U.S. FOREIGN INTELLIGENCE SURVEILLANCE COURT
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UNITED STATES
FOREIGN INTELLIGENCE SURVEILANCE 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

REPLY OF THE CENTER FOR NATIONAL SECURITY STUDIES IN SUPPORT OF MOTION TO ESTABLISH A PUBLIC BRIEFING SCHEDULE INCLUDING THE FILING OF BRIEFS BY AMICI CURIAE, FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF, AND A SUGGESTION FOR HEARING EN BANC

The Telephony Records Program ("Program"), the name used by the Solicitor General in the Supreme Court, is a program, periodically reauthorized by this Court for the last seven years, of compelled production to the National Security Agency of "all" call detail records not only for calls between the United States and abroad but for those "wholly within the United States, including local telephone calls" (Order in BR 13-158, October 11, 2013, at p. 4). That Program is without precedent in American history. And it is very questionable whether it is within the scope of what Congress intended to authorize in passing Section 501 of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1861. Yet in the seven years the Program has operated, this Court has heard only from the Government, in secret, on that exceptionally important legal question.[1]

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[1] On October 17, 2013, the Center for National Security Studies ("Center") moved this Court to establish procedures to ensure that the current or next reauthorization of bulk telephony metadata collection is given plenary consideration by the full Court that includes an opportunity for amici curiae to submit a brief or briefs detailing why that bulk collection is unlawful. This is the Center's Reply to the Government's Response.

At the heart of the Center's Motion is the principle that the Court needs to hear from more than one side. Accordingly, the Center has moved this Court to direct the Government to file its legal justifications for the Program publicly, and to set a briefing schedule to allow amici curiae to respond to those justifications. That is the best way to bring about a meaningful and comprehensive airing of the issues. It would also be consistent with Section 501, because proceedings will remain ex parte and any sensitive information in the Government's application or Court's order may remain protected. Moreover, the Court should follow the Center's suggestion and consider this case en banc. This case presents foundational issues concerning whether Congress has authorized the Executive Branch to engage in massive collection of personal data that seemingly has no end point.

I. The Court Should Receive on the Public Record Competing Legal Arguments from the Government and Amici on the Lawfulness of Bulk Metadata Collection.

The Government concedes in its Response that this Court has inherent power to receive a public brief from amici curiae on whether Section 501 authorizes the bulk collection at issue. *See* Resp. at 1, 8-10. Yet the Government contends that Section 501 prohibits it from publicly filing its own legal argument in support of the bulk collection, thus preventing any amicus from grappling directly with the Government's actual legal justifications. Resp. at 10-12. The Government's position misinterprets Section 501, and would deny this Court the chief benefit of amicus participation—a full and informed briefing on both sides of the relevant issues. This Court both can and should require the Government to publicly file its legal justifications.

The ability of the Court to receive an amicus brief that comprehensively addresses the legal arguments of the Government will be greatly enhanced if the Government is directed to file its own public memorandum of law defending the program. The Government's legal arguments are scattered across various sources that have been declassified in piecemeal fashion. For example, this Court's Amended Memorandum Opinion of August 29, 2013 cites a Government 2006 Memorandum of Law in No. BR 06-05, the docket for the first telephony metadata order. That memorandum of law was made public only this week. Beginning in August 2013, the Government has addressed publicly the legality of bulk telephony metadata collection in a White Paper, briefs and legal memoranda in the Supreme Court, *see In re Electronic Privacy Information Center*, (No. 13-58), at least two district courts, *see* Government Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunctions at 31-44, *Klayman v. Obama*, No. 13-cv-00851 (D.D.C. Nov. 12, 2013); Defendants' Memorandum of Law in Support of Motion to Dismiss the Complaint, at 19-29, *ACLU v. Clapper*, 13 Civ. 3994 (S.D.N.Y. Aug. 26, 2013), congressional testimony, and a speech before the Brookings Institution. These briefs, statements, and speeches do not, however, address elements of the reasoning in the August opinion, such as the Court's reliance on earlier opinions construing the term "relevance" in Title IV of FISA on governing the use of of pen registers for metadata.

