relevant to an authorized investigation other than a threat assessment as required by section 501(b)(2)(A) and (c)(1) of FISA. However, Second Circuit rulings are not

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[11] The government may not believe that, in the long term, this program in its current form is essential to national security. The government fully supported the USA FREEDOM Act, which requires the government to terminate bulk collection of call-detail records after 180 days, in favor of a framework in which the call detail records are retained by telephone service providers and may be queried for investigative purposes in certain circumstances. This Court agrees with the Second Circuit that "Congress is better positioned than the courts to understand and balance the intricacies and competing concerns involved in protecting our national security, and to pass judgment on the value of the telephone metadata program as a counterterrorism tool," ACLU v. Clapper, 785 F.3d at 824, and will not second-guess the decision of Congress to permit this program to continue in the near term.

binding on the FISC, and this Court respectfully disagrees with that Court's analysis, especially in view of the intervening enactment of the USA FREEDOM Act. As Judge Eagan stated: "Taken together, the [section 501] provisions are designed to permit the government wide latitude to seek the information it needs to meet its national security responsibilities, but only in combination with specific procedures for the protection of U.S. person information that are tailored to the production and with an opportunity for the authorization to be challenged." Eagan Opinion at 23.

The Second Circuit in ACLU v. Clapper rejected the theory of relevance that supported prior FISC prior authorizations of bulk production of call detail records: that such production was relevant because it was necessary to acquire and retain the records in order to deploy analytic tools "that are likely to generate useful investigative leads to help identify and track terrorist operatives." Eagan Opinion at 20 (internal quotation marks omitted). In so doing, the Second Circuit looked to grand jury subpoena practice to inform the standard of relevance under section 501. ACLU v. Clapper, 785 F.3d at 811-15. It acknowledged that a generous standard of relevance applies to grand jury subpoenas, under which the grand jury may compel production of a large body of records, most of which will be found not to pertain to its investigation, in order to sift through them and identify the small number of records that are directly relevant. Id. at 813-14. It further acknowledged that the government had provided examples of how querying the call detail records acquired through this program had "resulted in identification of a previously unknown contact of known terrorists," id. at 815 n.8 – in other words, information relevant to the investigations of those terrorists. Nevertheless, the Second Circuit concluded that the

understanding of relevance put forward by the government in that case and applied by the FISC in prior authorizations was inconsistent with section 501.

To a considerable extent, the Second Circuit's analysis rests on mischaracterizations of how this program works and on understandings that, if they had once been correct, have been superseded by the USA FREEDOM Act. For example, the Second Circuit asserted that the production of call detail records has "no foreseeable end point." Id. at 814. That is no longer the case: Congress has now ensured that this production will cease no later than November 29, 2015. See pages 10-12 supra.

As Movants have noted, see Motion in Opposition at 7-8, the Second Circuit concluded that "the government's approach essentially reads the 'authorized investigation' language out of the statute." 785 F.3d at 815-16. But that Court based this conclusion on the premise that the call detail records "are not sought, at least in the first instance, because the government plans to examine them in connection with a systematic examination of anything at all." Id. at 816 (internal quotation marks omitted). According to that Court,

> the records are simply stored and kept in reserve until such time as some particular investigation, in the sense in which that word is traditionally used . . ., is undertaken. Only at that point are any of the stored records examined. . . . [T]hey are relevant, in the government's view, because there might at some future point be a need or desire to search them in connection with a hypothetical future inquiry.

Id. But this description bears little resemblance to how the government actually uses the records. The automated tools used to query the records "search all of the material stored in the database [of call detail records] in order to identify records that match the search term . . . even if such a search does not return [particular] records for close review by a human agent." Id. at 802

(emphasis added). Moreover, there is nothing "hypothetical" or "future" about the need to conduct searches of the entire volume of records or the investigations giving rise to that need: all the records are searched to uncover contacts with numerous phone numbers or other identifiers[12] approved under a "reasonable articulable suspicion" standard. See, e.g., In re Application of the FBI for an Order Requiring the Production of Tangible Things, Docket No. BR 15-24, Primary Order at 6-10 (Feb. 26, 2015). For the same reason, the Second Circuit's conclusion that the approach to relevance adopted by the FISC conflicts with the "other than a threat assessment" language of section 501(b)(2)(A) is also unpersuasive. See 785 F.3d at 817.

Furthermore, the tangible things are being sought in support of individual authorized investigations to protect against international terrorism and concerning various international terrorist organizations. See Eagan Opinion at 4. The Court notes that tangible things are "presumptively relevant to an authorized investigation if the applicant shows in the statement of the facts that they pertain to – (i) a foreign power or an agent of a foreign power; . . . or (iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation." FISA § 501(b)(2)(A). And, as discussed above, it is necessary for the government to collect telephone metadata in bulk in order to find connections between known and unknown international terrorist operatives as part of authorized investigations.[13]

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[12] In 2014, 161 identifiers were approved for use in such queries. Office of the Director of National Intelligence, Calendar Year 2014 Transparency Report (Apr. 22, 2015), available at: http://icontherecord.tumblr.com/transparency/odni_transparencyreport_cy2014.

