White House Press Office

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THE WHITE HOUSE

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PRESS BRIEFING
BY PRESS SECRETARY JOSH EARNEST

James S. Brady Press Briefing Room

1:26 P.M. EDT

MR. EARNEST: Good afternoon, everybody. Before I go to your questions, I just wanted to make one quick announcement at the top. Later this afternoon, the President will sign into law the two-month transportation patch that was passed by the Senate and the House last week. This is the 33rd short-term fix for the Highway Transportation Trust Fund since 2008 -- the 33rd.

Democrats and Republicans acknowledge that investments in infrastructure are critical to our economy, both over the long term but also in terms of the short-term impact that they could have to strengthen our economy and create jobs. But these kinds of short-term patches are also not beneficial to our economy.

According to one estimate, the uncertainty around the Highway Trust Fund has led a number of states to delay projects totaling $2 billion -- or nearly $2 billion. Again, that's $2 billion fewer dollars going into our economy in the form of paychecks for workers, in the form of contracts going to small businesses, in the form of investments that we know would derive a much larger economic benefit for communities across the country if they benefitted from a modern, efficient, upgraded transportation infrastructure.

So it's the President's view that the era of short-term patches and chronic under-investment in our transportation infrastructure must

come to an end. The President has put forward a common-sense proposal for closing loopholes that only benefit the wealthy and well-connected, and using revenue from that tax reform to making investments in the kind of infrastructure that benefit everybody. And the President is willing to continue to urge Congress to take steps in that direction, again, not because it's the President's preference -- although it is -- but because of the important benefits for our economy.

So with that, Julie, we'll go to your questions.

Q Is there coverage of the bill signing?

MR. EARNEST: I do not anticipate that there will be coverage of it today.

Q Any money for the Memorial Bridge?

MR. EARNEST: I'd refer you to the Department of Transportation about whether or not the upgrades that are needed for the Memorial Bridge would benefit from this particular piece of legislation.

Julie.

Q Thanks, Josh. I just want to start with Cuba. Does officially taking Cuba off the state sponsor of terror list essentially clear the way for announcements on opening embassies? And if so, how quickly should we expect those announcements?

MR. EARNEST: Julie, you'll recall that Cuban diplomats were in the United States last week meeting with American diplomats at the State Department to resolve a number of issues related to normalizing relations between the United States and Cuba. Cuba's inclusion on the state sponsor of terror list was just one of those issues. So there continue to be issues that need to be worked out.

In the discussions that were convened last week, there was important progress that was made. I don't have a time frame to give you in terms of any specific announcement, but that obviously is among the next milestones here, which is the opening of a Cuban embassy here in the United States and the opening of an American embassy on the island of Cuba.

Q But you're saying there are still unresolved issues that are going to prevent you for some period of time from doing that?

MR. EARNEST: As of right now, there are additional issues that our diplomats are working through before we can reach an agreement that would yield the opening of embassies.

Q This weekend marks the end of the agreement that the U.S. has had with Qatar to keep the five Taliban detainees in Doha. Should we expect that there will be an extension of that agreement, that they

will continue to have a ban on their travel? Or will they be free after this weekend to travel as they please?

MR. EARNEST: I don't have any announcements on this matter that I'm prepared to deliver today. But it is true that the United States has been in touch with our partners in Qatar about the kinds of steps that we believe are important to protecting the national security of the American people. You'll recall that prior to the transfer of these detainees taking place, we had reached agreements with Qatar about limitations that could be placed on these individuals that would protect our national security. And that's ultimately why then-Secretary of Defense Hagel certified that this transfer could be conducted consistent with our national security goals. And we continue to be in touch with the Qataris about the steps that we believe are necessary to protect the American people.

Q And do those steps include extending the travel ban?

MR. EARNEST: We're talking to them about a range of issues. And when we have an announcement on this we'll let you know.

Q Would the President be comfortable with these former detainees being free to travel?

MR. EARNEST: Well, what the President believes is important is for us to make sure that we have in place the conditions that are necessary to protect the American people. And what exactly that entails is not something I can talk about here because it's something that we're talking about with the Qataris right now. But when we do have an announcement on this we'll let you know.

Q And would you expect to have an announcement by the time this one-year agreement expires?

MR. EARNEST: I wouldn't make any promises on the deadline, but we'll certainly keep you apprised of the conclusion of those talks.

Jeff.

Q Josh, Mr. Blatter has won the reelection as the head of the soccer body, FIFA. Does the White House have a response to that?

MR. EARNEST: We do not. It's the members of that organization that cast votes to choose their president, and that's apparently what they've done.

Q Do you feel like the United States has lost confidence in him, given the controversy and the start of prosecutions this week?

MR. EARNEST: I wouldn't speak to even the degree of confidence that we had in Mr. Blatter prior to the latest announcements about the Department of Justice investigation. So I'll reserve comment on this. This is a decision for that organization -- that's now in some

turmoil -- for them to make, and we'll let them make it.

Q We had a chance to ask Eric a couple times on the plane about the President's reaction and the White House's reaction more generally to the controversy with the soccer organization. Chancellor Merkel has weighed in. Prime Minister of Britain has weighed in. How does the President feel now about this controversy going on in the soccer community at-large?

MR. EARNEST: Well, I think I'll just say something you've heard me say on other similar occasions, which is that this is the subject of an ongoing Department of Justice criminal investigation. And in this case, I think we'll leave that investigation in the hands -- or, in this case, maybe it's appropriate to say at the feet -- of the career prosecutors who are leading the investigation.

Q Let me move to just other topic. Is the White House monitoring the protests in Phoenix in which participants have been asked to draw pictures of the Prophet Muhammad? And do you have any reaction to that protest?

MR. EARNEST: I've read some of the news reports about this event that's being planned, and let me just reiterate what I've said when I've learned of previous gatherings like this, which is that even expressions that are offensive, that are distasteful and intended to sow divisions in an otherwise tightknit, diverse community like Phoenix, cannot be used as a justification to carry out an act of violence, and certainly can't be used as a justification to carry out an act of terrorism.

And the Department of Homeland Security is aware of this event, and as they were in advance of the previous event that was convened earlier this month, I believe, the Department of Homeland Security has been in touch with state and local law enforcement authorities, and we're going to continue to monitor the situation.

Michelle.

Q The meeting today with Attorney General Lynch, was that organized because of the possible expiration of parts of the Patriot Act? And how would you characterize the kind of outreach, if any, that the administration has been able to do with members of Congress this week, despite their being away?

MR. EARNEST: The meeting that the President will have later this afternoon with the Attorney General is just a routine meeting. It's part of the regular slate of meetings that the President has with his Attorney General. That was true of the previous Attorney General and it's true of this one.

It's apparent from reading the newspapers that they've got plenty to talk about, and I think this issue will be at the top of the agenda, and I don't have detailed conversations to share with you.

But even though members of the United States Senate left town for a week -- at the end of last week -- with a really important piece of business left undone, the administration has been in touch with senators over the last week to urge them to do the one thing that will eliminate unnecessary risk to our national security, and that is to pass the USA Freedom Act -- a piece of legislation that both extends important but non-controversial law enforcement authorities, and implements reforms that are critical to protecting the privacy and civil liberties of the American people.

This is a piece of legislation that accomplishes those two top priorities and that earned the strong support of Democrats and Republicans in the House of Representatives. It got 338 votes of Democrats and Republicans in the House. And the Senate should act before the deadline to pass that piece of legislation.

Q And we heard Jen Psaki yesterday talk about Rand Paul and his role in this, and she mentioned that he has presidential aspirations and that maybe he should put those aside for now. So is the White House saying that his concerns about surveillance aren't legitimate and they're more related to his aspirations?

MR. EARNEST: Well, I'll let you guys make that assessment. What I will tell you --

Q But she said that.

MR. EARNEST: Well, what I will tell you is that the President is concerned about making sure that the privacy and civil liberties of the American people are protected. That's why the President, in a speech at the Department of Justice almost a year and a half ago, called for this program to be reformed. That's why the President dispatched his national security team to travel to Capitol Hill last year to begin conversations with relevant Democrats and Republicans about how these authorities could be reformed in a way that would boost public confidence but would also protect the ability of our law enforcement and national security professionals to keep the country safe. And they hammered out that bipartisan agreement.

And this legislation, if passed, would effectively out the federal government out of the business of collecting and holding bulk data. And that is the stated goal of many members of the United States Senate, both Democrats and Republicans. And we would expect all of those Democrats and Republicans who share that goal to vote for this bill.

Q So based on what you said, you clearly feel that it is politics that's marring this process that would otherwise be agreed upon?

MR. EARNEST: Well, there's no -- I haven't heard -- I mean, as we spent some time talking about a week ago today, I haven't heard a rational explanation for what exactly is going on in the United States

Senate right now. There's no good explanation for it.

There are members of the United States Senate who are deeply concerned about making sure our national security professionals have all of the tools they need to keep us safe, but yet they're blocking a piece of legislation -- the USA Freedom Act -- that would do exactly that. We've heard other members of the United States Senate say that they are deeply concerned with protecting the privacy and civil liberties of the American people, and yet they're blocking a piece of legislation that would do exactly that -- it's called the USA Freedom Act.

So it's been very difficult for anybody to offer up a satisfactory explanation or even a rational explanation -- even an unsatisfactory rational explanation for what exactly they're doing up there. And so hopefully they'll be able to come back after eight or nine days of clearing their heads and put the best interest of the country and our citizens and our national security first.

Q What do you think about that super PAC ad sort of portraying this as a big rumble on Sunday -- it's in support of Rand Paul -- but kind of making this into a wrestling match, including, I might add, a shirtless Rand Paul versus Barack Obama in this ad.

MR. EARNEST: I haven't seen the ad, but I will say --

Q The President was not shirtless.

MR. EARNEST: I will say, I haven't seen the ad, but you have piqued my interest. (Laughter.) So put that on the to-do list for this afternoon, guys. We'll check that out. (Laughter.)

Q Don't you think that might -- could you say that it's in poor taste, or, I don't know, portraying the wrong things to the American public?

MR. EARNEST: I would say that there is a pretty long history in the commonwealth of Kentucky of pretty heated feuds, going all the way back to the Hatfields and McCoys. (Laughter.) And the fact is there seems to be a feud right now between the leader of the United States Senate, Mitch McConnell, a native of Kentucky, and Senator Paul. Unfortunately, the victim of that feud right now is the amount of risk that's facing our national security and legislation that would protect the privacy and civil liberties of our people.

All right, move around -- April.

Q Josh, I want to follow up on what Michelle was talking about. The President asked for this meeting, we understand. You said it was a routine meeting, but we understand that he asked for this meeting. It wasn't a regularly scheduled meeting. So is there -- now, from my sources over at Justice, they said it was something that the President had asked for. So with that --

MR. EARNEST: I think the President asks to meet with his Attorney General on a fairly regular basis. So I wouldn't read too much into who extended the invitation.

Q Okay. Well, with that, and looking ahead at Sunday, there are two options. It could be extended, passed or what have you, or it could -- there needs to be a plan B coming from the White House. What is the plan B? And is that something that the President and Loretta Lynch will be discussing if indeed the Senate does not come back, if indeed this is not dealt with?

MR. EARNEST: Well, April, as we've said a couple of times now, the possibility of a plan B is not something that's on the agenda because it doesn't exist. There is no plan B. There is no executive action that the President can take to give our law enforcement and national security professionals the tools they need -- all of the tools that they need, including the tools that are included in the USA Freedom Act.

Now, what our national security professionals will tell you is that they will, if faced with a scenario in which they have some of these tools taken out of their toolbox, they will try to use all the tools that they currently have to do what's necessary to keep us safe.

And the point that I would make is that taking those tools away seems like an unnecessary risk. I can't necessarily say to you that our national security professionals at 6:00 a.m. on Monday are going to need to be able to use Section 215, even the routine use of Section 215, which is not at all controversial. But why would we take the chance? And, more importantly, why are we taking the chance? Again, there's no rational explanation for the Senate not acting in bipartisan fashion to pass a piece of legislation that already has a strong bipartisan support in the House of Representatives.

Q Can you be frank and detailed -- and we're not talking hypothetical --

MR. EARNEST: I think I've been pretty frank up here.

Q No, no, no --

MR. EARNEST: There's some days you can probably accuse me of not being overly frank, but --

Q I want more information about when you take these tools out of the toolkit, what could happen? I mean, you don't want to talk hypotheticals, but this is a possibility that could happen. What could the American public be in jeopardy of? Can you give us detail and not talk around it, just give us frank detail?

MR. EARNEST: Well, there are some very specific authorities that

are included in the USA Freedom Act that will lapse if the Senate doesn't vote to approve this piece of legislation. The one that has gotten the most attention is the use of Section 215 authority to search bulk data that's collected by telecom companies. And the USA Freedom Act includes reforms that would put the federal government out of the business of holding those records, and instead, it would require our national security professionals to get a court order, and then to search data that is held by the telecommunications companies. And that is a reform that's put in place to ensure that the privacy and civil liberties of the American people are protected.

But what's also true -- and that's the controversial element of this, and this is consistent with the reforms that the President himself called for a year and a half ago. But the reason that our national security -- one of the more important reasons that our national security professionals have raised concerns is that there are other authorities that are included in this legislation that will also lapse if the Senate doesn't pass this bill.

The first of those is the routine use of Section 215. This is authority that allows our national security professionals, with a court order, to go and obtain business records relating to a suspected terrorist. And by business records I mean things like hotel records, financial records, bank records, other things that might give them insight into what the suspected terrorist is up to or who they might be plotting and planning with.

Again, this is specific authority that's given to our national security professionals by the Congress. They have to obtain a court order before they can exercise those authorities. But that's non-controversial. People haven't raised concerns about that -- or at least not many people have. And as our national security professionals will tell you, it's an important tool for collecting information.

There are two other authorities that are included here. The first is what's called the roving wiretap authority, and this gives essentially our national security professionals the opportunity to monitor the communications of individuals even -- again, with a court order -- even if they are changing cellphones rapidly. So you've heard the term, a burner phone, where somebody will use a phone for a day and then move to a different cellphone. What this authority gives our national security professionals is the authority to essentially follow this person from cellphone to cellphone as they monitor their activities.

The third and final authority is actually an authority that our national security professionals have not used, and it is the lone wolf provision. This essentially is an authority that, again, under a court order, would allow our national security apparatus to collect information about a suspected terrorist who is not an American citizen, and even if they are not able to directly link them to a specific terror organization. And this is an authority that has not

been used before, but it is considered by our national security professionals to be an important one.

And, again, the case that I would make overall here is that it doesn't make sense, and no one has presented a compelling case for why we should take the unnecessary risk of allowing these authorities to lapse.

Q And on the next question, you said President Obama was not going to support Hillary Clinton at this time for her presidential bid because he's got other friends out there who could be making an announcement. There's a friend that could be making an announcement tomorrow -- Martin O'Malley. What does the President think about Martin O'Malley and his chances?

MR. EARNEST: Well, I'm not going to handicap his chances from here. He'll have the opportunity to make the case that he would like to Democratic voters. If he chooses to run, he obviously will have a compelling case to make about his record in the state of Maryland as the governor of that state. But I would not anticipate any presidential statement or endorsement in the coming days for any of the candidates in the race at this point.

Q Since the President is now on Twitter, is he following and looking at some of his favorite reporters -- (laughter) -- tweets? Is he -- what's he doing? Is he just watching what people are saying to him? Is he going around looking through the Twitterverse?

MR. EARNEST: I can confirm for you that he is not spending much time doing that. (Laughter.) He's got a lot of other things on his plate. But he certainly did enjoy the opportunity that he had yesterday to use his new Twitter handle to answer some questions and interact with the public, some of whom had some direct, serious questions to ask him about climate change, and some of who had direct and serious questions to ask him about the NBA playoffs.

Q And is he aware of some of the hate that has come to him since he's been on the Twitterverse?

MR. EARNEST: Yes.

Jon.

Q Josh, any reaction to the news that former Speaker of the House, Dennis Hastert, has been indicted?

MR. EARNEST: Jon, I read those stories in the paper today. I'll tell you that this falls in the category of an active Department of Justice criminal investigation. But I think I can speak pretty faithfully for everybody here at the White House that even though Speaker Hastert served as a Speaker of the House in the other party that there is nobody here who takes -- who derives any pleasure from reading about the former Speaker's legal troubles at this point.