The Government appears to argue that Section 501 precludes it from filing a public legal memorandum in this Court because that section requires that the proceedings be ex parte and that the application and orders remain secret. *Id.* at 11. But requiring the Government to publicly file its legal memorandum would not violate either of those requirements. The Government's argument appears to conflate "ex parte" with "in

camera." To say that a proceeding must be held ex parte does not necessarily mean that it must be held in secret; rather, it simply means that it must be held without providing notice to the other party. *See Mission Eng'g Co. v. Continental Cas. Co.*, 883 F. Supp. 488, 489 (C.D. Cal. 1995). The proceedings will still be "ex parte" because appearance of amici will not alter the fact that the Government is the *only* party present. Nor does "ex parte" always require consideration "in camera," as can be seen by the inclusion in Section 501(f)(5), 50 USC § 1861(f)(5), of authority to proceed "in camera" as well as "ex parte" in proceedings involving recipients of Section 501 orders. *See* Section 802(d), 50 USC § 1885a(d) (the court shall review classified information "in camera and ex parte"). The inclusion of both terms in that section is in contrast to Section 501(c), which requires only that the proceedings be ex parte, and thus as a statutory matter does not preclude an open part of a proceeding when no classified matter would be disclosed.

Additionally, directing the Government to file its legal memorandum publicly would not require the Government or the Court to divulge anything that must be kept secret. Indeed, much if not all of the information that would be contained in such a memorandum has already been made public. The Government has declassified the fact of the collection and the Government or this Court has made public various opinions, orders, and legal arguments related to the Program. In fact, the Government publicly filed a detailed legal defense of its bulk metadata collection just last week in the District Court for the District of Columbia. *See* Government Defendants' Opposition to Plaintiffs' Motion for Prelimary Injunctions at 31-44, *Klayman v. Obama*, No. 13-cv-00851 (D.D.C. Nov. 12, 2013). No reasonable reading of Section 501's non-disclosure

requirements compels the Court to simply ignore what has already been made public.[2] And Rule 7(j) of this Court provides a model for the Government's service of a redacted submission provided that it "must clearly articulate the government's legal arguments." That some or all of the Government's brief is made public does not mean that sensitive information in the application or order must also be revealed.

In testimony before the Privacy and Civil Liberties Oversight Board on July 9, 2013, Tr. at 34, a former member of this Court, James Robertson, described the importance of hearing competing views:

> Now judges are learned in the law and all that, but anybody who has been a judge will tell you that a judge needs to hear both sides of a case before deciding.
>
> It's quite common, in fact it's the norm to read one side's brief or hear one side's argument and think, hmm, that sounds right, until we read the other side.

Now that the fact of the Program is declassified, this Court has released its recent opinions, and the Government is making public arguments before other courts and

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[2] The Government submits that an amicus brief does not belong in a business records docket and should be accepted only as a brief on "an abstract legal issue, Resp. at 9, and placed in a separate public miscellaneous docket, Resp. at 1, n.1, where the Court could use it in adjudicating a "future" application, *id* at 8. The Court's miscellaneous public dockets appear to be used for ancillary matters, each under a case number, in which final relief is sought on a question of public release of information. The question whether bulk metadata collection is authorized by Section 501 is not a comparably ancillary issue.

The Court has discretion to provide for docketing in a manner that best enables it to achieve fully informed adjudication of competing legal views. One way is to establish procedures for reconsideration of the present order. That would address the stated concern of the Government about a classified docket because the fact of the present docket and collection order is declassified. Another way is to establish procedures for the next authorization (the present order expires on January 3, 2014) and to begin them in time for action on it. Or the Court could begin the procedures under the present docket and transfer them to the next when it is established. Whichever path the Court takes in its discretion, the objective should be to connect consideration of the competing briefs to an actual decision on authorization of bulk telephony metadata collection.

elsewhere, it is time for argument to be joined in public before this Court, which has the unavoidable responsibility of adjudicating the lawfulness of this collection.