[13] The Center similarly argues that the language of section 501 permits neither bulk productions nor the ongoing production of tangible things. See Center's Brief at 13-16. The Court disagrees. Judge Eagan persuasively explained in her August 2013 opinion why even before the USA FREEDOM Act, Section 501 permitted the bulk production orders issued by the (continued...)

Otherwise, the Second Circuit's analysis of relevance consists largely of emphasizing the unusually large volume of call detail records produced and the prevalence within those records of information about callers with no connection to terrorism, see 785 F.3d at 812-13, and expressing concern that the conception of relevance advocated by the government contains no limiting principle. See id. at 814, 818. The upshot of these considerations was that the Second Circuit would not countenance so broad a production of records or so expansive an interpretation of relevance without a clearer statement of Congressional intent. See id. at 818 ("we would expect such a momentous decision to be preceded by substantial debate, and expressed in unmistakable language"); 819 ("The language [of section 501] is decidedly too ordinary for what the government would have use believe is such an extraordinary departure from any accepted understanding" of relevance); 821 ("if Congress chooses to authorize such a far-reaching and unprecedented program, it has every opportunity to do so, and to do so unambiguously"). For the reasons explained at pages 10-12 supra, the Court has concluded that, in the USA FREEDOM Act, Congress – with full knowledge and after extensive public debate of this program and its legal underpinnings – permitted the continuation of this program until November 29, 2015, albeit

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[13](...continued)
Court in the prior dockets in this matter. See Eagan Opinion at 9-28. With respect to whether an order under Section 501 can require ongoing production, there is no question that call detail records are generated for business purposes and that they are among the broad range of tangible things subject to production under Section 501. The fact that the records requested here have not yet been created at the time of the application and order, and that their production is requested on an ongoing daily basis, does not affect the basic character of the records as tangible things subject to production under the statute. Finally, the USA FREEDOM Act and its legislative history make clear that, until November 29, 2015, the ongoing bulk production of the call detail records at issue here is permitted under Section 501 if the statutory requirements are otherwise satisfied, as they are in this case. See supra at pages 18-12.

no longer. Congressional approval of the implementation of this program until that date, and therefore of the conception of relevance on which it depends, has been clearly manifested.

The Court turns next to the constitutional arguments raised by amici. Prior FISC opinions have unanimously concluded that the production of call detail records to the government does not constitute a search under the Fourth Amendment, relying on Smith v. Maryland, 442 U.S. 735 (1979). See Eagan Opinion at 9 (because the collection involves "call detail records or 'telephony metadata' belonging to a telephone company, and not the contents of communications, Smith v. Maryland compels the conclusion that there is no Fourth Amendment impediment to the collection," and "the volume of records being acquired does not alter this conclusion"); McLaughlin Opinion at 4 ("The undersigned also agrees with Judge Eagan that, under Smith v. Maryland . . ., the production of call detail records in this matter does not constitute a search under the Fourth Amendment."); Collyer Opinion at 30 ("This Court concludes that where the acquisition of non-content call detail records such as dialing information is concerned, Smith remains controlling."); Zagel Opinion at 11 (agreeing with Collyer Opinion).

Movants dedicate the majority of their brief to constitutional arguments, but fail to persuade this Court that Smith v. Maryland is not controlling in this case. Movants urge the Court to distinguish or ignore Smith based on the following arguments:

Movants argue that the "differences between the present circumstances and Smith in nature and scope are so stark as to make Smith inapposite." Motion in Opposition at 20. With regard to the nature of the data acquired, the information the government receives pursuant to the Court's order is indistinguishable from the information at issue in Smith and its progeny. See

Collyer Opinion at 11. It includes dialed and incoming telephone numbers and other numbers pertaining to the placing or routing of calls, as well as the date, time and duration of calls, but does not include the "contents" of any communication as defined in 18 U.S.C. § 2510; the name, address, or financial information of any subscriber or customer; or cell cite location information. Id. As in Smith, this information is voluntarily conveyed to a telecommunications provider when a person places a call, and the provider stores and uses the information for billing and other purposes.

