

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
Washington, D.C.


IN RE: APPLICATION OF THE
FEDERAL BUREAU OF
INVESTIGATION FOR AN ORDER
REQUIRING THE PRODUCTION OF
TANGIBLE THINGS

Docket No. BR 13-158

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it hereby is **ORDERED** that the Motion to Establish a Public Briefing Schedule Including the Filings of Briefs by *Amici Curiae*, for Leave for the Center for National Security Studies to File an *Amicus Curiae* Brief, and a Suggestion for Hearing *En Banc* is **GRANTED IN PART**. The Center for National Security Studies may file an *amicus curiae* brief on why Section 501 of the FISA, 50 U.S.C. § 1861, does not authorize the collection of telephony metadata records in bulk. All other relief requested by the Center for National Security Studies is **DENIED**.

Signed 12/18/13 3:08 P.M. Eastern Time
Date Time


MARY A. McLAUGHLIN
Judge, United States Foreign
Intelligence Surveillance Court

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
Washington, D.C.

IN RE: APPLICATION OF THE
FEDERAL BUREAU OF
INVESTIGATION FOR AN ORDER
REQUIRING THE PRODUCTION OF
TANGIBLE THINGS

Docket No. BR 13-158

MEMORANDUM OPINION

The Center for National Security Studies (“the Center”) has filed a Motion to Establish a Public Briefing Schedule Including the Filings of Briefs by *Amici Curiae*, for Leave for the Center for National Security Studies to File an *Amicus Curiae* Brief, and a Suggestion for Hearing *En Banc*, in connection with the government’s collection of telephony metadata records in bulk. The motion requests entry of an order permitting the Center to file an *amicus curiae* brief and also requests that the Court: (1) reconsider the *ex parte* order that authorized the collection of bulk telephony metadata as of October 11, 2013, and establish procedures for the submission of legal briefs addressing the request for reconsideration; (2) establish a docket for the United States’ next application for an order authorizing the collection of bulk telephony metadata; (3) require the United States to file a public legal brief or declassify the current arguments setting forth the legality of bulk telephony metadata collection and establish a briefing schedule for the submission of *amicus curiae* briefs responding to the United States’ legal brief or declassified arguments; and (4) order a hearing *en banc* to consider the United States’ request for authorization of bulk telephony metadata collection. Mot. ¶ 5.

Pursuant to the Court's October 18, 2013 order, the United States filed a response to the Center's motion. Although the United States does not contest the proposition that the Court has the inherent authority to grant requests to file *amicus curiae* briefs, the United States takes no position on whether the Court should exercise that authority with respect to the Center's request. The United States opposes, however, the filing and docketing of *amicus curiae* briefs in *ex parte* proceedings pursuant to Foreign Intelligence Surveillance Act ("FISA") § 501(f), 50 U.S.C. § 1861(f) and argues that an "*amicus* brief should be accepted in a miscellaneous docket rather than the docket of a classified application." United States' Opp'n Br. at 8-9, 10 n.4. The United States opposes the Center's request for all other relief.

The Court will grant the motion only to the extent that the Court will allow the movant to file an *amicus curiae* brief on "why Section 501 of the FISA, 50 U.S.C. § 1861, does not authorize" the collection of telephony metadata records in bulk. Mot. ¶ 1. The Court will deny all other relief requested by the movant.

Although there is no statute or rule applicable to this Court that specifically addresses whether an *amicus curiae* may be permitted to file a legal brief,¹ federal district courts possess the inherent authority to appoint *amici curiae* and permit the filing of briefs by them.² See, e.g., Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 447 n.2 (S.D.N.Y. 2012); Jin v. Ministry of State Sec., 557 F. Supp. 2d 131, 136-37 (D.D.C. 2008); Martinez v. Capital Cities/ABC-

¹ Neither the Rules of Procedure for the Foreign Intelligence Surveillance Court ("FISC") nor the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. §§ 1801-1885c, as amended, provide for the filing of legal briefs by an *amicus curiae*. Although the FISC may refer to the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure to resolve issues not addressed by the FISC Rules, see FISC Rule P. 1, those rules also do not address the filing of *amicus curiae* briefs.