II. Bulk Telephony Metadata Collection Presents Questions of Exceptional Importance that Merit En Banc Review.

A. The Standard

The Government states that the Center has no standing to seek en banc review. Resp. at 11. But we have not sought to file, and under the rules of this Court could not file, a petition for hearing or rehearing en banc that is required to be submitted to the members of the Court for a vote. We have made a *suggestion* to the Court. Under Rule 49 of this Court, a Judge to whom a matter has been presented may request that all Judges be polled with respect to whether the matter should be considered or reheard en banc. It would serve the public interest to make that request and for the members of the Court to act favorably on it.

The Government offers one reason why en banc review is "not necessary" – namely, that fifteen judges of this Court have ruled the same way on bulk telephony metadata orders. Resp at 12. The standard the Government addresses – "to secure or maintain uniformity of the court's decisions" – is one of two alternative standards for en banc review. The other standard, which is the basis for the Center's suggestion (Motion at 5), is that "the proceeding involves a question of exceptional importance." Section 103(a)(2)(A)(ii), 50 USC §1803(a)(2)(A)(ii); see also FISC Rule 45. The Government's Response makes no effort to refute the undeniable exceptional importance of the question whether Section 501 authorizes the bulk metadata collection at issue.

B. The Center's Amicus Brief Would Address Numerous Questions of Exceptional Importance.

At issue in the Center's amicus brief would be the Government's authority to collect massive amounts of data on the activities of its citizens in secret. The scope of the Program is unprecedented, both because of its incredible breadth and because it targets purely domestic telephony data. Yet this massive program was undertaken without clear congressional authorization or public knowledge and approved by secret court orders until the existence of the Program was publicly revealed. The Government has developed powerful tools to search the mass of collected information to identify connections of interest. The conjunction of the collection of mass information with the very power of these search tools makes it exceptionally important to consider whether the Congress has authorized the collection.

Yet the statutory provision the Government invokes to justify the Program does not, on its face, appear to support any kind of data collection "program" at all. Rather, Section 501 provides for access to business records relevant to "an investigation," suggesting that Congress intended that section to apply on a case-by-case basis for specific investigatory purposes, and not as the foundation for a program to collect data pertaining to virtually all Americans in perpetuity.

The extraordinary importance of these issues is magnified by the legal predicate the Program establishes for other bulk collection. Neither the Government nor this Court has articulated any limiting principle for the expansive interpretation of Section 501 advanced by the Government and accepted by this Court. Without such a limit, that interpretation coud be applied to justify the collection of virtually any kind of data that can be classified as a "business record," such as data relating to electronic

communications and credit card and other financial transactions within the United States. On this view, Congress has handed the Executive Branch virtual carte blanche to determine the limits of its own data collection programs.

Among the specific issues that should be addressed in briefs by the Government and an amicus are the following:

1. Does the collection fit within the overall structure and limitations of Section 501 or FISA as a whole?

The Telephony Records Program is in tension with the structure of Section 501 in at least two respects: first, Section 501 is directed on its face to the Federal Bureau of Investigation; and second, Section 501 lacks key safeguards present in other sections of FISA, such as a set duration authority for orders issued under those sections, indicating that Congress intended Section 501 to provide for the FBI's discrete collections of business records in connection with an investigation, not to serve as the foundation for a massive, perpetual data collection program by the National Security Agency.

In contrast to other FISA authorities, Section 501 explicitly applies to one Government entity, the FBI. For electronic surveillance orders under Title I or search orders under Title III, a "Federal officer" may make the application. In Title V regarding business records, authority is given the FBI Director or, depending on the sensitivity of the application, to subordinate levels within the FBI. Section 501(a)(1) and (3), 50 USC §1861(a)(1) and (3). Both the minimization and use provisions of Section 501 apply to records "received" by the FBI. Section 501(g) and (h), 50 USC § 1861(g) and (h). Nothing in the statutory text authorizes or contemplates the wholesale contracting out to the NSA of authority that Congress vested in the FBI.

