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 13-158[1]

THE UNITED STATES' RESPONSE TO THE MOTION TO ESTABLISH A PUBLIC BRIEFING SCHEDULE INCLUDING THE FILINGS OF BRIEFS BY *AMICI CURIAE*, FOR LEAVE FOR THE CENTER FOR NATIONAL SECURITY STUDIES TO FILE AN *AMICUS CURIAE* BRIEF, AND A SUGGESTION FOR HEARING *EN BANC*

This Court has the inherent power to authorize an *amicus curiae* to submit a brief on an issue of law, if the Court determines that this would assist the Court. Thus, the Court has discretion to accept an *amicus* brief from the Center for National Security Studies setting forth the Center's arguments as to "why [it believes that] section 501 of the Foreign Intelligence Surveillance Act [FISA], 50 U.S.C. § 1861, does not authorize" bulk telephone metadata collection, Mot. 1.

The Center's motion should be denied, however, to the extent the motion goes beyond seeking participation as *amicus curiae* and seeks relief that would undermine the carefully structured statutory provisions setting out the *ex parte* and classified nature of FISA proceedings. First, the Court should not consider the Center's request for "reconsideration" of this Court's

[1] The Center for National Security Studies filed its motion in "Docket No. BR 13-109 (or successor docket)." In its briefing Order, the Court ruled that "[t]he Motion is deemed to have been filed in Docket No. BR 13-158, which is the 'successor docket' to Docket No. BR 13-109." The Government respectfully submits that this matter belongs in neither of these business records dockets, but rather in a separate miscellaneous docket. *See infra* note 4. Such a docket could then be made publicly available on the Court's public website.

previously entered *ex parte* order. *See* Mot. 3. An *amicus* (or putative *amicus*) has no standing to move for reconsideration of a decision. Second, the Court should not open or disclose to the Center or the public any past or future business records dockets, as this would be inconsistent with FISA, nor should it permit the Center or other outside entities to participate in these proceedings as parties. Finally, there is no reason for the Court to sit *en banc* at this time.

BACKGROUND

I. Statutory Background

Section 501 of FISA, as amended by Section 215 of the USA PATRIOT Act in 2001, permits the Federal Bureau of Investigation (FBI) to apply to this Court "for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation . . . to protect against international terrorism." 50 U.S.C. § 1861(a). Such an application must comply with certain enumerated requirements, including that it contain "a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." 50 U.S.C. § 1861(b)(2)(A). If the application meets the statutory requirements, FISA requires that the Court "shall enter an *ex parte* order as requested, or as modified, approving the release of tangible things." 50 U.S.C. § 1861(c)(1). As in all matters before this Court, FISA directs that proceedings be "conducted as expeditiously as possible," with records "maintained under [appropriate] security measures." 50 U.S.C. § 1803(c).

Both FBI applications and Court orders pursuant to Section 1861 are subject to a broad non-disclosure obligation. Specifically, FISA provides that "[n]o person shall disclose to any other person that the [FBI] has sought or obtained tangible things pursuant to an order under this

section, other than to" (1) persons to whom disclosure is necessary for compliance, (2) an attorney consulted for legal advice or assistance with respect to the production orders, or (3) other persons as permitted by the FBI. 50 U.S.C. § 1861(d)(1). FISA permits the recipient of an order to challenge the legality of the order in this Court. 50 U.S.C. § 1861(f). FISA does not provide for any other person to challenge a Section 1861 order, and unlike several other FISA provisions, Congress did not provide a suppression remedy for business records obtained under section 1861. *Compare* 50 U.S.C. § 1861 *with* 50 U.S.C. §§ 1806(e), 1825(f), 1845(e), 1881e.

