IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Larry Klayman, et. al. Appellees-Cross-Appellants, v. Barack Hussein Obama, et al., Appellants-Cross-Appellees.	Nos. 14-5004, 14-5016 14-5005, 14-5017

SUPPLEMENT TO NOTICE OF NEW CASE AUTHORITY

Appellees-Cross-Appellants, Larry Klayman, Charles Strange, Mary Ann Strange, Matt Garrison, and Michael Ferrari hereby file this supplement to their Notice of New Case Authority that was filed on May 26, 2015.

On December 16, 2013, Appellees-Cross-Appellants were granted a preliminary injunction preventing the National Security Agency ("NSA") from continuing their repeated and systematical violations of the Fourth Amendment constitutional rights of hundreds of millions of Americans though the use of the NSA's illegal surveillance of telephone metadata.

In a related lawsuit, the U.S. Court of Appeals for the Second Circuit ("Second Circuit") ruled that section 215 of the Patriot Act, 50 U.S.C. § 1861, was

being systematically violated by the NSA and found standing for the appellant, the American Civil Liberties Union under section 215 and also under the Fourth and First Amendments. *ACLU v. Clapper*, No. 14-42 (2nd Cir. May 7, 2015).

Since the time of the *ACLU* decision, the Patriot Act expired on June 1, 2015. However, the USA Freedom Act, Public Law 114-23, was passed by Congress on June 2, 2015 in order to take its place and was signed into law by President Obama on June 2, 2015.

The expiration of the Patriot Act, and the subsequent enactment of the USA Freedom Act, does not preclude the issuance of an opinion in this appeal. In fact, the Freedom Act is not a part of the record under appeal. This case was not specifically about Section 215, but rather the illegal conduct of the NSA in violation of the Fourth Amendment to the U.S. Constitution. Thus, whether the law of Section 215 is still in place is not germane to and is thus irrelevant to this lawsuit. Further, based on a documented pattern over the last many years of continuing constitutional violations by the NSA, it is certain that the agency will continue its illegal acts, not respecting any law much more the Constitution. Thus, that the law has now changed does not render this case moot. It is only though court intervention that the NSA will be restrained from continuing to violate constitutional rights of Appellees-CrossAppellants and hundreds of millions of Americans.

As Appellees-Cross-Appellants have previously shown on the record, the NSA has no respect for the Constitution and its Fourth and First Amendments and the agency does as it pleases, believing and acting as if it is above the law. In so doing, the NSA has lied to and flouted judges and their orders and the rule of law.

First, as set forth on the record in Appellees-Cross-Appellants' Supplemental Brief In Response To Questions Asked At Oral Argument, The Washington Post reported that an internal audit of the National Security Agency found that the agency has broken privacy rules or overstepped its legal authority thousands of times each year since 2008. *See* Barton Gellman, *NSA broke privacy rules thousands of times per year, audit finds*, Washington Post (August 15, 2013), available at http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_story.html. As disclosed, "The NSA audit obtained by The Post, dated May 2012, counted 2,776 incidents in the preceding 12 months of unauthorized collection, storage, access to or distribution of legally protected communications." *Id.* The report continued by stating that "the more serious lapses include unauthorized access to intercepted communications, the distribution of protected content and the use of automated systems without built-in safeguards to prevent unlawful surveillance." *Id.*

Second, the NSA has been forced to admit, as it must, that it has significantly violated the constitutional rights of hundreds of millions of Americans by failing to comply with even the minimization procedures that were set forth in certain orders, much more the Fourth Amendment of the Constitution of the United States. SA 21. For instance, in 2009, the NSA reported to the FISC that the NSA had improperly used an "alert list" of identifiers to search the bulk telephony metadata, which was composed of identifiers that had *not* been approved under the RAS standard. SA 21. Judge Reggie Walton of the FISC, who reviewed the NSA's reports on their noncompliance, concluded that the NSA had engaged in "systematic noncompliance" with FISC-ordered minimization procedures over the proceeding years, since the inception of the Bulk Telephony Metadata illegal government surveillance, and had also repeatedly made misrepresentations and inaccurate statements about the illegal government surveillance to the FISC judges. Mem. Op at 21. The Honorable Reggie Walton concluded, because of NSA lying, that he had no confidence that the Government was obeying the law by doing its utmost to comply with the court's orders, and ordered the NSA to seek FISC approval on a *case-by-case basis* before conducting any further queries of the bulk telephony metadata collected pursuant to Section 1861 orders. Mem. Op at 21.