Section 501 differs from other collection authorities under FISA in another fundamental respect: it lacks a key limitation like those Congress enacted in other sections that contemplate significant data collection for an extended period of time – an expiration date for data collection orders issued thereunder. The absence of such a limitation indicates that Congress intended Section 501 to provide for discrete data collections in the limited circumstances its plain language suggests – in connection with authorized investigations – and not as part of a perpetual data collection "program."

Title I on electronic surveillance, Title IV on pen registers for 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)(1), 50 USC § 1805(d)(1); Section 402(e)(1), 50 USC § 1842(e)(1); Section 702(a), 50 USC § 1881a(a). Title III provides that a physical search order may be for a limited number of days. Section 304(d)(1), 50 USC § 1824(d)(1). But while Congress provided for collection over a period of time in these other provisions, it did not do that in Section 501. The reason is that, unlike Sections 105, 402 and 702, which are aimed at the collection of ongoing communications and data created on a continual basis, Section 501 contemplates specific and discrete orders to produce "tangible things (including books, records, papers, documents, and other items)," not a continuous collection program. The Government elsewhere suggests it could overcome this by burdening the Court with daily applications, but that would make distortion of the statute only more obvious.

This leads to a broader point about the lack of fit between the Program and FISA as a whole. In Title VII, 50 U.S.C. § 1881 et seq., when Congress addressed large-scale, programmatic collection from within the United States targeted against persons

reasonably believed to be outside the United States, it worked with the Executive Branch to enact legislation that specifically allocates responsibilities among the branches of Government, including the specific legislative determination of standards to be applied by this Court in reviewing and approving the Government's certifications for that broad collection. Section 501 has no such legislative standards. While Court-devised limitations on the Program, such as the Reasonable Articulable Standard or the number of hops permitted for searches, may be salutary, the fact remains the Court has had to create key features of the governance of the Program. That Congress omitted such key features from Section 501 while including similar standards in other provisions indicates that Congress did not intend for Section 501 to authorize large-scale programmatic data collection.

2. Does Section 501's "relevance" standard, as adopted in the USA PATRIOT Improvement and Reauthorization Act of 2005, authorize the bulk telephony metadata program?

It is equally hard to see how the Telephony Records Program can be squared with the statutory relevance standard Congress established when it revised Section 501 in the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-77 (March 9, 2006). Section 501 authorizes mandatory prodution of things "relevant to an authorized investigation" involving international terrorism. That is not a mandate for indiscriminate and continuous collection of all telephony metadata. After all, it is obvious (and uncontested by the Government) that nearly all of the metadata has no relevance whatever to any investigation.

The legislative history further undercuts the argument that Congress intended Section 501's relevance standard to authorize something like the current Program.

Although there was debate about the exact reach of that standard, even the broader interpretations offered during that debate would be far too limited to justify the current Program. At the outset of the Senate's consideration of the report of the Conference Committee for the Improvement and Reauthorization Act, which sought to reconcile very different Senate and House bills concerning the laguage of Section 501, Senator Arlen Specter, who as Judiciary Committee Chairman was leader of the Senate conferees and the Senate floor manager, placed in the Record a detailed explanation of the conference report. 151 Cong. Rec. S13442-43 (Dec. 12, 2005).[3] He noted the Senate's preference to tie business record collection to limited categories of persons, explaining that the more general relevance standard accepted by the conference "will apply only in extraordinary circumstances." *Id.* at S13443. He characterized the burden law enforcement would face in going beyond the categories of the Senate bill as "an uphill battle." *Id.* From that description to the Senate, there is no reason to believe Section 501 was an effort to enact a predicate for bulk collection.

