Foreign Intelligence Surveillance Act Litigation

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The Foreign Intelligence Surveillance Act created procedures for judicial oversight of domestic foreign intelligence surveillance. Over time, the purview of the act expanded from electronic surveillance incidents to surveillance programs encompassing electronic communications and tangible things. Judicial supervision became both more litigated and more public.

Contents

The Foreign Intelligence Surveillance Act

The Foreign Intelligence Surveillance Act (FISA) was signed by President Carter on October 25, 1978.[1] The eleven sections of FISA's title I became chapter 36, sections 1801 through 1811, of the U.S. Code's title 50 on war and national defense. FISA's title II included conforming amendments, and title III concerned the effective date.

FISA provides for court orders authorizing "electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information [involving] the acquisition of communications of [a] United States person."[2] Foreign powers include foreign governments, foreign factions, and international terrorists.[3] Use of FISA-derived evidence in court requires notice to the person against whom the evidence is used.[4]

FISA orders are issued by a FISA court, referred to as the Foreign Intelligence Surveillance Court or FISC, that originally consisted of seven district judges from seven circuits appointed by the Chief Justice for nonrenewable seven-year terms.[5] The court's chief judge is known as the court's presiding judge.

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1. Pub. L. No. 95-511, 92 Stat. 1783 (1978). *See generally* 2 James G. Carr, Patricia L. Bellia & Evan A. Creutz, The Law of Electronic Surveillance 437–511 (May 2020); David S. Kris & J. Douglas Wilson, National Security Investigations and Prosecutions (2d ed. 2012); Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 Harv. J. L. & Pub. Pol'y 757 (2014); Walter F. Mondale, Robert A. Stein & Caitlinrose Fisher, *No Longer a Neutral Magistrate: The Foreign Intelligence Surveillance Court in the Wake of the War on Terror*, 100 Minn. L. Rev. 2251 (2016); International Surveillance, The 2014 Cato Institute Surveillance Conference (Dec. 12, 2014) [hereinafter Cato Conference], www.cato.org/events/2014-cato-institute-surveillance-conference.

2. FISA § 102(b), 50 U.S.C. § 1802(b) (2020).

3. *Id.* § 101(a), 50 U.S.C. § 1801(a).

4. *Id.* § 106(a), 50 U.S.C. § 1806(c).

5. Pub. L. No. 95-511, §§ 103(a), (d), 92 Stat. at 1788. *See generally* Elizabeth Goitein & Faiza Patel, What Went Wrong with the FISA Court (Brennan Ctr. for Justice 2015), www.brennancenter.org/sites/default/files/analysis/What_Went_%20Wrong_With_The_FISA_Court.pdf; Bruce Moyer, *The Most Powerful Court You Have Never Heard Of*, Fed. Law., Mar. 2015, at 6.

Physical Searches

In 1980, President Carter's second attorney general, Benjamin Civiletti, adopted a policy of seeking FISA-court permission for some physical searches in service of foreign intelligence, searches that are sometimes called black bag jobs.[6] William French Smith, President Reagan's first attorney general, submitted a black bag petition to the FISA court on June 3, 1981, asking the court to deny the petition and rule that the court did not have jurisdiction over such petitions.[7] Presiding Judge George L. Hart, Jr., a district judge in the district court for the District of Columbia,[8] acceded to the government's request in the court's first public opinion.[9] Expressing a judgment in which all judges on the court concurred, Judge Hart observed that the text of FISA applied only to electronic surveillance.[10]

In 1994, FISA was amended to extend the FISA court's jurisdiction to include physical searches for foreign intelligence purposes.[11] The new provisions became FISA's title III,[12] and provisions on effective dates became title IV.

FISA Expansion

In 1998, the FISA court's jurisdiction was expanded further to include pen registers, trap-and-trace devices, and business records, creating new titles IV[13] and V[14] and moving effective date provisions to title VI.[15]

The USA PATRIOT Act was signed by President George W. Bush on October 26, 2001.[16] It relaxed the standard for issuing a FISA order from "the

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6. *See* William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 Am. U. L. Rev. 1, 78 (2000); Charlie Savage, Takeover 40 (2007); Benjamin Wittes, Law and the Long War 224 (2008).

7. Brief, *In re* Physical Search, No. 81-___ (FISA Ct. June 3, 1981), *reprinted in* S. Rep. No. 97-280.

8. Judge Hart died on May 21, 1984. Federal Judicial Center Biographical Directory of Article III Federal Judges [hereinafter FJC Biographical Directory], www.fjc.gov/history/judges.

9. Opinion, *Physical Search*, No. 81-___ (FISA Ct. June 11, 1981), *reprinted in* S. Rep. No. 97-280.

10. *Id.*

11. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, § 807, 108 Stat. 3423, 3443 (1994); *see* Wittes, *supra* note 6, at 59–61 (reporting that the Clinton administration sought expansion of FISA-court authority over black bag jobs because of uncertainty about whether surveillance of the spy Aldrich Ames, whose prosecution ended in a plea bargain benefitting Ames's wife, would have withstood judicial scrutiny); Laura K. Donohue, The Future of Foreign Intelligence 13 (2016) ("It was not clear . . . that the search of [Aldrich Ames's] home had been legal.").

12. 50 U.S.C. §§ 1821–1829 (2020) (subchapter II).

13. *Id.* §§ 1841–1846 (subchapter III, on pen registers and trap-and-trace devices).

14. *Id.* §§ 1861–1862 (subchapter IV, on business records).

15. Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, §§ 601–603, 112 Stat. 2396, 2404–12 (1998); *see* Donohue, *supra* note 1, at 797 (reporting that the 1998 amendments were triggered by the 1995 Oklahoma City bombing).

purpose of the surveillance is to obtain foreign intelligence information" to require that only "a significant purpose" be foreign intelligence.[17] The act also expanded the FISA court from seven to eleven district judges, at least three of whom must reside within twenty miles of D.C.[18] (The FISA Amendments Act of 2008 clarified that the eleven judges must come from "at least" seven circuits.[19])

Section 215 of the Patriot Act expanded FISA's title V for business records to include "any tangible things."[20] Before the Patriot Act, FISA provided for FISA-court orders issued to the FBI "*authorizing* a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility to release records in its possession for an investigation to gather foreign intelligence information or *an investigation concerning international terrorism*."[21] The Patriot Act authorized the FISA court to assist the FBI by issuing "an order *requiring* the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or *to protect against international terrorism* or clandestine intelligence activities."[22]

Minimization and the Wall

FISA imposes on the government a requirement for "minimization procedures" to protect persons from unnecessary violations of privacy.[23] Over the years, the FISA court exercised oversight over minimization procedures:

> In order to preserve both the appearance and the fact that FISA surveillances and searches were not being used *sub rosa* for criminal investigations, the Court routinely approved the use of information screening "walls" proposed by the government in its applications. Under the normal "wall" procedures, where there were separate intelligence and criminal *investigations*, or a single counter-espionage investigation with overlapping

16. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); *see* Charlie Savage, Power Wars 182 (2015) ("The bill contained a grab bag of new and expanded law enforcement and surveillance powers the Justice Department had long coveted, and it made several changes to FISA.").

17. Pub. L. No. 107-56, § 218, 115 Stat. at 291, 50 U.S.C. §§ 1804(a)(6)(B), 1823(a)(6)(B).

18. *Id.* § 208, 115 Stat. at 283, 50 U.S.C. § 1803(a)(1).

19. Pub. L. No. 110-261, § 109, 122 Stat. 2436, 2464 (2008), 50 U.S.C. § 1803(a)(1).

20. Pub. L. No. 107-56, § 215, 115 Stat. at 287, 50 U.S.C. §§ 1861–1862; *see* Laura K. Donohue, *The Fourth Amendment in a Digital World*, 71 N.Y.U. Ann. Surv. Am. L. 553, 671 (2017) ("[FISA] was to be the *only* way the Executive branch could engage in domestic electronic surveillance for foreign intelligence purposes. [Footnote omitted.] It later expanded FISA to govern physical searches, pen register and trap and trace devices, and tangible goods."); *see also* Donohue, *supra* note 11, at 25–26.

21. 50 U.S.C. § 1861(a) (2000) (emphasis added).

22. *Id.* § 1861(a)(1) (2001) (emphasis added). *See generally* U.S. Dep't of Just. Inspector Gen., A Review of the Federal Bureau of Investigation's Use of Section 215 Orders for Business Records (Mar. 2007) (redacted), oig.justice.gov/sites/default/files/legacy/special/s0703a/final.pdf.

23. See 50 U.S.C. §§ 1801(h), 1821(4) (2020) (definitions).

> intelligence and criminal *interests*, FBI criminal investigators and Department prosecutors were not allowed to review all of the raw FISA intercepts or seized materials lest they become defacto partners in the FISA surveillances and searches. Instead, a screening mechanism, or person, usually the chief legal counsel in an FBI field office, or an assistant U.S. attorney not involved in the overlapping criminal investigation, would review all of the raw intercepts and seized materials and pass on only that information which might be relevant evidence. In unusual cases such as where attorney–client intercepts occurred, Justice Department lawyers in [the Office of Intelligence Policy and Review] acted as the "wall." In significant cases, involving major complex investigations such as the bombings of the U.S. Embassies in Africa, and the millennium investigations, where criminal investigations of FISA targets were being conducted concurrently, and prosecution was likely, this Court became the "wall" so that FISA information could not be disseminated to criminal prosecutors without the Court's approval. In some cases where this Court was the "wall," the procedures seemed to have functioned as provided in the Court's orders; however, in an alarming number of instances, there have been troubling results.
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> In November of 2000, the Court held a special meeting to consider the troubling number of inaccurate FBI affidavits in so many FISA applications.
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> In virtually every instance, the government's misstatements and omissions in FISA applications and violations of the Court's orders involved information sharing and unauthorized disseminations to criminal investigators and prosecutors.[24]

Following the attacks of September 11, 2001, the government proposed relaxed minimization procedures, but all seven members of the court agreed that some of the changes were "designed to enhance the acquisition, retention and dissemination of *evidence for law enforcement purposes*, *instead* of being consistent with the need of the United States to obtain, produce, and disseminate *foreign intelligence information*."[25] One of the court's concerns was that the government would be able to circumvent probable-cause requirements for criminal investigations by characterizing the investigations as for foreign intelligence.[26] So the court modified the submitted minimization procedures.[27]

FISA requires the Chief Justice to appoint three district or circuit judges to a FISA court of review to hear government appeals from FISA-court rulings.[28] Hearing its very first appeal, the court of review overruled the FISA

24. *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 620–21 (FISA Ct. 2002).

25. *Id.* at 623.

26. *Id.* at 624 (quotation marks omitted).

27. *Id.* at 625–27.

28. 50 U.S.C. § 1803(b).

court's modifications to the government's minimization procedures.[29] "The FISA court's decision and order not only misinterpreted and misapplied minimization procedures it was entitled to impose, but as the government argues persuasively, the FISA court may well have exceeded the constitutional bounds that restrict an Article III court."[30]

The Intelligence Community

The Central Intelligence Agency (CIA) and the National Security Agency (NSA) are well-known members of the U.S. intelligence community (IC).[31] The FBI is also a member. There are seventeen members,[32] and a Director of National Intelligence provides some coordination:[33]

- Central Intelligence Agency
- National Security Agency
- Federal Bureau of Investigation
- Defense Intelligence Agency
- Army Intelligence and Security Command
- Office of Naval Intelligence
- Marine Corps Intelligence
- Air Force Intelligence
- U.S. Coast Guard Intelligence
- U.S. Space Force
- Department of State Bureau of Intelligence and Research
- Department of Homeland Security Office of Intelligence and Analysis
- Department of Treasury Office of Intelligence and Analysis
- Department of Energy Office of Intelligence and Counterintelligence
- National Reconnaissance Office
- National Geospatial-Intelligence Agency
- Drug Enforcement Administration Intelligence Program

Stellar Wind

On December 16, 2005, the *New York Times* reported that President Bush had secretly authorized in 2002 a program of surveillance that excluded the FISA court from approval of the surveillance, although the surveillance in-

29. *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002); *see* Laura Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 Harv. J.L. & Pub. Pol'y 117, 219 (2014). *See generally* Donohue, *supra* note 11, at 26–31 ("National Security and Criminal Law Converge"); Karen J. Greenberg, Rogue Justice 55–62 (2016) ("Tearing Down the Wall").

"Since the government is the only party to FISA proceedings, we have accepted briefs filed by the American Civil Liberties Union (ACLU) and the National Association of Criminal Defense Lawyers (NACDL) as *amici curiae*." *Sealed Case*, 310 F.3d at 719 (footnote omitted).

30. *Sealed Case*, 310 F.3d at 731.

31. We Are the Intelligence Community, www.intelligence.gov/.

32. Our Organizations, www.intelligence.gov/how-the-ic-works.

33. Office of the Director of National Intelligence, www.odni.gov.

cluded international communications with people in the United States.[34] *USA Today* reported on May 11, 2006, that telephone companies were cooperating with government surveillance in possible violation of FISA.[35] Civil suits against the government and against telephone companies followed these revelations, and most of the suits were consolidated by the Judicial Panel on Multidistrict Litigation before District Judge Vaughn R. Walker in the Northern District of California.[36] On June 28, 2013, the *Washington Post* reported that a surveillance program authorized on October 4, 2001, was called Stellar Wind.[37]

Judges in these cases were divided on whether the plaintiffs had standing to challenge the government programs.

In an action against the government filed in the Eastern District of Michigan, District Judge Anna Diggs Taylor ruled before the cases were consolidated that the program was unconstitutional and a violation of FISA.[38] On appeal, Circuit Judge Ronald Lee Gilman agreed both that the plaintiffs had

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34. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

35. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today, May 11, 2006, at 1A.

"President Bush authorized the NSA to (1) collect the contents of certain international communications, a program that was later referred to as the [terrorist surveillance program], and (2) collect in bulk non-content information, or 'metadata,' about telephone and Internet communications." Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act 16 (July 2, 2014) [hereinafter Second Privacy Board Report], documents.pclob.gov/prod/Documents/OversightReport/823399ae-92ea-447a-ab60-0da28b555437/702-Report-2.pdf.

Following the *New York Times* report, the label "terrorist surveillance program" was coined to refer to aspects of a broader program that were revealed by the news report. A Review of the Department of Justice's Involvement with the President's Surveillance Program, *in* Annex to the Report on the President's Surveillance Program 347, 365 (July 10, 209), www.dni.gov/files/documents/424/2009%20Joint%20IG%20Report%20on%20the%20PSP_Annex%20Vol.%20III-F.pdf; *see* Michael V. Hayden, Playing to the Edge 106 (2016). "After the *New York Times* reported leaked information about the Terrorist Surveillance Program, the administration had to retroactively justify its actions." Mondale *et al.*, *supra* note 1, at 2279.

36. *In re* NSA Telecomm. Records Litig., 474 F. Supp. 2d 1355 (J.P.M.L. 2007); *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006); Docket Sheet, *In re* NSA Telecomm. Records Litig., No. 4:06-md-1791 (N.D. Cal. Aug. 14, 2006) [hereinafter Warrantless Wiretaps Docket Sheet]. *See generally* Robert Timothy Reagan, National Security Case Studies: Special Case-Management Challenges 505–59 (Federal Judicial Center, 6th ed. 2015).

Judge Walker retired on February 28, 2011. FJC Biographical Directory, *supra* note 8.

37. Robert O'Harrow, Jr. & Ellen Nakashima, *NSA Collected Data with Private Sector After 9/11*, Wash. Post, June 28, 2013, at A6.

"[Vice President Dick Cheney] and his chief counsel conceived it, enlisted the NSA director, Michael V. Hayden, to build it, found a Justice Department lawyer to bless it, and packaged the program for sign-off by President Bush." Barton Gellman, Dark Mirror 26 (2020).

38. ACLU v. NSA, 438 F. Supp. 2d 754, 775–76, 778–80, 782 (E.D. Mich. 2006).

Judge Taylor died on November 4, 2017. FJC Biographical Directory, *supra* note 8.

standing and that their suit had merit,[39] but he was outvoted by Circuit Judges Alice M. Batchelder and Julia Smith Gibbons, who determined that the plaintiffs' claims were too speculative to afford them standing.[40]

Judge Walker dismissed most of the consolidated suits against the government as generalized grievances insufficient to afford the plaintiffs standing.[41] Circuit Judges M. Margaret McKeown, Harry Pregerson, and Michael Daly Hawkins, however, all agreed that the plaintiffs did have standing.[42]

One case against the government had exceptional facts. The government froze the assets of the Al-Haramain Islamic Foundation, a charity headquartered in Ashland, Oregon, on February 19, 2004.[43] On September 9, the Treasury Department designated the charity a global terrorist organization.[44] The Ashland charity was affiliated with the Al-Haramain Islamic Foundation in Saudi Arabia, which was the charitable arm of the Muslim World League, an organization founded in 1962.[45] In legal actions against designating the charity a terrorist organization freezing its assets, the government mistakenly produced to the charity's attorneys a top-secret document that apparently was evidence of surveillance pursuant to President Bush's secret surveillance program.[46] Relying on the top-secret document, the attorneys filed a civil action in the District of Oregon on February 28, 2006.[47]

District Judge Garr M. King ruled that the document was protected by the state-secrets privilege, so it could not be entered into evidence to support the attorneys' case, but the attorneys' memories of the document's contents could not be expunged, so the attorneys could rely on those.[48] On interlocutory appeal, certified by Judge King and accepted by the court of appeals,

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39. ACLU v. NSA, 467 F.3d 590, 683, 720 (6th Cir. 2006) (Circuit Judge Gilman, dissenting).

40. *Id.* at 653 (opinion for the court); *id.* at 692 (Circuit Judge Gibbons, concurring in the judgment).

41. Order, Ctr. for Constitutional Rights v. Obama, No. 3:07-cv-1115 (N.D. Cal. Jan. 31, 2011), D.E. 51; Dismissal Order, Jewel v. NSA, No. 4:08-cv-4373 (N.D. Cal. Jan. 21, 2010), D.E. 57, 2010 WL 235075.

42. Jewel v. NSA, 673 F.3d 902 (9th Cir. 2011).

43. Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 686 F.3d 965, 970–71, 973 (9th Cir. 2012); Al Haramain Islamic Found. v. U.S. Dep't of Treasury, 585 F. Supp. 2d 1233, 1245 (D. Or. 2008).

44. *Al Haramain Islamic Found.*, 686 F.3d at 970, 973–74, 977; *Al Haramain Islamic Found.*, 585 F. Supp. 2d at 1243, 1245–46; *see* Reagan, *supra* note 36, at 165.

45. United States v. Sedaghaty, 728 F.3d 885, 893 (9th Cir. 2013); *see* Chris Heffelfinger, Radical Islam in America 57–59 (2011).

46. Opinion at 4, Al-Haramain Islamic Found. v. U.S. Dep't of Treasury, No. 3:07-cv-1155 (D. Or. June 5, 2008), D.E. 69, 2008 WL 2381640; *see* Reagan, *supra* note 36, at 173, 516.

47. Complaint, Al-Haramain Islamic Found. v. Bush, No. 3:06-cv-274 (D. Or. Feb. 28, 2006), D.E. 1 (describing the document as "United States Treasury Office of Foreign Assets Control logs of . . . conversations").

48. Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215, 1217, 1223–24, 1228–29 (D. Or. 2006).

Judge King died on February 5, 2019. FJC Biographical Directory, *supra* note 8.

Judges McKeown, Pregerson, and Hawkins reversed Judge King's "commendable effort to thread the needle," holding that the plaintiffs' memories of the top-secret document were also covered by the state-secrets privilege.[49] The court of appeals remanded the case for a determination of whether FISA's remedies for improper surveillance preempted the privilege.[50] By the time of remand, the case had been consolidated with the cases before Judge Walker,[51] who determined that FISA did preempt the state-secrets privilege, "but only in cases within the reach of its provisions."[52]

FISA's section 110 provides civil remedies for violations of FISA.[53] Judge Walker determined, however, that the court of appeals unequivocally ruled that the plaintiffs could not rely on the top-secret document to establish standing to seek those remedies.[54] In 2010, Judge Walker awarded the plaintiffs summary judgment, because they presented as unrebutted evidence numerous public government statements implying that the charity had been surveilled and the government did not show that the surveillance was authorized by FISA.[55] On appeal, Judges McKeown, Pregerson, and Hawkins concluded that section 110 had not waived the government's sovereign immunity.[56]

Congress amended FISA to provide the telephone companies with retroactive immunity in the consolidated cases before Judge Walker.[57] The Intelligence Reform and Terrorism Prevention Act of 2004 moved FISA's title VI on effective dates to title VII and added a new title VI on requirements for reporting FISA-court statistics to Congress.[58] The FISA Amendments Act of 2008 (FAA) substituted a new title VII providing "additional procedures regarding certain persons outside the United States."[59] Subject to FISA-court

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49. Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1204–05 (9th Cir. 2007).

