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. Misc. 14-01

BRIEF OF AMICUS CURIAE CENTER FOR NATIONAL SECURITY STUDIES ON THE LACK OF STATUTORY AUTHORITY FOR THIS COURT'S BULK TELEPHONY METADATA ORDERS

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The Center for National Security Studies ("the Center") is a project of the National Security Archive Fund, Inc., a tax-exempt organization. Founded in 1974, the Center is dedicated to the defense of civil liberties, human rights, and constitutional limits on government power. A principal concern of the Center is the prevention of illegal government surveillance. On December 18, 2013, in an order entered in BR 13-158, this Court granted the Center leave to file an amicus curiae brief explaining why Section 501 of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1861, does not authorize the bulk collection by the National Security Agency ("NSA") of metadata on the calls, including local calls, of virtually all Americans, a program that the Solicitor General has described to the Supreme Court as the Telephony Records Program ("the program").[1] Per the Court's order, this brief will be placed in a miscellaneous docket for consideration by any judge when considering a future application.

Since December, the President has undertaken initiatives to limit how the government collects and searches the telephony metadata while preserving the program's intelligence capabilities. In response to the government's motion, on February 5, 2014, this Court entered an order modifying provisions relating to NSA's queries of telephony metadata, but not modifying the collection of it. On March 27, 2014, the President issued a statement "that the government should not collect or hold this data in bulk" and that he was seeking legislation to implement his proposal. However, the President also directed the Department of Justice to seek from this Court a 90-day reauthorization of the existing program, as modified in February. On March 28, it was announced that this Court had granted an extension until June 20, 2014. More such extension

[1] While the Center recognizes that the NSA's bulk collection raises significant issues under the Fourth Amendment and the Electronic Communications Privacy Act, this brief does not address those issues.

requests are possible. Accordingly, the question whether Section 501 authorizes the NSA's bulk collection of telephony metadata remains legally important.

Moreover, regardless of any changes ultimately made to the program, this Court's opinions approving the program in its current form will not become a dead letter. Those opinions could be invoked in future cases concerning a number of important issues, such as the limits of "relevance" as applied to large-scale government surveillance. *See infra* Section II.d. Future invocation of this Court's holding that Congress implicitly ratified the Court's and the Executive Branch's secret interpretation of Section 501, *see infra* Section III, could also have significant ramifications for questions about open government and congressional action far beyond this specific context. *See Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting) (warning against the judicial validation of a principle that "lies about like a loaded weapon[,] ready for the hand of any authority that can bring forward a plausible claim of an urgent need").

Given the important issues raised by this Court's orders authorizing the program, the Center respectfully submits this brief pursuant to the leave granted by this Court.

ARGUMENT

I. Introduction

Congress has never authorized the telephony metadata program. Congress did not authorize the program in Section 501, as the program violates the plain text of Section 501 and is inconsistent with the structure of that section and FISA as a whole. *See infra* Section II. Nor can Congress be deemed to have secretly ratified the program in 2011 when extending the sunset of Section 501 to June 2015. *See infra* Section III. Finding otherwise requires an unprecedented extension of the ratification-by-reenactment doctrine, and is fundamentally inconsistent with principles of democratic government. When the government acts in an area of questionable

constitutionality, Congress cannot be deemed to have authorized that action by mere implication or acquiescence. *Greene v. McElroy*, 360 U.S. 474, 506-07 (1959). Rather, Congress must explicitly indicate that it intends to alter the rights and limitations normally afforded by the law. *Id.* Yet neither in the text of Section 501 nor in the extension of the sunset has Congress made such an explicit statement.

Although the issues addressed here principally involve statutory interpretation, it must be recognized that much more is at stake than simply the correct interpretation of one statute. As both the president's Review Group and the Privacy and Civil Liberties Oversight Board ("PCLOB") recognized in their reports on the program, records of an individual's calls made over a period of years can reveal detailed information about that person's activities and associations. Government collection of such information can be expected to chill protected First Amendment activities, as well as fundamentally shift the balance of power between the government and the American public. *Liberty and Security in a Changing World: Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies* 116-17 (2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf (citing *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring)); David Medine et al., Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted Under Section 215 of the USA PATIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* 156 (2014), *available at* http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf.