II. Previous Third-Party Requests To File Briefs in *Ex Parte* FISA Proceedings

There have been at least two previous instances in which third parties have sought to file *amicus* briefs in *ex parte* FISA proceedings. In *In re: Sealed Case*, the Government appealed an adverse ruling from this Court in a proceeding brought by the Government pursuant to Title I of FISA, which, like Section 1861, requires proceedings to be *ex parte*. 50 U.S.C. § 1805 (containing an *ex parte* requirement similar to that of Section 1861). The Government's appeal raised an issue of statutory interpretation that had broad legal significance to the Government's foreign intelligence programs. At the *ex parte* hearing before the Foreign Intelligence Surveillance Court of Review, the Government did not object to the Court receiving *amicus* briefs.[2]

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[2] JUDGE SILBERMAN: [W]e expect to get some *amicus* briefs. Do you have a view [as to] what we should do with *amicus* briefs?

SOLICITOR GENERAL OLSON: Our position is we have no objection to the Court receiving *amicus* briefs. In fact, I think it's probably good that the Court receive *amicus* briefs.

JUDGE SILBERMAN: That sets a precedent for this process which worries me a little bit.

Ultimately, the Court of Review agreed, accepting two *amicus* briefs and giving the Government an opportunity to reply. *See In re Sealed Case*, 310 F.3d 717, 719 (For. Intel. Surveillance Ct. Rev. 2002) ("Since the government is the only party to FISA proceedings, we have accepted briefs filed by the American Civil Liberties Union (ACLU) and the National Association of Criminal Defense Lawyers (NACDL) as *amici curiae*.") (footnote omitted).

In contrast, in 2008, the ACLU sought not merely to file an *amicus* brief, but also to participate broadly in proceedings brought by the Government pursuant to the FISA Amendments Act, 50 U.S.C. § 1881a, *et seq*. Specifically, the ACLU requested:

> (i) that it be notified of the caption and briefing schedule for any proceedings under section 702(i) in which this Court will consider legal questions relating to the scope, meaning, and constitutionality of the FISA Amendments Act;
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> (ii) that, in connection with such proceedings, the Court require the government to file public versions of its legal briefs, with only those redactions necessary to protect information that is properly classified;
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> (iii) that, in connection with such proceedings, the ACLU be granted leave to file a legal brief addressing the constitutionality of the Act and to participate in oral argument before the Court; [and]

> SOLICITOR GENERAL OLSON: I understand that. I think that this is an unusual situation because it would not typically have occurred that this opinion would become public or that this appeal would have been taken or that it was going to be scheduled on a schedule—I don't think a Court deciding in a particular case to accept or not accept an *amicus* brief has ever been done as requiring the Court to always do that or invariably do that, but because this is a special issue and it is important and for the very reasons that you imply when you say that it might be good to address and resolve the constitutional questions, I think it's good for the process.
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> . . . .
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> JUDGE SILBERMAN: [T]hen . . . you would want time to respond if you thought there was something of importance [in an *amicus* brief].

Tr. 67-69, *available at* www.fas.org/irp/agency/doj/fisa/hrng090902.htm.

> (iv) that any legal opinions issued by this Court at the conclusion of such proceedings be made available to the public, with only those redactions necessary to protect information that is properly classified.

ACLU Mot. 2, *available at* www.fas.org/irp/agency/doj/fisa/aclu071008.pdf.

This Court, in an opinion by Judge McLaughlin, denied the ACLU's motion. *See In re Proceedings Required by § 702(i) of the FISA Amendments Act of 2008*, Dkt. No. Misc. 08-01 (Aug. 27, 2008), *available at* www.fas.org/irp/agency/doj/fisa/fisc082708.pdf. The Court observed that the ACLU's broad requests fell into two categories: (1) a request for the release of records, and (2) "a more general request to participate in the Court's review under § 702(i)." *Id.* at 4. The Court rejected the request for records for essentially the same reasons that this Court had previously found a similar ACLU request for access to this Court's records to be without merit. *See id.* at 5-8 (citing *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 490-97 (Foreign Intel. Surveillance Ct. 2007)). The Court then rejected the request to participate in the proceedings for two reasons. First, the Court found that the FISA Amendments Act (FAA) did not contemplate participation by a third party. *See id.* at 9 (finding that "Congress did not contemplate the Court's review of the [FAA] certification and procedures to be anything other than an *ex parte* proceeding"). And, second, the Court determined that, given the circumstances, "the ACLU's participation [was] unlikely to provide meaningful assistance to the Court." *Id.* at 8.