Q What does the President think is the most prominent political figure from the state of Illinois to see -- this is a state where, by last count, four of the last seven governors have gone to prison, a member of Congress has gone to prison, another member of Congress recently on charges that could send him to prison, and now you have Speaker Hastert, perhaps the most prominent outside of the President from the state of Illinois, under this cloud. What does he make of that -- I mean, somebody who came into politics to get people involved and restore faith in the political process, but sees so many top political figures from his state brought up on charges or convicted of charges?

MR. EARNEST: Again, based on only what has been shared publicly, it's not clear that any of the charges that Speaker Hastert is facing are related to his service in government, either at the local level or in the United States Congress. But I do think that as a more general matter, the responsibility that the Department of Justice has to make sure that our public officials are not violating the public's trust is an important responsibility.

And again, I won't speak to any of the specific cases, but the President certainly believes that they have an important job to do, and expects them to do it.

Q Okay, and just one other one quickly. You've seen the news with the case of Jason Rezaian, the Washington Post reporter held in Iran. One of the pieces of evidence against him apparently was a job application he made to come to the Obama administration, which somehow the Iranians see as evidence that he's some kind of an American spy. What do you make of that?

MR. EARNEST: Well, we have said for quite some time that Mr. Rezaian is being unjustly detained by Iran. We're aware of the reports that his trial has both started and adjourned. We have expressed concerns about the lack of transparency associated with his case, but it's consistent with the pattern that we've seen in Iran of these kinds of trials being closed to the public.

That certainly does raise questions about the veracity of claims against Mr. Rezaian. And that's why we have made clear both publicly and in private conversations that Mr. Rezaian should be released immediately, and he should be allowed to return to the United States and be reunited with his family.

Q Do you have any indication that either Jason Rezaian, Amir Hekmati, Saeed Abedini, that any of the Americans now being held prisoner in Iran -- as you have said, unjustly -- are any closer to being freed, or will be freed before the agreement is done on the nuclear deal?

MR. EARNEST: Jon, we have made clear to the Iranians that they should release Mr. Rezaian, Mr. Abedini, and Mr. Hekmati. They are being unjustly held in Iran, and they should be released and allowed

to return to the United States so that they can be reunited with their families.

We have also raised, again, both in public and in private with Iranians that we would like their assistance and we would like information about the whereabouts of Mr. Levinson. And we've also been clear that we will not allow these American citizens to be used as bargaining ships. We're not going to negotiate for their release; they should be released because they're being held unjustly. And again, we've made that clear in public on many occasions -- the President himself has. And we've raised concerns about each of these individual cases in private as well, including the President. And we're going to continue to do so until these American citizens have been released.

Major.

Q Josh, following up on Dennis Hastert, what would you say was the President's relationship with him? He was a formidable figure in Illinois politics, as well; he was the Speaker of the House. And some in political circles in Illinois have described them being -- themselves being shocked and saddened by this. Would you say any of those adjectives fairly characterize the President's reaction? Could you describe to what degree, if any, they had a professional and political relationship?

MR. EARNEST: I did not speak to the President after the news broke late in the day yesterday about this specific case. Off the top of my head here, I do not recall having heard the President talk about his relationship with Speaker Hastert. I'm sure they had the occasion to meet at some point, but I'm not aware that they had any sort of material or personal relationship.

Q Okay. When you said at the top that the era must come to an end of short-term Highway Trust Fund extensions, does that mean the President won't sign another?

MR. EARNEST: Well, I'm not saying anything that declarative. What I'm saying is that the --

Q (Inaudible.)

MR. EARNEST: Well, as bad as this short-term extension is and this uncertainty that it creates around the Highway Trust Fund has delayed all across the country about $2 billion worth of projects. So this kind of uncertainty is bad management and is bad for the country and is bad for our economy. But allowing the trust fund to go broke would be worse. But we need to actually set our aspirations a little higher than that. And that's why the President has put forward a very specific plan for essentially a six-year proposal that would close loopholes that only benefit the wealthy and well-connected, and use the revenue from those reforms to invest in infra that would benefit everybody. That would be good for the economy, it would create jobs

in the short term, and it clearly is the right thing to do.

As I have often done, I remind you that on the day after the election, Leader McConnell and Speaker Boehner wrote a joint op-ed in The Washington Post, the headline of which was "Now We Can Get Congress Moving." Well, we have an opportunity now to literally get America moving by putting in place a modern, upgraded transportation infrastructure that would be good for our economy both in the short term and the long term. And we hope that Leader McConnell and Speaker Boehner will follow through on that promise. And we certainly have our own very specific ideas about how they can start.

Q But he will sign other short-term extensions, if necessary?

MR. EARNEST: Well, I'm not making any pronouncements about future short-term extensions. What I am saying is that it is not at all in the best interest of the country for the United States Congress to continue to kick the can down the road, even if it's two months at a time. What they need to do is they need to get serious about considering a common-sense proposal like the one the President has put forward to make a long-term commitment to the transportation infrastructure of the United States.

Q Back to FIFA for a second. Vladimir Putin left the impression that he felt the United States was meddling in business it ought not to meddle in and trying to extend its jurisdiction in ways it should not by pursuing this criminal prosecution of FIFA executives, suggesting that there really was no jurisdiction and this is not the United States Justice Department's business. Your reaction to that?

MR. EARNEST: I'd refer you to the Department of Justice who can, I'm sure, give you a very detailed explanation about the jurisdiction that they have recognized here to pursue these charges.

Q You disagree, though?

MR. EARNEST: Well, I have full confidence in the explanation you can receive from the Department of Justice.

Q Speaking of Putin, there were reports yesterday that some number of thousands of Russian troops, with their uniform insignia stripped off and with armaments, were moving again, as we have seen before, toward parts of eastern Ukraine still in dispute. To what degree does this add or has added to the administration's concerns about what may come next in that particular --

MR. EARNEST: I haven't seen those specific reports, but I will say that we do continue to be concerned -- because what you have just relayed is consistent with the kind of behavior that we've seen by the Russians over the last year and a half or so. And they have repeatedly violated the territorial integrity of Ukraine. And the international community has spoken clearly and with one voice to

insist that the Russians recognize and respect the sovereignty of their neighbors, including in Ukraine.

And the Russians have been isolated as a result of this. The Russian government has been heavily sanctioned. And it's had a significant impact, a negative impact on their economy. And those costs will continue as long as Russia and President Putin continue to engage in destabilizing activities in Ukraine.

Q Will the G7 summit be a platform to intensify discussion about another round of sanctions?

MR. EARNEST: Well, the G7 has obviously been very involved in imposing economic costs on Russia for their destabilizing activities in Ukraine. And I would anticipate that there will be additional discussions of this issue at the G7. I don't have any outcomes to foreshadow at this point, though.

Q Last question. There's not just a legislative deadline, but there is this 2nd Circuit Court of Appeals ruling that the conduct of bulk collection data, telephony data, is illegal because it is broader than was sanctioned by Congress. If the Patriot Act expires, how significant does that 2nd Circuit Court of Appeals ruling loom in trying to restart any of this and getting legislative approval for what you're doing now -- what you would lose the legislative right to do, and have a court opinion saying it's illegal?

MR. EARNEST: Let me answer that question in two ways. The first is that this is the concern that we have about the very short-term extensions that have been floated by some members of the Senate. There's been the suggestion that, well, why don't we just extend the life of the Patriot Act by three or four days or a week to give us additional time to tinker with the compromise proposal that's already passed with bipartisan support in the House.

And the concern with that is that the 2nd Circuit has said -- has raised significant concerns about whether or not the use Of that authority can be used to continue to search this information. The good news is that the USA Freedom Act as passed in the House our lawyers believe actually addresses the concerns of the 2nd Circuit. So rather than to throw into doubt the ability of our law enforcement professionals to use these authorities based on a ruling from the 2nd Circuit, we believe we should act quickly to reform that proposal, to reform that program, consistent with the concerns that were raised by the 2nd Circuit. That's how we can be confident that we can prevent a lapse in these authorities and make sure that this information that our law enforcement and national security professionals say is important is something that they'll continue to have uninterrupted access to.

Q Since your lawyers looked at this, if the Patriot Act lapses and you don't have the USA Freedom Act legislation, which talks about a continuation in this transition period for NSA housing of this data

to telecoms housing it, do you have to start from scratch legislatively to rewrite authorities for this program and essentially draft a new bill that has to go through both chambers? If you lose the authorities you have now and they are not reauthorized as the USA Freedom Act envisions, this sort of handover, do you have to start from scratch?

MR. EARNEST: I have not heard that prospect raised. I don't believe that that will be necessary. But what -- I guess the scenario that you're setting up is, if Congress blows through the deadline but five days later they come to their senses and pass the USA Freedom Act, is it still possible to do that? I understand that, yes, it is still possible for them to do that, but it would introduce some unnecessary risk in the form of that five-day lapse in which our national security professionals would not have access to some tools that they say are important to keeping us safe.

Kristen.

Q Josh, thanks. I want to get your reaction -- I know you've been talking about Rand Paul -- you obviously disagree with him and his tactics, but he makes one argument that I want to get your reaction to. He says that the metadata program has never actually stopped an attack. He says that rather it's a "building block tool" for investigations. Can you respond to that? I know that the counterargument is that, well, he's using the wrong metric. But is he wrong? I mean, can you say definitively that this metadata program has thwarted an attack?

MR. EARNEST: Well, Kristen, what I can say is that in the same way that building blocks are critical to the stability of a structure, building blocks are critical to the successful completion of an investigation. And I think that's what our national security professionals would tell you, is that they have used these tools in the past to collect information that they were previously not aware of and that that information has been important to their activities that are critical to our security.

Q Can you draw a direct link?

MR. EARNEST: Well, again, I think what I can do is I can illustrate to you that these programs are really important. And again, they are important building blocks to investigations that have protected the American people.

I think the other thing that I would say, Kristen, is that even if you assume the worst about what some of our critics have said, they don't know what's going to happen in the future; neither do I. And I guess the point is why would we unnecessarily take the risk that someday in the coming days we could need access to that information and it could be critically important to our national security -- why would we take the risk of removing that tool from the toolbox of our national security professionals even though it includes the necessary

reforms that Senator Paul and others have called for?

Q Can you give us a specific example of when this program has played out -- has been a part of the building block that has thwarted an attack?

MR. EARNEST: These are investigations that are conducted in the classified setting, so I don't have specifics that I can share with you in this format. But our national security professionals have indicated that these programs are an important building block to their investigations and that there has been information that has been obtained through these programs that they were previously unaware of, and that that newly obtained information was important to their investigations.

And again, no one has presented a compelling explanation for why the United States and the American people should assume the risk associated with taking those tools out of the hands of our law enforcement professionals.

Q And I want to circle back to the contingency plan. You say there's no contingency plan in place. But you're not suggesting that there aren't still tools in place that intelligence, NSA officials have at their disposal?

MR. EARNEST: No, I'm saying that if Congress doesn't act, if the Senate doesn't act by the end of the day on Sunday, there are three important tools that our national security officials do currently have that they will not have unless the Senate acts.

Q And can you just look ahead for us over the next 48 hours -- what will President Obama be doing? Is he going to be making phone calls directly to lawmakers on Capitol Hill, pressing them to get this done?

MR. EARNEST: Well, I don't have any presidential conversations to preview for you, but certainly the President will be available when members of the Senate do eventually return to Washington after their weeklong recess to consider this piece of legislation. The President stands ready to have conversations, if necessary.

I can tell you that members of the President's team and members of the President's national security staff have been in touch with members of Congress about this issue to make sure that they understand the stakes here. The stakes are significant. We're talking both about the basic civil liberties of the American people and the national security of the United States.

Q I guess what I'm saying is, given the enormity of the argument that you're making, what's the -- how would you characterize the strategy from now through Sunday?

MR. EARNEST: Well, Kristen, I think what's really important for

people to understand about this is we've already done the hard work of resolving these very complicated policy issues; that a year and a half ago, the President called for these reforms and more than a year ago our national security professionals have been engaged in difficult work with Democrats and Republicans on Capitol Hill to try to fashion a bipartisan compromise.

And this isn't a matter of, "well, I'll give you half of this budget if you give me half of that budget." This is a situation where they're going through very complicated legal and national security policy issues, some of which are affected by rapid changes in technology, to try to find a policy that both protects the ability of our national security professionals to keep us safe, and protects the privacy and civil liberties of the American people. That's hard work.

Good people, well-informed individuals who aren't influenced by politics can have a legitimate difference of opinion on these things. That makes it all the more remarkable that a House of Representatives that typically is wracked by politics was able to find this common ground and vote on it in a timely fashion, and yield 338 votes of Democrats and Republicans. Again, you don't often hear me doing this -- that is a credit to the leadership of Republicans and Democrats in the House of Representatives.

And unfortunately, when it came to the Senate's turn to take this up, we did see all the Democrats in the Senate do the right thing. They all did try to vote in a timely fashion for the USA Freedom Act. But because of the latest installment of the Kentucky feud, we haven't seen that critically important piece of legislation advance in advance of the deadline.

Q And just one more, Josh, on Iraq. Can you update us on the discussions -- the reports that the administration is considering sending arms to Sunni fighters in Iraq?

MR. EARNEST: Well, Kristen, as you know, the President and his team have been engaged for some time in training and equipping Iraqi security forces. And we have insisted from the beginning that the security forces in Iraq be multi-sectarian, that they need to reflect the diversity of that country.

And that's why equipment supplied by the United States and our coalition partners has benefitted Kurdish security forces, some Shia fighters in the Iraqi security forces, and even some Sunni tribal fighters as well. All of that supplying of equipment has been done through the Iraqi central government. And if there are things that we can do to make the flow of that equipment more efficient to getting that equipment in the hands more quickly of the fighters who need it the most, we'll look for ways to do that. But we're going to make sure that that effort continues to be multi-sectarian and that it is done under the auspices of the Iraqi central government.

Carol.

Q Can you go back to what you said on Cuba earlier when you said there were additional issues that needed to worked out for embassies to open in Havana and Washington? Can you elaborate on that? What are those issues?

MR. EARNEST: I don't have a detailed readout of their conversations. As you know, there have been a variety of issues that our diplomats have encountered as they've sought to normalize relations between our two countries. They made some important progress. The state sponsor of terror was one stumbling block in those discussions. That's something that should be resolved as of today.

There have also been extensive discussions about what sort of limitations we placed on the activities of American diplomats on the island of Cuba. This is the role of diplomats in countries all around the world, not just in Cuba, that they interact not just with government officials, but they also interact with the people in the countries where they're located. And that includes meeting with citizens outside of the capital city, and it includes even meeting with citizens who aren't entirely supportive of the political decisions that are being made by their government.

And we want to make sure that our diplomats who, if they're operating out of an embassy, an American embassy in Cuba, do have the ability to do their jobs. And that includes not just meeting with government leaders, but also involves meeting with members of -- with citizens of the population.

Q Is there any update on the likelihood that the President will travel to Cuba before he leaves office? Or is that something he wants to leave to his successor?

MR. EARNEST: Well, I think that's -- you could still characterize this as presidential aspiration. I guess it's a different sort of presidential aspiration than the one that's consumed a lot of attention in this room over the last few months. But obviously it would be another milestone in the effort to normalize the relations between our two countries.

Nadia.

Q I don't know if you have seen the debate at the Security Council today. But the Secretary General is saying basically that the number of foreign fighters who are fighting among ISIS in Iraq and Syria has risen to 25,000, which, if I'm not wrong, is around 70 percent. Does that change the White House perspective into looking at the ISIS problem as an international one? So are you considering changing the strategy of fighting them, considering also the attack in the Shiite mosque in Saudi Arabia, so they are no longer local in Syria and Iraq?

MR. EARNEST: Well, there are a lot of questions there. Let me try to do a couple of them. The first is that the President has recognized the importance of shutting down the flow of foreign fighters in our strategy to degrade and destroy ISIL. And you'll recall that at the United Nations Security Council last fall, the President convened a meeting with other heads of state to talk exactly about this issue, about what countries all around the world could do to prevent their citizens from traveling to Iraq and Syria, and taking up arms alongside ISIL.

The announcement -- while I can't speak to the veracity or the accuracy of that report, it does highlight something that we've long acknowledged, that there is more that can and should be done to shut down the flow of foreign fighters to Iraq and Syria. And we have been in frequent touch with countries around the world about that ongoing effort.

Now, the second thing that we have raised concerns about -- and this may go more directly to the incidents that we've seen in Saudi Arabia over the last week or so -- that we continue to be concerned about the way that ISIL uses social media to incite and inspire people around the world to carry out acts of violence. I can't speak to whether or not ISIL was involved in the attack that occurred earlier today in Saudi Arabia. I know that Saudi Arabian authorities have indicated that the attack that was carried out at a Shiite mosque last week was the work of someone that was affiliated with ISIL.