Judge Pregerson died on November 25, 2017. FJC Biographical Directory, *supra* note 8.

50. *Al-Haramain Islamic Found.*, 507 F.3d at 1205–06.

51. Docket Sheet, Al-Haramain Islamic Found. v. Bush, No. 4:07-cv-109 (N.D. Cal. Jan. 9, 2007).

52. *In re* NSA Telecomm. Records Litig., 564 F. Supp. 2d 1109, 1115–25 (N.D. Cal. 2008).

53. 50 U.S.C. § 1810 (2020).

54. *NSA*, 564 F. Supp. 2d at 1134.

55. *In re* NSA Telecomm. Records Litig., 700 F. Supp. 2d 1182 (N.D. Cal. 2010).

56. Al-Haramain Islamic Found. v. Obama, 705 F.3d 845 (9th Cir. 2012).

57. *See In re* NSA Telecomm. Records Litig., 671 F.3d 881 (9th Cir. 2011), *aff'g In re* NSA Telecomm. Records Litig., 633 F. Supp. 2d 949 (N.D. Cal. 2009), *cert. denied*, 568 U.S. 958 (2012); *see also* Donohue, *supra* note 29, at 117, 137.

58. Pub. L. No. 108-458, § 6002, 118 Stat. 3638, 3743 (2004), 50 U.S.C. § 1871 (2020) (subchapter V); *see* Donohue, *supra* note 29, at 138–39.

59. Pub. L. No. 110-261, § 101(a), 122 Stat. 2436, 2437 (2008), 50 U.S.C. §§ 1881–1881g (subchapter VI); *see* Donohue, *supra* note 20, at 672 (reporting that the act brought within FISA, for the first time, purely overseas communications, but only those involving U.S. persons); *see also* United States v. Hasbajrami, 945 F.3d 641, 649–58 (2d Cir. 2019); Donohue, *supra* note 11, at 33–38. *See generally* The FISA Amendments Act: Q&A (Apr. 18, 2017), www.dni.gov/files/icotr/FISA%20Amendments%20Act%20QA%20for%20Publication.pdf (the intelligence community's summary of the act's benefits in advance of the act's 2017 reauthorization).

approval or exigent circumstances, "the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information."[60] A new title VIII granted the telephone companies retroactive civil immunity.[61]

On January 10, 2007, while the warrantless wiretap litigation was pending, the FISA court issued two negotiated classified orders that resulted in the government's no longer circumventing the FISA court in the surveillance program at issue.[62]

> The new FISA Court orders are innovative and complex and it took considerable time and work for the Government to develop the approach that was proposed to and ultimately accepted by the Court. As a result of the new orders, any electronic surveillance that was conducted as part of the [terrorist surveillance program] is now being conducted subject to the approval of the FISA Court.[63]

The Electronic Frontier Foundation filed an action under the Freedom of Information Act (FOIA) on February 27 in the district court for the District

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60. Pub. L. No. 110-261, § 101(a), 122 Stat. 2438, 50 U.S.C. § 1881a; *see* Second Privacy Board Report, *supra* note 35, at 19–24; *see also* Wittes, *supra* note 6, at 246 (reporting that this provision, first adopted as part of the Protect America Act, eliminated the difference between wire and radio communications).

"Whereas FISA originally limited intelligence agencies to collecting information from 'foreign powers' and 'agents of foreign powers' . . . the FAA extended FISC jurisdiction to '*any* non-U.S. person overseas' so long as collecting that intelligence furthered the goals of collecting 'foreign intelligence.'" Mondale *et al.*, *supra* note 1, at 2267.

61. Pub. L. No. 110-261, §§ 201–202, 122 Stat. at 2467–71, 50 U.S.C. §§ 1885–1885c (subchapter VII).

62. Ex. A, Government Motion for Summary Judgment, Elec. Frontier Found. v. Dep't of Just., No. 1:07-cv-403 (D.D.C. May 11, 2007), D.E. 7; *see* Offices of Inspectors General, Redacted Classified Report on the President's Surveillance Program 57–58 (July 10, 2009) [hereinafter Redacted PSP Report], oig.justice.gov/reports/2015/PSP-09-18-15-full.pdf; *see also* Government Brief, *In re* ___, No. ___ (FISA Ct. Dec. 13, 2006), www.dni.gov/files/documents/1212/Memo%20of%20Law%20as%20filed%2012%2013%202006%20-%2012-11%20Redacted.pdf (redacted brief making a case for the orders).

63. Redacted Declaration of NSA Director at 3, *In re* NSA Telecomm. Records Litig., No. 4:06-md-1791 (N.D. Cal. Feb. 22, 2007), D.E. 175.

> In January 2007, the FISC issued orders authorizing the government to conduct certain electronic surveillance of telephone and Internet communications carried over listed communication facilities where, among other things, the *government* made a probable cause determination regarding one of the communicants, and the email addresses and telephone numbers to be tasked were reasonably believed to be used by persons located outside the United States.

Second Privacy Board Report, *supra* note 35, at 17.

> [A] speechwriter for Bush came up with the name "Terrorist Surveillance Program," a marketing slogan that deliberately misdirected public scrutiny. The domestic surveillance did not spy on known terrorists. It aspired to cover substantially all Americans, collecting hundreds of billions of telephone and internet records, in the hope of discovering *unknown* conspirators.

Gellman, *supra* note 37, at 123.

of Columbia seeking disclosure of the orders.[64] Judge Thomas F. Hogan ruled on August 14 that the orders satisfied the national defense, statutory, and law enforcement FOIA exemptions.[65]

On August 9, the ACLU filed a motion directly with the FISA court for public release of the orders.[66] On August 16, the court's Presiding Judge Colleen Kollar-Kotelly, a district judge in District of Columbia, ordered the government to respond to the motion.[67] FISA Court Judge John D. Bates, also a District of Columbia district judge, determined on December 11 that the FISA court had supervisory power over its records, so it had jurisdiction to hear the ACLU's motion, contrary to the government's position on that issue.[68] Judge Bates denied the ACLU its requested relief.[69] "Other courts operate primarily in public, with secrecy the exception; the FISC operates primarily in secret, with public access the exception."[70]

The Director of National Intelligence released redacted versions of the two helpful orders on December 12, 2014.[71] On January 10, 2007, FISA Court Judge Malcolm J. Howard, of the Eastern District of North Carolina, issued one order covering surveillance of Americans[72] and another order covering foreign surveillance.[73]

Partially declassified declarations released on December 21, 2013, provided some details about the two helpful FISA-court orders:

> On January 10, 2007, the FISA Court issued two orders authorizing the Government to conduct certain electronic surveillance that had been occurring under the [surveillance program]. . . . [T]he orders consisted of a [redacted] and a Foreign Telephone and Email Order, which authorized, *inter alia*, electronic surveillance of telephone and Internet communications car-

64. Complaint, *Elec. Frontier Found.*, No. 1:07-cv-403 (D.D.C. Feb. 27, 2007), D.E. 1.

65. Opinion, *id.* (Aug. 14, 2007), D.E. 17; *see* Elec. Frontier Found. v. Dep't of Just., 532 F. Supp. 2d 22 (D.D.C. 2008) (denying a motion for reconsideration based on new revelations by news media).

66. Motion, *In re* Certain Orders, No. Misc. 07-1 (FISA Ct. Aug. 9, 2007), www.aclu.org/files/images/asset_upload_file968_31228.pdf; *In re* Motion for Release of Court Records, 526 F. Supp. 2d 484, 485 (FISA Ct. 2007).

67. Scheduling Order, *In re* Motion for Release of Court Records, No. Misc. 07-1 (FISA Ct. Aug. 16, 2007), www.aclu.org/files/pdfs/safefree/fisc_order_08162007.pdf.

68. *Court Records*, 526 F. Supp. 2d at 486–87.

69. *Id.* at 497.

70. *Id.* at 488.

71. Press Release, Office of the Dir. of Nat'l Intelligence, Dec. 12, 2014, www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1152-the-doj-releases-additional-documents-concerning-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-september-11-2001; *see also* Order, *In re* Tangible Things, No. BR 06-5 (FISA Ct. May 24, 2006), www.dni.gov/files/documents/section/pub_May%2024%202006%20Order%20from%20FISC.pdf, 2006 WL 7137486.

72. Order, *In re* Various Known and Unknown Agents, No. ___ (FISA Ct. Jan. 10, 2007), www.dni.gov/files/documents/1212/FISC%20Order%2001%2010%2007%20-%2012-11%20-%20Redacted.pdf.

73. Order, *In re* ___, No. ___ (FISA Ct. Jan. 10, 2007), *as redacted*, www.dni.gov/files/documents/1212/FISC%20Order%2001%2010%2007%2012-11%20-%20Redacted.pdf.

> ried over particularly listed facilities when the Government determines that there is probable cause to believe that (1) one of the communicants is a member or agent of al Qaeda or an associated terrorist organization, and (2) the communication is to or from a foreign country (*i.e.*, a one-end foreign communication to or from the United States). The telephone numbers and email addresses to be targeted under the Foreign Telephone and Email Order were further limited to those that the NSA reasonably believes are being used by persons *outside* the United States.[74]

On April 3, 2007, Northern District of Florida Judge Roger Vinson was on FISA-court duty, and he narrowed the government's ability to make probable-cause determinations without FISA-court approval.[75]

In 2015, *New York Times* journalist Charlie Savage reported that the January 10, 2007, orders resulted from an application presented to the FISA court at a time when a judge that the government viewed to be favorably disposed to the government's position was on duty, and the court thereafter adjusted its procedures so that the government would have less awareness of the court's duty schedule.[76]

Upon Judge Walker's February 28, 2011, retirement, the court assigned the warrantless wiretap cases to Judge Jeffrey S. White.[77] On July 8, 2013, Judge White ruled that FISA displaced the state-secrets privilege in two remaining cases—a case originally filed in Brooklyn on May 17, 2006,[78] and a case filed in San Francisco on September 18, 2008[79]—and that potentially valid constitutional claims remained.[80] An action originally filed in Manhattan

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74. Classified Alexander Declaration at 15, *In re* NSA Telecomm. Records Litig., No. 4:06-md-1791 (N.D. Cal. May 25, 2007) (lodged D.E. 298), *as redacted,* www.dni.gov/files/documents/1220/NSA%20Alexander%202007%20Shubert%20Declaration.pdf.

75. Opinion, *In re* ___, No. ___ (FISA Ct. Apr. 3, 2007), *as redacted*, www.dni.gov/files/documents/1212/CERTIFIED%20COPY%20-%20Order%20and%20Memorandum%20Opinion%2004%2003%2007%2012-11%20Redacted.pdf; *see* Redacted PSP Report, *supra* note 62, at 57, 59; *see also* Greenberg, *supra* note 29, at 147–48; Charlie Savage, *Documents Shed New Light on Legal Wrangling Over Spying in U.S.*, N.Y. Times, Dec. 13, 2014, at A12; Savage, *supra* note 16, at 204.

Two subsequent FISA-court opinions by Judge Vinson were redacted and released on January 26, 2015, in response to a FOIA action by the *New York Times*. Opinion, No. ___ (FISA Ct. Aug. 27, 2007) (redacted); Opinion, No. ___ (FISA Ct. May 31, 2007) (redacted); Letter from U.S. Dep't of Just. to N.Y. Times, s3.amazonaws.com/s3.documentcloud.org/documents/1509488/nyt-savage-foia-fisc-may-august-2007-orders.pdf (both opinions, redacted); Docket Sheet, N.Y. Times Co. v. U.S. Dep't of Just., No. 1:14-cv-3948 (S.D.N.Y. June 3, 2014); *see* Charlie Savage, *Collection of Foreigners' Data Began Before Congress Backed It, Papers Show*, N.Y. Times, Jan. 28, 2015, at 13.

76. Savage, *supra* note 16, at 199–202; *see* Greenberg, *supra* note 29, at 146 ("Late in 2006 the [Justice Department's national security division] settled upon a case to take before FISC Judge Malcolm Howard.").

77. Warrantless Wiretaps Docket Sheet, *supra* note 36; *see* FJC Biographical Directory, *supra* note 8.

78. Complaint, Shubert v. Bush, No. 1:06-cv-2282 (E.D.N.Y. May 17, 2006), D.E. 1; *see* Docket Sheet, Shubert v. Bush, No. 4:07-cv-693 (N.D. Cal. Feb. 2, 2007).

79. Complaint, Jewel v. NSA, No. 4:08-cv-4373 (N.D. Cal. Sept. 18, 2008), D.E. 1.

80. Jewel v. NSA, 965 F. Supp. 2d 1090 (N.D. Cal. 2013).

on January 17, 2006,[81] was dismissed by the Ninth Circuit's court of appeals on June 10, 2013,[82] in light of a February 26 standing ruling by the Supreme Court in *Clapper v. Amnesty International USA*.[83] An action originally filed in Atlanta on January 20, 2006,[84] was voluntarily dismissed on March 5, 2010.[85]

Statutory Enhancement of Surveillance Authority

President Bush signed the Protect America Act on August 5, 2007.[86] The act was a six-month modification of FISA that excluded from FISA's coverage electronic "surveillance directed at a person reasonably believed to be located outside of the United States."[87] The act specified a procedure for the FISA court to enforce a directive by the Director of National Intelligence or the attorney general to a communication service provider for compensated assistance in "the acquisition of foreign intelligence information" concerning "persons reasonably believed to be located outside the United States."[88]

The FISA Court of Review's Second Published Opinion

On August 22, 2008, following closed oral argument held in Providence, Rhode Island, in June, the FISA court of review, in its second published opinion, affirmed an order of compliance issued by the FISA court.[89] Reviewing the constitutionality of the directives, the court held "that a foreign intelligence exception to the Fourth Amendment's warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States."[90] The court determined that the directives satisfied the Fourth Amendment's reasonableness requirement.[91]

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81. Complaint, Ctr. for Constitutional Rights v. Bush, No. 1:06-cv-313 (S.D.N.Y. Jan. 17, 2006), D.E. 1; *see* Docket Sheet, Ctr. for Constitutional Rights v. Bush, No. 3:07-cv-1115 (N.D. Cal. Feb. 23, 2007).

82. Ctr. for Constitutional Rights v. Obama, 522 F. App'x 383 (9th Cir. 2013), *aff'g* Order, No. 3:07-cv-1115 (N.D. Cal. Jan. 31, 2011), D.E. 51, *cert. denied*, 571 U.S. 1238 (2014).

83. 568 U.S. 398 (2013).

84. Complaint, Guzzi v. Bush, No. 1:06-cv-136 (N.D. Ga. Jan. 20, 2006), D.E. 1; *see* Docket Sheet, Guzzi v. Bush, No. 4:06-cv-6225 (N.D. Cal. Oct. 3, 2006).

85. Order, *Guzzi*, No. 4:06-cv-6225 (N.D. Cal. Mar. 5, 2010), 27.

86. Pub. L. No. 110-55, 121 Stat. 552 (2007); *see* Jacob Sommer, *FISA Authority and Blanket Surveillance*, Litigation, Spring 2014, at 40, 44.

87. Pub. L. No. 110-55, § 2, FISA § 105A, 50 U.S.C. § 1805a (2007); *see* Second Privacy Board Report, *supra* note 35, at 19; Donohue, *supra* note 29, at 135–37; Greenberg, *supra* note 29, at 148–50.

88. Pub. L. No. 110-55, §§ 2–3, FISA §§ 105B–105C, 50 U.S.C. §§ 1805b–1805c (2007).

89. *In re* Directives, 551 F.3d 1004 (FISA Ct. Rev. 2008); *see* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 158–59 (2010); Greenberg, *supra* note 29, at 161–66; Sommer, *supra* note 86, at 40–41. *See generally* Donohue, *supra* note 29, at 234–36.

90. *Directives*, 551 F.3d at 1012; *see* Second Privacy Board Report, *supra* note 35, at 90.

91. *Directives*, 551 F.3d at 1012–15; *see* Donohue, *supra* note 11, at 146; Donohue, *supra* note 29, at 137. *See generally* Sommer, *supra* note 86.

Yahoo! complied with the directives.[92] On June 14, 2013, it filed a motion with the FISA court to make public the lower court's opinion and to make public Yahoo!'s identity.[93] Presiding FISA Court Judge Reggie B. Walton, of the District of Columbia—after consultation with the other FISA-court judges—issued an order on July 15 that the government review the opinion for redaction of classified information.[94] In response to the motion, the government stated that Yahoo!'s identity could be declassified and that the government had no objection to publication of unclassified portions of the opinion and the case file.[95]

On September 11, 2014, the Director of National Intelligence posted on the internet forty-eight documents comprising 1,283 pages:[96] the FISA-court opinion,[97] a less redacted version of the FISA court of review's opinion,[98] and many documents from the two case files. A redacted transcript of argument before the FISA court of review was released on November 17.[99] Additional documents were released in March 2015[100] and April 2016.[101]

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92. *Directives*, 551 F.3d at 1008; *see* Craig Timberg & Christopher Ingraham, *Fines in NSA Dispute Might Have Bankrupted Yahoo*, Wash. Post, Sept. 16, 2014, at A13.

93. Motion, *In re* Directives to ___, No. 105B(g) 07-1 (FISA Ct. June 14, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Motion-1.pdf.

94. Order, *id.* (July 15, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Order-3.pdf.

95. Government Response, *id.* (June 14, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Motion-2.pdf; *see* Order, *id.* (Oct. 22, 2013), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Order-4.pdf (noting the status of the classification review).

96. Press Release, Office of the Dir. of Nat'l Intelligence, Sept. 11, 2014 [hereinafter Sept. 11, 2014, DNI Press Release], www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1109-statement-by-the-odni-and-the-u-s-doj-on-the-declassification-of-documents-related-to-the-protect-america-act-litigation; *see* Government Supplemental Response, *In re* Directives to Yahoo!, Inc., No. 105B(g) 07-1 (FISA Ct. Dec. 12, 2014), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Response-5.pdf; *see also* Vindu Goel & Charlie Savage, *Threat of Daily Fine Shows Government's Aggressive Push for Data*, N.Y. Times, Sept. 12, 2014, at B1; Craig Timberg, *U.S. Threat Led Yahoo to Relent*, Wash. Post, Sept. 12, 2014, at A1; Danny Yadron, *Yahoo Faced Big U.S. Fines*, Wall St. J., Sept. 12, 2014, at B1.

97. Opinion, *Directives*, No. 105B(g) 07-1 (FISA Ct. Apr. 25, 2008), *as redacted*, www.dni.gov/files/documents/0909/Memorandum%20Opinion%2020080425.pdf; *see* Order, *In re* Directives to Yahoo!, Inc., No. 08-1 (FISA Ct. Rev. Sept. 11, 2014), lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2014/09/FISCR-08-01WCB-Order-140911.pdf (archived at web.archive.org/web/20170519023954/lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2014/09/FISCR-08-01WCB-Order-140911.pdf) (ordering the unsealing of declassified portions of the opinion).

A more redacted version of this opinion was also included in the release: www.dni.gov/files/documents/0909/Redacted%20Memo%20Opinion%20and%20Order%2020080425.pdf.

98. Opinion, *Directives*, No. 08-1 (FISA Ct. Rev. Aug. 22, 2008), *as redacted*, www.dni.gov/files/documents/0909/FISC%20Merits%20Opinion%2020080822.pdf, 2008 WL 10632524.