This Court should recognize the importance of requiring Congress to act first to strike the balance between privacy and national security in the novel and complex circumstances now present. As Justice Alito observed in *United States v. Jones*: "In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." 132 S. Ct. 945, 964 (2012) (internal citation omitted). As discussed in detail throughout this brief, Congress has neither authorized the program nor enacted a statutory scheme designed to govern mass collection of bulk telephony metadata. Yet, the rulings of this Court have allowed the executive branch and the judiciary to assume that legislative role. In its first opinion on bulk metadata collection (approving collection of bulk Internet metadata in 2004), this Court, rather than recognize the absence of express congressional authorization or a robust statutory scheme that balances the relevant interests, emphasized the deference that it thought should be given to executive branch assessments and responses to national security threats and in determining the potential intelligence significance of information. Opinion and Order of Presiding Judge Kollar-Kotelly, Docket No. PR/TT (redacted), at 30. But the executive branch has no special competence entitling it to deference in weighing the privacy interests of Americans with regard to the creation of massive government databases of the records of ordinary activity like emails and telephone calls. And while the judicial branch has the responsibility of determining whether the Fourth Amendment prohibits that collection or requires a warrant, it is for Congress in the first instance to make a legislative judgment about the appropriate balance between national security and individual privacy and security in a collection program of such size and duration.

II. Section 501 Does Not Authorize the Program.

Section 501 permits the FBI Director to move the FISA Court for an order "requiring the production of any tangible things (including books, records, papers, documents, and other items) . . . ." 50 U.S.C. § 1861(a)(1). Those tangible things must be "for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." *Id.* An application under Section 501 must include "a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are *relevant to an authorized investigation*, " *id.* § 1861(b)(2)(A) (emphasis added), and "an enumeration of the minimization procedures . . . that are applicable to the retention and dissemination" by the FBI of the tangible things produced, *id.* § 1861(b)(2)(B). An order granted by the Court under Section 501 must be limited to tangible things that "can be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation" or other court order. *Id.* § 1861(c)(2)(D).

A walk through these provisions—with attention paid both to what is present and what is absent—shows that Section 501 does not authorize the NSA's bulk collection of telephony metadata. Specifically, the program cannot be reconciled with Section 501 because that section: (a) is explicitly directed to the FBI, not the NSA; (b) only allows production of tangible things for particular authorized investigations, not an amalgam of all current and potential future investigations; (c) requires that the tangible things be "relevant" to authorized investigations; (d) is limited to tangible things that can be obtained by a grand jury subpoena or other court order; and (e) unlike other sections of FISA that were designed to accommodate ongoing or bulk collection, contains no provision to regulate continuous collection.

A. Section 501 Is Explicitly Directed to the FBI, not the NSA.

In contrast to other FISA provisions, Section 501 is directed explicitly to a single government entity—the FBI.[2] *See* 50 U.S.C. § 1861(a)(1). Depending on the sensitivity of categories of records, Congress has prescribed in Section 501 for levels of authority among officials ***within*** the FBI for the making of applications, 50 U.S.C. § 1861(a)(1), (a)(2) and (a)(3), but in no way has provided for any authority outside of the FBI. The orders authorized by Section 501 are expressly similar to subpoenas and other court orders, *see infra* Sections II.C.-D., and in fact impose an additional level of supervision by requiring Court approval before issuance. Such orders are familiar tools of the investigatory activities performed by the FBI. Congress's decision to place authority under Section 501 in the FBI, rather than in any other government agency including the NSA, indicates that Congress never intended that section to be the foundation of the NSA's bulk collection program sweeping in massive amounts of domestic call data.[3]

Congress's explicit and exclusive placement of Section 501 authority in the FBI was both sensible and significant. Section 501 orders are addressed to businesses within the United States about the transactions of persons within the United States, and therefore are likely to present questions about constitutional and statutory authority relating to persons in the United States. It is both important and unsurprising that in Section 501 Congress vested that authority exclusively

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[2] For instance, a "Federal officer" may apply for electronic surveillance orders under Title I or search orders under Title II. 50 U.S.C. §§ 1804(a), 1823(a).