And so the point is that we recognize that this is an important part of the strategy, too, and it's an element of the strategy that we take very seriously. And we work closely with the Saudis, in fact, as we try to counter some of the radical messaging that we see from ISIL. But obviously that is very difficult business, particularly given the sophistication that ISIL has shown in using social media tools. But that's something that we continue to be very aware of, and we're going to continue to work closely with the Saudis and others to confront that element of the threat.

Q I have another question. I don't know if you are aware, but the last city in the province, which is northern Syria, has fallen to the rebel hands, led by Jabhat al-Nusra. And I'm just wondering why the United States, or the coalition led by the United States, has not targeted Jabhat al-Nusra, who are in part affiliated and considered a terrorist organization. Is it because they're not against the U.S., or is it because you want to put more pressure on Assad to compromise in a political transition?

MR. EARNEST: Nadia, we have expressed significant concerns about the way in which a variety of extremist groups inside of Syria have sought to capitalize on the chaos in that country to set up operations in that country. That makes Syria a very dangerous place not just to people who live in Syria, but to people who live throughout the region, and potentially the people around the world.

And that's why you've seen the United States take some military

action not just against ISIL fighters inside Syria, but also against some other extremist elements inside Syria that may pose a more direct threat to the United States. And that's something that we have been engaged since the earliest days of our efforts inside of Syria.

I was not aware of the most recent reports about some of the gains that some groups had made in northern Syria, but I have been briefed on some of the advances that Syrian Kurdish fighters and Syrian Christian fighters in Syria have made in northeast Syria against ISIL; that there has been substantial territorial integrity that has been gained by those fighters who have been acting in coordination with our broader military coalition -- that there are a number of coalition military airstrikes that have been taken in northeastern Syria in support of those efforts on the ground that have succeeded in driving back ISIL.

And, again, that is a characteristic of the kind of areas of progress and periods of setback that we've seen throughout this military conflict.

Connie. I'm calling on all the women who are wearing blue dresses and black blazers today. (Laughter.) So you'll get your turn.

Q There are reports -- that North Korean nuclear scientists are now in Iran helping to (inaudible) nuclear weapons in Iran. Do you have anything on that?

MR. EARNEST: I don't, Connie. I haven't seen those reports. But I can a check with our national security team and see if they have information for you on that.

Q Secondly, does the President believe that the U.S. still can conduct guns and butter at the same time, and to give more priority to fighting terrorism or rebuilding the infrastructure?

MR. EARNEST: Connie, the President believes that we can do both, that we don't need to make sacrifices in that regard; that we can successfully devote the necessary resources to keep the American people safe while investing in the kind of infrastructure and in the kind of economy that will expand opportunity for all middle-class families in this country.

And that does involve a set of strategic choices, and our resources are not unlimited. But the President does believe that if we are making wise decisions consistent with our priorities that we can take the steps that are necessary to protect the country and take the steps that are necessary to support the private sector as they unleash economic opportunity for every citizen in the United States.

Lesley.

Q I'm wearing a brown blazer.

MR. EARNEST: Yes. You look nice today, though.

Q Thank you. I wanted to ask you a couple questions about the President's visit yesterday with the Sotloff family in Miami. Can you tell us a little bit more about the hostage review and when that might be wrapped up? And is that going to be publicly shared?

MR. EARNEST: I don't have any update on the timing. This is obviously something that our team has been engaged and working on for almost a year now, I believe. And I would anticipate that we'll have something relatively soon. And I don't know that every element of the review is something that we'll be able to make public, but we'll be able to offer some sort of public accounting of the kinds of reforms that that review recommends.

Q I also wanted to ask you -- Steven Sotloff's father had told the Miami Herald earlier this week that they got a lot of the letters from their son because of hostages that had been released -- and I'm quoting him -- "because their countries were responsible enough to pay a ransom to get their kids back." Do you know if he was that upfront with the President yesterday? Did that come up, the discussion on paying a ransom?

MR. EARNEST: I did not travel with the President yesterday, so I did not witness the meeting. But even if I did, I wouldn't be in a position to talk about the details of their conversation. So we did offer what I would acknowledge is a very topline readout of the meeting, if you will. But the conversation that the President had with the Sotloff family is a private one.

John.

Q Thank you, Josh.

MR. EARNEST: Go ahead, John. And, John, you'll be next. Back-to-back Johns up there, so it makes it challenging.

Q Secretary Lew said this morning that in the matters involved resolution of the Greek debt crisis there has to be greater flexibility on all sides. Did he mean that the IMF should relax a little bit in requiring its payments, or possibly renegotiate?

MR. EARNEST: What he meant, John, is that it's clearly in the interests of all the parties in these talks to resolve their differences and to come to an agreement that doesn't create undue turmoil in the financial markets. That's not in anybody's interest. And he's hopeful that all the parties will be able to sit down in good faith and broker an agreement that satisfies their concerns.

Q And that includes the IMF among all the parties?

MR. EARNEST: Obviously the IMF has been a part of the

conversations here, and these kinds of multilateral institutions like the IMF have a role to play. The IMF has provided significant assistance to Greece. And what Secretary Lew was urging is for all of the parties to come together and to work out an agreement that doesn't cause undue turmoil in the financial markets.

Q Turning to the domestic front, it could be as early as next week that the Supreme Court comes down with a ruling in King v. Burwell. And Senator Cassidy of Louisiana said that of course, if it rules in favor of the administration nothing happens; if it rules in favor of the plaintiff there has to be an alternative plan. And he laid out his own patient freedom act that he said has many of the same goals as the Affordable Care Act but does things a bit differently, like removes mandates, provides for greater competition. This was his presentation. Is the White House in touch with Senator Cassidy, or any senators of either party, or representatives who have alternative plans in case the Court rules in favor of the plaintiff in the King v. Burwell case?

MR. EARNEST: John, I don't have any conversations to tell you about. But I can tell you that the administration continues to be completely confident in the strength of the legal arguments that were presented to the Supreme Court. The fact is that if the Supreme Court does not rule in favor of the arguments that were made by the administration, it will cause significant turmoil in the health care markets, and we will see a lot of people's affordable health care plans be put at risk. And there's no easy fix to doing that, particularly when you consider how difficult it has been for common-sense pieces of legislation to move through the Congress. With something as controversial as health care, it's hard to imagine any sort of legislative fix passing through that legislative body.

But that all being said, we continue to have a lot of confidence in the legal arguments that we make -- that we've already made, and are hopeful that the decision that's announced by the Supreme Court will reflect that. But obviously there a separate branch of government and they'll be the ones to decide.

Q I want to ask you a little bit about the formal decision by the State Department to formally remove Cuba from the list of State Sponsors of Terrorism. What leverage does the U.S. now have on Cuba going forward now that that has been eliminated as possible leverage to use against the government of Cuba?

MR. EARNEST: Well, President Castro and other representatives of the Cuban government have made no secret of the fact that they are interested in normalizing relations with the United States. And obviously some of that is a result of the kind of opportunity that they see in the United States. We obviously see important opportunity in Cuba that, if we succeed in normalizing relations, that there will be additional opportunities for Americans to travel to Cuba. There's obviously additional opportunities for American businesses to do business in Cuba.

That's why we've seen strong bipartisan support for the President's decision. Ultimately what we think all of that will do is empower the Cuban people. That is the ultimate goal of this policy change. And there is no question that the deeper engagement that we hope will be the result of this policy change between our two countries, and between the people of our two countries, that that will empower the Cuban people and put additional pressure on the Cuban government to do a better job of respecting and protecting the basic human rights of their people.

Q There are a number of American citizens who are living freely in Cuba who are wanted by U.S. authorities here, including a woman who killed a New Jersey state trooper. Has that particular case ever been brought up as a way to tie together these various issues of -- including this one -- of removing Cuba from its list of State Sponsors of Terrorism?

MR. EARNEST: John, I'd refer you to the State Department for a more detailed description of the kinds of issues that were discussed between the diplomats when they were here.

Q And one final question as it relates to this. Cuba, because of the action taken by the State Department formally today, is now eligible for foreign assistance. Is there any plan by President Obama to propose that Cuba receive foreign assistance from the United States?

MR. EARNEST: Nothing that I'm aware of at this point. But if that changes, we'll obviously let you know.

Jordan.

Q Thanks, Josh. On the AUMF, Senator Corker was quoted yesterday in saying that it's basically an intellectual exercise, it's not going to have bearing on what happens on the ground. And even Senator Reid said that he doesn't think there's a need to pass a new AUMF for ISIS. Do you have any reaction to those comments? And has the White House considered redrafting the AUMF and sending a new one to the Hill?

MR. EARNEST: Well, Jordan, the President has been very clear about why he believes it's important for the United States Congress to pass an authorization to use military force against ISIL. You've heard me say, and the President has indicated as well, that passing an authorization to use military force would send a very clear signal to the American people, to our men and women in uniform, to our allies around the globe, and even to our adversaries in ISIL that the country is united behind the strategy that the President has put forward.

And Senator Corker himself said the same thing. He wrote an op-ed at the end of last year, I believe, indicating that "unless the President reverses course and requests congressional backing, our

efforts to confront ISIL risk failure without the long-term domestic political support necessary for a multiyear campaign in at least two countries." He continued to say, "We would be stronger and our actions against ISIL more effective if the President requested authorization."

As you guys know, the President requested authorization. The President and his national security team are certainly doing their job to confront the threat that is posed by ISIL in terms of laying out a strategy and building out a 60-nation coalition to execute it. No one doubts that our men and women in uniform are doing their important job, and in some cases, at substantial risk to themselves to carry out and execute this strategy.

But when it comes to passing an authorization to use military force, something that Senator Corker says would make our campaign against ISIL "more effective," the United States Congress has been AWOL. They haven't been willing to stand up and do their job. Their job doesn't require putting themselves at great personal risk. Their job doesn't require making difficult strategic decisions. Their job requires holding some congressional hearings, writing legislation, and casting a vote. Their job requires basically only fulfilling the bare minimum.

And when it comes to our national security and something as important as this, something that they say is so critically important to our country, it's time for them to not just pay lip service, but to actually follow through with some action.

Q Right, but it seems there's no appetite for the draft that was submitted by the White House now among members of both parties. So has there been any thought to making tweaks and sending a new one up to the Hill that might address some of the concerns that Senator Corker --

MR. EARNEST: We've been clear from the second that we submitted that authorization that it could be used as the starting point for negotiations, that we're open to discussions about adjustments and refinements that could be made to that legislative proposal. But we haven't even seen Congress be willing to do that -- even members of Congress who made an aggressive case for the President to submit an authorization to use military force.

Congress has held meetings -- has held a couple of congressional hearings that have been attended by the most senior members of the President's national security team. So the administration has already demonstrated a clear willingness to engage in this discussion. We had a number of discussions before we submitted the authorization -- our draft authorization. We did so, indicating a willingness to engage in future conversations. And the President even dispatched senior members of his national security team to testify in public, on the record, about the authorization to use military force. But yet, all we've seen from Congress is some idle chatter.

Surely, our campaign against ISIL deserves more than that. And I know we all agree that our men and women in uniform deserve a lot more than that.

Kevin.

Q Thank you. Just a little Cuba housecleaning really fast, just two questions and we can wrap it up. (Laughter.) Would you say it is more likely --

MR. EARNEST: I'm not sure your colleagues in the back would agree with this. (Laughter.) You can take it up with them separately.

Q After 80, 90, 100 minutes -- I mean, at this point, I'm just glad you called on me. (Laughter.)

MR. EARNEST: Don't make me regret it, Kevin. (Laughter.)

Q You may regret it, absolutely, that would be really funny. Would you say it's more likely than not that sometime before the end of June that the White House would announce embassy openings both in Havana and in Washington, and announce a presidential trip to the island?

MR. EARNEST: I don't have a time frame for you in terms of an announcement about embassy openings. When it comes to the President's travel, I wouldn't anticipate any sort of travel in the near future. But the President does have I think a previously stated aspiration to travel to Cuba, but I don't know if that will happen before the end of his presidency or not.

Q Would you say -- or, I guess, how would you characterize the legislative shop here at the White House? How active were they in the 45-day period trying to head off any possible blowback from Congress?

MR. EARNEST: I don't know that there were a whole lot of discussions on this particular topic. We saw that some of the President's most aggressive critics of this policy change -- even they were pretty forthright in indicating that there was not a lot of public support for trying to prevent the removal of Cuba from the state sponsor of terror list. So there wasn't a particularly aggressive campaign on the other side on this issue so I don't know that there were that many discussions about it.

Q The Attorney General coming and meeting with the President -- is it your impression that they'll talk about the Lois Lerner circumstance? You may remember back in March the U.S. Attorney for the District declined to move forward in one aspect, but not in all aspects -- perhaps criminal activity has happened. Do you think that will be on the conversation list between the President and the Attorney General?

MR. EARNEST: I doubt it.

Q Lastly, for me -- for all the sports fans out there, a lot of people, whether you're watching Fox Sports or ESPN or just following the President on Twitter, they'll want to know, who's he got -- Warriors, Cavs? NBA Finals.

MR. EARNEST: Well, the President has talked publicly of the degree to which he is impressed by LeBron James. And so --

Q But?

MR. EARNEST: But the President has also said similarly complimentary things about Steph Curry, too. So I know the President is really looking forward to the offensive skills that will be on display in the NBA Finals this year, but I don't know that -- since his Chicago Bulls are not in the Finals, I don't know that he is going to be picking sides this time.

We'll just do a couple more. Let's see, Steve.

Q China. A lot of heating up in rhetoric about the (inaudible.) It doesn't sound like China wants to withdraw or pull back, so what are we prepared to do in the coming days and weeks in terms of troop movements and flights and treatment of that area that we call international space? What are we prepared to do to demonstrate that we want to treat it that way, no matter what they're doing?

MR. EARNEST: Steve, there have been some reports about some recently developed intelligence in that area of the world. I'm not in a position to confirm those specific reports, so I can't speak about that. But I can indicate that we continue to be very concerned about recent developments in the South China Sea, particularly the large-scale land reclamation that China has been engaged in, in that region of the world. We've been clear that all the claimants in the South China Sea, including China, that the United States opposes any further militarization of outposts in disputed areas of the South China Sea. And we continue to urge all of the claimants -- again, including China -- to avoid any actions that escalate tensions in that region of the world.

The President has indicated that we have a genuine interest in that region of the world because it is the site of so much international commerce, and disruption of the free flow of commerce in the South China Sea would have a significant impact on the global economy and would have an impact on the U.S. economy as well. That's why the United States has sought to try to play a role to facilitate a resolution of these disputes through diplomacy among all of the parties.

Q China has said we're just meddling.

MR. EARNEST: They have indicated that, but that's -- in anticipating their line of argument on this, that's why I tried to be clear about what the President has said about the U.S. interest in this region of the world. This is the site of extensive international commerce, and disrupting that international commerce would have a destabilizing impact on the global economy, and that would have an impact on the U.S. economy. Obviously, American businesses do a decent amount of business in that region of the world. If we can succeed in getting a Trans-Pacific Partnership agreement then American businesses will be doing even more business in that region of the world. But that is what our interest is.

We do not intend to resolve our concerns about that interest through the use of our military might. We intend to encourage all of the direct claimants in the South China Sea to facilitate diplomatic discussions that would allow for a resolution of their differences.

Q I thought that there was some discussion about the United States maybe going through some of those waters or reconnaissance flights over that area.

MR. EARNEST: Well, there obviously is a U.S. military presence in that region of the world and China has, on occasion, interpreted the movement of those military assets as a threat to their claim. But what the United States military would be happy to tell you -- these are principally Navy assets -- is that they're operating in international waters consistent with widely acknowledged international rules and norms.

I wouldn't rule out that sort of movement here -- I'd refer you to the Department of Defense on that, but what they will tell you is what I will tell you -- is that while that may occur, that's not how we're going to resolve the differences here. The way we're going to resolve the difference is for all of the claimants in the South China Sea to sit down and try to resolve their differences through diplomacy.

Sarah, I'll give you the last one and then the week ahead.

Q You characterized the situation in the Senate as being because of a feud between the two Kentucky senators. And I'm wondering if, in the view of the White House, if that solely explains the situation that we're in, or if there are other issues with Senator McConnell's leadership as Majority Leader or other factors.

MR. EARNEST: Well, I think that we have a situation where a piece of legislation got strong bipartisan support in the House of Representatives. It's a piece of legislation dealing with complicated policy issues, but I wouldn't just dismiss the policy issues as complicated -- they're critically important to our country. They are important to our national security and important to the civil liberties of American citizens.