99. Transcript, *Directives*, No. 08-1 (FISA Ct. Rev. June 19, 2008), www.dni.gov/files/documents/1118/19%20June%202008%20FISCR%20PAA%20Hearing%20Transcript%20-%20Declassified%20FINAL.pdf; *see* Release of Oral Argument Transcript from the Protect Amer-

Challenges to the FISA Amendments Act

The ACLU initiated litigation on the FISA Amendments Act on the day that the act was signed.[102]

The ACLU filed a motion with the FISA court for access to the court's rulings on the constitutionality of the act's provisions.[103] On August 27, 2008, FISA Court Judge Mary A. McLaughlin, of the Eastern District of Pennsylvania, denied the motion.[104]

The ACLU also filed an action in the Southern District of New York challenging the act's constitutionality.[105] Judge John G. Koeltl ruled that the plaintiffs lacked standing because they could only claim that their communications might be monitored as a result of the amendments.[106] A panel of the U.S. Court of Appeals for the Second Circuit determined that the plaintiffs did have standing and remanded the action for a determination of constitutionality.[107] En banc rehearing was denied by a vote of six to six.[108] In *Clapper*, however, the Supreme Court ruled that Judge Koeltl was correct that the plaintiffs lacked standing because their grievance was too speculative.[109]

Concerns by Senators Wyden and Udall

On May 26, 2011, Senators Ron Wyden and Mark Udall warned that the Justice Department's secret interpretation of surveillance authorized by the Pa-

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ica Act Litigation by the Office of the Director of National Intelligence and the U.S. Department of Justice, IC on the Record (Nov. 17, 2014), tmblr.co/ZZQjsq1VwCSPx.

100. Notice, *Directives*, No. 105B(g) 07-1 (FISA Ct. Mar. 4, 2015), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Notice-1.pdf; IC on the Record (Mar. 3, 2015), tmblr.co/ZZQjsq1eu8iiE; *see* Motion for Enlargement of Time, Electronic Frontier Found. v. Dep't of Just., No. 1:14-cv-760 (D.D.C. Mar. 4, 2015), D.E. 13 (noting the release of eight out of eleven FOIA documents); *see also* Electronic Frontier Found. v. Dep't of Just., 141 F. Supp. 3d 51 (D.D.C. 2015) (granting the government summary judgment with respect to a FISA-court opinion), *appeal dismissed,* Order, No. 15-5346 (D.C. Cir. Apr. 27, 2016), 2016 WL 3041648.

101. Government Response, *Directives*, No. 105B(g) 07-1 (FISA Ct. Apr. 11, 2016), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Response-8_0.pdf; *see* Order, *id.* (Apr. 27, 2016), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01.pdf, 2016 WL 8233915 (later order in the case); Order, *id.* (Feb. 5, 2016), www.fisc.uscourts.gov/sites/default/files/105B%28g%29%2007-01%20Order-9_0.pdf, 2016 WL 6212316 (earlier order in the case).

102. *See Lawfare Podcast: Jameel Jaffer, Bob Litt, and William Banks Debate FISA* (episode 101, Nov. 22, 2014), www.lawfareblog.com/2014/11/lawfare-podcast-episode-101-jameel-jaffer-bob-litt-and-william-banks-debate-fisa/ (noting that the ACLU filed an action forty-five minutes after the statute was signed into law); Greenberg, *supra* note 29, at 226.

103. Motion, *In re* Proceedings Required by § 702(i), No. Misc. 08-1 (FISA Ct. July 10, 2008), www.aclu.org/files/pdfs/safefree/fisc_motion_20080710.pdf.

104. Opinion, *id.* (Aug. 27, 2008), 2008 WL 9487946.

Judge McLaughlin retired on July 1, 2020. FJC Biographical Directory, *supra* note 8.

105. Complaint, Amnesty Int'l USA v. McConnell, No. 1:08-cv-6259 (S.D.N.Y. July 17, 2008), D.E. 1.

106. Amnesty Int'l USA v. McConnell, 646 F. Supp. 2d 633 (S.D.N.Y. 2009).

107. Amnesty Int'l USA v. Clapper, 638 F.3d 118 (2d Cir. 2011).

108. Amnesty Int'l USA v. Clapper, 667 F.3d 163 (2d Cir. 2011).

109. 568 U.S. 398 (2013).

triot Act did not comport with the act's text and would trouble citizens.[110] On June 22, *New York Times* reporter Charlie Savage submitted a FOIA request to the Department for a report referenced by Senators Wyden and Udall.[111] Savage and the *Times* filed a complaint to enforce the request in the Southern District of New York on October 5.[112]

On October 26, the ACLU filed an action in the same district to enforce a May 31 FOIA "Request for the release of any and all records concerning the government's interpretation or use of Section 215" of the Patriot Act, which amended FISA's title V on business records and other tangible things.[113] The case was immediately referred to Judge William H. Pauley III as related to the *Times* case, over which Judge Pauley was presiding.[114]

After an in camera review of the report, Judge Pauley ruled on May 17, 2012, that it was properly withheld.[115] In 2013[116] and 2014,[117] the government released to the ACLU additional documents concerning section 215. Judge Pauley decided to review in camera other documents—FISA-court orders and opinions—to resolve the government's FOIA obligations as to them,[118] and he determined that they were properly withheld.[119]

On July 20, 2012, *Wired* posted a story online that the FISA court had ruled on at least one occasion that the government had applied the FISA Amendments Act unconstitutionally.[120] The report arose from a July 20 letter to Senator Wyden from the Office of the Director of National Intelligence granting the senator permission to make three statements, including that "on at least one occasion the Foreign Intelligence Surveillance Court held that

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110. N.Y. Times Co. v. U.S. Dep't of Just., 872 F. Supp. 2d 309, 312–13 (S.D.N.Y. 2012); *see* Savage, *supra* note 16, at 436; Charlie Savage, *Senators Say Patriot Act Is Being Misinterpreted*, N.Y. Times, May 27, 2011, at A17.

111. *N.Y. Times Co.*, 872 F. Supp. 2d at 313; Complaint at 6, N.Y. Times Co. v. U.S. Dep't of Just., No. 1:11-cv-6990 (S.D.N.Y. Oct. 5, 2011), D.E. 1 [hereinafter *N.Y. Times* Complaint]; *see* Savage, *supra* note 16, at 436.

112. *N.Y. Times* Complaint, *supra* note 111, at 8; *see* Savage, *supra* note 16, at 436.

113. Complaint, ACLU v. FBI, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011), D.E. 1; *N.Y. Times Co.*, 872 F. Supp. 2d at 313; *see* Savage, *supra* note 16, at 436.

114. Docket Sheet, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011); *see* Savage, *supra* note 16, at 436.

Judge Pauley died on July 6, 2021. FJC Biographical Directory, *supra* note 8; *see* Sam Roberts, *William H. Pauley III, 68, Judge Who Oversaw Trump Hush Money Case*, N.Y. Times, July 18, 2021, at 24.

115. *N.Y. Times Co.*, 872 F. Supp. 2d at 315, 318; *see* Savage, *supra* note 16, at 436–37.

116. ACLU v. FBI—FOI Case for Records Relating to Patriot Act Section 215, www.aclu.org/national-security/section-215-patriot-act-foia; Letters, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Oct. 26, 2011), D.E. 74, 78.

117. Letter, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. July 9, 2014), D.E. 101.

118. ACLU v. FBI, 59 F. Supp. 3d 584 (S.D.N.Y. 2014).

119. Opinion, *ACLU*, No. 1:11-cv-7562 (S.D.N.Y. Mar. 31, 2015), D.E. 117, 2015 WL 1566775.

120. Spencer Ackerman, *U.S. Admits Surveillance Violated Constitution At Least Once*, Wired, July 20, 2012, Danger Room, www.wired.com/dangerroom/2012/07/surveillance-spirit-law/.

some collection carried out pursuant to the [FISA] Section 702 minimization procedures used by the government was unreasonable under the Fourth Amendment."[121] According to the letter,

> The text that you have asked us to review concerns classified opinions of the Foreign Intelligence Surveillance Court (FISC). . . . However, . . . the Director of National Intelligence (DNI), has determined, as an exercise of his discretion, "that the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure." Accordingly, the DNI has taken the exceptional step of declassifying your proposed text and the other information contained in this letter.[122]

The Director's office asked the senator to report also, "The government has remedied these concerns and the FISC has continued to approve the collection as consistent with the statute and reasonable under the Fourth Amendment."[123]

On August 30, the Electronic Frontier Foundation filed a FOIA complaint in the district court for the District of Columbia to enforce a July 26 FOIA request for any FISA-court opinion supporting Senator Wyden's statement.[124] In an April 1, 2013, motion for summary judgment, the government argued that it was properly withholding from the plaintiff a FISA-court order otherwise responsive to the FOIA request, and only the FISA court could authorize its publication anyway.[125]

On May 20, the plaintiff sought from the FISA court permission for the government to release the order.[126] On June 12, Presiding Judge Walton determined that FISA-court rules did not prohibit disclosure of the order.[127]

Judge Bates's Concerns

The FISA-court order at issue in the Electronic Frontier Foundation's FOIA action was an October 3, 2011, opinion by Presiding FISA Court Judge

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121. Letter from Director of Legislative Affairs Kathleen Turner, Office of the Director of National Intelligence, to Senator Ron Wyden, July 20, 2012 [hereinafter Turner Letter], www.wired.com/images_blogs/dangerroom/2012/07/2012-07-20-OLA-Ltr-to-Senator-Wyden-ref-Declassification-Request.pdf; *see* Ryan Lizza, *State of Deception*, New Yorker, Dec. 16, 2013, at 48, 60.

122. Turner Letter, *supra* note 121, at 1–2.

123. *Id.* at 2.

124. Complaint, Electronic Frontier Found. v. Dep't of Just., No. 1:12-cv-1441 (D.D.C. Aug. 30, 2012), D.E. 1; Electronic Frontier Found. v. Dep't of Just., 57 F. Supp. 3d 54, 55–57 (D.D.C. 2014); *see* Ellen Nakashima, *Group Wants Release of Surveillance Ruling*, Wash. Post, May 23, 2013, at A3.

125. Government Summary-Judgment Brief at 26, *Electronic Frontier Found.*, No. 1:12-cv-1441 (D.D.C. Apr. 1, 2013), D.E. 11.

126. Motion, *In re* Motion for Consent to Disclosure of Court Records, No. Misc. 13-1 (FISA Ct. May 20, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-01%20Motion-1.pdf.

127. Order, *id.* (June 12, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-01%20Opinion-1.pdf, 2013 WL 5460051.

Bates.[128] The government publicly released a redacted version of the opinion on August 21, 2013.[129] FISA's section 702, enacted as part of the FAA, provides for FISA-court approval of surveillance programs "targeting . . . persons reasonably believed to be located outside the United States to acquire foreign intelligence information."[130]

Judge Bates held that aspects of some NSA surveillance violated the Fourth Amendment's reasonableness requirement.[131]

> The Court's review of the targeting and minimization procedures submitted with the April 2011 Submissions is complicated by the government's recent revelation that NSA's acquisition of Internet communications through its upstream collection under Section 702 is accomplished by acquiring Internet "transactions," which may contain a single, discrete communication, or multiple discrete communications [multi-communication transactions or MCTs], including communications that are neither to, from, nor about targeted facilities. . . .
>
> . . .
>
> In sum, NSA's collection of MCTs results in the acquisition of a very large number of Fourth Amendment-protected communications that have

128. Summary-Judgment Motion at 1, *Electronic Frontier Found.*, No. 1:12-cv-1441 (D.D.C. Oct. 2, 2013), D.E. 19 [hereinafter Oct. 2, 2013, *EFF* Summary-Judgment Motion]; *see* Second Privacy Board Report, *supra* note 35, at 30–31. *See generally* Donohue, *supra* note 29, at 190–94, 259–63.

129. Opinion, ___, No. ___ (FISA Ct. Oct. 3, 2011) (redacted) [hereinafter Oct. 3, 2011, Bates Opinion], www.eff.org/document/october-3-2011-fisc-opinion-holding-nsa-surveillance-unconstitutional, 2011 WL 10945618, *attached as* ex. A, Oct. 2, 2013, *EFF* Summary-Judgment Motion, *supra* note 128; *Electronic Frontier Found.*, 57 F. Supp. 3d at 57; *see* Anita Kumar & Lesley Clark, *Surveillance Program Nets Americans' Emails*, Miami Herald, Aug. 22, 2013, at 3A; Charlie Savage & Scott Shane, *Top-Secret Court Castigated N.S.A. on Surveillance*, N.Y. Times, Aug. 22, 2013, at A1.

On November 19, 2013, the government posted on the website for the Director of National Intelligence pages of the opinion with a substantially less redacted footnote 14: www.dni.gov/files/documents/October%202011%20Bates%20Opinion%20and%20Order%20Part%202.pdf.

130. FISA § 702(a), 50 U.S.C. § 1881a(a) (2020); *see* Second Privacy Board Report, *supra* note 35, at 1 ("Under the . . . program implemented under Section 702 of the Foreign Intelligence Surveillance Act ('FISA'), the government collects the contents of electronic communications, including telephone calls and emails, where the target is reasonably believed to be a non-U.S. person [footnote omitted] located outside the United States."); *see also In re* DNA/AG 702(h) Certifications 2018, 941 F.3d 547, 550–51 (FISA Ct. Rev. 2019). *See generally* Donohue, *supra* note 29, at 139–42.

"Rather than adjudicating individual cases or controversies, the [FISA] court [now] approves systems and procedures developed by the executive branch." Mondale *et al.*, *supra* note 1, at 2291; *see id.* at 1198–301 (likening approving programmatic surveillance to issuing advisory opinions).

131. Oct. 3, 2011, Bates Opinion, *supra* note 129, at 78–80. *See generally* U.S. Dep't of Just. Inspector Gen., A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008 (Sept. 2012) (redacted), oig.justice.gov/reports/2015/o1501.pdf; Donohue, *supra* note 29, at 190–94; Mondale *et al.*, *supra* note 1, at 2278 ("It is . . . very questionable whether Section 702 comports with Article III of the Constitution.").

> no direct connection to any targeted facility and thus do not serve the national security needs underlying the Section 702 collection as a whole. Rather than attempting to identify and segregate the non-target, Fourth-Amendment protected information promptly following acquisition, NSA's proposed handling of MCTs tends to maximize the retention of such information and hence to enhance the risk that it will be used and disseminated.[132]

Judge Bates expressed concern that the government's clarifying revelation while the application for Judge Bates's approval was pending was "the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program."[133]

On November 30, 2011, Judge Bates ruled that "the government has adequately corrected the deficiencies identified in the October 3 Opinion."[134]

Presiding over the Electronic Frontier Foundation's FOIA action, Judge Amy Berman Jackson reviewed Judge Bates's unredacted opinion and ordered the government to provide additional justifications for some redactions.[135] The government responded by removing some redactions; Judge Jackson determined that the less redacted opinion complied with FOIA.[136]

Litigation Following Edward Snowden's Revelations

In January 2013, Edward Snowden, who worked in Hawaii for an NSA contractor, contacted documentarian Laura Poitras, who lived in Berlin, because he was interested in disclosing what he believed to be improper surveillance practices.[137] Poitras brought into the loop journalists Glenn Greenwald, a reporter for the London *Guardian* living in Rio de Janeiro, and Barton Gellman, formerly a reporter for the *Washington Post*, living in New York.[138]

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132. Oct. 3, 2011, Bates Opinion, *supra* note 129, at 15.

133. *Id.* at 16 n.14; *see* Klayman v. Obama, 957 F. Supp. 2d 1, 19 (D.D.C. 2013).

134. Opinion at 2, ___, No. ___ (FISA Ct. Nov. 30, 2011), www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB436/docs/EBB-040.pdf, 2011 WL 10947772.

135. Docket Sheet, Electronic Frontier Found. v. Dep't of Just., No. 1:12-cv-1441 (D.D.C. Aug. 30, 2012) (June 11, 2014, minute order); Electronic Frontier Found. v. Dep't of Just., 57 F. Supp. 3d 54, 58–59 (D.D.C. 2014).

136. *Electronic Frontier Found.*, 57 F. Supp. 3d 54; *see* Opinion, *Electronic Frontier Found.*, No. 1:12-cv-1441 (D.D.C. Sept. 30, 2015), D.E. 47 (magistrate judge recommendation that the plaintiffs be awarded $49,474.50 in attorney fees and costs); Notice, *id.* (Nov. 16, 2015), D.E. 50 (notice that the government would not contest the fee award).

137. *See* Ken Auletta, *Freedom of Information*, New Yorker, Oct. 7, 2013, at 46, 52; Suzanna Andrews, Bryan Burrough & Sarah Ellison, *The Snowden Saga*, Vanity Fair, May 2014, at 152, 154; Michael Gurnow, The Edward Snowden Affair 31–33 (2014); George Packer, *The Holder of Secrets*, New Yorker, Oct. 20, 2014, at 50, 55–56.

138. *See* Glenn Greenwald, No Place to Hide 10–16 (2014); Andrews *et al.*, *supra* note 137, at 154, 164, 196–97; Auletta, *supra* note 137, at 52; Gurnow, *supra* note 137, at 33–40. *See generally* Gellman, *supra* note 37.

Snowden turned to Poitras after Greenwald's cool response to Snowden's December 2012 efforts to interest him.[139]

On June 1, Poitras and Greenwald flew to Hong Kong to meet Snowden.[140] The *Guardian* insisted that one of its veteran journalists, Ewen MacAskill, accompany the other two.[141] Snowden transferred to the journalists files containing classified information about NSA surveillance programs.[142] The impact of Snowden's revelations resulted in his being the first runner-up as *Time* magazine's person of the year for 2013.[143] The *Guardian* and the *Washington Post* won public-service Pulitzer Prizes.[144]

In June 2013, the FISA court created a public docket website for selected matters brought by private parties; the website was later expanded to include other declassified filings.[145]

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139. *See* Greenwald, *supra*, note 138, at 7–14, 81–82; Andrews *et al.*, *supra* note 137, at 154, 163; Gurnow, *supra* note 137, at 22, 34, 37–38; Luke Harding, The Snowden Files 66–69 (2014); *see also* Mark Hertsgaard, Bravehearts 31–32 (2016) (reporting that Snowden was interested in contacting Poitras because of her short film, *The Program*).

Snowden "had explicitly avoided *The New York Times*, due to the paper's decision to delay publication for nearly a year of its 2005 story detailing the N.S.A.'s Bush-era warrantless wiretapping." Andrews *et al.*, *supra* note 137, at 202.

140. *See* Greenwald, *supra*, note 138, at 24–33 (noting that they arrived Sunday night, June 2); Savage, *supra* note 16, at 401 (reporting that Snowden selected Hong Kong "because its foreign affairs were controlled by China, which would be less likely to swiftly turn him over to the United States"); *see also* Auletta, *supra* note 137, at 52; Gurnow, *supra* note 137, at 40–41; Harding, *supra* note 139, at 6–13, 78–83. *See generally* James Bamford, *The Most Wanted Man in the World*, Wired, Sept. 2014, at 87.

141. *See* Greenwald, *supra*, note 138, at 24–27, 61–62; Andrews *et al.*, *supra* note 137, at 154–55; Gurnow, *supra* note 137, at 40; Harding, *supra* note 139, at 81–82.

142. *See* Citizenfour (Praxis Films 2014); Barton Gellman, *Man Who Leaked NSA Secrets Steps Forward*, Wash. Post, June 10, 2013, at A1; Glenn Greenwald, *US Orders Phone Firm to Hand Over Data on Millions of Calls*, Guardian (London), June 6, 2013, at 1; Glenn Greenwald & Ewen MacAskill, *The Whistleblower*, Guardian (London), June 10, 2013, at 1; Mark Mazzetti & Michael S. Schmidt, *Ex-Worker at C.I.A. Says He Leaked Data on Surveillance*, N.Y. Times, June 10, 2013, at A1; Ellen Nakashima, *Report: Verizon Giving Call Data to NSA*, Wash. Post, June 6, 2013, at A1; Charlie Savage & Mark Mazzetti, *Cryptic Overtures and a Clandestine Meeting Gave Birth to a Blockbuster Story*, N.Y. Times, June 11, 2013, at A13; Charlie Savage, Edward Wyatt & Peter Baker, *U.S. Says It Gathers Online Data Abroad*, N.Y. Times, June 7, 2013, at A1; *see also* ACLU v. Clapper, 785 F.3d 787, 795–96 (2d Cir. 2015). *See generally* David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. Nat'l Sec. L. & Pol'y 209 (2014).