[3] Other provisions of Title V make plain that the FBI cannot be just a nominal applicant on behalf of the NSA. The FBI's responsibilities go beyond the making of the initial application and extend throughout Section 501. Both the minimization and the use provisions of Section 501 apply to records "received" by the FBI. Section 501(g) and (h), 50 U.S.C. § 1861(g) and (h). Section 501 places the FBI Director at the center of procedures for disclosure of information about business records orders. Section 501(d), 50 U.S.C. § 1861(d).

in an entity that operates directly under the Attorney General, and that is experienced with domestic investigations.

Moreover, Congress's decision to direct Section 501 to the FBI reflects a long-standing policy of limiting the scope of foreign intelligence operations in the domestic sphere. The Director of National Intelligence has the responsibility, under section 102A(g) of the National Security Act of 1947, "to ensure maximum availability of and access to intelligence information within the intelligence community consistent with national security requirements." 50 U.S.C. § 3024(g). But that key objective in no way diminishes the need for faithfulness to fundamental decisions by the Congress on important boundaries. Thus, the Director of the Central Intelligence Agency "shall have no police, subpoena, or law enforcement powers or internal security functions." 50 U.S.C. § 3036(d)(1). Congress also proscribes the use of the U.S. military to execute the laws "except in cases and under circumstances expressly authorized by the Constitution or Acts of Congress." 18 U.S.C. § 1385. Congress's express determination in Section 501 to grant authority regarding business records to the FBI, and not the NSA, constitutes a similar limitation on the role of intelligence/military organizations concerning domestic activity.

The National Security Agency is tasked to perform foreign intelligence responsibilities that are essential to our Nation's security. The Agency is strengthened when Americans are assured that its powerful tools are directed outward not inward but it is weakened when thrust into the role of analyst and archivist for the details of calls of all Americans. Adherence to the plain text of Section 501 would prevent that harm.

B. Section 501 Only Allows for Collection of Tangible Things for Specific Investigations.

When interpreting Section 501, as with any other statute, the Court must give effect to all the relevant language and may not adopt a reading that renders certain language meaningless. *See Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010). This Court's rulings approving the program have violated this rule because they effectively nullified the requirement that the tangible things collected be relevant to "an authorized investigation."

When the bulk records are collected, the collection is not tied to any terrorism investigation. Rather, the government has argued and this Court has accepted that Section 501 permits the collection to be tied simply to *any* investigation, including investigations that may arise in the future. But it is clear that Section 501 requires such a connection at the time of collection. For example, Section 501 requires that the investigation to which the records are relevant be conducted under approved guidelines and not based solely on First Amendment protected activities. Additionally, the authorized investigation must be made under guidelines established by the Attorney General. A determination whether an investigation meets those requirements cannot be made for bulk collection, since the collection is not tied to any identified investigation.

C. Section 501 Requires that Collection be "Relevant" to Authorized Investigations.

The records collected by the program also cannot be considered "relevant" to an authorized investigation in any familiar or meaningful sense of that term. The program involves bulk collection far broader than has been permitted in analogous legal contexts, and effectively reads that phrase out of the statute, given that there is no apparent principle to differentiate those records that are within the scope of collection from those that are not. Perhaps even more problematic is the government's effort to justify the program's vast collection by dramatically

redefining "relevance." Under the government's view, relevance is to be transformed from a limit on the government's authority to collect information about Americans, based on what is justified by the facts and circumstances of the investigation, into a blank check permitting the government to collect as much personal information as its mass surveillance tools and methods permit.

As the government has noted, the requirement that the tangible things collected be "relevant" to an authorized investigation reflects a familiar limitation on the government's ability to collect records on Americans, and is routinely applied to define the permissible scope of subpoenas duces tecum issued by grand juries and administrative agencies. *See* Administration White Paper, *Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT ACT* 1-2, 9-11 (Aug. 9, 2013), *available at* http://i2.cdn.turner.com/cnn/2013/images/08/09/administration.white.paper.section.215.pdf (hereinafter "White Paper"). That requirement was added to FISA's tangible things provision by the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006). Those 2006 amendments clarified the limitations of the broadly worded tangible records provision enacted by the USA PATRIOT Act, shortly after September 11, 2001.