This should be a top priority. And the fact that our national security establishment, lawyers from the Department of Justice, senior administration officials, including the President, were engaged in discussions with Democrats and Republicans on Capitol Hill to try to find a bipartisan compromise -- something that Congress has struggled to find over the last four or five years -- but because the stakes were so high, bipartisan ground was hammered out in the House. And it's been very disappointing to the President and I think it's pretty disappointing to the American people that something that is clearly so important to our country is, for reasons that are so unclear, being blocked in the Senate by Republicans -- and for a variety of reasons.

Again, there are some Republicans who say that it's critically important to protect these authorities and they're blocking the USA Freedom Act, but the USA Freedom Act actually extends those authorities. Blocking the USA Freedom Act actually is the surest way to result or to take away those authorities that our national security professionals say that they need.

There are others in the Republican Party who say that they are concerned about protecting the privacy and civil liberties of the American people -- that's exactly what the USA Freedom Act would protect. And to block this piece of legislation prevents those protections from being passed into law.

So that is why you've heard me say, and others say, that there is no rational explanation for the tactics that are currently being used by Republicans in the Senate to block the passage of this bill. And we're hopeful that after a week-long break, that Republicans in the Senate will come back ready to act on a piece of legislation that will protect our privacy and civil liberties, and will ensure that there is no lapse in these authorities that our national security professionals say are critical to keeping the country safe.

Q Do you see Senator McConnell as a weak Majority Leader?

MR. EARNEST: I wouldn't put myself in a position at this point to pass that kind of judgment. I think that -- well, I think what I would say is that Senator McConnell would want to be judged by his record, and that's a record that -- as is the case with all politicians -- that we'll have an opportunity to evaluate that record in public.

Let's do a week ahead, and then I will let at least some of you get an early start on your weekend, I hope.

On Monday, the President will host Their Majesties King Willem-Alexander and Queen Máxima of the Netherlands for a meeting in the Oval Office. Their visit reinforces the strong and enduring ties between the United States and the Netherlands that stretches back more than 400 years.

In the afternoon, the President will host a discussion at the White House with a group of 75 young Southeast Asian leaders on themes of civic engagement, the environment and natural resources management, and entrepreneurship. The group is the first cohort from The Young Southeast Asian Leaders Initiative Fellows program. The fellows, ranging in age from 18 to 35, hail from all 10 ASEAN countries, and have just completed their five-week fellowship in the United States to enhance their practical expertise, leadership skills, and professional contacts that they'll use to address challenges and create new opportunities in their home communities and countries.

On Tuesday, the President will award the Medal of Honor to Army Sergeant William Shemin and Army Private Henry Johnson for conspicuous gallantry during World War I.

On Wednesday, the President will attend meetings at the White House.

And then on Thursday, the President will welcome the World Series Champion San Francisco Giants to the White House to honor their team in the 2014 World Series victory. The President will recognize the efforts of the Giants to give back to their community as part of their visit, continuing the tradition begun by President Obama of honoring sports teams for their efforts on the field and off. And certainly the San Francisco Giants performed very well on the field in last year's playoffs.

Q Is that hard for you to say?

MR. EARNEST: No, it's not. (Laughter.) They're deserving of all of the attention that they'll receive next week, so it will be good.

On Friday, the President will attend meetings at the White House.

So with that, I bid you all a good weekend.

END 2:43 P.M. EDT

Bruck, Andrew J. (ODAG)

From:	Bruck, Andrew J. (ODAG)
Sent:	Monday, April 13, 2015 4:29 PM
To:	Axelrod, Matthew (ODAG (b) (6))
Subject:	Tracked versions
Attachments:	Durbin QFRs for Yates - 4.13.15.docx; Feinstein QFRs for Yates - 4.13.15.docx; Franken QFRs for Yates - 4.13.15.docx; Perdue QFRs for Yates - 4.13.15.docx; Sessions QFRs for Yates - 4.13.15.docx; Tillis QFRs for Yates - 4.13.15.docx; Grassley QFRs for Yates - 4.13.15.docx

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Senator David Perdue
Questions for the Record
On the Nomination of Sally Quillian Yates
To be Deputy Attorney General of the United States
March 31, 2015

1. **As a former federal prosecutor, I know you are familiar with the concept of prosecutorial discretion. What, if any, are the limits of the President's discretion to enforce federal law?**

RESPONSE: (b) (5) [redacted]

2. **In his Memorandum Opinion and Order in *Texas v. United States*, B-14-254 (S.D. Tex. Feb. 16, 2015), Judge Hanen enjoined the implementation of President Obama's Deferred Action for Parental Accountability Program ("DAPA") and of the "three expansions/additions to the [Deferred Action for Childhood Arrivals Program, hereinafter "DACA"]," finding that the government had "clearly legislated a substantive rule without complying with the procedural requirements under the Administrative Procedure Act." *Mem. Op.* at 123. Do you agree that in promulgating and implementing DAPA and the DACA expansions, the government acted unlawfully?**

RESPONSE (b) (5) [redacted]

3. **According to press reports, at a recent hearing on the injunction in the *Texas* case, Judge Hanen told the government that "I was made to look like an idiot. I believed your word that nothing would happen." The judge was referring to the more than 100,000 three-year DACA renewals the government processed in the weeks following issuance of the injunction. Is it the Justice Department's position that the government is authorized to continue processing of DACA renewals during the pendency of the *Texas* injunction? If so, please explain the legal basis for your answer.**

RESPONSE: (b) (5) [redacted]

(b) (5) [redacted]

4. **With respect to the President's executive actions on immigration implemented through the DACA and DAPA programs, please explain whether you share the view of Attorney General nominee Loretta Lynch that the Office of Legal Counsel memorandum setting forth the argument for the President's actions are constitutional and "reasonable."**

RESPONSE: (b) (5) [redacted]

5. **Please explain your view on how, or whether, the President's executive action on immigration implemented through the DACA and DAPA programs comports with the Constitution's Take Care Clause and Congress's Article I authority over immigration and naturalization.**

RESPONSE: (b) (5) [redacted]

6. **It's now indisputable that the Internal Revenue Service ("IRS") targeted conservative organizations that were seeking to obtain tax-exempt status. Senate investigators with the Permanent Subcommittee on Investigations found that over 80% of the targeted groups had a conservative political ideology. The Department of Justice ("DOJ" or "Department") responded by initiating a criminal probe led by a Civil Rights Division attorney who had contributed to President Obama's campaign in 2012. Little, if any, progress has been made in that investigation thus far.**

    a. **With respect to IRS targeting of individuals and organizations who ostensibly identify with a conservative or Tea Party viewpoint, do you believe that reassignment of the DOJ's investigation to a special prosecutor is appropriate?**

RESPONSE: (b) (5) [redacted]

(b) (5) [redacted]

b. Do you believe it was appropriate to assign management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President Obama's campaign?

RESPONSE: (b) (5) [redacted]

c. Do you believe that assigning management of the DOJ's investigation of IRS targeting to a DOJ lawyer who contributed to President Obama's campaign could reasonably be expected to create the appearance of partiality or lack of objectivity on the part of the DOJ?

RESPONSE (b) (5) [redacted]

d. If you are confirmed, will you commit to keeping Congress informed in a more timely way than the current DOJ leadership has about the status of the investigation?

RESPONSE: (b) (5) [redacted]

7. National security is always of paramount importance for the Justice Department. The January 2015 Paris attack and the rise of ISIS are episodes that show two emerging national security threats that you will confront, if confirmed: foreign fighters and so-called "lone wolf" attacks.

a. In your view, does the recent emergence of these threats have any impact on the debate over the impending renewal of the Foreign Intelligence Surveillance Act of 1978 ("FISA")?

RESPONSE (b) (5) [redacted]

(b) (5) [redacted]

b. Do you believe that the current "bulk collection" regime under FISA Section 215 is lawful?

RESPONSE (b) (5) [redacted]

c. Do you believe that the incidental collection provision, Section 702, is lawful?

RESPONSE (b) (5) [redacted]

d. President Obama has indicated that he supports a legislative reform of Section 215's bulk collection regime. What are your thoughts on amending Section 215?

RESPONSE: (b) (5) [redacted]

e. Do you think law enforcement currently has sufficient investigative and legal authority to address the increasing threat from foreign fighters and "lone wolves"?

RESPONSE: (b) (5) [redacted]

(b) (5) [redacted]

8. **Are you committed to transparency between the DOJ and Congress, and will you commit to prompt, complete, and truthful responses to requests for information from Congress about outstanding issues related to Operation Fast and Furious?**

RESPONSE: (b) (5) [redacted]

9. **Do you believe that detainees currently being held at the United States Naval Base at Guantanamo Bay, Cuba, are entitled to criminal trials in the civilian court system within the United States?**

RESPONSE: (b) (5) [redacted]

10. **In 2013, the DOJ intervened in litigation over the Louisiana Scholarship Program, a state initiative that provides school vouchers to low-income families. An analysis by the State of Louisiana found that the program promoted diversity in Louisiana schools and actually assisted in speeding up federal desegregation efforts. Most of the schoolchildren who benefit from this program are members of minority groups. This year, more than 13,000 students applied and nearly 7,500 schoolchildren were awarded a scholarship voucher. These children now get the chance to excel and attend high-quality schools that their parents can choose for them because of the program. Ultimately, after public pressure, the Justice Department backed off trying to kill the program entirely, but still insisted that the State provide demographic data about the students to a federal judge overseeing the lawsuit. Accordingly, now Louisiana has to provide data for the upcoming school year and for every school year as long as the program is in place.**

    a. **Do you agree with the DOJ's decision to intervene in this case?**

b. If confirmed, will you use Justice Department resources to obstruct, monitor, or regulate school-choice programs?

d. Will you commit to asking the federal district court with jurisdiction over this case to discontinue the reporting requirement if you are confirmed?

RESPONSE: (b) (5) [redacted]

11. A 2013 report by the DOJ's Inspector General revealed disturbing systemic problems related to the operation and management of the DOJ's Civil Rights Division. If confirmed, will you commit to implementing the recommendations made by the Inspector General in that report?

RESPONSE: (b) (5) [redacted]

12. Do you agree with the recommendation of the U.S. Sentencing Commission in its 2011 report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, that Congress should amend 18 U.S.C. § 924(c) to confer on federal district judges the discretion to impose concurrent sentences under that provision?

RESPONSE: (b) (5) [redacted]

13. As the former U.S. Attorney for the Northern District of Georgia and the former Vice

Chair of the Attorney General's Advisory Committee, you are no doubt familiar with the DOJ's recent "Smart on Crime" Initiative, which addresses a number of criminal justice issues like prioritizing prosecutions, sentencing disparities, recidivism, and incarceration of non-violent offenders. Attorney General Holder has advocated reduction of the federal sentencing guideline levels that apply to most drug-trafficking offenses, including trafficking of hard drugs like heroin. The Holder Justice Department also announced a new clemency initiative last year that invites clemency petitions from offenders who meet a number of criteria. Thousands of offenders, including drug traffickers, fall within those criteria.

a. **What are your views on those DOJ initiatives and proposals?**

b. **Do they make the work of federal prosecutors harder?**

c. **Do they make the American People safer?**

d. **Are you going to continue them if you are confirmed as Deputy Attorney General?**

RESPONSE to a-d: (b) (5) [redacted]

e. Do you believe that these or other DOJ initiatives should be expanded to encompass early release for violent offenders who have served a substantial portion of their sentences?

f. Do you believe that these or other DOJ initiatives should be expanded to encompass early release for offenders who have received so-called "stacked" or consecutive mandatory minimum sentences under 18 U.S.C. § 924 or other provisions of federal law?

RESPONSE to e-f: (b) (5) [redacted]

14. The 2013 Cole Memorandum explains the DOJ's priorities on enforcement of federal law regarding marijuana offenses. Several jurisdictions have recently legalized cultivation and distribution of marijuana for personal use, in effect, initiating a series of state regulatory regimes that contravene federal drug laws.

a. Do you agree with the current DOJ enforcement policies and priorities outlined in the Cole Memorandum?

RESPONSE: (b) (5) [redacted]

b. Do you consider the DOJ's policy, as it is being implemented now, to reflect legitimate enforcement discretion consistent with the Take Care Clause?

RESPONSE: (b) (5) [redacted]

c. If you are confirmed, how do you plan to measure the effect of the DOJ's policy on the federal interest in enforcement of drug laws?

RESPONSE: (b) (5) [redacted]

15. A number of commentators have expressed the opinion that voter fraud simply doesn't exist or the alternative opinion that, if it does, it is a minor problem with no real effect on the integrity of elections.

a. Do you agree that voter fraud does not exist or is so insignificant that it does not threaten the integrity of elections?

RESPONSE: (b) (5) [redacted]

b. Do you think that voter fraud is a *bona fide* issue that states should be entitled to address with voter ID laws?

RESPONSE (b) (5) [redacted]

(b) (5) [redacted]

16. **First Amendment freedoms that protect the press became a lot more tenuous during Mr. Holder's administration of the DOJ. In May 2013, the Department obtained phone records for the Associated Press ("AP") without the knowledge of that organization, reportedly as part of an investigation of an AP story on CIA operations in Yemen. It then came to light that in 2010 the Holder Justice Department obtained a warrant to search the emails of Fox News reporter James Rosen – the Department claimed that Rosen was a potential co- conspirator with a State Department contractor in violation of the Espionage Act. Since then, the DOJ has issued new guidelines governing how it obtains evidence from journalists. The guidelines maintain that notice of a subpoena may be withheld only if notifying the journalist would present a "clear and substantial threat" to an investigation or to national security.**

    a. **Do you agree that the Department's treatment of journalists has been heavyhanded and that reform of DOJ practices was necessary?**

RESPONSE: (b) (5) [redacted]

    b. **Do you believe that the DOJ investigations described above pose a serious risk of chilling free speech?**

RESPONSE: (b) (5) [redacted]

(b) (5) [redacted]

c. Do you support the new guidelines?

RESPONSE: (b) (5) [redacted]

d. As a former federal prosecutor, you are no doubt aware of the balance between individual liberties and the need to conduct thorough and effective investigations. Do the guidelines strike the right balance?

RESPONSE: (b) (5) [redacted]

e. Going forward, how should the Justice Department distinguish itself from the Holder Justice Department when it comes to investigation of journalists?

RESPONSE: (b) (5) [redacted]

17. There have been significant developments recently at the DOJ regarding policies on civil asset forfeiture in response to abuses by U.S. Attorney's Offices and federal and state agencies. Attorney General Holder recently announced that the DOJ will end the Equitable Sharing Program, which essentially apportions billions of dollars in seized assets between federal, state, and local authorities – a huge pool of money that clearly created a risk of encouraging aggressive, if not unlawful, seizures from individuals who are not charged with a crime, have not been indicted, and have not enjoyed any due process whatsoever.

a. Do you believe that there have been inappropriate or excessive seizures by

your office or by the DOJ with respect to civil asset forfeitures, adoptive seizures, and equitable sharing practices?

RESPONSE: (b) (5) [redacted]

b. What steps do you plan to take, if confirmed as Deputy Attorney General, to ensure that the DOJ returns wrongfully seized assets promptly and does not continue to seize assets wrongfully?

RESPONSE (b) (5) [redacted]

Gauhar, Tashina (ODAG)

From: Gauhar, Tashina (ODAG)
Sent: Monday, June 29, 2015 10:31 PM
To: Axelrod, Matthew (ODAG); Yates, Sally (ODAG); Childs, Heather G. (ODAG)
Subject: FISC approved the 215 Renewal
Attachments: BR 15-75 Misc 15-01 Opinion and Orderr 150629.pdf

This evening, we received the FISC's opinion (attached and summarized below) approving the Government's application to reinitiate the NSA's bulk telephony metadata program. The opinion was authored by FISC Judge Michael Mosman from Oregon. Here is a short summary of the opinion:

1. The FISC denied movants' request to participate as party based on the first-to-file rule because of the pending DDC litigation in the *Paul* case;
2. The FISC granted leave for the movants' to participate as an amicus under the new discretionary amicus provision of FISA;
3. The FISC concluded that Congress clearly intended for bulk collection to continue for 180 days when passing the Freedom Act;
4. The FISC explained that the 2d. Cir. decision isn't binding on the FISC, is wrong on the merits, and in any event did not take into account the Freedom Act and Congress' decision to allow collection to continue for 180 days longer (by virtue of not banning it immediately as they could have done); and
5. The FISC rejected the movants' Constitutional arguments and held that *Smith* still governs.