143. Michael Scherer, *Edward Snowden: The Dark Prophet*, Time, Dec. 23, 2013, at 78.

144. *See* Paul Farhi, *Washington Post Wins Pulitzer Prize for NSA Spying Revelations*, Wash. Post, Apr. 15, 2014, at A1; Ravi Somaiya, *Pulitzer Prizes Awarded for Coverage of N.S.A. Secrets and Boston Bombing*, N.Y. Times, Apr. 15, 2014, at A18.

145. Public Filings—U.S. Foreign Intelligence Surveillance Court, www.fisc.uscourts.gov/public-filings (remodeled approximately May 1, 2014); *see* U.S. Foreign Intelligence Surveillance Court Public Filings, www.uscourts.gov/uscourts/courts/fisc/index.html (former website address, archived at web.archive.org/web/20140430090344/http://www.uscourts.gov/uscourts/courts/fisc/index.html; *see also* Peter Wallsten, Carol D. Leonnig & Alice Crites, *Rare Scrutiny for a Court Used to Secrecy*, Wash. Post, June 23, 2012, at A1.

Judicial Approval of Surveillance Programs

On June 12, the ACLU filed a motion with the FISA court for release of orders approving the newly disclosed surveillance programs,[146] and the ACLU filed a civil action in the Southern District of New York on the previous day challenging the constitutionality of the programs.[147] The New York court assigned the case there to Judge Pauley as related to the 2011 FOIA actions by the *New York Times* and the ACLU.[148] On November 20, 2013, FISA Court Judge F. Dennis Saylor IV, of the District of Massachusetts, ordered the government to explain why no part of a February 19 opinion by the FISA court could be released.[149]

On December 20, the government submitted to Judge Saylor a proposed redacted opinion for public release.[150] After discussions with court staff on January 23, 2014, the government agreed on February 6 to release a less redacted opinion.[151] On August 7, Judge Saylor approved the government's redactions as achieving "the basic objective sought by the movants: disclosure of the Court's legal reasoning, to the extent that it can reasonably be segregated from properly classified facts."[152]

The Director of National Intelligence posted on the internet additional FISA-court filings. *E.g.*, Primary Order, *In re* Tangible Things, No. BR 14-67 (FISA Ct. Mar. 28, 2014) (Judge Rosemary M. Collyer), www.dni.gov/files/documents/0627/BR_14-67_Primary_Order.pdf; Press Release, Office of the Dir. of Nat'l Intelligence, June 27, 2014, www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1085-joint-statement-from-the-odni-and-the-doj-on-the-declassification-of-renewal-of-collection-under-section-501-of-fisa; Sept. 11, 2014, DNI Press Release, *supra* note 96; Primary Order, *In re* Tangible Things, No. BR 09-19 (FISA Ct. Dec. 16, 2009) (Judge Walton), www.dni.gov/files/documents/0708/BR%2009-19%20Primary%20Order.pdf; Primary Order, *In re* Tangible Things, No. BR 09-15 (FISA Ct. Oct. 30, 2009) (Judge Walton), www.dni.gov/files/documents/0708/BR%2009-15%20Primary%20Order.pdf; Primary Order, *In re* Tangible Things, No. BR 09-09 (FISA Ct. July 9, 2009) (Judge Walton), www.dni.gov/files/documents/0708/BR%2009-09%20Primary%20Order.pdf.

146. Motion, *In re* Orders Issued by This Court Interpreting Section 215 of the Patriot Act, No. Misc. 13-2 (FISA Ct. dated June 10, 2013, filed June 12, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Motion-1.pdf, www.aclu.org/files/assets/fisc_unsealing_motion.pdf.

147. Complaint, ACLU v. Clapper, No. 1:13-cv-3994 (S.D.N.Y. June 11, 2013), D.E. 1; ACLU v. Clapper, 804 F.3d 617, 619–20 (2d Cir. 2015); *see* Greenberg, *supra* note 29, at 233–34.

148. Assignment Notice, *ACLU*, No. 1:13-cv-3994 (S.D.N.Y. June 14, 2013), D.E. 2; *see* N.Y. Times Co. v. U.S. Dep't of Just., 872 F. Supp. 2d 309 (S.D.N.Y. 2012).

149. Order, *Section 215 Orders*, No. Misc. 13-2 (FISA Ct. Nov. 20, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-5.pdf, 2013 WL 5460064.

150. Submission, *id.* (Dec. 20, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Response-6.pdf.

151. Submission, *id.* (Feb. 6, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Response-3.pdf.

152. Order, *id.* (Aug. 7, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-7.pdf, 2014 WL 5442058.

The government submitted the redacted opinion to Judge Saylor on August 27.[153] In the six-page opinion, Judge Bates addressed the "difficult question [of] whether the [surveillance] application shows reasonable grounds to believe that the investigation of [the target] is not being conducted solely upon the basis of activities protected by the first amendment."[154] Judge Bates was satisfied: "According to the application, the government is investigating [the target] not only on the basis of his own personal words and conduct (which, as noted, suggest sympathy toward, if not support of, international terrorism), but also on the basis of the admitted or suspected [redacted]."[155]

Because of FOIA actions by the ACLU and the Electronic Frontier Foundation, the Director of National Intelligence released 1,040 pages of documents, including several FISA-court documents, on November 18, 2013.[156] Two long and redacted opinions granted "authority for the [NSA] to collect information regarding e-mail and certain other forms of Internet communications under the pen register and trap and trace provisions of [FISA]."[157] In later litigation over the public's right to statutory interpretation, Presiding FISA Court Judge Rosemary M. Collyer, of the district court for the District of Columbia, would note the release of these opinions on bulk collection.[158] The director's press release stated that the surveillance program granted authority by these opinions had been discontinued for lack of effectiveness pursuant to an evaluation begun in 2011.[159] Additional documents were released in August 2014.[160]

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153. Submission, *id.* (Aug. 27, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Opinion-1.pdf.

154. Opinion at 4, *In re* Tangible Things, No. BR 13-25 (FISA Ct. Feb. 19, 2013, filed Aug. 27, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2013-25%20Opinion-1.pdf, 2013 WL 9838183.

155. *Id.* at 5.

156. Press Release, Office of the Dir. of Nat'l Intelligence, Nov. 18, 2013 [hereinafter Nov. 18, 2013, DNI Press Release], www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/964-dni-clapper-declassifies-additional-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act; ACLU, NSA Documents Released to the Public Since June 2013, www.aclu.org/nsa-documents-released-public-june-2013; *see* Ellen Nakashima & Greg Miller, *Intelligence Director Releases About 1,000 Pages of Documents*, Wash. Post, Nov. 19, 2013, at A5.

157. Opinion at 1, No. PR/TT ___ (FISA Ct. ___) [hereinafter Kotelly PR/TT Opinion], www.dni.gov/files/documents/1118/CLEANEDPRTT%201.pdf; *see* Opinion, No. PR/TT ___ (FISA Ct. ___) [hereinafter Bates PR/TT Opinion], www.dni.gov/files/documents/1118/CLEANEDPRTT%202.pdf.

158. Opinion, *In re* Bulk Collection Orders and Opinions, No. Misc. 13-8 (FISA Ct. Jan. 25, 2017) [hereinafter Collyer Right-of-Access Opinion], www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20and%20Order_0.pdf, 2017 WL 427591.

159. Nov. 18, 2013, DNI Press Release, *supra* note 156; *see also* Laura K. Donohue, *FISA Reform*, 10 I/S: J. of L. & Pol'y 599, 604 (2014) ("The program appears to have operated until December 2011, when it was discontinued for failure to deliver sufficient operational value to the NSA."); Donohue, *supra* note 29, at 127–28.

In 2015, the *New York Times* reported that the email collection program became less valuable when the NSA developed a program of collecting foreign internet data, which is not subject to oversight by the FISA court. Charlie Savage, *File Says N.S.A. Found Way to Re-*

The first opinion is eighty-seven pages by Judge Kotelly, with a redacted date of issue.[161] The *Washington Post*, however, concluded, "Although the date was blacked out, the opinion appeared to be the order that placed the NSA's Internet metadata program under court supervision in July 2004, according to an NSA inspector-general report leaked this year by former NSA contractor Edward Snowden."[162] According to Judge Kotelly, "This application seeks authority for a much broader type of collection than other pen register/trap and trace applications and therefore presents issues of first impression. For that reason it is appropriate to explain why the Court concludes that the application should be granted as modified herein."[163]

"[B]ased on the plain meaning of the applicable definitions, the proposed collection involves a form of both pen register and trap and trace surveillance."[164] Additionally, Judge Kotelly found that "such an interpretation would promote the purpose of Congress in enacting and amending FISA regarding the acquisition of non-content addressing information."[165] The surveillance program comports with the Fourth Amendment because "there is no reasonable expectation of privacy under the Fourth Amendment in the meta data to be collected."[166] Additionally, "The weight of authority supports the conclusion that Government information-gathering that does not constitute a Fourth Amendment search or seizure will also comply with the First Amendment when conducted as part of a good-faith criminal investigation."[167]

On the expiration of Judge Kotelly's authorization of the email metadata surveillance program, Judge Bates considered an "application to re-initiate in expanded form" such surveillance.[168] In his 117-page opinion, Judge Bates discussed many violations of surveillance restrictions that the government

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place Email Program, N.Y. Times, Nov. 20, 2015, at A4; *see also* Savage, *supra* note 16, at 565–66.

160. Press Release, Office of the Dir. of Nat'l Intelligence, Aug. 11, 2014, www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1099-newly-declassified-documents-regarding-the-now-discontinued-nsa-bulk-electronic-communications-metadata-pursuant-to-section-402-of-the-foreign-intelligence-surveillance-act (including links to forty-three documents totaling 990 pages on the NSA's discontinued pen-register and trap-and-trace program, including three documents previously released on November 18, 2013, one of which—orders in FISA Ct. No. BR 09-05—was rereleased with slightly fewer redactions); *see* Status Report, Electronic Privacy Info. Ctr. v. Dep't of Just., No. 1:13-cv-1961 (D.D.C. Aug. 8, 2014), D.E. 20 (noting the August 7, 2014, production of documents to the plaintiff); Electronic Privacy Info. Ctr. v. Dep't of Just., 296 F. Supp. 3d 109 (D.D.C. 2017) (approving the withholding of some documents following an in camera review); Electronic Privacy Info. Ctr. v. Dep't of Just., 15 F. Supp. 3d 32 (D.D.C. 2014) (denying a preliminary injunction).

161. Kotelly PR/TT Opinion, *supra* note 157.

162. Nakashima & Miller, *supra* note 156.

163. Kotelly PR/TT Opinion, *supra* note 157, at 1–2.

164. *Id.* at 16–17.

165. *Id.* at 18.

166. *Id.* at 59.

167. *Id.* at 66.

168. Bates PR/TT Opinion, *supra* note 157, at 1.

had disclosed.[169] "The history of material misstatements in prior applications and non-compliance with prior orders gives the Court pause before approving such an expanded collection."[170] So Judge Bates's approval of the surveillance came with some modifications.[171]

Disclosing Surveillance Cooperation

On June 18 and 19, 2013, respectively, Google and Microsoft sought permission from the FISA court to disclose aggregate statistics on FISA orders that they had received.[172] Yahoo!, Facebook, and LinkedIn filed similar motions in September.[173] Apple joined the litigation as an amicus curiae in November.[174] On January 27, 2014, the government settled the motions by granting permission to the carriers to report the number of FISA orders received in bands of 250, or in bands of 1,000 if broken down into category of FISA order.[175]

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169. *Id.* at 9–22; *see* Devlin Barrett, *Surveillance Court Judge Criticized NSA "Overcollection" of Data*, Wall St. J., Aug. 12, 2014, at A4.

170. Bates PR/TT Opinion, *supra* note 157, at 72; *see* Savage, *supra* note 16, at 564–65 (reporting that the opinion was issued in July 2010).

171. Bates PR/TT Opinion, *supra* note 157, at 117.

172. Motion, *In re* Motion to Disclose Aggregate Data Regarding FISA Orders, No. Misc. 13-4 (FISA Ct. June 19, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-04%20Motion-10.pdf; Motion, *In re* Motion for Declaratory Judgment of Google Inc.'s First Amendment Right to Publish Aggregate Information About FISA Orders, No. Misc. 13-3 (FISA Ct. June 18, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Motion-10.pdf.

173. Motion, *In re* Motion for Declaratory Judgment That LinkedIn Corp. May Report Aggregate Data Regarding FISA Orders, No. Misc. 13-7 (FISA Ct. Sept. 17, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-07%20Motion-3.pdf; Motion, *In re* Motion for Declaratory Judgments to Disclose Aggregate Data Regarding FISA Orders and Directives, No. Misc. 13-6 (FISA Ct. Sept. 9, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-06%20Motion-3.pdf (Facebook); Motion, *In re* Motion for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Orders and Directives, No. Misc. 13-5 (FISA Ct. Sept. 9, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-05%20Motion-12.pdf (Yahoo!).

174. Amicus Curiae Brief, Nos. Misc. 13-3 to 13-7 (FISA Ct. Nov. 5, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Brief-1.pdf; Order, *id.* (Nov. 13, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Order-15.pdf (granting leave to file the brief).

175. Notice, Nos. Misc. 13-3 to 13-7 (FISA Ct. Jan. 27, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Notice.pdf; Dismissal Stipulation, *id.* (Jan. 27, 2014), www.fisc.uscourts.gov/sites/default/files/Misc%2013-03%20Action.pdf; *see* Facebook Releases New Data About National Security Requests (Feb. 3, 2014), about.fb.com/news/2014/02/facebook-releases-new-data-about-national-security-requests/ (public report by Facebook); LinkedIn's Transparency Report for Second Half of 2013 (Mar. 31, 2014), blog.linkedin.com/2014/03/31/linkedins-transparency-report-for-second-half-of-2013 (LinkedIn); More Transparency For U.S. National Security Requests, yahoo.tumblr.com/post/75496314481/more-transparency-for-u-s-national-security-requests (Yahoo!); Providing Additional Transparency on US Government Requests for Customer data (Feb. 3, 2014), blogs.microsoft.com/on-the-issues/2014/02/03/providing-additional-transparency-on-us-government-requests-for-customer-data/ (Microsoft); Shedding Some Light on Foreign Intelligence Surveillance Act (FISA) Requests (Feb. 3, 2014), googleblog.blogspot.ca/2014/02/shedding-some-light-on-foreign.html (Google);

The Electronic Privacy Information Center filed a petition for a writ of mandamus with the Supreme Court on July 8, 2013, seeking review of a leaked FISA-court order requiring Verizon to provide the NSA with telephony metadata for all communications in which at least one party is within the United States.[176] On July 19, the day that the leaked order expired, the Director of National Intelligence reported that the FISA court had renewed authorization for NSA's "telephony metadata collection program."[177] The Supreme Court denied mandamus review on November 18.[178]

The Electronic Frontier Foundation had filed a FOIA complaint in the Northern District of California on October 26, 2011, to enforce a June 2 FOIA request for records concerning the government's interpretation of the Patriot Act's section 215, which amended FISA's tangible-things title.[179] In response to that suit and the ACLU's 2011 FOIA suit in the Southern District of New York, and in light of Snowden's revelations, the government released on September 10, 2013, fourteen previously classified documents, with redactions.[180] Eight of the documents were FISA-court orders—a 2006 order by Judge Howard, a 2008 opinion by Judge Walton, and six 2009 orders and opinions by Judge Walton—and two of the documents were government submissions to the FISA court.

The released documents illustrated the FISA court's supervision, through its business records or BR docket, of telecommunication metadata surveillance. They also included concerns by Judge Walton that government surveillance was departing from approved procedures:[181]

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see also Timothy B. Lee, *Tech Firms Publicize Data on NSA Requests*, Wash. Post, Feb. 4, 2014, at A9; Zoe Tillman, *Tech Companies Reach Deal in Data Fight*, Nat'l L.J., Feb. 3, 2014, at 21; *U.S., Web Firms Reach Deal*, Miami Herald, Jan. 28, 2014, at 3A.

176. Petition, *In re* Electronic Privacy Info. Ctr., No. 13-58 (U.S. July 8, 2013); *see* Primary Order, *In re* Tangible Things, No. BR 13-80 (FISA Ct. Apr. 25, 2013), www.dni.gov/files/documents/PrimaryOrder_Collection_215.pdf, 2013 WL 5460137.

177. Press Release, Office of the Dir. of Nat'l Intelligence, July 19, 2013, www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/898-foreign-intelligence-surveillance-court-renews-authority-to-collect-telephony-metadata; *see* Joby Warrick, *NSA Cellphone Surveillance Program Renewed, Officials Say*, Wash. Post, July 20, 2013, at A2.

178. *In re* Electronic Privacy Info. Ctr., 571 U.S. 1023 (2013).

179. Complaint, Electronic Frontier Found. v. Dep't of Just., No. 4:11-cv-5221 (N.D. Cal. Oct. 26, 2011), D.E. 1; *see* Amended Complaint, *id.* (Nov. 3, 2011), D.E. 9.

180. Press Release, Office of the Dir. of Nat'l Intelligence, Sept. 10, 2013, www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/927-dni-clapper-declassifies-intelligence-community-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act-fisa (providing links to the documents); *see* Paul Elias, *Records: Officials Abused Spying Program*, Miami Herald, Sept. 11, 2013, at 1A; Siobhan Gorman & Devlin Barrett, *NSA Admits It Violated Privacy Rules*, Wall St. J., Sept. 11, 2013, at A3; Carol D. Leonnig, *Judge Questioned NSA Program*, Wash. Post, Sept. 12, 2013, at A3; Ellen Nakashima, Julie Tate & Carol Leonnig, *NSA Broke Privacy Rules for 3 Years, Documents Say*, Wash. Post, Sept. 11, 2013, at A1; Scott Shane, *N.S.A. Violated Rules on Use of Phone Logs, Intelligence Court Found in 2009*, N.Y. Times, Sept. 11, 2003, at A14.

181. *See generally* Donohue, *supra* note 11, at 142–44.

> In summary, since January 15, 2009, it has finally come to light that the FISC's authorizations of this vast collection program have been premised on a flawed depiction of how the NSA uses BR metadata. 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. 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 systematically violated that it can fairly be said that this critical element of the overall BR regime has never functioned effectively.[182]

> The Court is deeply troubled by the incidents [disclosed by the government], which have occurred only a few weeks following the completion of an "end to end review" by the government of NSA's procedures and processes for handling the BR metadata, and its submission of a report intended to assure the Court that NSA had addressed and corrected the issues giving rise to the history of serious and widespread compliance problems in this matter and had taken the necessary steps to ensure compliance with the Court's orders going forward.[183]

> [T]he Court . . . continues to be concerned about the likelihood that these queries could reveal communications of United States person users of the telephone identifier who are not the subject of FBI investigations.[184]

A version of one document released on March 28, 2014, with considerably fewer redactions than in the September 2013 release, revealed Judge Wal-

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182. Order at 10–11, *In re* Tangible Things, No. BR 08-13 (FISA Ct. Mar. 2, 2009), www.dni.gov/files/documents/section/pub_March%202%202009%20Order%20from%20FISC.pdf, 2009 WL 9150913; *see* Klayman v. Obama, 957 F. Supp. 2d 1, 18–19 & n.23 (D.D.C. 2013).

> On January 15, 2009, the Department of Justice notified the Court in writing that the government has been querying the business records acquired pursuant to Docket BR 08-13 in a manner that appears to the Court to be directly contrary to the [court's] Order and directly contrary to the sworn attestations of several Executive Branch officials.

Order at 2, *Tangible Things*, No. BR 08-13 (FISA Ct. Jan. 28, 2009), www.dni.gov/files/documents/section/pub_Jan%2028%202009%20Order%20Regarding%20Prelim%20Notice%20of%20Compliance.pdf, 2009 WL 9157881; *see* Lizza, *supra* note 121, at 56; *see also* Opinion, *Tangible Things*, No. BR 08-13 (FISA Ct. Dec. 12, 2008), www.dni.gov/files/documents/section/pub_Dec%2012%202008%20Supplemental%20Opinions%20from%20the%20FISC.pdf (earlier opinion in the case).