III. Procedural Background

The Center's motion relates to the Government's collection of telephony metadata records in bulk. In response to unauthorized disclosures earlier this year, the Government has declassified and made available to the public certain facts about this collection. *See, e.g.*,

Administration White Paper: Bulk Collection of Telephony Metadata under Section 215 of the USA PATRIOT Act (Aug. 9, 2013), *available at* http://apps.washingtonpost.com/g/page/politics/obama-administration-white-paper-on-nsa-surveillance-oversight/388/. Pursuant to the program, the Government has obtained FISC orders under Section 1861 directing certain telecommunications companies to produce certain telephony metadata records that the companies create and maintain as part of their business. Fifteen different judges of the FISC have issued these orders over the past seven years.

In connection with the two most recent instances in which the Court has approved the program, the Court issued opinions explaining its conclusion that the collection of bulk telephony metadata is consistent with Section 215 of the USA PATRIOT Act, 50 U.S.C. § 1861. *See In re Application of the F.B.I. for an Order Requiring the Production of Tangible Things*, Dkt. No. BR 13-109, 2013 WL 5741573, at *3-*9 (For. Intel. Surveillance Ct. Aug. 29, 2013) (Eagan, J.); *In re Application of the F.B.I. for an Order Requiring the Production of Tangible Things*, Dkt. No. BR 13-158, at 3 (For. Intel. Surveillance Ct. Oct. 11, 2013) (McLaughlin, J.), *available at* www.uscourts.gov/uscourts/ courts/fisc/br13-158-memo-131018.pdf.

On September 25, 2013, the Center sent a letter to Presiding Judge Walton asking the Court to alter its procedures "to ensure plenary consideration on a public record" of "legal issues concerning bulk telephone metadata collection under section 501 of [FISA]" "in the event that the Government seeks reauthorization of that collection." Letter from Kate Martin to Hon. Reggie B. Walton, at 1 (Sept. 25, 2013). In an Order dated October 9, 2013, the Court rejected the Center's request because it failed to comply with the Court's Rules of Procedure, and ruled that "[t]he Center may re-submit its requests in the form of a motion that complies with all applicable requirements of the FISC Rules." Order, Dkt. No. BR 13-109, at 1 (Oct. 9, 2013),

available at www.uscourts.gov/uscourts/fisc/index.html. The Court directed that any such motion "should address the question whether the Center's requests are foreclosed in whole or in part by the language and structure of Section 1861." *Id.* at 1-2 (citing 50 U.S.C. § 1861(c)(1), (d), and (f)).

On October 17, 2013, the Center filed the instant motion which asks the Court to set a public briefing schedule for "the most recent or next authorization of the bulk telephone metadata collection," seeks leave to file an *amicus* brief "setting forth reasons why [the Center believes] section . . . 1861[] does not authorize that bulk collection," and requests that the Court sit *en banc*. *See* Mot. 1. In response to the Court's direction to address whether this relief is foreclosed by the language and structure of Section 1861, the Center provided only the following:

> [T]here is also no conflict between the receipt of amicus briefs on unclassified matters and the provisions in [Section 1861] on the potential party status of the recipients of business record orders. The amici will not be parties. For example, they will not have the right to seek review in the Court of Review. Their only role would be to provide arguments to the Court in response to arguments that have been declassified by the Executive Branch. . . . And, of course, any order issued by this Court would remain an ex parte order even if amici are permitted to present competing viewpoints.

Mot. 6-7. The Center also noted that "[t]he briefing proposed by this motion will not require counsel for amici obtaining access to or using any classified information." *Id.* at 7.