The FISC provided this opinion to us and the movants at the same time this evening and will "publish" it on its website, likely later this week. However, because counsel for Movants (Cuccinelli) has the opinion, it may hit the press at any time. We are coordinating with OLA to inform the Hill and OPA so they are also aware. We are discussing if we should do a formal press release as we have historically done with past renewals. In the interim, OPA has the following statement: "We agree with the Court's conclusion that the program is lawful, and that in passing the USA Freedom Act Congress provided for a 180 day transition period for the government to continue the existing collection program until the new mechanism of obtaining call detail records is implemented."

The opinion is an interesting read. A few quotes of note:

1. (b) (5) [redacted]

2. (b) (5) [redacted]

3. [redacted] (b) (5) [redacted]

Available to discuss if you would like additional information.

Thanks,
Tash

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)(l) 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

From: Gauhar, Tashina (ODAG)
Sent: Wednesday, January 25, 2017 7:00 PM
To: Yates, Sally (ODAG)
Cc: Axelrod, Matthew (ODAG)
Subject: FW: FISC - Misc 13-08 - For Service on all parties
Attachments: Misc 13-08 Opinion and Order.pdf

FYI only Good news on a public case before the FISC. Public cases in the FISC are few and far between and this one has been pending since 2014.

Summary: The FISC issued an unclassified opinion holding that there is no First Amendment right of access to FISC opinions. The court ruled that those seeking FISC opinions must ask the Executive Branch under FOIA and pursue any judicial review through that mechanism. This case was filed after the unauthorized disclosures of 2013. We expect the FISC to post this opinion on its website. OPA and OLA are aware.

Happy to discuss or provide additional information as needed. I also let Jim know.

Thanks,
Tash

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE OPINIONS & ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT.	Docket No. Misc. 13-08

OPINION

Pending before the Court is the MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE MEDIA FREEDOM AND INFORMATION ACCESS CLINIC FOR THE RELEASE OF COURT RECORDS,[1] which, as is evident from the motion's title, was filed jointly by the American Civil Liberties Union ("ACLU"), the American Civil Liberties Union of the Nation's Capital ("ACLU-NC"), and the Media Freedom and Information Access Clinic ("MFIAC") (collectively "the Movants"). The Movants ask the Court to "unseal its opinions addressing the legal basis for the 'bulk collection' of data" on the asserted ground that "these opinions are subject to the public's First Amendment right of access, and no proper basis exists to keep the legal discussion in these opinions secret." Mot. for Release of Ct. Records 1. As will be explained, however, the four opinions the Movants seek were never under seal and were declassified by the Executive Branch and made public with redactions in 2014. Consequently, although characterized as a request for the release of certain

[1] Hereinafter, this motion will be referred to as the "Motion for the Release of Court Records" and cited as "Mot. for Release of Ct. Records." Documents submitted by the parties are available on the Court's public website at http://www.fisc.uscourts.gov/public-filings.

of this Court's judicial opinions, what the Movants actually seek is access to the redacted material that remains classified pursuant to the Executive Branch's independent classification authority.

As explained in Parts I and II of the following Discussion, this Court has jurisdiction over the Motion for Release of Court Records only if it presents a case or controversy under Article III of the Constitution, which in turn requires among other things that the Movants assert an injury to a legally protected interest. The Movants claim that withholding the opinions in question contravenes a qualified right of access to those opinions under the First Amendment. If, contrary to the Movants' interpretation of the law, the First Amendment does not afford a qualified right of access to those opinions, they have failed to claim an injury to a legally protected interest. For reasons explained in Part III of the Discussion, the First Amendment does not apply pursuant to controlling Supreme Court precedent so there is no qualified right of access to those opinions. Accordingly, the Court holds that the Movants lack standing under Article III and the Court therefore must dismiss the Motion for Release of Court Records for lack of jurisdiction.

By no means does this result mean that the opinions at issue, or others like them, will never see the light of day. First, the opinions at issue have already been publicly released, subject to Executive Branch declassification review and redactions that withhold portions of those opinions found to contain information that remains classified. Members of the public seeking release of other opinions (or further release of redacted text in the opinions at issue in this matter) may submit requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and seek review of the Executive Branch's responses to those requests in a federal district court. Finally, as noted *infra* Part V, Congress has charged Executive Branch officials—not this

Court—with releasing certain significant Court opinions to the public, subject to declassification review. Those statutory mechanisms for public release are unaffected by the determination that the Court lacks jurisdiction over the instant motion.

BACKGROUND AND PROCEDURAL POSTURE

The Movants filed the pending motion in the wake of unauthorized but widely-publicized disclosures about National Security Agency ("NSA") programs involving the bulk collection of data under the Foreign Intelligence Surveillance Act of 1978, codified as amended at 50 U.S.C. §§ 1801-1885c (West 2015) ("FISA"). The motion urges the Court to unseal its judicial opinions addressing the legality of bulk data collection on the ground that the First Amendment to the United States Constitution guarantees that the public shall have a qualified right of access to judicial opinions. Mot. for Release of Ct. Records 1, 2, 12-21. The Movants contend that this right of access applies even when national security interests are at stake. *Id.* at 17. According to the Movants, the right of access can be overcome only if the United States of America (the "Government") satisfies a "strict" test requiring evidence of a substantial probability of harm to a compelling interest and no alternative means to protect that interest. *Id.* at 3, 21-24, 25, 28. Even if the Government demonstrates a substantial probability of harm to a compelling interest, the Movants maintain that "[a]ny limits on the public's right of access must . . . be narrowly tailored and demonstrably effective in avoiding that harm." *Id.* at 3. The Movants therefore insist that the First Amendment obligates the Court to review independently any portions of the Court's judicial opinions that are being withheld from public disclosure via redaction and assess whether the redaction is sufficiently narrowly tailored to protect only a compelling interest and nothing more. *Id.* at 23.

To conduct this independent review, the Movants suggest that the Court should first invoke Rule 62 of the United States Foreign Intelligence Surveillance Court ("FISC") Rules of Procedure and order the Government to perform a classification review of all judicial opinions addressing the legality of bulk data collection.[2] *Id.* at 24. If the ordered classification review results in the Government withholding any contents of the Court's opinions by redaction, the Movants assert that the Court should schedule the filing of legal briefs to allow the Government to set forth the rationale for "its sealing request" and to accommodate the Movants' presentation of countervailing arguments regarding "any sealing they believe to be unjustified," *id.*, after which the Court should "test any sealing proposed by the government against the standard required by the First Amendment," *id.* at 27. *See also* Movants' Reply in Supp. of Their Mot. for Release of Ct. Records 2, 4. The Movants further request that the Court exercise its discretion to order a classification review pursuant to FISC Rule 62 even if the Court ultimately concludes that a First Amendment right of access does not apply in this matter. *Id.* at 27.

The Government opposes the Movants' motion principally because the four opinions that address the legal bases for bulk collection were made public in 2014 after classification reviews conducted by the Executive Branch. Gov't's Opp'n Br. 1-2. Two opinions were published by the Court:

- Memorandum, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, Docket No. BR 13-158 (Oct. 11, 2013) (McLaughlin, J.), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-1.pdf; and

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[2] Rule 62 provides in relevant part that, after consultation with other judges of the court, the Presiding Judge of the FISC may direct that an opinion be published and may order the Executive Branch to review such opinion and "redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor)." FISC Rule 62(a).

- Amended Memorandum Opinion, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, Docket No. BR 13-109 (Aug. 29, 2013) (Eagan, J.), *available at* http://www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf.

Gov't's Opp'n Br. 2. The other two opinions were released by the Executive Branch:

- Opinion and Order, [Redacted], Docket No. PR/TT [Redacted] (Kollar-Kotelly, J.), *available at* https://www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf; and

- Memorandum Opinion, [Redacted], Docket No. PR/TT [Redacted] (Bates, J.), *available at* https://www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

Id. The Government submits that, because the Executive Branch already conducted thorough classification reviews of all four opinions before their publication and release, there is no reason for the Court to order the Government to repeat that process.[3] *Id.* The Government further argues that the motion should be dismissed for lack of the Movants' standing to advance FISC Rule 62 as a vehicle for publication because that rule permits only a "party" to move for publication of the Court's opinions. *Id.* at 3. In support, the Government cites the Court's decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02, 2013 WL 5460064 (FISA Ct. Sept. 13, 2013), for the proposition that the term "party" in Rule 62 refers to a "party" to the proceeding that resulted in the opinion. Gov't's Opp'n Br. 3. The Government points out that the Movants were not such "parties" to any of the proceedings that begot the four opinions discussing the legality of bulk collection. *Id.* Finally, the Government contends that the Court should decline to exercise its own discretion to require the Executive Branch to conduct another classification review of the relevant opinions under Rule 62—or to permit the Movants to challenge the redaction of classified material—because FOIA

[3] The Movants argue that the Executive Branch's classification reviews were insufficient and resulted in the four declassified opinions being "redacted to shreds." Movants' Reply In Supp. of Their Mot. for Release of Ct. Records 8.

supplies the proper legal mechanism to seek access to classified material withheld by the Executive Branch. *Id.* at 3-4. According to the Government, the FISC is not empowered to review independently and/or override Executive Branch classification decisions, *id.* at 4-6, nor should the FISC serve as an alternate forum to duplicate the judicial review afforded by FOIA, *id.* at 3-4.

DISCUSSION

Before proceeding to consider the merits of the pending motion the Court must first establish with certainty that it has jurisdiction. Because the FISC is an Article III court,[4] it cannot exercise the judicial power to resolve the Movants' motion unless there is an actual "case or controversy" in which the Movants have standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (May 16, 2016) (discussing the constitutional limits on the exercise of judicial power). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies" as set forth in Article III of the Constitution. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). By framing the exercise of judicial power in terms of "cases or controversies," Article III recognizes:

> [T]wo complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

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[4] *See In re Sealed Case*, 310 F.3d 717, 731 (FISA Ct. Rev. 2002) (per curiam) (indicating that "the constitutional bounds that restrict an Article III court" apply to the FISC); *In re Kevork*, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985) (rejecting the assertion that the FISC "is not a proper Article III court"), *aff'd*, 788 F.2d 566 (9th Cir. 1986).

Flast v. Cohen, 392 U.S. 83, 95 (1968). As will be discussed, the separation-of-powers concern poses particular unease in this case.

"From Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation, [the Supreme Court has] deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). This doctrine of standing is an "essential and unchanging part of the case-or-controversy requirement of Article III . . . ." *Lujan*, 504 U.S. at 560. "In fact, standing is perhaps the most important jurisdictional doctrine, and, as with any jurisdictional requisite, we are powerless to hear a case when it is lacking." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005) (internal citations and quotation marks omitted). As the Supreme Court has observed:

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.
>
> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit.

Warth v. Seldin, 422 U.S. 490, 498 (1975) (internal quotation marks and citations omitted).

I.

Accordingly, at the outset, the Court is obligated to ensure that it can properly entertain the Movants' motion because they have met their burden of establishing standing sufficient to satisfy the Article III requirement of a case or controversy. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). To do so, the Movants "must clearly and specifically set forth facts sufficient to satisfy . . . Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990). Moreover, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), the Movants "must demonstrate standing for each claim [they] seek[] to press" as well as "'for each form of relief sought,'" *DaimlerChrysler*, 547 U.S. at 352 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). Ultimately, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 547 U.S. at 341. Absent standing, the Court's exercise of judicial power "would be gratuitous and thus inconsistent with the Art. III limitation." *Simon*, 426 U.S. at 38.

Anticipating that standing might be an issue, the Movants commenced their legal arguments by first claiming that they established standing by virtue of the fact that they were denied access to judicial opinions. Mot. for Release of Ct. Records 10. The Movants assert that "[d]enial of access to court opinions alone constitutes an injury sufficient to satisfy Article III." *Id.* By footnote, the Movants also question in part the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, to the extent that it held that a party claiming the denial of public access to judicial opinions must further show either (1) that the lack of public access impeded the party's own activities in a concrete and particular way or

(2) that access would afford concrete and particular assistance to the party in the conduct of its own activities, although the Movants alternatively argue that "even if those showings are necessary to establish standing, [they] satisfy the additional requirements." *Id.* at 11 n.27.

It appears that *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* was the first and only occasion on which a FISC Judge expressly addressed the question of a third party's standing for the purpose of asserting a First Amendment right to access this Court's judicial opinions.[5] That was a case championed by these same Movants on the same ground that the First Amendment guarantees a qualified right of public access to judicial opinions, although in that case the Movants sought access to opinions analyzing Section 215 of the USA PATRIOT Act (as codified at 50 U.S.C. § 1861). *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, at *1. There, the parties neglected to address standing so the Court was obliged to consider it sua sponte based on the existing record, *id.*, after impliedly taking judicial notice of public matters, *id.* at *4 (stating that "[t]he Court ordinarily would not look beyond information presented by the parties to find that a claimant has Article III standing" but "[i]n this case . . . the ACLU's active participation in the legislative and public debates about the proper scope of Section 215 and the advisability of amending that provision is obvious from the public record and not reasonably in dispute"). The Court found that the ACLU and the ACLU-NC had standing but MFIAC did not, *id.* at *4, albeit the Court later reinstated MFIAC as a party upon granting MFIAC's motion seeking reconsideration of its standing on the strength of

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[5] *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007), also involved a motion filed by the ACLU seeking the release of court documents. In that case, part of which is discussed at length *infra* Part IV, the ACLU's standing was not addressed and the cited basis for the exercise of jurisdiction was the Court's inherent supervisory power over its own records and files. *Id.* at 486-87 (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)).

additional information regarding MFIAC's activities, Opinion & Order Granting Mot. for Recons., *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02 (Aug. 7, 2014), *available at* http://www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-6_0.pdf. The Court never reached the question of whether the First Amendment applied, however, and, instead, dismissed for comity the Movants' motion to the extent it sought opinions that were the subject of ongoing FOIA litigation in another federal jurisdiction. *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act*, 2013 WL 5460064, at *6-7. The Court then exercised its own discretion to initiate declassification review proceedings for a single opinion pursuant to Rule 62. *Id.* at *8.

Recognizing that the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* involved the same Movants asserting, in essence, the same type of legal claim, the question of standing nevertheless must be independently examined in this case because "[t]his court, as a matter of constitutional duty, must assure itself of its jurisdiction to act in every case." *CTS Corp. v. EPA*, 759 F.3d 52, 57 (D.C. Cir. 2014). Significantly, the decision in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act* is distinguishable because it did not reach the question of whether the First Amendment applied and, if not, whether the Movants could establish standing in the absence of an interest protected by the First Amendment. This case also is in a unique posture because the Movants seek access to judicial documents that already have been made public and declassified by the Executive Branch, unlike the documents sought in *In re Orders of This Court Interpreting Section 215 of the PATRIOT Act.* An independent assessment of standing also is warranted in light of Article III's necessary function to circumscribe the Federal Judiciary's exercise of power, *Spokeo*, 136 S. Ct. at 1547, and given

the "highly case-specific" nature of jurisdictional standing inquiries, *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003).

Embarking on an analysis of standing in this matter, the Court is mindful that, because "[s]tanding is an aspect of justiciability," "the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability." *Flast*, 392 U.S. at 98. Indeed, "[s]tanding has been called one of 'the most amorphous (concepts) in the entire domain of public law.'" *Id.* at 99 (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm.*, 89th Cong. 498 (2d Sess. 1966) (statement of Prof. Paul A. Freund)). The United States Court of Appeals for the Second Circuit has referred to standing as a "labyrinthine doctrine," *Fin. Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 146 (2d Cir. 1992), and even the Supreme Court has admitted that "'the concept of Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it," *Whitmore*, 495 U.S. at 155 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)).

Despite its nebulousness, there are several fundamental guideposts that offer direction and a general framework to evaluate standing in any given case. To begin with, while it has long been the rule that standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," it nonetheless "often turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. Supreme Court precedent "makes clear that Art. III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue[.]" *Diamond v. Charles*, 476 U.S. 54, 70 (1986) (citing *Valley Forge Christian Coll.*, 454 U.S. at 472). Thus, "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72,

77 (1991). "In essence, the standing question is determined by 'whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.'" *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014) (quoting *Warth*, 422 U.S. at 500). "[A]lthough standing is an anterior question of jurisdiction, the grist and elements of [the Court's] jurisdictional analysis require a peek at the substance of [the Movants'] arguments." *Transp. Workers Union of Am., AFL-CIO v. Transp. Sec. Admin.*, 492 F.3d 471, 474-75 (D.C. Cir. 2007).