A relevance requirement cannot be defined only by hard-and-fast rules. *See In re Subpoena Duces Tecum*, 228 F.3d 341, 347 (4th Cir. 2000) (stating that "relevance" varies according to the "nature, purposes, and scope of the inquiry," and "cannot be reduced to formula." (quoting *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 209 (1946))). Rather, "relevance" is a flexible, fact-intensive standard that differentiates between what is within the scope of and reasonably related to a particular inquiry and the rest of the universe of existing documents and information. *See United States v. Matras*, 487 F.2d 1271 1274-75 (8th Cir. 1973)

(refusing to enforce an IRS summons where the IRS argued that it needed to obtain an expansive amount of information to provide a "road map" for its investigation). Although lines between what is relevant and what is not often cannot be drawn with precision, the basic notion of relevance is that some line must exist. *See United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991) (the investigatory power of a grand jury is "not unlimited" and cannot be used "to engage in arbitrary fishing expeditions."); *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002) (the term "relevant" should not be interpreted so broadly as to render the statutory language a "nullity" (quoting *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984))); *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 97 (2d Cir. 1997) (a subpoena "may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power" (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))).

But the NSA's bulk collection under Section 501 eliminates the distinction between what is relevant and what is not. The government never even asserts that particular facts or circumstances, such as the activities being investigated or the targets of the investigation, suggest that certain records may be relevant. To the contrary, because the records are collected on an ongoing basis, the government is not even claiming relevance at the time the records are collected. The government simply claims that because a very small number of calls made by Americans may be relevant to a terrorism investigation, it is entitled to collect and review all the call data of all Americans in perpetuity.

The government notes that terrorism investigations often are very large, and that large subject matters have justified very broad subpoenas. Those observations are undoubtedly true, and it is also true that subpoenas and court orders frequently require the production of large numbers of records, even where it is clear that many of the records produced ultimately will not

prove to be important. *See In re Grand Jury Proceedings*, 616 F.3d 1186, 1205 (10th Cir. 2010) ("Incidental production of irrelevant documents . . . is simply a necessary consequence of the grand jury's broad investigative powers . . . ."). Of course it must be acknowledged—as the government does—that the case law defining the permissible scope of "relevance" was developed in response to far more limited subpoenas and orders than what is at issue here. White Paper at 11 ("To be sure, the cases that have been decided in these contexts do not involve collection of data on the scale at issue in the telephony metadata collection program, and the purpose for which information was sought in these cases was not as expansive in scope as a nationwide intelligence collection effort designed to identify terrorist threats."). Those cases provide tenuous support for the unparalleled breadth of collection at issue here.

More fundamentally, the fatal flaw of the program is not that the number of records collected is large *per se* (although the incredible breadth of the records collected certainly illustrates the program's unrestrained nature). The question of relevance ultimately is not just one of quantity, but also of quality. The program's fatal flaw is that it simply collects the records of millions of Americans in bulk continuously without providing any way to plausibly connect the vast majority of records collected to an investigation, or to differentiate between the records that may be relevant and those that are not. Where a doctor allegedly committed fraud related to 15,000 patients' records, the grand jury would be justified in subpoenaing the records of all 15,000, notwithstanding the large number of records involved. *See In re Subpoena Duces Tecum*, 228 F.3d at 350-51. However, the grand jury would not be justified in subpoenaing the records of all doctors perpetually without limitation to see if others had committed or would commit fraud too. In short, the government's applications here stretch the relevance standard so far that it becomes a legal "nullity." *United Air Lines*, 287 F.3d at 653.

In order to shoehorn this massive collection into the familiar concept of relevance, the government has proffered a novel theory: that while the vast majority of the bulk metadata is not relevant to any facts or circumstances of any authorized investigation, it is relevant to investigative *tools* employed by NSA—specifically, to data analytical tools used to determine patterns and connections between different numbers, thereby revealing associations between suspects. *See* White Paper at 12-13.

While this rhetorical shift—from relevance as determined by the circumstances of the inquiry to relevance as determined by the government's investigative tools—may seem subtle, its consequences are dramatic. On the government's view, the relevance standard does not work to limit the permissible scope of data collection to what the government actually needs for a specific investigation, but rather functions as an elastic statutory term whose meaning expands, by virtue of a kind of blank check from Congress, as information technology provides ever more powerful tools for agencies of the executive branch to identify matters of interest in masses of information about ordinary conduct, such as the calls of all Americans. The government's argument does not justify smaller or greater amounts of collection depending on the actual scope of an investigation; for all terrorism investigations, regardless of size, scope or complexity, the nation's telephony metadata is apparently always "relevant." On the government's view, it is sufficient that the data is stored in bulk and can be analyzed effectively by the NSA. In this way, a limitation that was added in 2006 to clarify the *limits* of the 2001 amendments actually serves as an invitation for unfettered collection of records on all Americans' activities.