183. Order at 4, *In re* Tangible Things, No. BR 09-13 (FISA Ct. Sept. 25, 2009), www.dni.gov/files/documents/section/pub_Sept%2025%202009%20Order%20Regarding%20Further%20Compliance%20Incidents.pdf, 2009 WL 9150896; *see also* Order, *id.* (Sept. 3, 2009), www.dni.gov/files/documents/section/pub_Sep%203%202009%20Primary%20Order%20from%20FISC.pdf, 2009 WL 9150914 (earlier order in the case).

184. Order at 6, *In re* Tangible Things, No. BR 09-15 (FISA Ct. Nov. 5, 2009), www.dni.gov/files/documents/section/pub_Nov%205%202009%20Supplemental%20Opinion%20and%20Order.pdf, 2009 WL 9150915.

ton's specific concerns about the NSA's general counsel's oversight of pen-register and trap-and-trace surveillance:

> The court is gravely concerned . . . that NSA analysts, cleared and otherwise, have generally *not* adhered to the dissemination restrictions proposed by the government, repeatedly relied upon by the Court in authorizing the collection of the PR/TT metadata, and incorporated into the Court's orders in this matter [redacted] as binding on NSA. Given the apparent widespread disregard of these restrictions, it seems clear that NSA's Office of General Counsel has failed to satisfy its obligation to ensure that all analysts with access to information derived from the PR/TT metadata "receive appropriate training and guidance regarding the querying standard set out in paragraph c. above, *as well as other procedures and restrictions regarding the retrieval, storage, and dissemination of such information*." Docket No. PR/TT [redacted] Order at 11 (emphasis added).[185]

On January 17, 2014, the Director of National Intelligence released twenty-four redacted orders in twenty BR cases before the FISA court in 2006 through 2011.[186] The orders were periodic approvals of a program to collect "all call detail records or 'telephony metadata'" for periods typically a few days short of ninety days, ranging from eighty-four days to eighty-nine days, but sometimes for shorter periods—forty-two, fifty-seven, or sixty-four days—and once for a longer period—115 days. The orders did not cover the period from July 10, 2009, to February 26, 2010. In addition to Judges Kotelly, Bates, Howard, Vinson, and Walton, orders were signed by Judges Frederick J. Scullin, Jr., Northern District of New York; Robert C. Broomfield, District of Arizona; Nathaniel M. Gorton, District of Massachusetts; and James B. Zagel, Northern District of Illinois.[187]

In the Northern District of California FOIA action, Judge Yvonne Gonzalez Rogers decided on June 13, 2014, that she would review in camera and ex parte five FISA-court orders and opinions "to assure that the agency is complying with its obligations to disclose non-exempt material."[188] "The evidence in the record shows that some documents, previously withheld in the course of this litigation and now declassified, had been withheld in their entirety when a disclosure of reasonably segregable portions of those documents would have been required."[189]

On August 11, Judge Gonzalez Rogers determined that the government "has established a proper basis for withholding, in full, the FISC orders and

185. Order at 6, *In re* Tangible Things, No. BR 09-06 (FISA Ct. June 22, 2009), www.dni.gov/files/documents/0328/101.%20Order%20and%20Supplemental%20Order.Redacted%2020140327.pdf.

186. Press Release, Office of the Dir. of Nat'l Intelligence, Jan. 17, 2014, www.dni.gov/index.php/newsroom/press-releases/press-releases-2014/item/1001-dni-clapper-declassifies-additional-documents-regarding-collection-under-section-501-of-the-foreign-intelligence-surveillance-act (including links to the twenty-four orders).

187. Judge Broomfield died on July 10, 2014. FJC Biographical Directory, *supra* note 8.

188. Order at 3, Electronic Frontier Found. v. Dep't of Just., No. 4:11-cv-5221 (N.D. June 13, 2014), D.E. 85.

189. *Id.* at 2.

opinions at issue."[190] The judge found, however, that the plaintiffs were entitled to a memorandum from the Office of Legal Counsel to the Department of Commerce, which was "prepared to aid the Department of Commerce in determining its legal obligations with respect to disclosure of census information to federal law enforcement [or] national security officers," concluding that "it can no longer be withheld because it has become a controlling statement of the executive branch's legal position and, specifically, has been adopted as the opinion of the executive branch in proceedings before the FISC."[191] The government voluntarily dismissed an appeal.[192]

Smith and *Jones*

On September 17, 2013, the FISA court released a public redacted version of an August 22 opinion by FISA Court Judge Claire V. Eagan, of the Northern District of Oklahoma, holding in an ex parte application for surveillance authorization that the FBI's obtaining a large volume of telephony metadata was consistent with the Fourth Amendment as interpreted by the Supreme Court in 1979 in *Smith v. Maryland*.[193]

In *Smith*, the Supreme Court held by a vote of five to three that installation and use of a pen register to record the numbers dialed on a specific telephone was not a search, because it did not violate reasonable expectations of privacy.[194] In 1975, a robbery victim reported "threatening and obscene phone calls from a man identifying himself as the robber."[195] Michael Lee Smith was identified as a suspect, so "the telephone company, at police request, installed a pen register at its central offices to record the numbers dialed from the telephone at [his] home."[196] Justice Blackmun, writing on behalf of himself, Chief Justice Burger, and Justices White, Rehnquist, and Stevens, reasoned, "All subscribers realize . . . that the phone company has facilities for making permanent records of the numbers they dial, for they see a

190. Opinion at 3, *id.* (Aug. 11, 2014), D.E. 90, 2014 WL 3945646; *id.* at 7 ("The FISC orders are properly withheld to protect intelligence sources and methods used by the government to gather intelligence data. . . . [B]ased upon the Court's review, the documents must be withheld in full and contain no reasonably segregable information.").

191. *Id.* at 10–13.

192. Voluntary Dismissal, Electronic Frontier Found. v. U.S. Dep't of Just., No. 14-17098 (9th Cir. Jan. 29, 2015), D.E. 9; Order, *id.* (Feb. 4, 2015), D.E. 10.

193. Opinion, *In re* Tangible Things, No. BR 13-109 (FISA Ct. Aug. 29, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-1.pdf, 2013 WL 5741573 (amending an August 22, 2013, opinion to correct numbering errors among the footnotes); *see* Order, *id.* (Aug. 29, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-3.pdf (Judge Eagan's order amending her opinion to renumber footnotes); Order, *id.* (Aug. 23, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-109%20Order-2.pdf (presiding judge's order for a classification review upon Judge Eagan's sua sponte request for publication of her opinion); *see also* Smith v. Maryland, 442 U.S. 735 (1979); Donohue, *supra* note 11, at 121–22.

194. *Smith*, 442 U.S. at 736 & n.1, 745–46.

195. *Id.* at 737.

196. *Id.*

list of their long-distance (toll) calls on their monthly bills."[197] In dissent, Justice Stewart responded, "The telephone conversation itself must be electronically transmitted by telephone company equipment, and may be recorded or overheard by the use of other company equipment."[198] He concluded, "I think that the numbers dialed from a private telephone—like the conversations that occur during a call—are within the constitutional protection recognized in [*Katz v. United States*]."[199] Justice Marshall, also in dissent, and joined by Justice Brennan, observed, "Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes."[200]

On October 18, 2013, the FISA court released a public redacted October 11 opinion by FISA Court Judge McLaughlin that adopted Judge Eagan's analysis.[201] Judge McLaughlin also addressed the Supreme Court's 2012 case, *United States v. Jones*.[202]

In *Jones*, Justice Scalia concluded for the court, in an opinion joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, that installation of a GPS tracking device on a vehicle to monitor the vehicle's movements is a Fourth Amendment search because it is a trespass onto property.[203]

Concurring, Justice Sotomayor observed, "Of course, the Fourth Amendment is not concerned only with trespassory intrusions on property."[204] Respecting *Smith*, she observed further,

> [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 parties in the course of carrying out mundane tasks.[205]

Concurring in the judgment, Justice Alito wrote for himself and Justices Ginsburg, Breyer, and Kagan that they "would analyze the question present-

197. *Id.* at 742.

198. *Id.* at 746 (Justice Stewart, dissenting).

199. *Id.* at 747; *see* Katz v. United States, 389 U.S. 347 (1967).

200. *Smith*, 442 U.S. at 749 (Justice Marshall, dissenting).

201. Opinion at 3, *In re* Tangible Things, No. BR 13-158 (FISA Ct. Oct. 11, 2013) [hereinafter McLaughlin Opinion], www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-1.pdf; *see* Order, *id.* (Oct. 15, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Order-1.pdf (presiding judge's order for a classification review upon Judge McLaughlin's sua sponte request for publication of her opinion).

Releases of these redacted opinions by Judges Eagan and McLaughlin would be noted in Judge Collyer's 2017 opinion finding no constitutional right of access to them. Collyer Right-of-Access Opinion, *supra* note 158, at 4–5.

202. McLaughlin Opinion, *supra* note 201, at 4–6; *see* United States v. Jones, 565 U.S. 400 (2012).

203. *Jones*, 565 U.S. at 404–06.

204. *Id.* at 414 (Justice Sotomayor, concurring).

205. *Id.* at 417 (citations omitted).

ed in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove."[206] Respecting older precedents, Justice Alito observed, "In the pre-computer age, the greatest protections of privacy were neither constitutional nor statutory, but practical."[207]

Judge McLaughlin decided that the concerns expressed by the concurring justices in *Jones* did not suggest a conclusion in the telephony surveillance applications, because non-content metadata are not the same as location information.[208]

On December 18, 2013, Judge McLaughlin granted a motion by the Center for National Security Studies to submit an amicus curiae brief on whether FISA authorizes the collection of telephony metadata in bulk, but she denied the Center's request for en banc rehearing.[209]

Judge Zagel endorsed the analyses of Judges Eagan and McLaughlin in a June 19, 2014, FISA-court opinion.[210]

Conflicting Rulings on Surveillance Constitutionality

In 2013, Larry Klayman and two other persons filed a class action in the U.S. District Court for the District of Columbia against the government and Verizon challenging the newly disclosed surveillance methods.[211] Five days later, an overlapping collection of four individuals filed a similar action against the government and ten other telecommunication companies.[212] On December

206. *Id.* at 419 (Justice Alito, concurring in the judgment).

207. *Id.* at 429.

208. McLaughlin Opinion, *supra* note 201, at 5.

209. Order, *In re* Tangible Things, No. BR 13-158 (FISA Ct. Dec. 18, 2013), www.fisc.uscourts.gov/sites/default/files/BR%2013-158%20Memorandum-2.pdf, 2013 WL 1235411.

210. Opinion, *In re* Tangible Things, No. BR 14-96 (FISA Ct. June 19, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-96%20Opinion-1.pdf, 2014 WL 5463290.

211. Complaint, Klayman v. Obama, No. 1:13-cv-851 (D.D.C. June 6, 2013), D.E. 1; Klayman v. NSA, 280 F. Supp. 3d 39, 42, 45 (D.D.C. 2017); Klayman v. Obama, 957 F. Supp. 2d 1, 7, 11 (D.D.C. 2013); *see* Second Amended Complaint, *Klayman*, No. 1:13-cv-851 (D.D.C. Nov. 23, 2013), D.E. 37; Amended Complaint, *id.* (June 9, 2013), D.E. 4; *see also* Jerry Markon, *Classified Programs Challenged in Court*, Wash. Post, July 16, 2013, at A1; James Risen, *Privacy Group to Ask Supreme Court to Stop N.S.A.'s Phone Spying Program*, N.Y. Times, July 8, 2013, at A9.

The plaintiffs voluntarily dismissed Verizon as a defendant on January 31, 2014. Stipulation, *Klayman*, No. 1:13-cv-851 (D.D.C. Jan. 31, 2014), D.E. 75; *see* Third Amended Complaint, *id.* (Feb. 10, 2014), D.E. 77; *see also Klayman*, 280 F. Supp. 3d at 42 n.1.

212. Complaint, Klayman v. Obama, No. 1:13-cv-881 (D.D.C. June 11, 2013), D.E. 1; *Klayman*, 280 F. Supp. 3d at 42, 45 & n.7; *see* Third Amended Complaint, *Klayman*, No. 1:13-cv-881 (D.D.C. Feb. 11, 2016), D.E. 112; Second Amended Complaint, *id.* (Jan. 30, 2014), D.E. 55; Amended Complaint, *id.* (Nov. 23, 2013), D.E. 30; *see also* Markon, *supra* note 211; *Klayman*, 957 F. Supp. 2d at 7 n.1, 11.

16, Judge Richard J. Leon granted the plaintiffs a preliminary injunction against bulk metadata collection.[213]

Judge Leon found that the plaintiffs had standing, because "[t]he Government . . . describes the advantages of bulk collection in such a way as to convince me that plaintiffs' metadata—indeed *everyone's* metadata—is analyzed, manually or automatically."[214] Judge Leon found the metadata collection constituted an unreasonable search, despite the Supreme Court's 1979 decision in *Smith*:

> In *Smith*, the Supreme Court was actually considering whether local police could collect one person's phone records for calls made after the pen register was installed and for the limited purpose of a small-scale investigation of harassing phone calls. The notion that the Government could collect similar data on hundreds of millions of people and retain that data for a five-year period, updating it with new data every day in perpetuity, was at best, in 1979, the stuff of science fiction.
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> . . .
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> . . . I cannot imagine a more "indiscriminate" and "arbitrary invasion" than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analyzing it without prior judicial approval. Surely, such a program infringes on "that degree of privacy" that the Founders enshrined in the Fourth Amendment. Indeed, I have little doubt that the author of our Constitution, James Madison, who cautioned us to beware "the abridgment of freedom of the people by gradual and silent encroachments by those in power," would be aghast.[215]

Moreover, "the Government does *not* cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent attack, or otherwise aided the Government in achieving any objective that was time-sensitive in nature."[216]

Judge Leon stayed his injunction pending appeal.[217] While the district court cases otherwise moved forward,[218] the prevailing plaintiffs unsuccessfully sought a writ of certiorari from the Supreme Court so that the high court could quickly consider the plaintiffs' concerns.[219] The plaintiffs filed a third class action in the district court on January 23, 2014.[220]

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213. *Klayman*, 957 F. Supp. 2d 1; *Klayman*, 280 F. Supp. 3d at 47 ("To say the least, that opinion unleashed a firestorm of press and public discussion."); *see* ACLU v. Clapper, 785 F.3d 787, 799 (2d Cir. 2015).

214. *Klayman*, 957 F. Supp. 2d at 26–29.

215. *Id.* at 33, 42 (citation omitted).

216. *Id.* at 40.

217. *Id.* at 10, 43; *Klayman*, 280 F. Supp. 3d at 47.

218. Docket Sheet, Klayman v. Obama, No. 1:13-cv-881 (D.D.C. June 11, 2013); Docket Sheet, Klayman v. Obama, No. 1:13-cv-851 (D.D.C. June 6, 2013).

219. Klayman v. Obama, 572 U.S. 1053 (2014) (denying certiorari).

220. Complaint, Klayman v. Obama, No. 1:14-cv-92 (D.D.C. Jan. 23, 2014), D.E. 1; *Klayman*, 280 F. Supp. 3d at 42; *see* Notice of Related Case, *Klayman*, No. 1:14-cv-92 (D.D.C. Jan. 24, 2014), D.E. 2.

Southern District of New York Judge Pauley issued an opinion on December 27, 2013, finding bulk collection authorized by FISA.[221] Judge Pauley's opinion included two important observations: (1) "[T]he Government acknowledged that it has collected metadata for substantially every telephone call in the United States since May 2006."[222] (2) "This blunt tool only works because it collects everything. Such a program, if unchecked, imperils the civil liberties of every citizen."[223] Judge Pauley determined that *Smith* compelled a decision in favor of the government.[224] In 2015, the court of appeals declined to consider a constitutional challenge to the surveillance program, because the court determined that the program exceeded congressional authorization.[225] Vast bulk collection cannot be "relevant to an authorized investigation."[226]

On June 3, 2014, Judge B. Lynn Winmill dismissed a complaint filed in the District of Idaho alleging that comprehensive metadata collection violated the Fourth Amendment.[227] Judge Winmill relied on *Smith*, circuit law, and Judge Pauley's decision.[228] Judge Winmill urged, however, that "Judge Leon's decision should serve as a template for a Supreme Court opinion."[229]

Appeals from Judge Leon and Judge Winmill's cases were resolved after the 2015 passing of the Freedom Act. Other district court cases did not result in constitutionality rulings.

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221. ACLU v. Clapper, 959 F. Supp. 2d 724 (S.D.N.Y. 2013), *rev'd*, 785 F.3d 787 (2d Cir. 2015); *see* Greenberg, *supra* note 29, at 242; Adam Liptak & Michael S. Schmidt, *Judge Upholds N.S.A.'s Bulk Collection of Data on Calls*, N.Y. Times, Dec. 30, 2013, at A1; Andrew Ramonas, Todd Ruger & Tony Mauro, *Courts Join NSA Fight*, Nat'l L.J., Jan. 6, 2014, at 1; Jennifer Smith & Jacob Gershman, *Judge Backs the NSA's Surveillance*, Wall St. J., Dec. 28, 2013, at A1; Sari Horwitz, *Judge: NSA's Action Lawful*, Wash. Post, Dec. 28, 2013, at A1.

222. *ACLU*, 959 F. Supp. 2d at 735.

223. *Id.* at 730.

224. *Id.* at 749–52.

225. *ACLU*, 785 F.3d at 792; ACLU v. Clapper, 804 F.3d 617, 618–20 (2d Cir. 2015); *see* Devlin Barrett & Damian Paletta, *Judges Say NSA Program Is Illegal*, Wall St. J., May 8, 2015, at A1; Michael Doyle, *NSA Phone Surveillance Is Illegal, Court Rules*, Miami Herald, May 8, 2015, at 1A; Greenberg, *supra* note 29, at 259–61; Ellen Nakashima, *Bulk Records Collection Nearing Endgame*, Wash. Post, May 9, 2015, at A3; Ellen Nakashima, *NSA Collection of Phone Data Ruled Unlawful*, Wash. Post, May 8, 2015, at A1; Charlie Savage & Jonathan Weisman, *N.S.A. Collection of Bulk Call Data Is Ruled Illegal*, N.Y. Times, May 8, 2015, at A1; Jonathan Weisman & Jennifer Steinhauer, *Court Ruling on N.S.A.'s Data Collection Jolts Both Defenders and Reformers*, N.Y. Times, May 9, 2015, at A13.

226. *ACLU*, 785 F.3d at 810–21; *see* 50 U.S.C. § 1861(b)(2)(A) (2020). *See generally* Donohue, *supra* note 11, at 51–53.

227. Smith v. Obama, 24 F. Supp. 3d 1005 (D. Idaho 2014); *see* Complaint, Smith v. Obama, No. 2:13-cv-257 (D. Idaho June 12, 2013), D.E. 1; *see also ACLU*, 785 F.3d at 799; David Cole, *Cd'A Attorneys Sue Obama Over NSA Surveillance*, Coeur d'Alene Press, June 13, 2013, at 4A; Markon, *supra* note 211; Betsy Z. Russell, *CdA Woman's Lawsuit Over NSA Data Tossed*, Spokane Spokesman-Review, June 4, 2014, at 6A.

228. *Smith*, 24 F. Supp. 3d at 1007–08.

229. *Id.* at 1009.

Data Retention

In a January 3, 2014, FISA-court order, Judge Hogan specified that the metadata authorized for collection by his order must be destroyed within five years of collection.[230] On March 7, Judge Walton denied[231] a February 25 motion by the government to extend the five-year limit to permit the government to comply with evidence-preservation obligations in the civil suits challenging the legality of broad metadata surveillance pursuant to section 215.[232] "Extending the period of retention for these voluminous records increases the risk that information about United States persons may be improperly used or disseminated."[233] "Further, there is no indication that any of the plaintiffs have sought discovery of this information or made any effort to have it preserved . . . ."[234]

Plaintiffs in the San Francisco post-Snowden challenge before Judge White responded to Judge Walton's Friday decision with a Monday motion for a temporary restraining order enjoining the government "from destroying any evidence relevant to the claims at issue in this action, including but not limited to prohibiting the destruction of any telephone metadata or 'call detail' records."[235] Judge White ordered a response from the government by 2:00 that afternoon[236] and then ordered the data retained, pending further hearing on the issue set for March 19.[237]

On Wednesday, March 12, Judge Walton issued an order permitting the government to comply with Judge White's order.[238] Judge White issued a permanent preservation order on March 21.[239]

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230. Order at 14, *In re* Tangible Things, No. BR 14-1 (FISA Ct. Jan. 3, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-02%20Order-2.pdf.