It also is well established that the doctrine of standing consists of three elements, the first of which requires the Movants to show that they suffered an "injury in fact." *Lujan*, 504 U.S. at 560. The second element requires that the injury in fact be "fairly traceable" to the defending party's challenged conduct and the third element requires that there be a likelihood (versus mere speculation) that the injury will be redressed by a favorable judicial decision. *Id.*

II.

Recently, the Supreme Court emphasized that "injury in fact" is the "'[f]irst and foremost' of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). Importantly for the purpose of resolving the pending motion, the Supreme Court has "stressed that the alleged injury must be legally and judicially cognizable." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). "This requires, among other things, that the plaintiff have suffered an invasion of a *legally protected interest* which is . . . concrete and particularized, and that the dispute is traditionally thought to be capable of resolution through the judicial process[.]" *Id.* (internal quotation marks and citations omitted, emphasis added). "[A]n injury refers to the invasion of some 'legally protected interest' arising

from constitutional, statutory, or common law." *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 366 (4th Cir. 2015) (quoting *Lujan*, 504 U.S. at 578).

The meaning of the phrase "legally protected interest" has been a source of perplexity in the case law as a result, at least in part, of the Supreme Court's pronouncement that a party can have standing even if he loses on the merits. *See Warth*, 422 U.S. at 500 (stating that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"); *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172 (10th Cir. 2006) ("The term *legally protected interest* has generated some confusion because the Court has made clear that a plaintiff can have standing despite losing on the merits . . . ." (emphasis in original)); *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 363 (D.C. Cir. 2005) (Williams, J., concurring) (expressing "puzzlement" over the Supreme Court's use of the phrase "legally protected" as a "modifier" and examining the discordant state of the case law's treatment of the phrase); *United States v. Richardson*, 418 U.S. 166, 180-81 (1974) (Powell, J., concurring) (questioning the Supreme Court's approach in *Flast*, 392 U.S. at 99-101, on the ground that "[t]he opinion purports to separate the question of standing from the merits . . . yet it abruptly returns to the substantive issues raised by a plaintiff for the purpose of determining whether there is a logical nexus between the status asserted and the claim sought to be adjudicated" (internal quotation marks omitted)); *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 951 n.23 (9th Cir. 2013) ("The exact requirements for a 'legally protected interest' are far from clear."). The confusion is compounded by the fact that the Supreme Court has occasionally resorted to using the phrase "judicially cognizable interest" rather than, or interchangeably with, the phrase "legally protected interest." *Judicial Watch*, 432 F.3d at 364 (Williams, J., concurring) ("[T]he [Supreme] Court appears to use the 'legally protected' and 'judicially cognizable' language

interchangeably."); *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 959 (8th Cir. 2011) (citing *Lujan* for the proposition that "[a] 'legally protected interest' requires only a 'judicially cognizable interest'"); *Lujan*, 504 U.S. at 561-63, 575, 578 (initially stating that a plaintiff must have suffered "an invasion of a legally protected interest" to satisfy Article III but then reverting to use of the term "cognizable" to characterize the viability of that interest to establish standing); *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (stating that "standing requires: (1) that the plaintiff have suffered an 'injury in fact'—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"); *Warth*, 422 U.S. at 514 (referring to a "judicially cognizable injury" in the context of discussing the legality of Congress expanding by statute the interests that may establish standing). Adding to the uncertainty, in some cases the Supreme Court makes no mention whatsoever of the requirement that an injury entail the invasion of either a "legally protected" or "judicially cognizable" interest. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) ("To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) ("To ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.").

Deciphering the meaning of the phrase "legally protected interest" also is muddled by the varying approaches courts use to identify the relevant "interest" at stake. In at least one case the United States Court of Appeals for the Fourth Circuit suggested that the interest at issue could be

considered subjectively from the perspective of the party asserting standing. *Doe v. Pub. Citizen*, 749 F.3d 246, 262 (4th Cir. 2014) (intimating that litigants need only assert an interest that "in their view" was protected by the common law or the Constitution). Other courts focus objectively on whether the Constitution, a statute or the common law actually recognizes the asserted interest. *See, e.g., Sargeant v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997) (stating that "[a] legally cognizable interest means an interest recognized at common law or specifically recognized as such by the Congress").

Still other courts have examined whether the type or form of the injury is traditionally deemed to be a legal harm, such as an economic injury or an invasion of property rights, although such an inquiry can blend into the question of whether the injury is concrete and particularized. *See, e.g., Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (stating that "[m]onetary harm is a classic form of injury-in-fact" that "is often assumed without discussion" and an invasion of property rights, "whether it sounds in tort . . . or contract . . . undoubtedly 'affect[s] the plaintiff in a personal and individual way'" (quoting *Lujan*, 504 U.S. at 560 n.1)). At least one court has found standing by analogizing to interests that were never advanced by the party asserting standing.[6] *See In re Special Grand Jury 89-2*, 450 F.3d at

[6] It is unclear how this approach can be reconciled with the Supreme Court's admonitions that standing "is gauged by the specific common-law, statutory or constitutional claims *that a party presents*," *Int'l Primate Prot. League*, 500 U.S. at 77 (emphasis added), and a "federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing," *Whitmore*, 495 U.S. at 155-56. The Tenth Circuit opined that the Supreme Court's decision in *Bennett*, 520 U.S. at 167, presented a "new locution" according to which the substitution of the phrase "judicially cognizable interest" for "legally protected interest" signaled that the Supreme Court had abandoned *Lujan's* requirement of a "legally protected interest" in favor of a formulation that provides that "an interest can support standing even if it is not protected by law (at least, not protected in the particular case at issue) so long as it is the sort of interest that courts think to be of sufficient moment to justify judicial intervention." *In re Special Grand Jury 89-2*, 450 F.3d at 1172. The question of whether the Supreme Court intended to abandon the requirement for a "legally protected interest" seems to have been

1172-1173 (characterizing former grand jurors' requests to lift the secrecy obligation imposed by Rule 6(e) of the Federal Rules of Criminal Procedure as an interest in "stating what they know" that mirrors the First Amendment claims of litigants challenging speech restrictions and commenting that "there is no requirement that the legal basis for the interest of a plaintiff that is 'injured in fact' be the same as, or even related to, the legal basis for the plaintiff's claim, at least outside the taxpayer-standing context").

Although no universal definition of the phrase "legally protected interest" has been developed by the case law,[7] the Supreme Court and a majority of federal jurisdictions have concluded that an interest is not "legally protected" or cognizable for the purpose of establishing standing when its asserted legal source—whether constitutional, statutory, common law or

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resolved in the negative by the Supreme Court's decision in *Raines*, which was decided shortly after *Bennett* and was joined by Justice Antonin Scalia, the author of the Court's unanimous decision in *Bennett*. In *Raines*, as stated *supra*, the Supreme Court "stressed that the alleged injury must be legally and judicially cognizable" and went on to state that "[t]his requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is . . . concrete and particularized.'" 521 U.S. at 819 (quoting *Lujan*, 504 U.S. at 560). The Supreme Court's recent decision in *Spokeo* also employs the locution requiring that, "[t]o establish injury in fact, a plaintiff must show that he or she suffered '*an invasion of a legally protected interest*' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560) (emphasis added).

[7] The bewildering state of the law might explain in part why one commentator has referred to the "injury in fact" requirement as "a singularly unhelpful, even incoherent, addition to the law of standing," William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 231 (1988), and another has taken what the United States Court of Appeals for the Tenth Circuit described as the "somewhat cynical view" that "'[t]he only conclusion [regarding what injuries are sufficient for standing] is that in addition to injuries to common law, constitutional, and statutory rights, a plaintiff has standing if he or she asserts an injury that the Court deems sufficient for standing purposes.'" *In re Special Grand Jury 89-2*, 450 F.3d at 1172 (second alteration in original) (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.2 at 74 (4th ed.2003)).

otherwise—does not apply or does not exist. The United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit")[8] has offered the following explanation:

> Whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits. Otherwise, every unsuccessful plaintiff will have lacked standing in the first place. Thus, for example, one can have a legal interest in receiving government benefits and consequently standing to sue because of a refusal to grant them even though the court eventually rejects the claim. *See generally Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d 377 (1989) (plaintiffs had standing to bring suit under [Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. §§ 1-15] although claim failed). Indeed, in *Lujan* the Court characterized the "legally protected interest" element of an injury in fact simply as a "cognizable interest" and, without addressing whether the claimants had a statutory right to use or observe an animal species, concluded that the desire to do so "undeniably" was a cognizable interest. *Lujan*, 504 U.S. at 562–63, 112 S. Ct. at 2137–38.
>
> On the other hand, if the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue. *See, e.g., Arjay Assocs. v. Bush*, 891 F.2d 894, 898 (Fed. Cir. 1989) ("We hold that appellants lack standing because the injury they assert is to a nonexistent right . . . ."); *ACLU v. FCC*, 523 F.2d 1344, 1348 (9th Cir. 1975) ("If ACLU's claim is meritorious, standing exists; if not, standing not only fails but also ceases to be relevant."); *United Jewish Org. of Williamsburgh v. Wilson*, 510 F.2d 512, 521 (2d Cir. 1975) ("Whether our decision on this point is cast on the merits or as a matter of standing is probably immaterial."), *aff'd*, 430 U.S. 144, 97 S. Ct. 996, 51 L.Ed.2d 229 (1977).

Claybrook v. Slater, 111 F.3d 904, 907 (D.C. Cir. 1997). Furthermore, although the question of whether a litigant's interest is "legally protected" does not depend on the merits of the claim, it nevertheless is the case that "there are instances in which courts have examined the merits of the underlying claim and concluded that the plaintiffs lacked a legally protected interest and therefore lacked standing." *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1236 (10th Cir. 2004) (citing *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232, 1240–41 (D. Utah 2002) (discussing cases), *Claybrook*, 111 F.3d at 907, and *Arjay Assocs.*

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[8] For brevity and convenience, this opinion hereinafter will omit the phrase "United States Court of Appeals for the" from the identification of federal circuit courts of appeal.

Inc. v. Bush, 891 F.2d 894, 898 (Fed. Cir. 1989)). *Accord Martin v. S.E.C.*, 734 F.3d 169, 173 (2d Cir. 2013) (per curiam) (declining to reach the merits of a litigant's claims when standing was lacking "except to the extent that the merits overlap with the jurisdictional question").

In *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part on other grounds, Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court concluded that a group of litigants lacked Article III standing because their claims could not be deemed "legally cognizable" when the Court had never previously recognized the broadly-asserted interest and that interest was premised on a mistaken interpretation of inapplicable legal precedent. The litigants in *McConnell* consisted in part of a group of voters, organizations representing voters, and candidates who collectively challenged, among other things, the constitutionality of a particular section of the Bipartisan Campaign Reform Act of 2002 ("BCRA") that amended the Federal Election Campaign Act of 1971 ("FECA") by "increas[ing] and index[ing] for inflation certain FECA contribution limits." 540 U.S. at 226. As relevant here, the litigant group argued that, as a result of the amendments, they suffered an injury they identified as the deprivation of an "equal ability to participate in the election process based on their economic status." *Id.* at 227. The group asserted that this injury was legally cognizable according to voting-rights case law that they viewed as prohibiting "electoral discrimination based on economic status . . . and upholding the right to an equally meaningful vote." *Id.* (internal quotation marks omitted). The Supreme Court, however, disclaimed the notion that it had ever "recognized a legal right comparable to the broad and diffuse injury asserted by the . . . plaintiffs." *Id.* In addition, the group's "reliance on this Court's voting rights cases [was] misplaced" because those cases required only "nondiscriminatory access to the ballot and a single, equal vote for each voter" whereas the group had not claimed that they were denied such equal access or the right to vote. *Id.* The

Court further stated that it had previously "noted that '[p]olitical 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources,'" so the group's "claim of injury . . . is, therefore, not to a legally cognizable right." *Id.* (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

In *Bond v. Utreras*, 585 F.3d 1061, 1065-66 (7th Cir. 2009), the Seventh Circuit reviewed a district court order lifting a protective order and permitting a journalist to intervene in a civil rights case involving allegations that Chicago police officers mentally and physically abused a plaintiff while performing their official duties. The journalist sought to "unseal" police department records relating to citizen complaints against Chicago police officers that the city had produced during pretrial discovery but never filed with the court. *Id.* at 1066. The journalist claimed that no good cause existed to continue the protective order under Rule 26(c) of the Federal Rules of Civil Procedure. *Id.* at 1065. Several months after dismissing the underlying lawsuit, which had settled, *id.*, the district court "reevaluated whether 'good cause' existed to keep the documents confidential, and in so doing applied a 'presumption' of public access to discovery materials," *id.* at 1067. On balance, the district court concluded that the city's interest in keeping the records confidential was outweighed by the public's interest in information about police misconduct; as a result, the court granted the journalist's request to intervene and lifted the protective order. *Id.* On appeal by the city, the Seventh Circuit characterized as a "mistake" the district court's failure to consider whether the journalist had standing in view of the fact that the underlying lawsuit had been dismissed. *Id.* at 1068. The Seventh Circuit held that a third party seeking permissive intervention to challenge a protective order after a case has been dismissed "must meet the standing requirements of Article III in addition to Rule 24(b)'s requirements for permissive intervention." *Id.* at 1072. Discussing Article III's standing requirements, *id.* at

1072-73, the Seventh Circuit noted that, "while a litigant need not definitely 'establish that a right of his has been infringed,' he 'must have a colorable *claim* to such a right' to satisfy Article III," *id.* at 1073 (emphasis in original) (quoting *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1024 (7th Cir. 2006)). Because the district court's decision to lift the protective order was premised on a presumptive right of access to discovery materials, *id.* at 1067, the Seventh Circuit analyzed the legal basis of such a presumptive right and concluded that, while "most documents filed in court are presumptively open to the public," *id.* at 1073, it nevertheless is the case that "[g]enerally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access to *unfiled* discovery," *id.* at 1073 (emphasis in original). The Seventh Circuit also found no support for the notion that Rule 26(c) "creates a freestanding public right of access to unfiled discovery." *Id.* at 1076. It then proceeded to consider and reject whether, alternatively, the First Amendment supplied such a right. *Id.* at 1077-78. Lacking any legal basis to assert a right to unfiled discovery, the Seventh Circuit held that the journalist "has no injury to a legally protected interest and therefore no standing to support intervention." *Id.* at 1078.

Griswold v. Driscoll, 616 F.3d 53 (1st Cir. 2010), is another instructive case. The First Circuit held that litigants lacked a legally protected interest because the source of the interest, the First Amendment, did not apply. In *Griswold*, students, parents, teachers, and the Assembly of Turkish American Associations ("ATAA") collectively challenged a decision by the Commissioner of Elementary and Secondary Education of Massachusetts to revise a statutorily-mandated advisory curriculum guide. 616 F.3d at 54-56. The Commissioner's initial revisions were motivated by political pressure to assuage a Turkish cultural organization that objected to the curriculum guide's references to the Armenian genocide as biased for failing to acknowledge an opposing contra-genocide perspective. *Id.* at 54-55. After the revised curriculum guide was

submitted to legislative officials, the Commissioner again modified it – at the request of Armenian descendants – by removing references to all pro-Turkish websites (including websites that presented the contra-genocide perspective) except the Turkish Embassy's website. *Id.* at 55. The plaintiffs sued claiming that the revisions to the curriculum guide were made in violation of their rights under the First Amendment to "inquire, teach and learn free from viewpoint discrimination . . . and to speak." *Id.* at 56. In an opinion notable for its authorship by U.S. Supreme Court Associate Justice David Souter (Ret.), sitting by designation, the First Circuit affirmed the dismissal of the ATAA's First Amendment claim as time barred and then considered whether the remaining plaintiffs had standing to assert a First Amendment right. *Id.* Remarking that "we see this as a case in which the dispositive questions of standing and statement of cognizable claim are difficult to disentangle," the First Circuit found it "prudent to dispose of both standing and merits issues together." *Id.* The First Circuit then evaluated whether the challenged advisory curriculum guide was analogous to a virtual school library—in which case the revisions to the guide would be subject to First Amendment review pursuant to the plurality decision in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982)—or whether the guide was more properly characterized as an element of curriculum over which the State Board of Education may exercise discretion. *Id.* at 56-60. The First Circuit ultimately regarded the complaint as pleading "a curriculum guide claim that should be treated like one about a library, in which case pleading cognizable injury and stating a cognizable claim resist distinction." *Id.* at 56. Declining to extend "the *Pico* plurality's notion of non-interference with school libraries as a constitutional basis for limiting the discretion of state authorities to set curriculum," the First Circuit found that the guide was an element of curriculum, *id.* at 59, so that "revisions to the Guide after its submission to legislative officials,

even if made in response to political pressure, did not implicate the First Amendment," *id.* at 60. The First Circuit therefore affirmed the lower court's judgment that the First Amendment did not apply to the challenged curriculum guide and, as a result, the plaintiffs had failed to establish either a cognizable injury or a cognizable claim. *Id.* at 56, 60.