The potential consequences of this argument beyond the telephony metadata program are substantial. That argument can readily be applied to justify the collection of virtually any kind of data that can be classified as a "business record," such as location information, and credit card

and other financial transactions within the United States, in connection with any current or potential future investigation. And, if the government is correct that the term "relevance" in Section 501 carries the same meaning as it does for grand jury and administrative subpoenas, the permissible scope of any of the many hundred authorities in the United States Code for judicial or administrative subpoenas can expand far beyond the size and scope of any specific investigation so long as advanced analytical tools can be used to search bulk data for relevant information. *See, e.g.*, FISC Supplemental Order of November 23, 2010 (BR 10-82) (released March 28, 2014) (noting that the term "relevance" governs production of financial records under the Right to Financial Privacy Act, 12 U.S.C. 3401, *et seq.*).

Perhaps recognizing the absence of a limiting principle, the government suggests that telephony metadata may be uniquely conducive to the NSA's analytic techniques, and therefore that other forms of data collected in bulk may not be considered "relevant" to those techniques. White Paper at 14. But that bald assertion fails to account for the extraordinary power and growth of data analytics in both the public and private sectors. Public and private entities are continuously finding novel ways to learn more comprehensive and detailed information about individuals' activities, preferences, habits, associations, etc. Even assuming that the government does not currently have a productive way to analyze other types of data in bulk, such as geolocation data or financial transactions, it is far from impossible that the government will develop such a mechanism in the future.

D. Section 501 Is Limited to Tangible Things that Can Be Obtained by a Grand Jury Subpoena or Other Court Order.

Along with the relevance requirement, the 2006 amendments added several other restrictions under the heading "Additional Protections," Pub. L. No. 109-177, § 106(d), 120 Stat. at 197. One is a provision limiting the permissible scope of a production order by the FISA Court

"only" to tangible things that could be obtained by a subpoena from a federal court, including a subpoena duces tecum issued by a grand jury. 50 U.S.C. § 1861(c)(2)(D). The government cites the provision limiting the scope of collection to records that could be obtained via grand jury subpoena or court order, 50 U.S.C. § 1861(c)(2)(D), as evidence that Congress intended Section 501 to authorize very broad collection. But that interpretation ignores both the text of that provision and legislative history surrounding its addition in 2006. That provision was intended to act as a shield against excessive collection, not, as the government would have it, a sword authorizing virtually limitless collection. The provision states that the government may collect "only" the records that could be obtained by those other means, and was added by the 2006 amendments under the title "Additional Protections." Pub. L. No. 109-177, § 106(d), 120 Stat. at 197. As discussed above, the program far exceeds the scope of collection authorized by grand jury subpoenas and court orders. Moreover, the government fails to appreciate why that provision was added—not to broaden the scope of collection, but to ensure that privileges and other protections that limited the permissible scope of collection in other contexts also applied to Section 501. A version of that limitation was discussed in a report of the Senate Intelligence Committee, S. Rep. No. 109-85 (2005), and prohibited collection of "privileged" records. Another version was included in a bill drafted by the Senate Judiciary Committee and passed as H.R. 3199 (2005), and prohibited collection of "protected" records. This history indicates that the provision was added to ensure that the tangible records contemplated by Section 501, including library records, book-seller records, health records, gun sale records, etc. could not be collected in violation of established rights and privileges.