231. Opinion, *id.* (Mar. 7, 2014) [hereinafter Mar. 7, 2014, FISA Ct. Opinion], www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-1.pdf; *see* Corrected Notice, Smith v. Obama, No. 2:13-cv-257 (D. Idaho. Mar. 8, 2014), D.E. 20; Notice, ACLU v. Clapper, No. 1:13-cv-3994 (S.D.N.Y. Mar. 8, 2014), D.E. 79; Notice, First Unitarian Church of L.A. v. NSA, No. 4:13-cv-3287 (N.D. Cal. Mar. 7, 2014), D.E. 85; Notice, Paul v. Obama, No. 1:14-cv-262 (D.D.C. Mar. 7, 2014), D.E. 14.

232. Motion, *Tangible Things*, No. BR 14-1 (FISA Ct. Feb. 25, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Motion-2.pdf.

233. Mar. 7, 2014, FISA Ct. Opinion, *supra* note 231, at 6.

234. *Id.* at 8–9.

235. Evidence Preservation Motion, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. Mar. 10, 2014), D.E. 86.

At a subsequent hearing, a plaintiffs' attorney acknowledged the irony: "It's a very strange position to be in, to be arguing for the preservation for the very records we think they shouldn't have gotten in the first place." Transcript at 14, *id.* (Mar. 19, 2014, filed Mar. 20, 2014), D.E. 101.

236. Order, *id.* (Mar. 10, 2014), D.E. 87; *see* Government Response, *id.* (Mar. 10, 2014), D.E. 88.

237. Order, *id.* (Mar. 10, 2014), D.E. 89.

238. Opinion, *In re* Tangible Things, No. BR 14-1 (FISA Ct. Mar. 12, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-2.pdf.

239. Preservation Order, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. Mar. 21, 2014), D.E. 103, *also filed as* Ex., Notice, *Tangible Things*, No. BR 14-1 (FISA Ct.

Judge Walton scolded the government for failing to inform him of preservation orders remaining in effect from the multidistrict warrantless wiretap litigation that had been transferred to Judge White; the existence of these orders was brought to Judge Walton's attention by the plaintiffs in Judge White's cases.[240] "As the government is well aware, it has a heightened duty of candor to the Court in *ex parte* proceedings."[241] In response to Judge Walton's order that the government explain its behavior,[242] the government acknowledged on April 2 that it should have behaved differently, with "the benefit of hindsight," but it "has always understood [the warrantless wiretap litigation] to be limited to certain presidentially authorized intelligence collection activities outside FISA."[243] The government advised, "no additional corrective action on the part of the Government or this Court is necessary."[244] A deputy assistant attorney general provided additional clarifying information one week later.[245]

Meanwhile, on March 20, Judge Collyer denied Verizon's challenge to the legality of Judge Hogan's January 3 telephony metadata surveillance order, concluding, "this Court finds Judge Leon's analysis in *Klayman* to be unpersuasive."[246]

Mar. 27, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Notice-4.pdf; *see* Bob Egelko, *S.F. in Spotlight as Legal Battles Over NSA Widen*, S.F. Chron., Mar. 22, 2014, at A1.

On June 6, 2014, Judge White denied plaintiffs a preservation order respecting section 702 claims in the earlier warrantless wiretap actions on a finding that the complaint did not encompass a challenge to section 702. Transcript at 50–53, Jewel v. NSA, No. 4:08-cv-4373 (N.D. Cal. June 6, 2014, filed Aug. 5, 2014), D.E. 275; Minutes, *id.* (June 6, 2014), D.E. 246.

As it turned out, some data were not preserved. *E.g.*, Stipulation, *id.* (Jan. 18, 2018), D.E. 386; *see also* Charlie Savage, *N.S.A. Says It Deleted Phone Data on Millions*, N.Y. Times, June 30, 2018, at A10.

240. Opinion, *Tangible Things*, No. BR 14-1 (FISA Ct. Mar. 21, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion-3.pdf.

241. *Id.* at 8.

242. *Id.* at 9–10.

243. Response at 1–2, *id.* (Apr. 2, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Response-2.pdf.

244. *Id.* at 2.

245. Letter, *id.* (Apr. 9, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Notice-6.pdf.

246. Opinion, *id.* (Mar. 20, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Opinion%20and%20Order-1.pdf, 2014 WL 5463097; *see* Ellen Nakashima, *Court Rejects Challenge to NSA Program*, Wash. Post, Apr. 26, 2014, at A3; Charlie Savage, *Phone Company Bid to Keep Data from N.S.A. Is Rejected*, N.Y. Times, Apr. 26, 2014, at A13.

> [T]he Court concludes that it has the discretion to unseal a petition and related Court records under appropriate circumstances. . . .
>
> . . . Accordingly, the Court is satisfied that it would be appropriate to unseal properly redacted versions of the Petition, the Government's Response, the January 23, 2014 Scheduling Order, the March 20, 2014 Opinion and Order, and the instant Order, once the redactions have been finalized.

Opinion, *Tangible Things*, No. BR 14-1 (FISA Ct. Apr. 11, 2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Order-2.pdf, 2014 WL 5463107; *see* Order, *id.* (Apr. 25,

The Privacy and Civil Liberties Oversight Board

The Privacy and Civil Liberties Oversight Board, "an independent bipartisan agency within the executive branch established by the Implementing Recommendations of the 9/11 Commission Act of 2007," issued a report on January 23, 2014, concluding that surveillance authorized by the FISA court violated FISA.[247] Although the Privacy Board was established in 2007, the full five members were not appointed by the President and confirmed by the Senate until May 7, 2013, shortly before the Snowden revelations.[248] The report analyzed the legality of surveillance conducted pursuant to FISA's title V on business records and other tangible things, as expanded by section 215 of the Patriot Act.[249]

> There are four grounds upon which we find that the telephone records program fails to comply with Section 215. First, the telephone records acquired under the program have no connection to any specific FBI investigation at the time of their collection. Second, because the records are collected in bulk—potentially encompassing all telephone calling records across the nation—they cannot be regarded as "relevant" to any FBI investigation as required by the statute without redefining the word relevant in a manner that is circular, unlimited in scope, and out of step with the case law from analogous legal contexts involving the production of records. Third, the program operates by putting telephone companies under an obligation to furnish new calling records on a daily basis as they are generated (instead of

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2014), www.fisc.uscourts.gov/sites/default/files/BR%2014-01%20Order%20Regarding%20Unsealing%20and%20Publication.pdf, 2014 WL 5460706 (final unsealing order).

247. Privacy and Civil Liberties Oversight Board, Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court (Jan. 23, 2014) [hereinafter First Privacy Board Report], documents.pclob.gov/prod/Documents/OversightReport/ec542143-1079-424a-84b3-acc354698560/215-Report_on_the_Telephone_Records_Program.pdf; *see* U.S. Privacy and Civil Liberties Oversight Board, www.pclob.gov/; Pub. L. No. 110-53, § 801(a), 121 Stat. 266, 352 (2007), *as amended*, 42 U.S.C. § 2000ee (2020); *see also* Donohue, *supra* note 159, at 613–14; Siobhan Gorman & Jared A. Favole, *Watchdog Urges NSA to End Phone Program*, Wall St. J., Jan. 24, 2014, at A4; Greenberg, *supra* note 29, at 242–44; Ellen Nakashima, *Board: NSA Phone Program Should End*, Wash. Post, Jan. 23, 2014, at A4; Todd Ruger, *Privacy Board Divided Over NSA Program*, Nat'l L.J., Jan. 27, 2014, at 15; Savage, *supra* note 16, at 603–04; Charlie Savage, *Watchdog Report Says N.S.A. Program Is Illegal and Should End*, N.Y. Times, Jan. 23, 2014, at A14.

248. First Privacy Board Report, *supra* note 247, at 3–4; *see* Jeremy W. Peters, *G.O.P. Delays On Nominees Raise Tension*, N.Y. Times, May 12, 2013, at A1; *see also* 42 U.S.C. § 2000ee(h)(1) ("The Board shall be composed of a full-time chairman and 4 additional members, who shall be appointed by the President, by and with the advice and consent of the Senate.").

> Members of the Board shall be selected solely on the basis of their professional qualifications, achievements, public stature, expertise in civil liberties and privacy, and relevant experience, and without regard to political affiliation, but in no event shall more than 3 members of the Board be members of the same political party.

§ 2000ee(h)(2); *see* First Privacy Board Report, *supra* note 247, at 3.

249. First Privacy Board Report, *supra* note 247, at 8; *see* Second Privacy Board Report, *supra* note 35, at 2.

> turning over records already in their possession)—an approach lacking foundation in the statute and one that is inconsistent with FISA as a whole. Fourth, the statute permits only the FBI to obtain items for use in its investigations; it does not authorize the NSA to collect anything.
>
> In addition, we conclude that the program violates the Electronic Communications Privacy Act. That statute prohibits telephone companies from sharing customer records with the government except in response to specific enumerated circumstances, which do not include Section 215 orders.[250]

Two board members dissented from the majority's conclusion that the section 215 surveillance program violates FISA.[251]

The board issued a report on the use of FISA's section 702 on July 2, 2014.[252] "[T]he Board has found no evidence of intentional abuse."[253] The board concluded that section 702 could be used constitutionally:

> In the Board's view, the core of this program—acquiring the communications of specifically targeted foreign persons who are located outside the United States, upon a belief that those persons are likely to communicate foreign intelligence, using specific communications identifiers, subject to FISA court-approved targeting rules that have proven to be accurate in targeting persons outside the United States, and subject to multiple layers of rigorous oversight—fits within the totality of the circumstances test for reasonableness as it has been defined by the courts to date.
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> . . .
>
> [Some features of the program, however,] push the entire program close to the line of constitutional reasonableness. At the very least, too much expansion in the collection of U.S. persons' communications or the uses to which those communications are put may push the program over the line.[254]

New Notices to Criminal Defendants

In 2013, the Justice Department revised its policy on notice to criminal defendants of FISA surveillance to bring its behavior in line with representations previously made by the solicitor general to the Supreme Court in *Clapper v. Amnesty International USA*.[255]

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250. First Privacy Board Report, *supra* note 247, at 10; *see* Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1948 (1986), *relevant sections as amended*, 18 U.S.C. §§ 2701–2712 (2020); *see also* ACLU v. Clapper, 785 F.3d 787, 798–99 (2d Cir. 2015).

251. First Privacy Board Report, *supra* note 247, at 208–18.

252. Second Privacy Board Report, *supra* note 35; *see* Ellen Nakashima, *Panel: NSA Program That Targets Foreigners Is Lawful*, Wash. Post, July 2, 2014, at A13; David E. Sanger, *U.S. Privacy Panel Backs N.S.A.'s Internet Tapping*, N.Y. Times, July 3, 2014, at A11; Ali Watkins, *Panel: Little Wrong with NSA Surveillance*, Miami Herald, July 3, 2014, at 3A.

253. Second Privacy Board Report, *supra* note 35, at 2.

254. *Id.* at 96–97.

255. 568 U.S. 398 (2013); *see* Donohue, *supra* note 29, at 245–52; Human Rights Watch, Illusion of Justice 102–03 (2014); Greenberg, *supra* note 29, at 226–29, 238, 243–44.

The issue in *Clapper* was standing to challenge the constitutionality of FISA's section 702, which is section 1881a of the U.S. Code's title 50. The plaintiffs argued "that they should be held to have standing because otherwise the constitutionality of § 1881a could not be challenged."[256] The Court observed that "if the Government intends to use or disclose information obtained or derived from a § 1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition."[257] Solicitor General Donald B. Verrilli, Jr., said in his reply brief, "the government must provide advance notice of its intent to use information obtained or derived from Section 1881a-authorized surveillance against a person in judicial or administrative proceedings and that person may challenge the underlying surveillance."[258]

On learning, after the Snowden revelations, that Justice Department practice did not conform to the government's representations in *Clapper*, Solicitor General Verrilli persuaded the department that the proper course was to provide defendants with section 702 surveillance notice.[259] On December 24, 2013, the Justice Department informed senators who had inquired about the issue,

> Based on a recent review, the Department has determined that information obtained or derived from Title I FISA collection may, in particular cases, also be derived from prior Title VII FISA collection, such that notice concerning both Title I and Title VII should be given in appropriate cases with respect to the same information. Based on this determination, the gov-

256. *Clapper*, 568 U.S. at 420.

257. *Id.* at 421.

258. Reply Brief at 15, Clapper v. Amnesty Int'l USA, No. 11-1025 (U.S. Oct. 17, 2012), www.aclu.org/sites/default/files/field_document/2012.10.17_sct_-_govt_reply_brief.pdf.pdf; *see* Transcript at 4, *id.* (Oct. 29, 2012), www.supremecourt.gov/oral_arguments/argument_transcripts/2012/11-1025.pdf (referring to "notice that the government intends to introduce information in a proceeding against" an aggrieved person).

"There was, in hindsight, something very odd about Verrilli's assertion. By then, the warrantless surveillance program had been operating under FISA for nearly six years. And yet, in all that time, federal prosecutors had *never given such a notice to any criminal defendant*." Savage, *supra* note 16, at 559.

259. United States v. Hasbajrami, 945 F.3d 641, 648 n.3 (2d Cir. 2019); *see* Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. Times, Oct. 17, 2013, at A3; Savage, *supra* note 16, at 586–93; *see also* Donohue, *supra* note 29, at 245–50 ("The government is required, *prior* to legal proceedings, to notify the aggrieved person and the court (or other authority), that information is to be disclosed or used.").

"The national security prosecutors explained that their division had long used a narrower definition of what *derived from* means for FISA wiretaps than for ordinary criminal-law wiretaps." Savage, *supra* note 16, at 587; *see id.* at 588 (noting that Justice Department practice shielded section 702 from judicial review).

ernment has provided notice concerning Section 702-derived information in two criminal cases.[260]

On October 17, 2013, the ACLU filed a complaint in the Southern District of New York based on a March 29 FOIA request for "records related to the government's use of evidence derived from surveillance authorized by the FISA Amendments Act."[261] After examining withheld documents in camera and ex parte, Judge Gregory H. Woods ruled on March 3, 2015, that five documents were properly withheld pursuant to the deliberative-process privilege, but the government's search had been improperly narrow.[262] On September 27, 2016, Judge Woods ruled that an expanded search was adequate, but some documents withheld needed further justification.[263] Judge Woods ruled that they were properly withheld work product on May 2, 2017.[264]

James Clapper, the Director of National Intelligence, provided Senator Wyden with a letter on March 28, 2014, explaining that "NSA sought and obtained the authority to query information collected under Section 702 of the Foreign Intelligence and Surveillance Act (FISA), using U.S. person identifiers," and "[t]hese queries were performed pursuant to minimization procedures approved by the FISA Court as consistent with the statute and the Fourth Amendment."[265]

Historically, federal courts frequently reviewed FISA evidence concerning criminal defendants to determine whether any of the evidence was discoverable as helpful to the defense[266] and whether any FISA evidence should be suppressed.[267] Courts also found prosecutions based on FISA evidence to

260. Letter from Principal Deputy Assistant Attorney General Peter J. Kadzik to Senator Mark Udall, Dec. 24, 2013, www.documentcloud.org/documents/1159182-122413-doj-response.html.

261. Complaint, ACLU v. U.S. Dep't of Just., No. 1:13-cv-7347 (S.D.N.Y. Oct. 17, 2013), D.E. 1; *see* Donohue, *supra* note 29, at 250.

262. ACLU v. U.S. Dep't of Just., 90 F. Supp. 3d 201 (S.D.N.Y. 2015); *see* 5 U.S.C. § 552(b)(5) (2020).

263. ACLU v. U.S. Dep't of Just., 210 F. Supp. 3d 467 (S.D.N.Y. 2016).

264. ACLU v. U.S. Dep't of Just., 252 F. Supp. 3d 217 (S.D.N.Y. 2017).

265. Letter from James R. Clapper to Senator Ron Wyden, Mar. 28, 2014, s3.amazonaws.com/s3.documentcloud.org/documents/1100298/unclassified-702-response.pdf; *see* Ellen Nakashima, *Clapper Confirms Warrantless Searches by NSA*, Wash. Post, Apr. 2, 2014, at A3; Charlie Savage, *Letter Tells of Searches for Emails and Calls*, N.Y. Times, Apr. 2, 2014, at A20.

266. United States v. Amawi, 695 F.3d 457, 474–75 (6th Cir. 2012), *aff'g* 531 F. Supp. 2d 832 (N.D. Ohio 2008); United States v. El-Mezain, 664 F.3d 467, 563–70 (5th Cir. 2011); United States v. Duggan, 743 F.2d 59, 78 (2d Cir. 1984), *aff'g* United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982); United States v. Belfield, 692 F.2d 141, 146–47 (D.C. Cir. 1982); United States v. Thomson, 752 F. Supp. 75, 78 (W.D.N.Y. 1990); United States v. Spanjol, 720 F. Supp. 55 (E.D. Pa. 1989).

267. United States v. Aldawsari, 740 F.3d 1015, 1017–19 (5th Cir. 2014); United States v. Campa, 529 F.3d 980, 988–89, 993–94 (11th Cir. 2009); United States v. Ning Wen, 477 F.3d 896, 897 (7th Cir. 2006); United States v. Dumeisi, 424 F.3d 566, 578–79 (7th Cir. 2005); United States v. Damrah, 412 F.3d 618, 623–25 (6th Cir. 2005); United States v. Hammoud,

be constitutional.[268] No court reviewing the use of section 702 evidence in a criminal case has found a constitutional infirmity.[269]

According to the *New York Times* on February 26, 2014, the government had filed section 702 notices in three cases.[270]

Jamshid Muhtorov

The FBI arrested Jamshid Muhtorov at Chicago's O'Hare airport on January 21, 2012, interrupting his trip to Turkey.[271] He was indicted in the District of Colorado, and the court assigned his case to Judge John L. Kane.[272]

The government filed a section 702 notice on October 25, 2013.[273] On November 19, 2015, Judge Kane denied a motion to suppress evidence de-

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381 F.3d 316, 331–34 (4th Cir. 2004) (en banc), *reinstated in relevant part*, 405 F.3d 1034 (4th Cir. 2005); United States v. Squillacote, 221 F.3d 542, 552–54 (4th Cir. 2000); United States v. Johnson, 952 F.2d 565, 571–73 (1st Cir. 1991); United States v. Isa, 923 F.2d 1300 (8th Cir. 1991); United States v. Badia, 827 F.2d 1458, 1462–64 (11th Cir. 1987); United States v. Ott, 827 F.2d 473 (9th Cir. 1987); United States v. Cavanagh, 807 F.2d 787 (9th Cir. 1987); *Duggan*, 743 F.2d at 76–80; United States v. Mahamud, 838 F. Supp. 2d 881 (D. Minn. 2012); United States v. Sherifi, 793 F. Supp. 2d 751 (E.D.N.C. 2011), *aff'd sub nom.* United States v. Hassan, 742 F.3d 104, 137 (4th Cir. 2014); United States v. Warsame, 547 F. Supp. 2d 982 (D. Minn. 2008); United States v. Mubayyid, 521 F. Supp. 2d 125, 131–41 (D. Mass. 2007); United States v. Rosen, 447 F. Supp. 2d 538, 547–53 (E.D. Va. 2006); United States v. Abdel Rachman, 861 F. Supp. 247 (S.D.N.Y. 1994); United States v. Falvey, 540 F. Supp. 1306 (E.D.N.Y. 1982).