The D.C. Circuit's decision in *Claybrook*, cited *supra*, also lends authority to the proposition that a party lacks standing when the statutory, constitutional, common law or other source of the asserted legal interest does not apply or does not exist. *Claybrook* involved a lawsuit filed by Joan Claybrook, a co-chair of Citizens for Reliable and Safe Highways ("CRASH"), who sued the Administrator of the Federal Highway Administration ("FHWA") for failing to prevent an agency advisory committee from passing a resolution that criticized CRASH's fund-raising literature. 111 F.3d at 905, 906. Claybrook claimed that the Administrator violated the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. §§ 1-15, by permitting the advisory committee to vote on and pass the challenged resolution, which Claybrook claimed was not on the committee's agenda and not within the committee's authority. *Id.* at 906. The Administrator countered by arguing that Claybrook lacked standing "because the legal duty she claims he violated does not exist." *Id.* at 907. Upon analysis of the relevant provisions of FACA, 5 U.S.C. App. §§ 9(c)(B), 10(a)(1), 10(a)(2), 10(e), 10(f), the D.C. Circuit agreed that the Act did not impose the asserted legal duty that served as a basis for Claybrook's claimed injury, the agency otherwise complied with the Act, and the decision to adjourn the advisory committee meeting was committed to the agency's discretion pursuant to 5 U.S.C. § 701(a)(2). *Id.* at 907-909. Because FACA offered no recourse to Claybrook, the D.C. Circuit held that "[i]n sum, we are left with no law to apply to Claybrook's claim and consequently Claybrook lacks standing." *Id.* at 909.

The Ninth Circuit reached a similar result in *Fleck & Assocs., Inc. v. Phoenix, an Arizona Mun. Corp.*, 471 F.3d 1100 (9th Cir. 2006). The appellant in *Fleck & Assocs.* was a "for-profit corporation that operate[d] . . . a gay men's social club in Phoenix, Arizona" where "[s]exual activities [took] place in the dressing rooms and in other areas of the club." 471 F.3d at 1102. Pursuant to a Phoenix ordinance banning the operation of live sex act businesses, a social club operated by the appellant was subjected to a police search during which two employees were questioned and detained. *Id.* at 1102-1103. The appellant was also "threatened with similar actions." *Id.* at 1103. The appellant sued the city seeking both injunctive and declaratory relief on the ground that the ordinance violated its constitutional privacy rights. *Id.* at 1102. The district court interpreted the appellant's complaint to raise one claim based on the invasion of its customers' privacy rights and a second claim based on the invasion of the appellant's rights as a corporation. *Id.* at 1103. With respect to the claim based on the customers' privacy rights, the district court found that the appellant lacked standing to pursue that claim and, alternatively, the appellants' customers had no privacy rights in the social club so dismissal was further warranted for failure to state a claim for relief. *Id.* The district court held, however, that the appellant had standing to assert its own privacy rights as a corporation, albeit "[t]he court did not . . . identify what those corporate rights might have been" and "immediately proceeded to hold that [the appellant] lacked any cognizable privacy rights and dismissed for failure to state a claim." *Id.* On appeal, the Ninth Circuit agreed with the district court that the appellant lacked associational standing[9] to assert its customers' rights but held that the district court erred by addressing the merits of the customers' privacy rights in the social club when the court lacked subject matter

[9] "Under the doctrine of 'associational' or 'representational' standing an organization may bring suit on behalf of its members whether or not the organization itself has suffered an injury from the challenged action." *Id.* at 1105.

jurisdiction. *Id.* at 1103, 1105, 1106. Discussing the appellant's claim of "traditional" Article III standing based on its asserted privacy rights as a corporation, the Ninth Circuit noted that the appellant "squarely identifie[d] the source of its supposed right as the liberty guarantee described in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)." *Id.* at 1104. The Ninth Circuit determined, however, that no corporate right to privacy emanated from that case, *id.* at 1105, 1106, and, as a result, "[b]ecause the right to privacy described in *Lawrence* is purely personal and unavailable to a corporation, [the appellant corporation] failed to allege an injury in fact sufficient to make out a case or controversy under Article III," *id.* at 1105.

In *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam), the Second Circuit considered a prisoner's complaint challenging New York Election Law section 5–106 on the ground that it denied felons the right to vote in violation of section 2 of the Voting Rights Act "because it 'result[ed] in a denial or abridgement of the right . . . to vote on account of race.'" 449 F.3d at 374 (quoting 42 U.S.C. § 1973(a), transferred to 52 U.S.C. § 10301). Because the prisoner was a resident of California before he was incarcerated, *id.* at 374, and the Second Circuit concluded that "under New York law, [his] involuntary presence in a New York prison [did] not confer residency for purposes of registration and voting," *id.* at 376, the court found that "his inability to vote in New York arises from the fact that he was a resident of California, not because he was a convicted felon subject to the application of New York Election Law section 5–106," *id.* As a result, the Second Circuit held that that the prisoner "suffered no 'invasion of a legally protected interest.'" *Id.* (quoting *Lujan*, 504 U.S. at 560).

Other federal circuits similarly have concluded that, when the source of the legal interest asserted by a litigant does not apply or does not exist, the litigant has not established a colorable claim to a right that is "legally protected" or "cognizable" for the purpose of establishing an

injury in fact that satisfies Article III's standing requirement. *See, e.g., 24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 633 (4th Cir. 2016) (finding that "[b]ecause neither Virginia law nor the Plan [of Organization that governs the Republican Party of Virginia] gives [the litigant] 'a legally protected interest' in determining the nomination method in the first place, he fails to make out 'an *invasion* of a legally protected interest,' i.e. actual injury, in this case" (quoting *Lujan*, 504 U.S. at 560) (emphasis in original)); *Spirit Lake Tribe of Indians ex rel. Comm. of Understanding and Respect v. Nat'l Collegiate Athletic Ass'n*, 715 F.3d 1089, 1092 (8th Cir. 2013) (noting that injury resulting from a college ceasing to use a Native American name, "even if . . . sufficiently concrete and particularized . . . does not result from the invasion of a legally protected interest"); *White v. United States*, 601 F.3d 545, 555 (6th Cir. 2010) (stating that the plaintiffs "must demonstrate an injury-in-fact to a legally protected interest" but failed to do so because "none of the purported 'constitutional' injuries actually implicates the Constitution"); *Pichler v. UNITE*, 542 F.3d 380, 390-92 (3d Cir. 2008) (affirming dismissal on the ground that litigants failed to establish an injury to a "legally protected interest" because the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725, was interpreted to apply only to an individual whose personal information was contained in a motor vehicle record and not to spouses who might share that same personal information but were not the subject of the motor vehicle record); *Bochese*, 405 F.3d at 984 (litigant was not an intended beneficiary of a contract amendment so he "had no 'legally cognizable interest' in that agreement and therefore lack[ed] standing to challenge its rescission"); *Aiken v. Hackett*, 281 F.3d 516, 519-20 (6th Cir. 2002) (appellants who claimed they were denied a benefit in violation of the Equal Protection Clause but did not allege that they would have received the benefit under a race-neutral policy lacked standing because they "failed to allege the invasion of a right that the law

protects"); *Arjay Assocs.*, 891 F.2d at 898 (stating that "[b]ecause appellants have no right to conduct foreign commerce in products excluded by Congress, they have in this case no right capable of judicial enforcement and have thus suffered no injury capable of judicial redress").

III.

Several considerations favor the above-described understanding of the injury in fact requirement, the first of which is its inherent logic. For an interest to be deemed "legally" protected or cognizable it must have some foundation in the law. *Claybrook*, 111 F.3d at 907 (stating, as quoted above, that "if the plaintiff's claim has no foundation in the law, he has no legally protected interest"). Thus, if the interest underlying a litigant's claimed injury is premised on a law that does not apply or does not exist, it directly follows that the litigant does not possess an interest that is "legally protected." *Cf. Pender*, 788 F.3d at 366 (indicating that a legally protected interest "aris[es] from constitutional, statutory, or common law" (citing *Lujan*, 504 U.S. at 578)).

Another consideration is the degree to which the approach taken by the majority of jurisdictions remains faithful to the proper role of standing as an element of Article III's constitutional limit on the exercise of judicial power. As the Supreme Court has said, "the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies'" and the Court "ha[s] always taken this to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. "Such a meaning is fairly implied by the text, since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all." *Id.* Declining to exercise jurisdiction to entertain a litigant's claim for which no law can be properly invoked and, as a result, no legally protected interest can be said to have been wrongfully invaded, comports with standing's role as a limitation on judicial power. A contrary approach to standing would effect an expansion of

judicial power without due regard for the autonomy of co-equal branches of government or the way in which the exercise of judicial power "can so profoundly affect the lives, liberty, and property of those to whom it extends," *Valley Forge Christian Coll.*, 454 U.S at 473.[10]

Most importantly, this matter poses separation-of-powers concerns. The Supreme Court has observed that the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819-20. The Movants bring a constitutional claim that implicates the authorities of co-equal branches of the government. First, the decisions the Movants seek have been classified by the Executive Branch in accordance with its constitutional authorities and the portions of the opinions that the Executive Branch has declassified have already been released. The Supreme Court has stressed that "[t]he President, after all, is the 'Commander in Chief of the Army and Navy of the United States'" and "[h]is authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Accordingly, "[f]or 'reasons . . . too obvious to call for enlarged discussion,' *CIA v. Sims*, 471 U.S. 159, 170, 105 S.Ct. 1881, 1888, 85 L.Ed.2d 173 (1985), the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *Egan*, 484 U.S. at 529.

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[10] Some might object that litigants should have an opportunity to develop the facts before a court assesses the scope or applicability of an asserted right. *E.g.*, *Judicial Watch*, 432 F.3d at 363 (Williams, J., concurring) (stating that "the use of the phrase 'legally protected' to require showing of a substantive right would thwart a major function of standing doctrine—to avoid premature judicial involvement in resolution of issues on the merits"). This case does not implicate those concerns. No amount of factual development would alter the outcome of the question of whether the First Amendment applies and affords a qualified right of access to classified, ex parte FISA proceedings.

"[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* In this case, the Movants seek access to information contained in this Court's opinions that the Executive Branch has determined is classified national security information.

Second, in the exercise of its constitutional authorities to make laws, *see United States v. Kebodeaux*, 133 S. Ct. 2496, 2502 (2013) (discussing Congress's broad authority to make laws pursuant to the Constitution's Necessary and Proper Clause), Congress has directed by statute that "[t]he record of proceedings under [FISA], including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence," 50 U.S.C. § 1803(c). While Congress has also established means by which certain opinions of this Court are to be subject to a declassification review and made public, it has made Executive Branch officials acting independently of the Court responsible for these actions. *See infra* Part V.

To be clear, the classified material the Movants' seek is not subject to sealing orders entered by this Court. *See* Movants' Reply In Supp. of Their Mot. for Release of Ct. Records 16 (requesting that the Court "unseal" the judicial opinions and release them "with only those redactions essential to protect information that the Court determines, after independent review, to warrant continued sealing"). No such orders were imposed in the cases in which the sought-after judicial opinions were issued; consequently, no question about the propriety of a sealing order is at play in this matter. The entirety of the information sought by the Movants is classified information redacted from public FISC opinions that is being withheld by the Executive Branch pursuant to its independent classification authorities and remains subject to the statutory mandate that the FISC maintain its records under the aforementioned security procedures. Adjudication

of the Movants' motion could therefore require the Court to delve into questions about the constitutionality, pursuant to the First Amendment, of the Executive Branch's national security classification decisions or the scope and constitutional validity of the statute's mandate that this Court maintain material under the required security procedures.

Together, these considerations commend the path paved by the majority of jurisdictions, which have held that an interest is not "legally protected" for the purpose of establishing standing when the constitutional, statutory or common-law source of the interest does not apply or does not exist. It bears emphasizing that the only interest the Movants identify to establish standing in this case is a qualified right to access judicial opinions. Mot. for Release of Ct. Records 1, 2, 10. The Movants claim that this interest is legally protected by the First Amendment. *Id.* at 10. The Movants further assert that this legally protected interest—that is, the qualified right to access judicial documents as protected by the First Amendment—was invaded when they were denied access to this Court's judicial opinions addressing the legality of bulk data collection, thereby causing injury. *Id.* Accordingly, the question for the Court is whether the First Amendment applies.

IV.

Access to judicial records is not expressly contemplated by the First Amendment, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I. The Supreme Court, however, has inferred that, in conjunction with the Fourteenth Amendment, "[t]hese expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion). The Supreme Court has further explained that "[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to these explicit guarantees" and "[w]hat this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id.*

In *Richmond Newspapers*, the Supreme Court "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials." *Globe Newspaper Co v. Superior Court*, 457 U.S. 596, 603 (1982). The Supreme Court has advised, however, that, "[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute," *id.* at 607, but "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," *Press-Enter. Co. v. Superior Court,* 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). The Supreme Court has extended this qualified First Amendment right of public access only to

criminal trials, *Richmond Newspapers*, 448 U.S. at 580, the voir dire examination of jurors in a criminal trial, *Press-Enterprise I*, 464 U.S. at 508-13, and criminal preliminary hearings "as they are conducted in California," *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"). Most circuit courts, though, "have recognized that the First Amendment right of access extends to civil trials and some civil filings." *ACLU v. Holder*, 673 F.3d 245, 252 (4th Cir. 2011). To date, however, the Supreme Court has never "applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings or the transcripts of such proceedings." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003). Nor has "the Supreme Court . . . ever *indicated* that it would apply the *Richmond Newspapers* test to anything other than criminal judicial proceedings." *Id.* (emphasis in original).

"In *Press–Enterprise II*, the Supreme Court first articulated what has come to be known as the *Richmond Newspapers* 'experience and logic' test, by which the Court determines whether the public has a right of access to 'criminal proceedings.'"[11] *Id.* at 934. The "experience" test questions "whether the place and process have historically been open to the press and general public." *Press-Enterprise II*, 478 U.S. at 8. The "logic" test asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

This is not the first occasion on which the Court has confronted the question of whether a qualified First Amendment right of access applies to this Court's judicial records. Nearly a decade ago, the ACLU sought by motion the release of this Court's "orders and government

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[11] In addition to the *Richmond Newspapers* "experience and logic" tests, the Second Circuit has also "endorsed" a "second approach" that holds that "the First Amendment protects access to judicial records that are 'derived from or a necessary corollary of the capacity to attend the relevant proceedings.'" *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004)).

pleadings regarding a program of surveillance of suspected international terrorists by the National Security Agency (NSA) that had previously been conducted without court authorization." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 485. Assuming, for the sake of argument, that a qualified First Amendment right of access might extend to judicial proceedings other than criminal proceedings, the Court applied the requisite "experience" and "logic" tests acknowledged by the Supreme Court in *Press-Enterprise II* to determine whether such a right attached to the FISA electronic surveillance proceedings in which the sought-after orders and pleadings were filed. *Id.* at 491-97.

Considering the "experience" test first, the Court in *In re Motion for Release of Court Records* noted that "[t]he FISC ha[d] no . . . tradition of openness"; it "ha[d] never held a public hearing in its history"; a "total of two opinions ha[d] been released to the public in nearly three decades of operation"; the Court "ha[d] issued literally thousands of classified orders to which the public has had no access"; there was "no tradition of public access to government briefing materials filed with the FISC" or FISC orders; and the publication of two opinions of broad legal significance failed to establish a tradition of public access given the fact that "the FISC ha[d] . . . issued other legally significant decisions that remain classified and ha[d] not been released to the public . . . ." 526 F. Supp. 2d at 492-93. Accordingly, the Court determined that "the FISC is not a court whose place or process has historically been open to the public" and the "experience" test was not satisfied. *Id.* at 493.

As far as the "logic" test was concerned, although the Court in *In re Motion for Release of Court Records* agreed that public access might result in a more informed understanding of the Court's decision-making process, provide a check against "mistakes, overreaching or abuse," and benefit public debate, *id.* at 494, it found that "the detrimental consequences of broad public

access to FISC proceedings or records would greatly outweigh any such benefits" and would actually imperil the functioning of the proceedings:

> The identification of targets and methods of surveillance would permit adversaries to evade surveillance, conceal their activities, and possibly mislead investigators through false information. Public identification of targets, and those in communication with them, would also likely result in harassment of, or more grievous injury to, persons who might be exonerated after full investigation. Disclosures about confidential sources of information would chill current and potential sources from providing information, and might put some in personal jeopardy. Disclosure of some forms of intelligence gathering could harm national security in other ways, such as damaging relations with foreign governments.