E. Unlike other FISA Sections, Section 501 Contains No Provision to Regulate Continuous Collections.

The limitations that Section 501 omits, in addition to the ones it expressly includes, also illustrate that Section 501 does not authorize massive, perpetual collection of bulk data, but instead was intended for much narrower, discrete record collections. This is especially apparent when Section 501 is compared to other FISA provisions that authorize ongoing collection. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). In particular, where Congress has authorized ongoing data collection in other provisions of FISA, it has enacted explicit limits on the duration of that collection. Title I on electronic surveillance, Title IV on pen registers for Internet or e-mail metadata, and Title VII on overseas collection from within the United States, each authorize collection for periods of time ranging from 90 days to one year. *See* Section 105(d)(l), 50 U.S.C. § 1805(d)(l); Section 402(e)(1), 50 U.S.C. § 1842(e)(l); Section 702(a), 50 U.S.C. § 1881a(a). Yet Congress included no such provision in Section 501, indicating that Congress's intent for Section 501 was different from that of the other provisions. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute"). Unlike Sections 105, 402 and 702, which are aimed at the collection of communications and data that is created on a continual basis, Section 501 contemplates collection of "tangible things (including books, records, papers, documents, and other items)," which exist and are tangible at a specific period of time. Indeed, it is difficult to say plausibly that not-yet-created records of not-yet-placed calls are truly "tangible things." 50 U.S.C. § 1861(a)(1).

In the absence of any statutory limitation on the duration of orders under Section 501, this Court has required the government to reapply for an order every 90 days. The Court has also crafted other limitations to make the scope of collections more palatable, such as the Reasonable Articulable Suspicion Standard or the number of hops permitted for searches. But while the Court's effort to impose some restrictions on the NSA's bulk collection is laudable, the fact remains that the 90-day requirement, as well as other court-imposed limitations, are judicial creations with no basis in the statute. Section 501 simply was not designed by Congress to authorize continuous bulk collection. In the absence of that authorization, this Court should interpret Section 501 in a way that avoids the serious and complex constitutional issues that the program raises, *see Boos v. Barry*, 485 U.S. 312, 331 (1988), rather than wading into those issues with judicially created rules and procedures.

III. Congress Did not Ratify This Court's Previous Interpretation of Section 501 When it Extended the Sunset of Section 501 in 2011.

Both Judge Eagan's opinion of August 29, 2013 (BR 13-109) and Judge McLaughlin's opinion of October 11, 2013 (BR 13-158) invoke the "doctrine of ratification through reenactment" to hold that Congress essentially adopted the executive branch's and this Court's expansive views of relevance under Section 501 when it extended the sunset in 2011. The theory advanced is that when Congress extended the sunset of Section 501 to June 2015, all members of Congress either were aware, or had an opportunity to be, that Section 501 was being used by the executive branch to justify bulk collection of telephony metadata. But application of the doctrine to the circumstances surrounding the 2011 sunset extension is both unprecedented and inappropriate. The Court should reject the ratification-through-reenactment doctrine as applied to Section 501 for two reasons: (a) applying the doctrine here conflicts with precedent and is both factually and legally unfounded; and (b) deeming that Congress has ratified a secret

interpretation of a law which has consequences for the privacy and First Amendment interests of all Americans and the obligations of private companies would make the Court a party to a constitutionally suspect violation of democratic principles.

A. Applying the Doctrine Here Conflicts with Precedent and Is Both Factually and Legally Unfounded.

At the outset, because the program is not authorized by Section 501, the ratification-through-reenactment doctrine is inapplicable. The doctrine is not a stand-alone rule for determining the meaning of a statute, but rather one of numerous available canons for interpreting the meaning of a statute beyond its text. Like all such canons, this doctrine cannot override the clear meaning of the law. *See Brown v. Gardner*, 513 U.S. 115, 121 (1994) (stating that the government's reenactment argument could not overcome the fact that the existing interpretation was contrary to the statute). As shown above, plain language and statutory structure do not support this Court's interpretation of Section 501 and thus the ratification doctrine alone cannot trump Congress's originally intended meaning.

The ratification doctrine should not be applied for additional reasons. First, the opinions of this Court—the court that is charged with considering the government's applications in the first instance—do not constitute a "settled judicial interpretation." *See Pierce v. Underwood*, 487 U.S. 552, 567 (1988); *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). This Court's interpretation of Section 501 has never been subject to appellate review by the FISA Court of Review, let alone by the Supreme Court. *See United States v. Powell*, 379 U.S. 48, 55 n.13 (1964) (declining to hold that Congress adopted the interpretation of four lower courts, as those opinions did not constitute settled law); *see also Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1311 (Fed. Cir. 2001); *In re Coastal Grp., Inc.*, 13 F.3d 81, 85 (3d Cir. 1994).