Movants cite the government's acquisition of trunk identifiers in an effort to distinguish Smith, Motion in Opposition at 22, but a "trunk identifier" provides only information about how a call is routed through the telephone network and reveals only general information about the party's location. ACLU v. Clapper, 785 F.3d at 797 n.3. While the acquisition of International Mobile Subscriber Identity (IMSI) numbers, International Mobile station Equipment Identity (IMEI) numbers and telephone calling card numbers goes beyond the precise categories of information at issue in Smith, such data is still the same kind of non-content dialing, signaling, and routing information that users of our modern telecommunications system routinely turn over to a telecommunications provider in order to complete a call and that those same providers record and store for billing and other business purposes. As such, the user has no reasonable expectation of privacy in the information. See Eagan Opinion at 6-7 n.11.

Movant's other arguments respecting the nature of the produced call detail records are reminiscent of the reasoning in Klayman, which Judge Collyer previously considered and rejected. To the extent Movants seek to distinguish this case based on the government's storage and use of the data post-acquisition, Motion in Opposition at 21-22, the third-party disclosure

principle applies regardless of the disclosing person's assumptions or expectations with respect to what will be done with the information following its disclosure. As Judge Collyer explained:

> If a person who voluntarily discloses information can have no reasonable expectation concerning limits on how the recipient will use or handle the information, it necessarily follows that he or she also can harbor no such expectation with respect to how the Government will use or handle the information after it has been divulged by the recipient. Smith itself makes clear that once a person has voluntarily conveyed dialing information to the telephone company, he forfeits his right to privacy in the information, regardless of how it might be later used by the recipient or the Government.

Collyer Opinion at 17.

Further, Movants' expectations based on their contractual relationships with telecommunications providers, the fact that there are more providers to choose from than there were in 1979, and Movants' claim that the relationship between the government and the providers is different, see Motion in Opposition at 17-20, 22, provide no basis for this Court to depart from Smith. Collyer Opinion at 17-18 ("expectations or assumptions on the part of telephone users who have disclosed their dialing information to the phone company have no bearing on the question whether a search has occurred."); see also id. at 16 ("'It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.'") (quoting S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 743 (1984)) (emphasis added in Collyer opinion).[14]

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[14] The court further determines, contrary to Movants' suggestion, see Motion in Opposition at 29-30, that these contractual arrangements do not give Movants (or similarly situated customers) a possessory interest in the call detail records generated and maintained by phone companies. Accordingly, production of those records to the government does not entail a "seizure" that implicates Movants' Fourth Amendment rights.

Equally unavailing is Movants' argument that the scope of the collection justifies departing from Smith. See Motion in Opposition at 21. Because Fourth Amendment rights "are personal in nature," Steagald v. United States, 451 U.S. 204, 219 (1981), someone who claims the protection of the Fourth Amendment "must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." Minnesota v. Carter, 525 U.S. 83, 88 (1998). Hence, the fact that the government is acquiring data about many people is immaterial in assessing whether any particular person's reasonable expectation of privacy has been violated such that a search under the Forth Amendment has occurred. Collyer Opinion at 20. To the extent the quantity of metadata is relevant at all, it can only be the quantity of metadata that pertains to a particular person. Id. at 20-21. Movants speculate about what the government could learn about a particular person from the data collected. As Judge Collyer previously stated, however: "[i]t is far from clear to this Court that even years' worth of non-content call detail records would reveal more of the details about a telephone user's personal life than several months worth of the same person's bank records." Collyer Opinion at 21 (comparing acquisition of call-detail records to acquisition of bank records in United States v. Miller, 425 U.S. 435 (1976)). Moreover, it is worth noting that under the applicable minimization procedures, the government's ability to search the data is carefully regulated and, absent an emergency, court approval is required before querying the data. See In re Application of the FBI for an Order Regarding the Production of Tangible Things, Docket No. BR 15-24, Primary Order at 6-10.

Movants also argue that a series of statutes enacted after Smith respecting the disclosure by telephone companies of information about their customers' calls supports the conclusion that

Movants have a reasonable expectation of privacy in the metadata in question. Motion in Opposition at 10-13. That argument also lacks merit. To be sure, Congress may, by statute, protect information or regulate investigative activity in circumstances that the Supreme Court has previously held not to involve a Fourth Amendment search or seizure. In and of themselves, such protections are "statutory, not constitutional." See United States v. Kington, 801 F.2d 733, 737 (5th Cir. 1986) (rejecting claim that enhanced protections for bank records in Right to Financial Privacy Act have Fourth Amendment dimensions). And, in any event, the statutes cited by Movants provide for the disclosure of call records under various circumstances even without the issuance of a warrant based on probable cause. See, e.g., 18 U.S.C. § 2703(c)(1)(B), (d); 47 U.S.C. § 222(c)(1), (d), (e); 18 U.S.C. § 1039(b)(1), (c)(1), (g). Accordingly, they fail to support the conclusion that notwithstanding Smith, telephone users have a reasonable expectation of privacy in phone carriers' records of their calls. See United States v. Payner, 447 U.S. 727, 732 n.4 (1980) (rejecting argument that foreign bank secrecy law, which was "hedged with exceptions" and "hardly a blanket guarantee of privacy," created expectation of privacy).