ARGUMENT

If the Court wishes to grant leave to file an *amicus* brief, it has the authority to do so. However, if the Court elects to do so, any proceedings must still be conducted in a manner consistent with FISA. As such, any application by the Government pursuant to Section 1861 must remain non-public, *see* 50 U.S.C. § 1861(d)(1), and the proceedings before the Court must

be *ex parte*, *see* 50 U.S.C. § 1861(c). An *amicus* brief on the legal question of whether Section 1861 permits an order for bulk telephony metadata collection could be used by the Court in adjudicating any future application that raises this legal question. Any resulting opinion could be published pursuant to the procedures set forth in Rule 62(a) of the Court's Rules of Procedure.

I. The Court Has the Authority To Accept a Brief of an *Amicus Curiae*

A. Appointment of *Amicus* is an Exercise of Inherent Authority

Numerous district courts have recognized broad inherent authority to appoint an *amicus curiae* when doing so would assist the court.[3] This Court is not a district court, but it possesses similar inherent authority except to the extent inconsistent with provisions of FISA. *See In re Mot. for Release of Ct. Records*, 526 F. Supp. 2d at 486-87; *cf.* 50 U.S.C. § 1803(g) (FISC may "take such actions[] as are reasonably necessary to administer [its] responsibilities under [FISA]"). While some of the relief sought by the Center would squarely conflict with FISA, accepting a brief of an *amicus curiae* to provide argument as to whether Section 1861 authorizes the Court to issue an order requiring the production of bulk telephony metadata would not, by itself, be inconsistent with FISA.

In the ordinary course, as Solicitor General Olson observed before the Court of Review, *see supra* note 2, the Court would not receive requests to file *amicus* briefs because the issues pending before the Court are almost invariably classified and not known to the public. And the Court should not solicit *amicus* briefs in a manner that would reveal the existence or contents of

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[3] *See, e.g.*, *Mobile County Water, Sewer & Fire Prot. Auth., Inc. v. Mobile Area Water & Sewer Sys., Inc.*, 567 F. Supp. 2d 1342, 1344 n.1 (N.D. Ala. 2008); *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008); *Verizon New England v. Maine Pub. Utils. Comm'n*, 229 F.R.D. 335, 338 (D. Me. 2005); *United States v. Davis*, 180 F. Supp. 2d 797, 799-800 (E.D. La. 2001); *Sciotto v. Marple Newtown Sch. Dist.*, 70 F. Supp. 2d 553, 554 (E.D. Pa. 1999); *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500-01 (S.D. Fla. 1991).

an application or any classified information associated therewith. However, where, as here, a legal issue that has arisen before the Court has become public, it is possible for the Court to accept an *amicus* filing provided that the Court complies with the strictures of FISA requiring *ex parte* proceedings and nondisclosure of applications and orders.

As the Court of Review's decision in *In re Sealed Case* demonstrates, the fact that the proceedings concerning the Government's application for an order pursuant to Section 1861 are *ex parte* does not preclude the appointment of an *amicus*. *See* 310 F.3d at 719. The *amicus* would not be a party to the proceeding, and would not have access to the Government's application or other docket proceedings. Rather, an *amicus* would, if the Court determined it to be appropriate, simply be permitted to file a brief on a specific legal question that has been at issue in a series of matters before the Court, where both the Court and the public have reason to believe that there may be future applications from the Government raising the same issue.

Similarly, although the non-disclosure provision of Section 1861(c)(1) indicates that an application from the Government and an order issued by the Court pursuant to Section 1861 must not be disclosed to an *amicus* or the public, it does not necessarily prevent the Court from permitting an *amicus* to submit a public brief on an abstract legal issue where the relevance of that legal issue to the Court's work is already publicly known. Finally, Section 1861(f) does not preclude appointment of an *amicus*. That subsection authorizes a challenge to an issued order by a recipient of that order, which is a different proceeding from a proceeding under Section

1861(c) in which the Court issues an *ex parte* order. The *amicus* brief posited here would relate to a hypothetical future Section 1861(c) proceeding and not to a Section 1861(f) proceeding.[4]

The Court thus has the authority to appoint the Center as *amicus curiae* and to invite it to submit a brief on an identified legal question, if the Court, in its discretion, elects to do so.