Id. The Court cautioned that "[a]ll these possible harms are real and significant, and, quite frankly, beyond debate," *id.*, and "the national security context applicable here makes these detrimental consequences even more weighty," *id.* at 495. In addition, after rejecting the ACLU's argument that the Court should conduct an independent review of the Executive Branch's classification decisions under a non-deferential standard, the Court identified numerous ways that "the proper functioning of the FISA process would be adversely affected if submitting sensitive information to the FISC could subject the Executive Branch's classification [decisions] to a heightened form of judicial review":

> The greater risk of declassification and disclosure over Executive Branch objections would chill the government's interactions with the Court. That chilling effect could damage national security interests, if, for example, the government opted to forgo surveillance or search of legitimate targets in order to retain control of sensitive information that a FISA application would contain. Moreover, government officials might choose to conduct a search or surveillance without FISC approval where the need for such approval is unclear; creating such an incentive for government officials to avoid judicial review is not preferable. *See Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (noting strong Fourth Amendment preference for searches conducted pursuant to a warrant and adopting a standard of review that would provide an incentive for law enforcement to seek warrants). Finally, in cases that are submitted, the free flow of information to the FISC that is needed for an ex parte proceeding to result in sound decision[-]making and effective oversight could also be threatened.

Id. at 496. Finding that the weight of all these harms counseled against public access, the Court adopted the reasoning of other courts that "have found that there is no First Amendment right of access where disclosure would result in a diminished flow of information, to the detriment of the process in question," *id.*, and remarked that this reasoning "compels the conclusion that the 'logic test' . . . is not satisfied here," *id.* at 497.

Because both the "experience" and "logic" tests were "unsatisfied," the Court concluded that "there [was] no First Amendment right of access to the requested materials." *Id.* The Court also declined to exercise its own discretion to "undertake the searching review of the Executive Branch's classification decisions requested by the ACLU, because of the serious negative consequences that might ensue . . . ." *Id.* The Court noted, however, that "[o]f course, nothing in this decision forecloses the ACLU from pursuing whatever remedies may be available to it in a district court through a FOIA request addressed to the Executive Branch." *Id.*

In the motion that is now pending, the Movants acknowledge the decision in *In re Motion for Release of Court Records* but argue that the decision erred by (1) "limiting its analysis to whether two previously published opinions of this Court 'establish a tradition of public access'" and (2) "concluding that public access would 'result in a diminished flow of information, to the detriment of the process in question.'" Mot. for Release of Ct. Records 21 (quoting *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 493, 496). Taking these two arguments in order, the first argument is premised on a misreading of the Court's analysis and an overly broad framing of the legal question. While examining the experience prong of *Richmond Newspapers*, the Court did not "limit" its analysis to two previously-published opinions; to the contrary, the Court made clear that its rationale for holding that there was no tradition of public access to FISC electronic surveillance proceedings was demonstrated by, as stated above, the lack of any

public hearing in the (at that point) approximately 30 years in which the FISC had been operating and the fact that, with *the exception of* only two published opinions, the entirety of the court's proceedings, which consisted of the issuance of thousands of judicial orders, was classified and unavailable to the public. *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 492. In other words, at that time, a minimum of 99.98% of FISC proceedings was classified and nonpublic. It would be an understatement to say that such a percentage reflected a tradition of no public access. Indeed, the Court found that "the ACLU's First Amendment claim runs counter to a long-established and virtually unbroken practice of excluding the public from FISA applications and orders . . . ." *Id.* at 493.

The Movants gain no traction challenging *In re Motion for Release of Court Records* by suggesting that the framing of the "experience" test should be enlarged to posit whether public access historically has been available to any "judicial opinions interpreting the meaning and constitutionality of public statutes," Mot. for Release of Ct. Records 14, rather than focusing on whether *FISC proceedings* historically have been accessible to the public. Such an expansive framing of the type or kind of document or proceeding at issue plainly would sweep too broadly because it would encompass grand jury opinions, which often interpret the meaning and constitutionality of public statutes but arise from grand jury proceedings, which are a "paradigmatic example" of proceedings to which no right of public access applies, *In re Boston Herald, Inc.*, 321 F.3d 174, 183 (1st Cir. 2003) (quoting *Press-Enterprise II*, 478 U.S. at 9), and a "classic example" of a judicial process that depends on secrecy to function properly, *Press-Enter. II*, 478 U.S. at 9. As demonstrated by the decision in *Press-Enterprise II*, the Supreme Court certainly contemplated the consideration of narrower subsets of legal documents and proceedings in light of the fact that it entertained the question of whether the First Amendment

right of access applied to a subset of judicial hearing transcripts—i.e., "the transcript of a preliminary hearing growing out of a criminal prosecution," 478 U.S. at 3—and never intimated that its analysis should (or could) extend to transcripts of *all* judicial hearings growing out of a criminal prosecution. Furthermore, to the extent the Movants take issue with the Court's formulation of the "experience" test on the ground that it focused too narrowly on FISC practices, Mot. for Release of Ct. Records 21 (arguing that the experience test "does not look to the particular practice of any one jurisdiction"), the fact of the matter is that FISA mandates that the FISC "shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States," 50 U.S.C. § 1803(a)(1), so the FISC's virtually-exclusive[12] jurisdiction over such proceedings is a construct of Congress and, thereby, the American people.[13] The Movants offer no authority to support a suggestion that the concentration of FISC proceedings in one judicial forum detracts from the legitimacy or correctness of applying the "experience" test to FISC proceedings rather than a broader range of proceedings. Accordingly, *In re Motion for Release of Court Records* properly framed the "experience" test to examine whether FISC proceedings—proceedings that relate to applications made by the Executive Branch for the issuance of court orders approving authorities covered exclusively by FISA—have historically been open to the press and general public.

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[12] *See* 50 U.S.C. §§ 1803(a), 1823(a), 1842(b)(1), 1861(b)(1)(A), 1881b(a), 1881c(a)(1). Although applications seeking pen registers, trap-and-trace devices, or certain business records for foreign intelligence purposes may be submitted by the government to a United States Magistrate Judge who has been publicly designated by the Chief Justice of the United States to have the power to hear such applications, FISA makes clear that the United States Magistrate Judge will be acting "on behalf of" a judge of the FISC. 50 U.S.C. §§ 1842(b)(2), 1861(b)(1)(B). In practice, no United States Magistrate Judge has been designated to entertain such applications.

[13] Although FISC proceedings occur in a single judicial forum, the district court judges designated to comprise the FISC are from at least seven of the United States judicial circuits across the country. 50 U.S.C. § 1803(a)(1).

Attending to the "logic" prong of the constitutional analysis, the Movants argue that the Court "erred in concluding that public access would 'result in a diminished flow of information, to the detriment of the process in question.'" Mot. for Release of Ct. Records 21 (quoting *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 496). The Movants neglect, however, to explain why they believe this conclusion was flawed; nor do they otherwise refute the Court's identification of the detrimental effects that could cause a diminished flow of information as a result of public access, *see In re Motion for Release of Court Records*, 526 F. Supp. 2d at 494-96. Instead, the Movants offer the conclusory statement that "disclosure of the requested opinions would serve weighty democratic interests by informing the governed about the meaning of public laws enacted on their behalf." Mot. for Release of Ct. Records 21. While it undoubtedly is the case that access to judicial proceedings and opinions plays an important, if not imperative, role in furthering the public's understanding about the meaning of public laws, the Movants cannot ignore the Supreme Court's instruction that, "[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Press-Enter. II*, 478 U.S. at 8-9. *In re Motion for Release of Court Records* identified detrimental consequences that could be anticipated if the public had access to open FISC proceedings, some of which the Court noted were "comparable to those relied on by courts in finding that the 'logic' requirement for a First Amendment right of access was not satisfied regarding various types of proceedings and records" and the others were described as "distinctive to FISA's national security context." 526 F. Supp. 2d at 494. These detrimental consequences, which are quoted above, were deemed to outweigh any benefits public access would add to the functioning of such proceedings, *id.*, and the Court emphasized that "the national security

context applicable here makes these detrimental consequences even more weighty," *id.* at 495. Because the Movants made no attempt to dispute or discredit these detrimental effects, the resulting diminished flow of information that public access would have on the functioning of FISC proceedings, or the weight the Court gave to the detrimental effects, this Court is left to view their argument as simply a generalized assertion that they disagree with *In re Motion for Release of Court Records.*[14] That disagreement being duly noted, the Movants have not made a persuasive case that the result was wrong. Consequently, this Court has no basis to disclaim the conclusion in *In re Motion for Release of Court Records* that the 'logic' test was "not satisfied[,]" *id.* at 497, and, indeed, agrees with it.

Although the records to which the ACLU sought access in *In re Motion for Release of Court Records* implicated only electronic surveillance proceedings pursuant to 50 U.S.C. §§ 1804-1805, *id.* at 486, the analysis applying *Richmond Newspapers'* "experience" and "logic" tests involved reasoning that more broadly concerned all classified, ex parte FISC proceedings regardless of statutory section. *Id.* 491-97. Notwithstanding the passage of time, that analysis retains its force and relevance.[15] The Court also sees no meaningful difference between the

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[14] The Movants specify four ways public access to FISC judicial opinions is "important to the functioning of the FISA system," Mot. for Release of Ct. Records 17-20; however, the Movants never discuss these benefits vis-à-vis the detrimental effects identified by *In re Motion for Release of Court Records.*

[15] Although there have been several public proceedings since *In re Motion for Release of Court Records* was decided, *see, e.g.*, Misc. Nos. 13-01 through 13-09, *available at* http://www.fisc.uscourts.gov/public-filings, the statistical significance of those public proceedings makes no material difference to the question of whether FISA proceedings historically have been open to the public, especially when considered in light of the many thousands more classified and ex parte proceedings that have occurred since that case was concluded. Furthermore, by and large, those public proceedings have been in the nature of this one whereby, in the wake of the unauthorized disclosures about NSA programs, private parties moved the Court for access to judicial records or for greater transparency about the number of orders issued by the FISC to providers. They are therefore distinguishable from the type of

application of the "experience" and "logic" tests to FISC proceedings versus the application of these tests to sealed wiretap applications pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20. Like FISC proceedings, Title III wiretap applications are "subject to a statutory presumption *against* disclosure,"[16] "have not historically been open to the press and general public," and are not subject to a qualified First Amendment right of access, *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) (emphasis in original). Accordingly, persuaded by *In re Motion for Release of Court Records*, this Court adopts its analysis and, for the reasons stated therein, as well as those discussed above, holds that a First Amendment qualified right of access does not apply to the FISC proceedings that resulted in the issuance of the judicial opinions the Movants now seek, which consist of proceedings pursuant to 50 U.S.C. § 1842 (pen registers and trap and trace devices for foreign intelligence and international terrorism investigations) and 50 U.S.C. § 1861 (access to certain business records for foreign intelligence and international terrorism investigations).

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proceedings relevant to the instant motion and to *In re Motion for Release of Court Records*, namely ex parte proceedings involving classified government requests for authority to conduct electronic surveillance or other forms of intelligence collection.

[16] Title III mandates that wiretap "[a]pplications made and orders granted under this chapter shall be sealed by the judge." 18 U.S.C. § 2518(8)(b). As discussed *supra*, FISA mandates that "[t]he record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence." 50 U.S.C. § 1803(c).

V.

As already noted, the only law the Movants cite as the source for their claimed right of public access to FISC judicial opinions is the First Amendment. If any other legal bases existed to secure constitutional standing for these Movants, they were obligated to present them. Because the First Amendment qualified right of access does not apply to the FISC proceedings at issue in this matter, the Movants have no legally protected interest and cannot show that they suffered an injury in fact for the purpose of meeting their burden to establish standing under Article III.[17]

To be sure, the Court does not reach this result lightly. However, application of the Supreme Court's test to determine whether a First Amendment qualified right of access attaches to the FISC proceedings at issue in this matter leads to the conclusion that it does not. Absent some other legal basis to establish standing, this means the Court has no jurisdiction to consider causes of action such as this one whereby individuals and organizations who are not parties to FISC proceedings seek access to classified judicial records that relate to electronic surveillance, business records or pen register and trap-and-trace device proceedings. Notably, the D.C. Circuit has advised that "[e]ven if holding that [the litigant] lacks standing meant that no one could initiate" the cause of action at issue "it would not follow that [the litigant] (or anyone else) must have standing after all. Rather, in such circumstance we would infer that 'the subject matter is committed to the surveillance of Congress, and ultimately to the political process.'" *Sargeant*,

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[17] The Court's decision involves scrutiny of whether the First Amendment qualified right of access applies, but only as part of the assessment of whether the Movants have standing under Article III. Because they do not, the Court dismisses their Motion for lack of jurisdiction without, strictly speaking, ruling on the merits of their asserted cause of action. Moreover, in the absence of jurisdiction, the Court may not consider any other legal arguments or requests for relief that were advanced in the motion.

130 F.3d at 1070 (quoting *Richardson*, 418 U.S. at 179). Indeed, "[t]he assumption that if [the litigants] have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

Evidence that public access to opinions arising from classified, ex parte FISC proceedings is best committed to the political process is demonstrated by Congress's enactment of the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 ("USA FREEDOM Act of 2015"), Pub. L. 114-23, 129 Stat. 268 (2015), which, after considerable public debate, made substantial amendments to FISA. One such amendment, which is found in § 402 of the USA FREEDOM Act and codified at 50 U.S.C. § 1872(a), added an entirely new provision for the public disclosure of certain FISC judicial opinions. Consequently, FISA now states that "the Director of National Intelligence, in consultation with the Attorney General, shall conduct a declassification review of each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court . . . that includes a significant construction or interpretation of any provision of law, including any novel or significant construction or interpretation of the term 'specific selection term', and, consistent with that review, make publicly available to the greatest extent practicable each such decision, order, or opinion." 50 U.S.C. § 1872(a). Although the Movants characterize the enactment of this provision of the USA FREEDOM Act as evidence that "favors disclosure of FISC opinions" and bolsters their argument that "public access would improve the functioning of the process in question," Notice of Supplemental Authority 2 (Dec. 4, 2015), the Court does not believe that this provision alters the First Amendment analysis. FISC proceedings of the type at issue historically have not been, nor presently will be, open to the press and general public given that no amendment to FISA altered the statutory mandate for such proceedings to occur ex parte and

pursuant to the aforementioned security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence. Furthermore, although Congress had the opportunity to do so, it made no amendment to FISA that established a procedure by which the public could seek or obtain access to FISC records directly from the Court. Rather, after informed debate, Congress deemed public access as contemplated by 50 U.S.C. § 1872(a) to be the means that, all things considered, best served the totality of the American people's interests. Accordingly, the USA FREEDOM Act enhances public access to significant FISC decisions, as provided by § 1872(a), and ensures that the public will have a more informed understanding about how FISA is being construed and implemented, which appears to be at the heart of the Movants' interest. Mot. for Release of Ct. Records 2 (stating that "Movants' current request for access to opinions of this Court evaluating the legality of bulk collection seeks to vindicate the public's overriding interest in understanding how a far-reaching federal statute is being construed and implemented, and how constitutional privacy protections are being enforced").

CONCLUSION

For the foregoing reasons, the Court will dismiss for lack of jurisdiction the pending MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE MEDIA FREEDOM AND INFORMATION ACCESS CLINIC FOR THE RELEASE OF COURT RECORDS. A separate order will accompany this Opinion.

January 25th, 2017

Rosemary M Collyer

ROSEMARY M. COLLYER
Presiding Judge, United States Foreign Intelligence Surveillance Court

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE OPINIONS & ORDERS OF THIS COURT ADDRESSING BULK COLLECTION OF DATA UNDER THE FOREIGN INTELLIGENCE SURVEILLANCE ACT.	Docket No. Misc. 13-08

ORDER

For the reasons set forth in the accompanying Opinion, it hereby is **ORDERED** that the MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE MEDIA FREEDOM AND INFORMATION ACCESS CLINIC FOR THE RELEASE OF COURT RECORDS is **DISMISSED** for lack of jurisdiction.

SO ORDERED.

January 25th, 2017

Rosemary M Collyer

ROSEMARY M. COLLYER
Presiding Judge, United States Foreign
Intelligence Surveillance Court