The secretive nature of these proceedings makes application of the ratification doctrine even more problematic. The doctrine is based on the legal assumption that Congress is aware of well-settled interpretations when it reenacts a statute—an assumption that must be employed cautiously given that it effectively places the court in the position of the legislature. *See Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146, 1162 n.10 (D.C. Cir. 1987). Such an assumption may be justified where the source of the interpretation is the Supreme Court or unanimous courts of appeal. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). But no such an assumption is warranted here, where no formal opinion by any court upholding the government's interpretation of Section 501 had even been authored until 2013, two years after the 2011 sunset extension and in the very opinions that then sought to apply the ratification doctrine.

Judge Eagan's opinion illustrates the dangers of this exercise. The opinion argues that applying the ratification doctrine is appropriate here because Congress was made aware of this Court's approval of the program by way of a five-page secret "Report on the National Security Agency's Bulk Collection Programs for USA PATRIOT Act Reauthorization" (hereinafter "the February 2011 Report"). Am. Mem. Op. at 24-26, BR 13-109. But as stated above, in 2011 no opinion of this Court had yet been authored that provided a reasoned justification for its interpretation of Section 501. The Report contains only a cursory description of this Court's orders authorizing the program and provides no legal reasoning. Moreover, it is uncertain whether the Report was even made available to all members of Congress. *See* Peter Wallsten, *House Panel Kept Document Explaining NSA Phone Program From Lawmakers*, Wash. Post., Aug. 17, 2013, at A3. While the government has stated that the Senate Intelligence Committee made the report available to all Senators, it has made no similar representation concerning the

House of Representatives. *See* Defendants' Memorandum of Law in Support of Motion to Dismiss the Complaint at 27 n.15, *ACLU v. Clapper*, 13-cv-03994 (S.D.N.Y. Aug. 26, 2013), ECF No. 33.

Judge McLaughlin also cites, Mem. Op. at 3, the Supreme Court's decision in *Haig v. Agee*, 453 U.S. 280 (1981). The government previously cited that opinion for the proposition that where Congress ratifies statutory language that has been subject to a "longstanding administrative construction," it is presumed to have adopted that construction. *See* White Paper at 19 (quotation marks omitted). But that decision concerned a longstanding administrative interpretation that had been publicly available for congressional scrutiny for 70 years, 453 U.S. at 296-98, not a secret program in operation for only several years. Moreover, courts have held that application of the reenactment doctrine typically requires a clear indication that Congress was aware of the existing interpretation and intended to adopt it. *See Brown*, 513 U.S. at 121 (ratification inappropriate without an indication that Congress considered the interpretation); *see also Lorillard*, 434 U.S. at 582-83 (noting that the legislative history expressly stated approval of the existing interpretation); *Forest Grove*, 557 U.S. at 239-40 (finding that the existing interpretation furthered Congress's purpose in reenacting that provision); *Micron*, 243 F.3d at 1311 (holding that there was no indication that Congress was aware of the decision by the Court of International Trade). Relying on a clear statement of congressional intent is critical to ensure that the Court does not reverse the constitutional roles of Congress, the executive and the judiciary by substituting the statutory interpretations of other branches for congressional enactments. Here, the executive branch's report and this court's orders do not reflect a well-settled, longstanding interpretation, and Congress has provided no clear statement that it intended to adopt that interpretation.

In *Ex Parte Endo*, 323 U.S. 283 (1944), an opinion that commenced the termination of the World War II internment of Japanese-Americans, the Supreme Court rejected the government's efforts to employ the ratification doctrine in an analogous situation. The issue was whether a lump-sum appropriation for the War Relocation Authority constituted ratification of the detention program that it administered. The government argued that the Authority's regulations and procedures for the detention program had been disclosed in reports to Congress and in congressional hearings. The Court rejected the ratification argument saying that "the appropriation must plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump sum appropriation was made for the overall program of the Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees without ratifying every phase of the program." *Id.* at 303 n.24.

Similarly to *Endo*, the actual circumstances of the sunset extension here are fraught with ambiguities that undermine any effort to draw an unambiguous conclusion that Congress affirmatively decided that Section 501 authorized the program.