268. *Ning Wen*, 477 F.3d at 897–99; United States v. Duka, 671 F.3d 329, 342–47 (3d Cir. 2011); United States v. Abu-Jihaad, 630 F.3d 102 (2d Cir. 2010), *aff'g* 531 F. Supp. 2d 299 (D. Conn. 2008); United States v. Stewart, 590 F.3d 93, 126–29 (2d Cir. 2009); *Isa*, 923 F.2d 1300; United States v. Posey, 864 F.2d 1487, 1490–91 (9th Cir. 1989) (noting, "As an initial matter, we think it clear that appellant may not make a facial challenge to the FISA without arguing that the particular surveillance *against him* violated the Fourth Amendment."); United States v. Pelton, 835 F.2d 1067, 1074–75 (4th Cir. 1987); *Cavanagh*, 807 F.2d 787; *Duggan*, 743 F.2d at 71–76; *Belfield*, 692 F.2d at 148–49; *Mahamud*, 838 F. Supp. 2d at 888–89; *Warsame*, 547 F. Supp. 2d at 992–97; *Mubayyid*, 521 F. Supp. 2d at 135–41; United States v. Benkahla, 437 F. Supp. 2d 541, 554–55 (E.D. Va. 2006); United States v. Nicholson, 955 F. Supp. 588 (E.D. Va. 1997); *Falvey*, 540 F. Supp. 1306; *see Damrah*, 412 F.3d at 625 ("FISA has uniformly been held to be consistent with the Fourth Amendment"); *Johnson*, 952 F.2d at 573 (noting, "We suspect . . . that appellants have waived this claim for purposes of their appeal.").

269. *See* Wadie E. Said, Crimes of Terror 78 (2015).

270. Charlie Savage, *Justice Dept. Informs Inmate of Pre-Arrest Surveillance*, N.Y. Times, Feb. 26, 2014, at A3; *see* Donohue, *supra* note 29, at 251–52; Greenberg, *supra* note 29, at 238.

271. United States v. Muhtorov, 20 F.4th 558, 581, 635 (10th Cir. 2021); United States v. Muhtorov, 329 F. Supp. 3d 1289, 1291–92, 1296 (D. Colo. 2018); *see* Complaint, United States v. Muhtorov, No. 1:12-cr-33 (D. Colo. Jan. 19, 2012), D.E. 1; Partially Translated Complaint, *id.* (Feb. 6, 2012), D.E. 22 (Russian translation); *see also* Bruce Finley & Felisa Cardona, *"I Knew Him as a Good Guy, Praying,"* Denver Post, Jan. 31, 2012, at 1A.

272. Indictment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Jan. 23, 2012) D.E. 5; Translated Indictment, *id.* (Feb. 6, 2012), D.E. 21 (Russian translation); *see* Second Superseding Indictment, *id.* (Mar. 22, 2012), D.E. 59; Superseding Indictment, *id.* (Mar. 20, 2012), D.E. 50; *Muhtorov*, 20 F.4th at 635.

273. FISA Notice, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Oct. 25, 2013), D.E. 457; *Muhtorov*, 20 F.4th at 636; *see* ACLU v. U.S. Dep't of Just., 90 F. Supp. 3d 201, 209 (S.D.N.Y. 2015);

rived via section 702.[274] "While I am convinced the [FISA Amendments Act] is susceptible to unconstitutional application as an end-run around the Wiretap Act and the Fourth Amendment's prohibition against warrantless or unreasonable searches, I am equally convinced that it was not unconstitutionally applied to Mr. Muhtorov."[275] The court of appeals agreed.[276]

Nearly three years later, Judge Kane sentenced Muhtorov to eleven years in prison on a material-support conviction.[277] The court of appeals affirmed the conviction on December 8, 2021.[278]

Mohamed Osman Mohamud

Mohamed Osman Mohamud was convicted on January 31, 2013, of an attempt to use a weapon of mass destruction for attempting to detonate a car bomb—a fake provided by the FBI in a sting—at Portland, Oregon's November 26, 2010, Christmas tree lighting ceremony.[279] Judge Garr M. King presided over the case.[280]

On November 19, 2013, before Mohamud had been sentenced, the government filed a section 702 notice.[281] On June 24, 2014, Judge King denied Mohamud's motions for a new trial.[282]

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see also Charlie Savage, *U.S. Prosecutors Cite Warrantless Wiretaps*, N.Y. Times, Oct. 27, 2013, at 21.

274. United States v. Muhtorov, 187 F. Supp. 3d 1240 (D. Colo. 2015); *Muhtorov*, 20 F.4th at 590, 636.

275. *Muhtorov*, 187 F. Supp. 3d at 1243.

276. *Muhtorov*, 20 F.4th at 592–618.

277. Judgment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Sept. 4, 2018), D.E. 1966; United States v. Muhtorov, 329 F. Supp. 3d 1289, 1311 (D. Colo. 2018); *see id.* at 1304 (noting six years, seven months, and nine days of presentence detention); Amended Judgment, *Muhtorov*, No. 1:12-cr-33 (D. Colo. Oct. 24, 2019), D.E. 2020 (clarifying recommendation for location of imprisonment near family); *see also* Federal Bureau of Prisons Inmate Locator [hereinafter BOP Locator], www.bop.gov (noting release from prison on June 18, 2021, reg. no. 42383-424).

278. *Muhtorov*, 20 F.4th 558, *cert. denied*, 598 U.S. ___, 143 S. Ct. 246 (2022).

279. United States v. Mohamud, 843 F.3d 420, 428–29 (9th Cir. 2016); Verdict, United States v. Mohamud, No. 3:10-cr-475 (D. Or. Jan. 31, 2013), D.E. 428; United States v. Mohamud, 941 F. Supp. 2d 1303, 1307 (D. Or. 2013) (denying motions for acquittal or a new trial); Opinion at 3, *Mohamud*, No. 3:10-cr-475 (D. Or. June 24, 2014), D.E. 517 [hereinafter *Mohamud* Section 702 Opinion], 2014 WL 2866749; *see* Indictment, *id.* (Nov. 29, 2010), D.E. 2; *see also* Colin Miner, Liz Robbins & Erik Eckholm, *F.B.I. Says Oregon Suspect Planned "Grand" Attack*, N.Y. Times, Nov. 28, 2010, at A1; Said, *supra* note 269, at 41.

280. Docket Sheet, *Mohamud*, No. 3:10-cr-475 (D. Or. Nov. 29, 2010).

281. FISA Notice, *id.* (Nov. 19, 2013), D.E. 486; *Mohamud*, 843 F.3d at 431; *Mohamud* Section 702 Opinion, *supra* note 279, at 3; *see* Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, N.Y. Times, Jan. 30, 2014, at A15.

In briefing, the government acknowledged that the notice was untimely. Government Discovery Opposition Brief at 9 n.5, 12, *Mohamud*, No. 3:10-cr-475 (D. Or. Feb. 13, 2014), D.E. 491.

282. *Mohamud*, 843 F.3d at 431; *Mohamud* Section 702 Opinion, *supra* note 279; *see* Charlie Savage, *Clashing Rulings Weigh Security and Liberties*, N.Y. Times, June 25, 2014, at A15.

> Clearly a lot of time has passed, but otherwise suppression and a new trial would put defendant in the same position he would have been in if the government notified him of the § 702 surveillance at the start of the case. Moreover, the government has apparently changed its practice in making this type of notification, so dismissal is not needed as a deterrence.[283]

Judge King rejected various constitutional challenges to FISA's new title VII, section 702 in particular. Respecting separation of powers, "[r]eview of § 702 surveillance applications is as central to the mission of the judiciary as the review of search warrants and wiretap applications."[284] With respect to the Fourth Amendment, "§ 702 surveillance falls within the foreign intelligence exception to the warrant requirement."[285] Mohamud's "communications were collected incidentally during intelligence collection targeted at one or more non-U.S. persons outside the United States."[286] Acknowledging the issue as presenting "a very close question," Judge King concluded that a warrant was not required for the examination of evidence incidentally collected on Mohamud.[287] Finally,

> I made a careful de novo, ex parte review of the § 702 applications and conclude the certification required by 50 U.S.C. § 1881a(g)(2)(A) [FISA § 702(g)(2)(A)] was in place. I also find that the government agents followed appropriate targeting and minimization procedures. Thus I conclude the § 702 surveillance at issue here was lawfully conducted.[288]

On October 1, 2014, Judge King sentenced Mohamud to thirty years in prison.[289]

The court of appeals affirmed the sentence and agreed that no warrant was required for surveillance of Mohamud's email communications with a foreign national under authorized section 702 surveillance of the foreign national.[290] Moreover, surveillance of Mohamud was reasonable.[291]

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283. *Mohamud* Section 702 Opinion, *supra* note 279, at 8; *see Mohamud*, 843 F.3d at 436 ("Mohamud cannot demonstrate how the late disclosure prejudiced him.").

284. *Mohamud* Section 702 Opinion, *supra* note 279, at 18; *see* Savage, *supra* note 282 ("The constitutionality of the 2008 law had never been tested in court before Judge King's ruling.").

285. *Mohamud* Section 702 Opinion, *supra* note 279, at 27.

286. *Id.* at 25.

287. *Id.* at 42–45.

288. *Id.* at 47.

289. Judgment, United States v. Mohamud, No. 3:10-cr-475 (D. Or. Oct. 3, 2014), D.E. 524; Transcript at 56, *id.* (Oct. 1, 2015, filed Dec. 8, 2014), D.E. 529; United States v. Mohamud, 843 F.3d 420, 431–32 (9th Cir. 2016); *see* Nigel Duara, *Ore. Man Caught in Bomb-Plot Sting Gets 30-Year Term*, Bos. Globe, Oct. 2, 2014, at A8; *see also* BOP Locator, *supra* note 277 (noting a release date of July 3, 2036, reg. no. 73079-065).

290. United States v. Mohamud, 666 F. App'x 591 (9th Cir. 2016), *cert. denied*, 583 U.S. ___, 138 S. Ct. 636 (2018); *Mohamud*, 843 F.3d at 439–41; *see* Maxine Bernstein, *Federal Appeals Court Upholds Conviction*, Oregonian, Dec. 6, 2016, at A1; Charlie Savage, *Panel Backs Warrantless Collection of Email*, N.Y. Times, Dec. 6, 2016, at A15.

291. *Mohamud*, 843 F.3d at 441–44.

Judge King died on February 5, 2019.[292] Judge Marco A. Hernández denied a motion for Mohamud's compassionate release on May 29, 2022.[293]

Agron Hasbajrami

On January 8, 2013, Agron Hasbajrami received a sentence of fifteen years in prison from Eastern District of New York Judge John Gleeson, on a plea of guilty to providing material support to terrorism.[294] Five days after the September 8, 2011, indictment, the government filed a notice that the government had collected FISA evidence against Hasbajrami.[295]

On February 24, 2014, the government informed Hasbajrami that the FISA evidence against him was obtained pursuant to orders based on section 702 FISA evidence.[296] "In the government's view, this supplemental notification does not afford you a basis to withdraw your plea or to otherwise attack your conviction or sentence because you expressly waived those rights, as well as the right to any additional disclosures from the government, in your plea agreement."[297]

Judge Gleeson ruled on October 2 that Hasbajrami could withdraw his guilty plea, because, "When the government provided FISA notice without FAA notice, Hasbajrami was misled about an important aspect of his case."[298]

The section 702 evidence complied with the Fourth Amendment, Judge Gleeson ruled.[299] The Constitution permits "warrantless surveillance of non-

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292. FJC Biographical Directory, *supra* note 8.

293. Opinion, *Mohamud*, No. 3:10-cr-475 (D. Or. May 29, 2022), D.E. 86, 2022 WL 1782587; *see id.* At 3 ("Defendant has not demonstrated extraordinary or compelling reasons for his release. Defendant does not have an underlying health condition that puts him at increased risk of serious illness or death if he contracts COVID-19, he has been vaccinated against COVID-19, and he has already contracted COVID-19 and recovered.").

294. Minutes, United States v. Hasbajrami, No. 1:11-cr-623 (E.D.N.Y. Jan. 8, 2013), D.E. 44; Judgment, *id.* (Jan. 16, 2013), D.E. 45; United States v. Hasbajrami, 945 F.3d 641, 645, 648 (2d Cir. 2019); *see* Superseding Indictment, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Jan. 26, 2012), D.E. 20; Indictment, *id.* (Sept. 8, 2011), D.E. 1; *see also* Mosi Secret, *15-Year Sentence in Terror Case*, N.Y. Times, Jan. 9, 2013, at A22.

Judge Gleeson resigned from the bench on March 9, 2016. FJC Biographical Directory, *supra* note 8; *see* Ben Protess, *Prominent U.S. Judge, Known as a Maverick, Is Expected to Join a White-Shoe Firm*, N.Y. Times, Feb. 25, 2016, at B3.

295. FISA Notice, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Sept. 13, 2011), D.E. 9; *Hasbajrami*, 945 F.3d at 645.

296. Letter, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Feb. 24, 2014), D.E. 65 [hereinafter Feb. 24, 2014, *Hasbajrami* Letter]; *Hasbajrami*, 945 F.3d at 645, 648; *see* Greenberg, *supra* note 29, at 257–59; Ellen Nakashima, *No Warrant, Inmate Is Told*, Wash. Post, Feb. 26, 2014, at A4; Charlie Savage, *Justice Dept. Informs Inmate of Pre-Arrest Surveillance*, N.Y. Times, Feb. 26, 2014, at A3.

297. Feb. 24, 2014, *Hasbajrami* Letter, *supra* note 296, at 2.

298. Opinion, Hasbajrami v. United States, No. 1:13-cv-6852 (E.D.N.Y. Oct. 2, 2014), D.E. 30, 2014 WL 4954596 (noting that withdrawal of the plea was against advice of counsel); *see Hasbajrami*, 945 F.3d at 645, 648; *see also* Devlin Barrett, *NSA Data Collection Gets Day in Court*, Wall St. J., Nov. 1, 2014, at A5.

U.S. persons who are abroad," so "the incidental interception of non-targeted U.S. persons' communications with the targeted persons is also lawful."[300]

Hasbajrami pleaded guilty to a superseding information on June 26, 2015.[301] On August 13, Judge Gleeson sentenced Hasbajrami to sixteen years in prison[302] followed by deportation to Albania.[303]

Hasbajrami reserved the right to appeal Judge Gleeson's section 702 ruling.[304] The court of appeals affirmed Judge Gleeson's decision in part, but remanded the case for more factfinding on database queries.[305]

> The vast majority of Section 702 surveillance at issue here involves information the government collected about Hasbajrami incidental to its surveillance of other individuals without ties to the United States and located abroad. . . .
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> . . .
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> [Q]uering databases of stored information derived from Section 702-acquired surveillance . . . raises novel and difficult questions. Querying, depending on the particulars of a given case (such as what databases are queried, for what purpose, and under what circumstances), *could* violate the Fourth Amendment, and thus require the suppression of evidence; therefore, a district court must ensure that any such querying was reasonable. But no information about any queries conducted as to Hasbajrami was provided to the district court, and the information provided to us on this subject is too sparse to reach a conclusion as to the reasonableness of any such queries conducted as to Hasbajrami.[306]

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299. Opinion, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Mar. 8, 2016), D.E. 165 [hereinafter E.D.N.Y. *Hasbajrami* Suppression Denial Opinion], 2016 WL 1029500; *see Hasbajrami*, 945 F.3d at 645, 647, 659–60.

300. E.D.N.Y. *Hasbajrami* Suppression Denial Opinion, *supra* note *299*, at 17.

301. Minutes, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. June 26, 2015), D.E. 142; Superseding Information, *id.* (June 26, 2015), D.E. 141; *see Hasbajrami*, 945 F.3d at 645, 660; Waiver of Indictment, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. June 26, 2015), D.E. 140.

Hasbajrami filed a pro se motion to withdraw his plea and fire his attorney a few weeks later. Motion, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. July 20, 2015), D.E. 146. Judge Gleeson denied these motions. Docket Sheet, *id.* (Sept. 8, 2011) [hereinafter *Hasbajrami* Docket Sheet].

302. Minutes, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Aug. 13, 2015), D.E. 151; Second Amended Judgment, *id.* (Nov. 3, 2015), D.E. 161; Amended Judgment, *id.* (Sept. 4, 2015), D.E. 158; Judgment, *id.* (Aug. 17, 2015), D.E. 152; Transcript, *id.* (Aug. 13, 2015, filed Nov. 19, 2015), D.E. 163; *Hasbajrami*, 945 F.3d at 660; *see* BOP Locator, *supra* note 277 (noting a release date of September 9, 2025, reg. no. 65794-053).

303. Order, *Hasbajrami*, No. 1:11-cr-623 (E.D.N.Y. Aug. 17, 2015), D.E. 150; *see Hasbajrami*, 945 F.3d at 660; *see also* Zachary R. Dowdy, *Terror Suspect Gets 16 Years*, Newsday, Aug. 14, 2015, at A35.

304. *Hasbajrami*, 945 F.3d at 645, 647, 660.

305. *Id.*, 945 F.3d 641.

After a classification of the court's opinion, the panel met ex parte with intelligence community personnel to discuss how the opinion would be expressed with a minimum of redactions; a few portions of the opinion remain redacted. *Id.*, at 646 n.1.

306. *Id.* at 646; *see Hasbajrami* Docket Sheet, *supra* note 301 (noting a status conference on October 19, 2021, before Judge LaShann DeArcy Hall).

Reaz Qadir Khan

A fourth case arose in April 2014.

A grand jury in the District of Oregon returned a sealed indictment against Reaz Qadir Khan on December 27, 2012, for providing advice and financial assistance to Ali Jaleel and his family; Jaleel perished in a suicide attack against Pakistan's Inter-Services Intelligence headquarters in Lahore on May 27, 2009.[307] Khan, who worked at Portland's wastewater treatment plant, was arrested on March 5, 2013.[308] The court assigned Khan's case to Judge Michael W. Mosman.[309]

On the day that Khan was arrested, the government filed a notice that it would use against the defendant evidence collected pursuant to FISA.[310] On April 3, 2014, just over one year later, the government filed a notice that evidence against Khan was acquired pursuant to FISA's section 702.[311] Judge Mosman scheduled FISA motions for hearing on July 27, 2015.[312] On June 17, 2014, Judge Mosman ruled that his 2013 appointment to the FISA court did not require recusal.[313]

The case was resolved by a plea agreement filed on February 13, 2015.[314] On June 19, Judge Mosman sentenced Khan to seven years and three months.[315] Kahn was released on September 30, 2021.[316]

Adel Daoud

Litigation over section 702 arose in a fifth case because it was championed by Senator Dianne Feinstein on December 27, 2012, as a success story for the FISA Amendments Act.[317] The defendant did not demonstrate the use of section 702 in his case.

Tim Reagan remotely attended a status conference on October 19, 2021, at which the government's response to the appellate court's mandate was briefly discussed.

307. Indictment, United States v. Khan, No. 3:12-cr-659 (D. Or. Dec. 27, 2012), D.E. 1.

308. Arrest Warrant, *id.* (Mar. 6, 2013), D.E. 11; *see* Helen Jung, *Indictment Ties Portland Man to Pakistan Attack*, Oregonian, Mar. 6, 2013.

309. Docket Sheet, *Khan*, No. 3:12-cr-659 (D. Or. Dec. 28, 2012) [hereinafter D. Or. *Khan* Docket Sheet].

310. Notice, *id.* (Mar. 5, 2013), D.E. 7.

311. Notice, *id.* (Apr. 3, 2014), D.E. 59.

312. Litigation Schedule, *id.* (Dec. 22, 2014), D.E. 175.

313. D. Or. *Khan* Docket Sheet, *supra* note 309 (D.E. 91); *see* Motion, *Khan*, No. 3:12-cr-659 (D. Or. May 5, 2014), D.E. 73; Transcript at 26–28, *id.* (Apr. 25, 2014, filed June 12, 2014), D.E. 89 (oral order, in an abundance of caution, by Judge Mosman to Khan's attorneys for briefing on reasons for Judge Mosman's recusal); *see also* FJC Biographical Directory, *supra* note 8.

314. Plea Agreement, *Khan*, No. 3:12-cr-659 (D. Or. Feb. 13, 2015), D.E. 187; Superseding Information, *id.* (Feb. 13, 2015), D.E. 182.

315. Judgment, *id.* (June 19, 2015), D.E. 193.

316. BOP Locator, *supra* note 277 (reg. no. 74926-065).

317. *See* Ellen Nakashima, *NSA Surveillance Questioned in Plot Case*, Wash. Post, June 22, 2013, at A2.