The Government has pointed to a statement made by Senator Kyl that "[t]he relevance standard is exactly the standard employed for the issuance of discovery orders in civil litigation, grand jury subpoenas in a criminal investigation, and for each and every one of the 335 different administrative subpoenas currently authorized by the United States Code." Defendants' Memorandum of Law in Support of Motion to Dismiss the Complaint, *ACLU v. Clapper*, 13 Civ. 3994 (S.D.N.Y. Aug. 26, 2013), at 23

[3] The Conference Committee issued its report on December 9, 2005. When cloture failed in the Senate, Congress enacted short-term extensions until March 10, 2006. The Improvement and Reauthorization Act finally cleared the Senate and was signed into law, together, with the USA PATRIOT Act Additional Authorizing Amendments Act of 2006, Pub. L. 109-178 (March 9, 2006).

n.12 (quoting 152 Cong. Rec. S1379, 1395 (Feb. 16, 2006)). While Senator Kyl's understanding of "relevance" may have differed from that of Senator Specter, it too does not justify the unprecedent scope of the Program. To the contrary, even under Senator Kyl's view, as well as similar views expressed by other Senators, the scope of any collection under Section 501 should resemble what is permissible under civil discovery orders, grand jury subpoenas, and numerous adminstrative subpoena authorities. None of these vehicles allows data collection of the scope and duration undertaken here.

Yet, despite the plain language of Section 501 and the legislative history underlying its relevance standard, it is apparent that several individual opinions of this Court have adopted an exceptionally broad definition of "relevance." That definition is focused not, as the text of Section 501 would have it, on whether the specific records are relevant to a specific authorized investigation, but rather on whether the NSA's analytical methods for uncovering investigative leads require bulk data collection. In considering the meaning of "relevance" in Section 501, Judge Eagan's Amended Memorandum Opinion of August 29, 2013 in BR 13-109 quotes approvingly a 2010 opinion interpreting 50 USC § 1842(c)(2) (which provides for a relevance standard in applications for authorization for installation of pen registers and trap and trace devices). The 2010 opinion states that the "finding of relevance most crucially depended on the conclusion that bulk collection is *necessary* for NSA to employ tools that are likely to generate useful investigative leads to help identify and track terrorist operatives." *See* Mem. Op. at 20. On this 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 even more powerful tools for agencies of the Executive Branch to identify matters of interest in masses of information about ordinary conduct, such as the local calls of all Americans. It is a matter of extraordinary importance whether that view of Section 501 is correct, both now and as data analytical tools become increasingly powerful.

A final consideration arises from the fact that interpreting Section 501 to authorize the Program raises serious constitutional questions. Courts have a duty, where possible, to interpret statutes so as to avoid serious constitutional issues. *See, e.g., Boos v. Barry*, 485 U.S. 312, 331 (1988). Here, although it can be argued that the public has no expectation of privacy in telephone records in the hands of third-party telephone companies, *see Smith v. Maryland*, 442 U.S. 735 (1979), members of the Supreme Court have recently suggested that the Fourth Amendment may be read to provide protection in this context. As Justice Sotomayor put it: "[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. . . . This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parites in the course of carrying out mundane tasks." *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J. concurring); *see also id.* at 963-64 (Alito, J. concurring joined by Justices Ginsburg, Breyer and Kagan) (concluding that government use of a GPS device to track a person's location for a month violated an expectation of privacy, even after noting that "cell phones and other wireless devices now permit wireless carriers to track and record the location of users"). Recognizing the seriousness of these constitutional

issues, Congress should not be deemed to authorize such an expansive Program absent clear statutory language that does so expressly.

3. Did the extension until June 2015 of the sunset of Section 501 enact this Court's interpretation of Section 501?

Both Judge Eagan's Amended Memorandum Opinion of August 29, 2013 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 this expansive view of relevance under Section 501 when it extended provisions of the USA PATRIOT Act in 2011. The theory advanced is that when Congress extended the sunset of Section 501 from May 2011 to June 2015, all members of Congress were either aware or had an opportunity to be aware that Section 501 was being used by the Executive Branch to justify its bulk collection of telephony metadata. But even assuming that amending a sunset date is properly treated the same as a reenactment of a statute (itself a dubious proposition), application of the doctrine to the circumstances surrounding the 2011 reauthorization is both unprecedented and inappropriate.