² Although this Court is not a district court, it possesses similar inherent authority, except to the extent it is limited by FISA. See In re Motion for Release of Court Records, 526 F. Supp. 2d 484, 486-87 (FISA Ct. 2007); cf. 50 U.S.C. § 1803(g).

WPVI, 909 F. Supp. 283, 286 (E.D. Pa. 1995). The decision to allow participation of an *amicus curiae*, and the extent of that participation, is within the sound discretion of the district court.

See Liberty Res., Inc. v. Philadelphia Housing Auth., 395 F. Supp. 2d 206, 210 (E.D. Pa. 2009); Jin, 557 F. Supp. 2d at 136-37; Cnty. Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999); 4 Am. Jur. 2d Amicus Curiae § 1 (2013).

The traditional role of an *amicus curiae* is to act as a “friend of the court,” whose purpose is to provide impartial information to the court on a question of law about which there is doubt, particularly in matters of public interest. Neonatology Assoc., P.A. v. C.I.R., 293 F.3d 128, 131 (3d Cir. 2002); United States v. Michigan, 940 F.2d 143, 164 (6th Cir. 1991); Miller-Wohl Co., Inc. v. Comm'r of Labor and Indus., 694 F.2d 203, 204 (9th Cir. 1982). An *amicus curiae* traditionally presents a perspective different from that of the litigants or provides information to the court that might otherwise escape its attention. Miller-Wohl Co., Inc., 694 F.2d at 204; 4 Am. Jur. 2d Amicus Curiae §§ 1, 6 (2013).

Some courts have expanded the role of the *amicus curiae* from a purely impartial advisor to more of an adversarial or partisan participant. See Neonatology Assoc., P.A., 293 F.3d at 131 (holding that an *amicus curiae* need not be disinterested or impartial); Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers) (noting that the “vast majority of amicus curiae briefs are filed by allies of litigants” and that “an adversary role of an amicus curiae has become accepted,” but finding that this practice is “an abuse”); Funbus Sys., Inc. v. California Pub. Util. Comm'n, 801 F.2d 1120, 1124-25 (9th Cir. 1986) (holding that an *amicus curiae* need not be disinterested); Samuel Krislov, The Amicus Curiae Brief: from Friendship to Advocacy, 72 Yale L.J. 694 (1963).

Regardless of whether the role of an *amicus curiae* is to act as an impartial advisor or as an advocate, most courts have recognized that the role of an *amicus curiae* is limited, and does not rise to the level of a party to the litigation. See, e.g., Upper Blackstone Water Pollution Abatement Dist. v. United States Env'tl. Prot. Agency, 690 F.3d 9, 29 n.25 (1st Cir. 2012); In re Bayshore Ford Trucks Sales, Inc., 471 F.3d 1233, 1249 n.34 (11th Cir. 2006); Cohen v. Empire Blue Cross & Blue Shield, 176 F.3d 35, 41 (2d Cir. 1999); Miller-Wohl Co., Inc., 694 F.2d at 204; City of Winter Haven v. Gillespie, 84 F.2d 285, 287 (5th Cir. 1936).

For example, in United States v. Michigan, the United States Court of Appeals for the Sixth Circuit concluded that an *amicus curiae* lacks standing “to exercise any litigating rights equal to a named party/real party in interest” 940 F.2d 143, 166 (6th Cir. 1991). In that case, the district court had granted the *amicus curiae* rights of a litigating party, such as the right to file pleadings, conduct discovery, initiate contempt proceedings, and file motions. Id. at 163. On review, the Sixth Circuit found that the district court had allowed a nonparty to circumvent the traditional processes for becoming a named party by giving it “litigating *amicus curiae*” status. Id. at 164. The Sixth Circuit reversed the district court’s expansion of the role of the *amicus curiae*, finding that giving an *amicus curiae* the powers of a named party would “convert the trial court into a free-wheeling forum of competing special interest groups capable” of interfering with the interests of the parties and the administration of justice. Id. at 165.

A nonparty cannot circumvent Article III standing requirements, and gain control over a case equal to that of a real party of interest, by filing an *amicus curiae* brief. Rio Grande Pipeline Co. v. Fed. Energy Regulatory Comm’n, 178 F.3d 533, 539 (D.C. Cir. 1999). A court has discretion to set limits on an *amicus curiae* consistent with that principle. See, e.g., Briggs v.