Third, the NSA further grossly violated the Fourth Amendment to the Constitution in collection in subsequent years. SA 21. In 2011, the Presiding Judge

of the FISC, The Honorable John Bates, found that the Government had misrepresented and again lied about the scope of its targeting of certain internet communications pursuant to 50 U.S.C § 1881a. SA 21. Judge Bates wrote "the Court is troubled that the government's revelations regarding NSA's acquisition of Internet transactions mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection [illegal government surveillance]." SA 21-22. In fact, since January 2009, the FISC's authorizations of the illegal government surveillance has "been premised on a flawed depiction of how the NSA uses BR metadata." SA 22 n.23. "This misperception by the FISC existed from the inception of its authorized collection in May 2006, buttressed by repeated inaccurate statements made in the government's submissions, and despite a government-devised and Court-mandated oversight regime." SA 22 n.23. The minimization procedures proposed by the government in each successive application and approved and adopted as binding by the orders of the FISC have been so frequently and systemically violated that it can fairly be said that this critical element of the overall BR regime has never functioned effectively." SA 22 n.23.

Finally, it was discovered that the widespread abuse of constitutional rights is so widespread that even lower officials in the NSA have been blatantly misusing the NSA's surveillance power to spy on their paramours. NSA Inspector General

George Ellard admitted that since 2003, there have been "12 substantiated instances of intentional misuse" of "surveillance authorities." About all of these cases involved an NSA employee spying on a girlfriend, boyfriend, or some kind of love interests. Jake Gibson, *"Too tempting? NSA watchdog details how officials spied on love interests,"* Fox News, (Sept. 27, 2013). http://www.foxnews.com/politics/2013/09/27/too-tempting-nsa-details-how-officials-spied-on-love-interests. More concerning, if lower level employees are capable of such misuse of the agency's surveillance power, then imagine what the higher officials are capable of are continuing to do, with access to such surveillance programs. And, indeed this gross violation of the Fourth and First Amendments have been more than documented on the record.

In short, the NSA had a continuous and systematic pattern and practice of violating the Fourth and First Amendments to the U.S. Constitution and going well beyond the alleged limitations of Section 215. It does not matter what the law is that is in place, the NSA will act in violation of it. Only through court intervention and supervision can these illegal acts be restrained and stopped. Congressional oversight has failed.

Even if the NSA's violations of the Fourth and First Amendments have ceased, which they have not, the Supreme Court has stated "[i]t is well settled that "'a defendant's voluntary cessation of a challenged practice does not deprive a

federal court of its power to determine the legality of the practice" for "if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *Friends of the Earth v. Laidlaw Envt'l Services, Inc.*, 528 U.S. 167, 189 (2000) (*quoting City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)); *see United States v. W.T. Grant Co*., 345 U.S. 629, 632 (1953) (holding that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case). Thus, the Supreme Court has directed this Court, in effect, to reach the constitutional issues before it. In this way, the implementation of even the new law will be put into proper focus and enforced through judicial oversight, such as before the Honorable Richard J. Leon.

Further, Appellees-Cross-Appellants sought and received a preliminary injunction against the NSA's illegal actions. A preliminary injunction does nothing more than to order the Defendants to obey the Constitution. Given the continuous and systematic violations of the Fourth and First Amendments to the U.S. Constitution, an injunction is specifically needed in order to force the NSA into obeying the sacred document upon which the nation was founded and implemented.

Finally, Appellees-Cross-Appellants sought damages for the blatant unconstitutional violations that had taken place against them prior to the preliminary injunction and subsequent to the preliminary injunction. The issue of

damages, which should be awarded due to the NSA's constitutional violations, means that this case will continue at the District Court level regardless of any new law. The District Court's decision finding a constitutional violation of the Fourth Amendment must thus be upheld, so that this case can proceed below. This is especially true given the fact that the District Court found a likelihood of success on the merits on the issue of the NSA's violations of the Fourth Amendment, and not based on violations of Section 215.

For these reasons, Appellees-Cross-Appellants supplement their Notice of New Case Authority. The NSA has been demonstrating a pattern of illegal and unconstitutional acts for an extended period of time. This appeal must respectfully continue to move forward as the NSA's unconstitutional actions will continue regardless of what any new law says or purports to do. It is only with court intervention that these illegal and unconstitutional acts can be restrained and finally put to an end. Moreover, only through court supervision can the NSA be prevented from further abuse now and into the future.

Dated: June 9, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

Respectfully Submitted,

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