Finally, Movants cite several cases for the proposition that the third-party disclosure doctrine relied on in Smith should not apply in this case. Motion in Opposition at 23-25. But these cases do not reduce the binding authority of Smith in this case.

The FISC has already had occasion to consider and distinguish Ferguson v. City of Charleston, 532 U.S. 67 (2001); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); and Bond v. United States, 529 U.S. 334 (2000), in the context of the government's acquisition of bulk call-detail records. See Collyer Opinion at 16 n.8, 18 n.9. The Court agrees with Judge Collyer with respect to these cases and need not address them further.

Stoner v. California, 376 U.S. 483 (1964), and O'Connor v. Ortega, 480 U.S. 709 (1987), involve search of premises, not acquisition of records. In Stoner, police searched petitioner's hotel room without a warrant and the Court considered whether the hotel clerk had authority to consent to the search. O'Connor involved an administrative search of an individual's office and considered whether the individual had a reasonable expectation of privacy in his office under the particular facts presented. As such, these cases bear no relation to the government's application at all.

Douglas v. Dobbs, 419 F.3d 1097 (10th Cir. 2005), involved the police acquiring Douglas' prescription records from her pharmacy pursuant to court order. Whatever the merits of that Court's conclusion that Douglas had a constitutional right to privacy in that particular category of records, Douglas, 419 F 3d. at 1102, it provides no reason for this Court to depart from Smith and find a reasonable expectation of privacy in the non-content records of telephone calls at issue here.

Movants cite cases involving the acquisition of cell-site and GPS location information, see Motion in Opposition at 25, but no such information is involved in this case. See Application at 4.

Movants argue that the Court should find that they have a reasonable expectation of privacy in call detail records based on the concurring opinions in United States v. Jones, __ U.S. __, 132 S. Ct. 945 (2012). Motion in Opposition at 25-28. Two FISC Judges have already had occasion to address these arguments and the Court agrees with their analysis:

> While the concurring opinions in Jones may signal that some or even most of the Justices are ready to revisit certain settled Fourth Amendment principles, the decision in Jones itself breaks no new ground concerning the third-party

> disclosure doctrine generally or Smith specifically. The concurring opinions notwithstanding, Jones simply cannot be read as inviting the lower courts to rewrite Fourth Amendment law in this area. This Court concludes that where the acquisition of non-content call detail records such as dialing information is concerned, Smith remains controlling.

Collyer Opinion at 30; see also McLaughlin Opinion at 5 ("The Supreme Court may some day revisit the third-party disclosure principle in the context of twenty-first century communications technology, but that day has not arrived. Accordingly, Smith remains controlling . . . ."). Other courts have reached the same conclusion. See United States v. Davis, 785 F.3d 498, 511-15 (11th Cir. 2015) (en banc) (acknowledging concurrences in Jones, but finding Smith to be applicable precedent); In re Application of the United States for Historical Cell Site Data, 724 F.3d 600, 608-15 (5th Cir. 2013) (same).

Because the Court concludes that Smith is controlling and that the government's acquisition of non-content call detail records involves no Fourth Amendment search, the Court does not address Movants' contention that government's actions involve a search that is unreasonable under the Fourth Amendment. See Motion in Opposition at 30-38.

Conclusion

Having considered the arguments presented in the amicus curiae briefs, the Court finds that the government's application satisfies the requirements of section 501(a) and (b) of FISA and that the minimization procedures meet the definition of "minimization procedures" under section 501(g).

Further, the Court notes that FISC Rule 9(a) requires the government to file a proposed application with the Court no later than seven days before the government seeks to have the matter entertained by the Court, except "as otherwise permitted by the Court." The Court has

decided to act on the final application without first reviewing a proposed application, thereby rendering the government's Motion for Relief from Rule 9(a) moot. After considering the various motions filed in this case,

IT IS HEREBY ORDERED as follows.

1. The government's Motion for Relief from Rule 9(a) of the Court's Rules of Procedure is DISMISSED.

2. The Motion of Kenneth T. Cuccinelli, II, and Freedom Works Foundation is GRANTED IN PART in that the Court will treat their submissions to date as briefs submitted by amici curiae under section 103(i)(2)(B). All other relief requested by Movants, including the request for oral argument, is DENIED.

3. The Center for National Security Studies' Motion to allow filing of Notice of Related Docket is GRANTED.

In light of the public interest in this particular collection and the government's declassification of related materials, I request pursuant to FISC Rule 62 that this Opinion and Order and the accompanying Primary Order be published, and I direct such request to the Presiding Judge as required by the Rule.

Entered this 29th day of June, 2015.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
Judge, United States Foreign
Intelligence Surveillance Court