At the outset, it must be noted that the "ratification through reenactment" doctrine is not a stand-alone rule for determining the meaning of a statutory provision; rather it is 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 argued above, the plain language, statutory structure and legislative history do not support this Court's interpretation of Section 501, and the ratification doctrine alone cannot trump Congress's originally intended meaning.

Even leaving aside for the moment the secret nature of the FISA Court's proceedings and orders, the ratification doctrine should not be applied here. 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 judicial opinions, as those opinions did not constitute settled law); *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1311 (Fed. Cir. 2001) (the decision by the Court of International Trade "was hardly the last word regarding the interpretation" of the statutory provision at issue); *In re Coastal Grp.*, 13 F.3d 81, 85 (3d Cir. 1994) (two decisions of the bankruptcy court did not constitute "settled judicial interpretation" under *Pierce*). Second, the doctrine is generally applied where there is some indication that Congress intended to ratify the existing interpretation; mere silence in reenacting the provision is not enough. Such an indication could be found in affirmative statements of approval from Congress, *see Lorillard v. Pons*, 434 U.S. 575, 582 (1978) (noting that the legislative history expressly stated approval of the existing interpretation); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 n.8 (1988) (declining to apply the doctrine where the legislative history merely made a passing reference to a prior judicial decision); *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), or in the fact that the prior judicial interpretation comports with the statutory

structure and Congress's purpose for reenactment, *see Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-240 (2009) (finding that the existing interpretation furthered Congress's purpose in reenacting that provision); *Lorillard*, 434 U.S. at 580-81 (holding that Congress evidenced an intent to adopt the existing interpretation, in part because it exhibited detailed knowledge of the existing law and selectively departed from that law in certain respects). No such indication from Congress is present here. As the Government would have it, Congress should be assumed to have adopted this Court's interpretation simply because this Court had issued orders prior to the reauthorization.

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 be must be employed cautiously given the significant consequences of its use. *See Natural Resources Defense Council, Inc. v. E.P.A.*, 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. That was the case in the two Supreme Court decisions, *Forest Grove* and *Lorillard*, cited by the opinions of Judges Eagan and McLaughlin in support of applying the ratification doctrine to Section 501. In *Forest Grove School District*, the doctrine was applied to an enactment that followed two Supreme Court opinions affirming the Court's interpretation of the statutory language. 557 U.S. at 239-40. In *Lorillard*, the doctrine was invoked when "every court to consider the issue" had interpreted the language in question in the same way. 434 U.S. at 580. But employing that legal assumption here, where no opinion by this Court justifying its interpretation of Section 501 had even been authored, let alone

made public, at the time of the reauthorization is far more precarious. It requires the Court essentially to engage in detailed fact-finding, including the examination of what materials were made available to Congress, when those materials were made available, what portions of any such materials were redacted, whether members of Congress in fact had a meaningful opportunity to scrutinize those materials, and whether those materials fairly and adequately informed Congress about the Court's underlying legal reasoning.

Judge Eagan's opinion illustrates the dangers of this exercise, as well as the need for argument by parties other than the Government. The opinion argues that applying the ratification doctrine is appropriate here because Congress was made aware of this Court's approval of 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"). *Id.* at 24-26.[4] But that is simply incorrect. As stated above, no opinion of this Court had yet been authored that provided a full substantive justification for its interpretation of Section 501. The Report itself, which is not a neutral analysis of the Program's legality but rather the Government's effort to justify the Program to Congress, contains only a cursory description of this Court's orders authorizing the Program and provides no legal reasoning. And it is uncertain whether the Report was even made available to all members of Congress. *See* Peter Wallsten, *House Panel Withheld Document on NSA Surveillience Program From Members*, Wash. Post., Aug. 16, 2013. While the Government has stated in its motion to dismiss in the *Clapper* case that the Senate Intelligence Committee made the report available to all Senators, it has made no similar representation concerning the House of Representatives. *See*

[4] The opinion cites to Ex. 3, which appears to include the probably unredacted "Report."

