ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

October 6, 2015

VIA CM/ECF

Ms. Molly C. Dwyer
Clerk, United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Electronic Frontier Foundation v. U.S. Dep't of Commerce*, No. 13-16480, (oral argument scheduled for Oct. 21, 2015)

Dear Ms. Dwyer,

Plaintiff-appellee Electronic Frontier Foundation ("EFF") offers this brief response to defendant-appellant Department of Commerce's 28(j) filing concerning Section 209 of Pub. L. No. 113-276 ("Section 209").

Despite Section 209's passage, the heart of this case remains unchanged: the government has failed to identify a statute that satisfies the criteria for withholding under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3). Section 209 does not alter the analysis. The language of Section 209 does not direct withholding so as "to leave no discretion on the issue," nor does it establish "particular criteria" or "particular types of matters" to be withheld, as Exemption 3 requires. *See* 5 U.S.C. § 552(b)(3)(A)(i), (ii).

Indeed, Section 209 does not appear to change federal law at all. Section 209 did not reenact or amend the EAA or its confidentiality provision.[1] Instead, by its own terms, Section 209 purports to legislate the lapsed EAA's "[a]pplication" and contains only the conclusion that the EAA's confidentiality provision "has been in effect from August 20, 2001, and continues in effect . . . pursuant to [IEEPA]." But whether the EAA has

[1] Accordingly, Section 209 does not place this case on the same footing as *Wisconsin Project v. Dep't of Commerce*, 317 F.3d 275 (D.C. Cir. 2003), and *Times Publishing v. Dep't of Commerce*, 236 F.3d 1286 (11th Cir. 2001), as the government suggests. In both cases, Congress actually reenacted EAA. *See* Brief for Plaintiff-Appellee at 24.

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been in effect is a question of law for this Court to decide, not an answer Congress can supply through legislation. *See United States v. Klein*, 80 U.S. 128, 146 (1871); *Robertson v. Seattle Audubon Assoc.*, 503 U.S. 429, 438 (1992) (upholding statute because it "compelled changes in the law, not findings or results under old law").

Finally, even assuming Section 209's valid application, it does not apply retroactively to this case. "[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Landgraf v. USI Film Products*, 511 U.S. 244, 264 (1994) (internal citations omitted). Nothing in Section 209's text requires such a result.

Sincerely,

/s/ Mark Rumold

MARK RUMOLD
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 6, 2015.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ Mark Rumold

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