B. Appointment of *Amicus* Is an Exercise of Judicial Discretion

The decision to appoint an *amicus* is within the broad discretion of the Court. The "classic role of *amicus curiae*" involves "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). Of course, "[a]n *amicus* is not a party and does not represent the parties but participates only for the benefit of the court." *Alliance of Auto. Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 306-07 (D. Me. 2003) (citation omitted); *accord Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008). Thus, "[t]he privilege of being heard amicus rests solely within the discretion of the court." *United States v. State of Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990); *accord Jin*, 557 F. Supp. 2d at 137 n.5.

II. The Court Should Not Alter the Statutorily Required FISA Procedures

Regardless of whether the Court decides to accept an *amicus* brief, the Court should not allow *amicus* participation in a manner that would conflict with the procedures required by FISA. Thus, any applications for business record orders should continue to be handled *ex parte*, *see* 50 U.S.C. § 1861(c), and both the applications and any orders issued to telecommunications

[4] Because any future application for bulk telephony records will be classified, any *amicus* brief should be accepted in a miscellaneous docket rather than the docket of a classified application.

companies or any other recipient should remain confidential and non-public, *see* 50 U.S.C. § 1861(d)(1). This necessarily means that the "public docket" envisioned by the Center is not legally possible.

Indeed, when directed by the Court to address the applicability of the language and structure of Section 1861 to the relief it seeks, the Center responded only that an *amicus* brief would not conflict with Section 1861, a position with which the Government agrees. *See* Mot. 6-7. The Center's motion does not address, however, how the other relief sought—particularly the request that the Court create a public docket for the Government's application for a Section 1861 business records order—could be consistent with either the language or the structure of Section 1861. The Center's request for a public docket is squarely inconsistent both with the structure of Section 1861 and with its specific language, which requires both that the proceedings be *ex parte* and that the Government's applications (as well as any orders) remain secret. *See* 50 U.S.C. §§ 1861(c), 1861(d)(1).

Additionally, to the extent that the Center seeks reconsideration of this Court's previous decision, this too is unwarranted. The Center, by its own admission, is not a party and does not seek to become a party. Mot. 6. An *amicus* (or, in this case, putative *amicus*) cannot move for "substantive relief," *see Newark Branch, NAACP v. Town of Harrison*, 940 F.2d 792, 808 (3d Cir. 1991), and the Center has provided no legal basis for a motion to reconsider here.

Similarly, the Center has no standing to seek *en banc* review by this Court. *See* FISC R.P. 46 (delineating who may seek *en banc* review). And while the Court has the power to initiate *en banc* proceedings *sua sponte*, *see* FISC R.P. 49, the Government sees no reason to do so now. Rule 46, which is instructive although not strictly applicable here, provides that "initial hearings en banc are extraordinary and will be ordered only when a majority of the Judges

determines that a matter is of such immediate and extraordinary importance that initial consideration by the en banc Court is necessary, and en banc review is feasible in light of applicable time constraints on Court action." FISC R.P. 46. Here, the legal question on which the Center seeks to opine has been ruled upon by fifteen different judges of this Court, and each has ruled the same way. Such uniformity suggests that it is not necessary for the next case presenting this same legal issue to be heard *en banc*.

CONCLUSION

Whether to accept a brief of an *amicus curiae* to provide argument on the issue of whether Section 1861 authorizes bulk telephony metadata collection is an issue committed to the sound discretion of the Court. Such an appointment, however, does not alter the statutory requirement for *ex parte* proceedings or the statutory requirement that the Government's applications shall be nonpublic.

November 8, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the United States' Response to the Motion To Establish a Public Briefing Schedule Including the Filings of Briefs by *Amici Curiae*, for Leave for the Center for National Security Studies To File an *Amicus Curiae* Brief, and a Suggestion for Hearing *En Banc* was served via Federal Express overnight delivery on this 8th day of November, 2013, addressed to:

Kate A. Martin
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Washington, DC 20006

/s/ Jeffrey M. Smith
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