First, a sunset extension should fairly be seen as a postponement of a decision rather than an endorsement of any particular application of the extended statute. Prior to Judge Eagan's and Judge McLaughlin's 2013 opinions, no court had ever applied the ratification doctrine to a sunset extension.

Second, a member voting on the 2011 sunset extension of Section 501 confronted a landscape of choices and consequences that should make any court hesitant to render judgment about what the Congress intended. To begin with, the 2011 sunset applied to three separate authorities: business record collection, roving wiretap authority, and lone wolf collection.

Members were presented with an up-or-down vote on the package. A member concerned about bulk business record collection may have been constrained to vote favorably in order to continue the effectiveness of roving wiretap and lone wolf authority.

Third, the terms of the sunset provision are in Section 102 of the USA PATRIOT Improvement and Reauthorization Act of 2005, as that section recently had been amended to change the effective date within it. *See* FISA Sunsets Extension Act of 2011, Pub. Law. No. 112-3, § 2(a), 125 Stat. at 5. At the time the 2011 extension was considered, Section 102(b) provided that "Effective May 27, 2011, the Foreign Intelligence Surveillance Act of 1978 is amended so that sections 501, 502, and 105(c) read as they read on October 25, 2001." *Id.* That meant that a "no" vote on an extension would return the business records provision of FISA to what had been enacted in 1998, and thus only applicable to the records of a common carrier, public accommodation, physical storage facility, or vehicle rental facility. A member concerned about bulk collection but who favored the expansion of business record authority beyond the four categories of the 1998 law may have felt constrained to vote favorably in order to continue the effectiveness of Title V for ordinary business record collection.

In the words of *Endo*, the 2011 sunset extension did not evidence "a purpose to bestow the precise authority which is claimed" by the government. 323 U.S. at 303 n.24. And Congress may have supported other uses of Section 501 "without ratifying every phase of the program." *Id.*

B. Secret Ratification Is Inconsistent with Democratic Principles.

From time to time, Congress considers a small number of matters in closed session. Examples include closed sessions of the Senate during impeachment trials or when it is assessing the verifiability of a provision of a proposed arms-control treaty. Congress may also spell out in a classified annex spending details for military or intelligence authorizations or appropriations.

But Congress has never in its 225 years enacted a secret law, or secret terms for an otherwise public law, that acts directly on persons outside of the government. If Congress had secretly passed a statute expressly authorizing bulk metadata collection that legislation would be constitutionally problematic. Secret legislation is inconsistent with the democratic principles and values that have long animated our constitutional system.

When the executive branch provided in 2011 a limited report on the fact of bulk telephony collection, it included a capitalized admonition: "IT IS IMPERATIVE THAT ALL WHO HAVE ACCESS TO THIS DOCUMENT ABIDE BY THEIR OBLIGATION NOT TO DISCLOSE THIS INFORMATION TO ANY PERSON UNAUTHORIZED TO RECEIVE IT." February 2011 Report at 1. In the view of the executive branch the American people were among those who were unauthorized to receive it. This meant that the legislative process did not operate in normal fashion. Members of Congress could not consider the views of the American public in deciding how to vote. Nor could they publicly discuss or explain their votes. For example, the secrecy greatly restricted any members of Congress inclined to vote against extending Section 501 because they believed it had been misused in the authorization of the program. They would have known they could not fully explain a "no" vote to their constituents because they could not reveal the secret interpretation. The great accountability mechanisms of our constitutional system – voting, speech, and petitioning Congress—are rendered inoperable when citizens do not know what their representatives have voted for or against and what the President has signed into law.

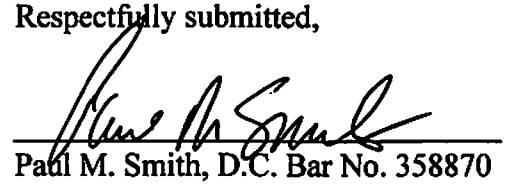
What should be absolutely clear is that the courts of the United States should play no role in tilting the balance against democratic governance. The ratification doctrine is a judicial canon that should never be employed by the Court to achieve indirectly what the Congress has never

sought to do directly, namely, enact a secret law that empowers the Court to compel private parties to provide records concerning the private communications of Americans to the government.

CONCLUSION

For the foregoing reasons, Section 501 does not authorize the government's bulk metadata collection under the program.

Respectfully submitted,



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Of Counsel

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