Defendants' Memorandum of Law in Support of Motion to Dismiss the Complaint, *ACLU v. Clapper*, 13-cv-03994, at 27 n.15 (S.D.N.Y. Aug. 28, 2013). The Report might have been a useful first step in informing Congress about the Program, but it was *far* from affording, as Judge Eagan asserts, "each Member" with "full knowledge" of the "underlying legal interpretation" of Section 501. Mem. Op. at 26-27.

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* Administration White Paper, Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act, at 19 (Aug. 9, 2013). But that decision concerned a longstanding administrative interpretation that had been publicly available for congressional scrutiny for 70 years. 453 U.S. at 296-298. And courts have held that application of the doctrine typically requires an indication that Congress was aware of the existing administrative interpretation and intended to adopt it. *See Brown*, 513 U.S. at 121 (ratification inappropriate without an indication that Congress considered the interpretation).

The publicly released version of the February 2011 Report illustrates another problem with applying the ratification doctrine to Section 501—the secretive nature of the Government's Program prevented debate by the members or the public, and no one from outside Congress was there to question the Government's and this Court's legal interpretation. This meant that the legislative process did not operate in normal fashion. 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 Program's existence.

III. Given the Government's View, this Court Sitting En Banc May be the Only Opportunity for Collegial Judicial Decision Making Regarding Bulk Telephony Metadata Collection

This Court, sitting en banc, may be the only Court on which Judges can come together to provide collective judgment to the legal questions presented by the Telephony Records Program. The Government has argued at every turn that private litigants in other forums cannot challege the orders of this Court under Section 501. For example, it successfully opposed the Supreme Court petition for mandamus of the Electronic Privacy Information Center on the ground that only the Government or a telecommunication company, as recipient of an order for the records of its customers, may seek appellate review of an order of this Court approving continuation of the Program. The Solicitor General argued that if the petitioner can bring its claim in any court the proper course would be an action in a federal district court. At the same time, the government also has sought dismissal of any lawsuit raising a challenge to the Program in federal district court. It has argued that the plaintiffs lack standing and that Section 501 impliedly precludes judicial review of the statutory claim that bulk collection pursuant to an order of this Court violates Section 501. If successful, these arguments would foreclose any avenue to federal appellate consideration through a district court.

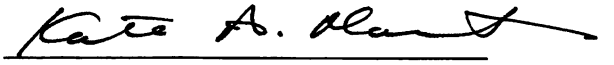
Additionally, if the Government continues to prevail in this Court on all applications to individual judges to extend the Telephony Records Program, and no telecommunication provider asserts an interest of its customers, no appeal can be taken to

the FISA Court of Review or thereafter to the Supreme Court. For seven years already, the Telephony Records Program has not been the subject of either en banc consideration or appellate review—the kind of collegial judicial examination that our system of law relies on to correct error in individual judgments. En banc review by this Court, under the authority provided by Congress, would provide that opportunity.

CONCLUSION

For the foregoing reasons, the Center for National Security Studies requests that the Court establish the procedures requested in its motion.

Respectfully submitted,



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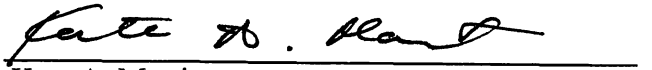
Date: November 22, 2013

CERTIFICATE OF SERVICE

I, Kate A. Martin, hereby certify that on November 22, 2013, pursuant to procedures established by the Security and Emergency Planning Staff, United States Department of Justice under FISC Rule 8, I caused copies of the Reply of the Center for National Security Studies in Support of Motion to Establish a Public Briefing Schedule Including the Filing of Briefs by Amici Curiae, for Leave to File an Amicus Curiae Brief, and a Suggestion for Hearing En Banc to be hand-delivered to:

Christine Gunning
United States Department of Justice
Litigation Security Group
145 N Street, NE
Suite 2W-115
Washington, DC 20530



Kate A. Martin