United States, 597 A.2d 370, 374-75 (D.C. Cir. 1991); Cobell v. Norton, 246 F. Supp. 2d 59, 62 (D.D.C. 2003); 4 Am. Jur. 2d Amicus Curiae § 6 (2013).

The Court will apply these principles relating to the filing of *amicus curiae* briefs within the context of the statutory provisions that set out the *ex parte* and classified nature of proceedings under the FISA. Section 501 of FISA, as amended by Section 215 of the USA PATRIOT Act in 2001, permits the Federal Bureau of Investigation (“FBI”) to apply to this Court “for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation . . . to protect against international terrorism.” FISA § 501(a)(1), 50 U.S.C. § 1861(a)(1). If the application meets the statutory requirements, FISA requires that the Court “shall enter an *ex parte* order as requested, or as modified, approving the release of tangible things.” FISA § 501(c)(1), 50 U.S.C. § 1861(c)(1). As in all matters, FISA directs that proceedings be “conducted as expeditiously as possible,” with records “maintained under [appropriate] security measures.” FISA § 103(c), 50 U.S.C. § 1803(c).

The Court will exercise its discretion to allow the Center to file an *amicus curiae* brief on the issue requested by the Center -- whether Section 1861 authorizes the collection of telephony metadata records in bulk. The brief will be filed in a miscellaneous docket that can be accessed by any judge of the Court when considering an application for such collection under Section 1861 in the future. The brief shall contain a table of contents with page references and a table of authorities with references to the pages of the brief where the authorities are cited, be no more than 15 pages in length excluding signature pages and any certificates of service, and shall otherwise comply with any relevant provisions contained in FISC Rule P. 7 with respect to form and filing.

Although the Court could require the Center to file a motion to file an *amicus* brief in accordance with the strictures of Fed. R. App. P. 29,³ the Court in this particular case will allow the Center to file the requested brief without filing an additional motion. According to Fed. R. App. P. 29, a court may grant leave for a nonparty to file an *amicus curiae* brief upon motion by the *amicus curiae*. Such a motion must include a copy of the proposed *amicus* brief and must state “the movant’s interest,” and “the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29(b). Such a motion would be repetitive of the briefing currently before the court, and is therefore unnecessary under these particular circumstances.

In its reply memorandum, the Center has described the issues that will be addressed by the Center’s *amicus* brief. The Center’s *amicus* brief will argue that (1) the collection of bulk telephony metadata does not fit within the structure and limitations of Section 1861 and FISA as a whole; (2) the collection of bulk telephony metadata does not meet the “relevance” standard of Section 1861, as adopted in the USA PATRIOT Improvement and Reauthorization Act of 2005; and (3) Congress’s extension of the sunset of Section 1861 from May 2011 to June 2015 did not enact the FISC’s interpretation of Section 1861. The Court therefore finds that, in light of the information provided in the Center’s reply brief, the Center has demonstrated the Center’s interest and the contents of and reasons for its *amicus curiae* brief.

The other relief requested by the Center goes well beyond the appropriate limits of an *amicus curiae*, especially in an *ex parte* proceeding such as the one here. An *amicus curiae* has no standing to move for reconsideration of a decision nor does the Center have standing to seek

³ Federal district courts often refer to Rule 29 of the Federal Rules of Appellate Procedure for guidance as to the filing of *amicus curiae* briefs. See, e.g., United States v. Alkaabi, 223 F. Supp. 2d 583, 592 (D.N.J. 2002); United States v. Gotti, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991).

en banc review by the Court. See FISC Rule P. 46. Congress has mandated that the Court's review of a Section 1861 application be *ex parte*. In view of that mandate, the Center will not have access to the government's application or other docket proceedings. As evidenced by the preview of the Center's intended arguments in its reply brief, information already made available to the public, including opinions of this Court, provides sufficient context for the Center to brief the issue specified herein.

Signed 12/18/13 3:08 P.M. Eastern Time
Date Time


MARY A. McLAUGHLIN
Judge, United States Foreign
Intelligence Surveillance Court