Adel Daoud was arrested in Chicago on September 14, 2012, for attempting to bomb a bar with a fake bomb provided by the FBI.[318] The court assigned the case to Judge Sharon J. Coleman.[319] The government filed a notice on September 18 that it would use against Daoud evidence derived pursuant to FISA.[320] On May 22, 2013, Daoud filed a motion for clarification from the government whether the FISA evidence against Daoud derived from traditional pre-FAA FISA surveillance or FAA FISA surveillance, often referred to as section 702 FISA surveillance.[321] The government responded on June 12 that "the information the government intends to use was acquired pursuant to a traditional FISA order . . . as opposed to a Section 702 Order."[322] In surreply on August 8, the government said that it would "provide notice to the defense and this Court if the government intended to use in this case any information obtained or derived from surveillance authorized under Title VII of FISA . . . as to which the defendant is an aggrieved person."[323] On the following day, Daoud's attorneys moved to examine and suppress all FISA evidence because "there is no indication that the prerequisites for a FISA warrant were present in this case."[324]

On January 29, 2014, Judge Coleman ruled that Daoud's secured counsel should be able to review FISA application materials pertaining to Daoud's case.[325]

> Here, counsel for defendant Daoud has stated on the record that he has top secret SCI (sensitive compartmented information) clearance. Assuming that counsel's clearances are still valid and have not expired, top secret SCI clearance would allow him to examine the classified FISA application material, if he were in the position of the Court or the prosecution. Furthermore, the government had no meaningful response to the argument by defense counsel that the supposed national security interest at stake is not implicated where defense counsel has the necessary security clearances. The government's only response at oral argument was that it has never been done.

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318. United States v. Daoud, 980 F.3d 581, 584–86 (7th Cir. 2020); United States v. Daoud, 755 F.3d 479, 480 (7th Cir. 2014); Minutes, United States v. Daoud, No. 1:12-cr-723 (N.D. Ill. Sept. 15, 2012), D.E. 2; *see* Michael Schwirtz & Marc Santora, *Chicago-Area Teenager Accused of Terrorism Plot*, N.Y. Times, Sept. 16, 2012, at 20; Annie Sweeney, Dawn Rhodes & Ryan Haggerty, *FBI: Car Bomb Plan Foiled*, Chi. Trib., Sept. 16, 2012, at 4. *See generally* Human Rights Watch, Illusion of Justice 6, 28–30, 192–93 (2014).

319. Docket Sheet, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Sept. 20, 2012).

320. Notice, *id.* (Sept. 18, 2012), D.E. 9; *Daoud*, 755 F.3d at 480.

321. FISA Clarification Motion, *Daoud*, No. 1:12-cr-723 (N.D. Ill. May 22, 2013), D.E. 43.

322. FISA Clarification Motion Response, *id.* (June 12, 2013), D.E. 46.

323. FISA Clarification Motion Sur-Reply, *id.* (Aug. 8, 2013), D.E. 49.

324. FISA Suppression Motion at 2, *id.* (Aug. 9, 2013), D.E. 52.

325. Opinion, *id.* (Jan. 29, 2014), D.E. 92 [hereinafter Jan. 29, 2014, N.D. Ill. *Daoud* Opinion], 2014 WL 321384; *Daoud*, 755 F.3d at 481; *see* Andrew Grossman, *Lawyers Win Right to See Secret Court Files*, Wall St. J., Jan. 30, 2014, at A5; Jason Meisner, *Defense to Get Terrorism Files*, Chi. Trib., Jan. 30, 2014, at 11; Ellen Nakashima, *Terrorism Suspect Challenges Warrantless Surveillance Program*, Wash. Post, Jan. 30, 2014, at A13; Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, N.Y. Times, Jan. 30, 2014, at A13.

> That response is unpersuasive where it is the government's claim of privilege to preserve national security that triggered this proceeding. Without a more adequate response to the question of how disclosure of materials to cleared defense counsel pursuant to protective order jeopardizes national security, this Court believes that the probable value of disclosure and the risk of nondisclosure outweigh the potential danger of disclosure to cleared counsel. Upon a showing by counsel, that his clearance is still valid, this Court will allow disclosure of the FISA application materials subject to a protective order consistent with procedures already in place to review classified materials by the court and cleared government counsel.
>
> While this Court is mindful of the fact that no court has ever allowed disclosure of FISA materials to the defense, in this case, the Court finds that the disclosure may be necessary. This finding is not made lightly, and follows a thorough and careful review of the FISA application and related materials. The Court finds however that an accurate determination of the legality of the surveillance is best made in this case as part of an adversarial proceeding. The adversarial process is the bedrock of effective assistance of counsel protected by the Sixth Amendment. *Anders v. California*, 386 U.S. 738, 743 (1967). Indeed, though this Court is capable of making such a determination, the adversarial process is integral to safeguarding the rights of all citizens, including those charged with a crime. "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984).[326]

On June 4, 2014, the court of appeals—Circuit Judges Richard A. Posner, Michael S. Kanne, and Ilana Diamond Rovner—heard the government's appeal from Judge Coleman's order granting Daoud's attorneys access to FISA application materials.[327] Following a public argument, the court held a closed ex parte session with the government.[328] Daoud's attorneys were not notified in advance that the court would hold part of the proceeding ex parte.[329]

Because of an error by court staff, the public argument was not recorded as it should have been.[330] Court staff members misinterpreted security precautions for the ex parte session as a signal that the public session should not be recorded.[331] The ex parte session was recorded by a cleared court reporter,

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326. Jan. 29, 2014, N.D. Ill. *Daoud* Opinion, *supra* note 325, at 4–5.

327. *Daoud*, 755 F.3d 479; Docket Sheet, United States v. Daoud, No. 14-1284 (7th Cir. Feb. 11, 2014) [hereinafter 7th Cir. *Daoud* Docket Sheet]; *see* Jason Meisner, *Secret Appeals Hearing Held*, Chi. Trib., June 5, 2014, at 12.

Judge Posner retired on September 2, 2017. FJC Biographical Directory, *supra* note 8.

328. *Daoud*, 755 F.3d at 479 n.*, 485; *see* Defendant's Objection, *Daoud*, No. 14-1284 (7th Cir. June 8, 2014) [hereinafter 7th Cir. *Daoud* Defendant's Objection]; *see also* Meisner, *supra* note 327.

329. *See* 7th Cir. *Daoud* Defendant's Objection, *supra* note 328; *see also* Meisner, *supra* note 327.

330. *Daoud*, 755 F.3d at 479 n.*; *see* Jason Meisner, *Court Didn't Record Terror Case Arguments*, Chi. Trib., June 6, 2014, at 4.

331. *See* Meisner, *supra* note 330.

however.[332] The court agreed to ask the government to approve a redacted transcript for defense counsel's use.[333] Attached to a motion to remove some redactions, the defense filed the redacted transcript on the public docket.[334]

To remedy the recording error, the court ordered a second argument session at the beginning of the following week.[335] Daoud was represented by a different attorney at the second argument.[336]

At the second argument, Judges Posner and Rovner explained to the defense attorney that the purpose of the ex parte proceeding was to provide the court with an opportunity to cross-examine the government about the government's representations to the court.[337] At the closed proceeding, the government assured the court that Senator Feinstein's comment about Daoud "was not meant to be understood as a statement that the FAA was used in this case."[338] Following the ex parte proceeding, the court issued a "Classified *Ex Parte* Order Requiring Additional Submission from the Government."[339]

On June 16, the court of appeals reversed Judge Coleman's discovery order, because she had not adequately established Daoud's attorneys' "need to know" the classified FISA application materials.[340]

The court of appeals also ruled that the investigation of Daoud did not violate FISA.[341] The court determined that Senator Feinstein had not identified Daoud's case as an FAA success story; the court concluded that Senator Feinstein meant to list thwarted attacks as evidence of needed vigilance, only some of which were FAA success stories.[342]

Also filed against Daoud were indictments for attempted murder following detention.[343] On August 25, 2016, Judge Coleman found Daoud "incompetent to stand trial at this time," noting that "his rational understanding of

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332. *Daoud*, 755 F.3d at 479 n.*; *see* Meisner, *supra* note 330.

333. *Daoud*, 755 F.3d at 485; 7th Cir. *Daoud* Docket Sheet, *supra* note 327; Oral Argument, *Daoud*, No. 14-1284 (7th Cir. June 9, 2014), D.E. 53 [hereinafter June 9, 2014, 7th Cir. *Daoud* Oral Argument], media.ca7.uscourts.gov/sound/2014/rs.14-1284.14-1284_06_09_2014.mp3 (audio recording).

334. Transcript Motion, *Daoud*, No. 14-1284 (7th Cir. June 25, 2014) [hereinafter 7th Cir. *Daoud* Transcript Motion].

335. *Daoud*, 755 F.3d at 479 n.*; Orders, *Daoud*, No. 14-1284 (7th Cir. June 6, 2014); *see* Jason Meisner, *Court Will Redo Terror Case Oral Arguments*, Chi. Trib., June 7, 2014, at 4.

336. 7th Cir. *Daoud* Docket Sheet, *supra* note 327.

337. June 9, 2014, 7th Cir. *Daoud* Oral Argument, *supra* note 333; *see Daoud*, 755 F.3d at 485; *see also* Steve Schmadeke, *Attorney, Judge Trade Shots in Terror Case*, Chi. Trib., June 10, 2014, at 9.

338. Transcript at 7, *attached to* 7th Cir. *Daoud* Transcript Motion, *supra* note 334.

339. Order, *Daoud*, No. 14-1284 (7th Cir. June 6, 2014) (cover page).

340. *Daoud*, 755 F.3d at 484, *cert. denied*, 574 U.S. 1158 (2015); United States v. Daoud, 980 F.3d 581, 587 (7th Cir. 2020); *see* Ellen Nakashima, *Landmark Surveillance Disclosure Order Reversed*, Wash. Post, June 17, 2014, at A2.

341. *Daoud*, 755 F.3d at 485.

342. United States v. Daoud, 761 F.3d 678, 682–83 (7th Cir. 2014).

343. Indictment, United States v. Daoud, No. 1:15-cr-487 (N.D. Ill. Aug. 13, 2015), D.E. 1; Indictment, United States v. Daoud, No. 1:13-cr-703 (N.D. Ill. Aug. 29, 2013), D.E. 1; *Daoud*, 980 F.3d at 586–87 (7th Cir. 2020).

the proceedings is significantly undermined by his pervasive belief that the Court and the prosecution are members of the Illuminati and that his attorneys are Freemasons."[344] Following many months of treatment with psychotropic medication, Judge Coleman found on March 12, 2018, that Daoud was competent to stand trial.[345]

On November 26, 2018, Judge Coleman accepted Daoud's plea of guilty in all three cases while maintaining his innocence pursuant to *North Carolina v. Alford*.[346] Following a sentencing hearing held from April 29 to May 6, 2019,[347] Judge Coleman sentenced Daoud to sixteen years in prison on May 20.[348] The court of appeals vacated that sentence in 2020 and remanded the case for sentencing by a different judge.[349] The district court reassigned Daoud's prosecutions to Judge John Z. Lee,[350] but upon Judge Lee's elevation to the court of appeals on September 9, 2022,[351] Daoud's prosecutions were reassigned to Judge Matthew F. Kennelly.[352] On December 20, Judge Kennelly denied an October 4 motion by Daoud's new attorney to withdraw the guilty plea and granted Daoud permission to proceed pro se.[353]

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344. Opinion at 1–2, United States v. Daoud, No. 1:12-cr-723 (N.D. Ill. Aug. 25, 2016), D.E. 216; *id.* at 4 ("it is in the best interest of the defendant to be immediately placed in a secure psychiatric treatment facility where persistent treatment for an initial period of three months may assist in a finding of competency"); *see id.* at 2–3 (noting that the government's forensic psychologist "appeared to be conflicted about Daoud's sincerity in his espoused beliefs"); Transcript, *id.* (Aug. 25, 2016, filed Oct. 3, 2016), D.E. 223 (ruling); Transcript, *id.* (Aug. 18 to 19, 2016, filed Oct. 3, 2016), D.E. 221, 222 (hearing); *see Daoud*, 980 F.3d at 587–88.

345. Minutes, *Daoud*, No. 1:12-cr-723 (N.D. Mar. 12, 2018), D.E. 246; *Daoud*, 980 F.3d at 588.

346. Order, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Nov. 26, 2018), D.E. 303; Transcript, *id.* (Nov. 26, 2018, filed Jan. 29, 2019), D.E. 307; *see* North Carolina v. Alford, 400 U.S. 25 (1970); *see also Alford* Motion, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Nov. 14, 2018), D.E. 295.

347. Transcripts, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Apr. 29 and 30 and May 1 and 6, 2019, filed June 10, 2019), D.E. 338 to 342; Minutes, *id.* (Apr. 29 and 30 and May 1 and 6, 2019), D.E. 330, 331, 332, 335.

348. Judgments, Nos. 1:12-cr-723, 1:13-cr-703, and 1:15-cr-487 (N.D. Ill. May 20, 2019), D.E. 386, 45, and 55, respectively; Amended Judgment, No. 1:13-cv-703 (May 28, 2019), D.E. 47; *Daoud*, 980 F.3d at 588–90, 596 (noting that the sentence was one year longer than recommended by Daoud's probation officer); *see* BOP Locator, *supra* note 277 (noting a release date of May 3, 2026, reg. no. 43222-424); *see also* Jason Meisner, *16 Years for Plot to Bomb Loop Bar*, Chi. Trib., May 7, 2019, at C1.

349. *Daoud*, 980 F.3d 581.

Three judges dissented from the court's decision not to rehear the appeal en banc. United States v. Daoud, 989 F.3d 610 (7th Cir. 2021).

350. Transfer Orders, Nos. 1:12-cr-723, 1:13-cr-703, and 1:15-cr-487 (N.D. Ill. Mar. 29 and Apr. 1, 2021), D.E. 369, 75, and 90, respectively.

Tim Reagan attended a telephonic status hearing on January 27, 2022, in which Judge Lee determined that Daoud was competent to request new counsel. Minutes, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Jan. 27, 2022), D.E. 402. Tim Reagan also attended telephonic status conferences on May 25 and July 27, 2022.

351. FJC Biographical Directory, *supra* note 8.

352. Order, *Daoud*, No. 1:12-cr-723 (N.D. Ill. Sept. 8, 2022), D.E. 414.

353. Minutes, *id.* (Dec. 20, 2022), D.E. 426; *see* Motion, *id.* (Oct. 4, 2022), D.E. 417.

The Qazi Brothers

In another case highlighted by Senator Feinstein, the court determined that section 702 was not at issue.

Raees Alam Qazi and Sheheryar Alam Qazi, brothers who were born in Pakistan and who became naturalized U.S. citizens, were indicted on November 30, 2012, in the Southern District of Florida for a plot to use a weapon of mass destruction.[354] On December 6, the government filed notices that it would use FISA evidence against the defendants.[355]

On April 22, 2013, the defendants moved for notice whether any of the FISA evidence was obtained pursuant to the FAA.[356] The defendants observed that their capture also was championed by Senator Feinstein as an FAA success.[357] On May 6, Magistrate Judge John J. O'Sullivan granted the defendants' motion so that they could challenge the lawfulness of any FAA surveillance, as promised by *Clapper*.[358]

On September 5, 2014, Judge O'Sullivan issued a report and recommendation advising that (1) after "a thorough *in camera*, *ex parte* review of the classified Foreign Intelligence Surveillance Act ("FISA") materials, the undersigned respectfully recommends that the defendants' motions to disclose FISA materials and to suppress evidence of FISA intercepts be DENIED"[359] and (2) because "the government does not intend to introduce or otherwise use or disclose evidence obtained or derived from FAA surveillance,"[360] de-

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354. Indictment, United States v. Qazi, No. 0:12-cr-60298 (S.D. Fla. Nov. 30, 2012), D.E. 1; *see* Scott Hiaasen, *Broward Brothers Held on Terror Charges*, Miami Herald, Dec. 1, 2012, at 1B.

355. Notice, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Dec. 6, 2012), D.E. 10 (Sheheryar); Notice, *id.* (Dec. 6, 2012), D.E. 9 (Raees).

356. Amended FAA Motion, *id.* (Apr. 22, 2013), D.E. 67 [hereinafter *Qazi* Amended FAA Motion] (motion by Sheheryar); *see* Order, *id.* (Apr. 24, 2013), D.E. 73 (granting Raees permission to join Sheheryar's motion).

357. *Qazi* Amended FAA Motion, *supra* note 356, at 3–4.

358. Opinion, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. May 6, 2013), D.E. 77; *see* Adam Liptak, *A Secret Surveillance Program Proves Challengeable in Theory Only*, N.Y. Times, July 16, 2013, at A11.

> I would like to have someone here maybe, you know, from the Solicitor General's Office who took the position in front of the Supreme Court that, "Hey, Supreme Court, don't rule on this now because, you know, these people don't have standing," but some day there is going to be somebody who is going to have standing, and they are going to be able to come before the Supreme Court, and now we have got some folks here who may have standing, but you don't want to tell them they have standing.

Transcript at 5, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. July 26, 2013, filed July 30, 2013), D.E. 129 (remarks by Judge O'Sullivan).

Judge O'Sullivan retired in January 2022. Judicial Milestones, www.uscourts.gov/judicial-milestones/john-j-osullivan; *see* Cindy Kent, *People on the Move*, S. Fla. Sun-Sentinel, Jan. 23, 2022, at A35.

359. Redacted Report and Recommendation at 5, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Sept. 5, 2014), D.E. 245 [hereinafter Sept. 5, 2014, *Qazi* Redacted Report and Recommendation]; *see* Redacted Report and Recommendation, *id.* (Sept. 3, 2014, filed Sept. 19, 2014), D.E. 250 (showing the locations in the document of the redactions).

360. Sept 5, 2014, *Qazi* Redacted Report and Recommendation, *supra* note 359, at 9.

ciding the constitutionality of the FAA would be an impermissible advisory opinion.[361]

District Judge Beth Bloom adopted Judge O'Sullivan's opinion.[362] The Qazis pleaded guilty to some counts of a superseding indictment on March 12, 2015.[363]

On June 12, Judge Bloom sentenced Raees Alam Qazi to thirty-five years, and she sentenced Sheheryar Alam Qazi to twenty years.[364]

Najibullah Zazi

While sentencing was pending, the government filed a section 702 notice in Najibullah Zazi's case on July 27, 2015.[365] Zazi was indicted in the Eastern District of New York on September 23, 2009, for conspiracy to use weapons of mass destruction.[366] Upon Zazi's agreement to plead guilty and cooperate in other prosecutions, the indictment was converted to an information on February 22, 2010.[367] Recognizing Zazi's cooperation and his testimony at two trials, Judge Raymond J. Dearie sentenced Zazi to ten years in prison on May 3, 2019.[368]

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361. *Id.* at 17.

362. Opinion, *Qazi*, No. 0:12-cr-60298 (S.D. Fla. Oct. 29, 2014), D.E. 259.

363. Plea Agreement, *id.* (Mar. 12, 2015), D.E. 283 (Raees); Plea Agreement, *id.* (Mar. 12, 2015), D.E. 282 (Sheheryar); Transcript, *id.* (Mar. 12, 2015, filed Sept. 17, 2015), D.E. 304; *see* Factual Basis, *id.* (Mar. 12, 2015), D.E. 284; Superseding Indictment, *id.* (Jan. 15, 2015), D.E. 267.

364. Judgments, *id.* (June 12, 2015), D.E. 301, 302; *see* Curt Anderson, *Brothers Sentenced for Plot to Bomb NYC Landmarks*, Bos. Globe, June 12, 2015, at A7; Jay Weaver, *Brothers Get Long Terms for "Evil" Plot*, Miami Herald, June 12, 2015, at 1B; *see also* BOP Locator, *supra* note 277 (noting release dates of January 24, 2030, for Sheheryan, reg. no. 01224-104, and September 26, 2042, for Raees, reg. no. 01223-104).

A pro se habeas corpus action by Raees claiming that the guilty plea resulted from a misunderstanding was unsuccessful. Order, Qazi v. United States, No. 0:16-cv-61177 (S.D. Fla. June 13, 2017), *adopting* Report and Recommendation, *id.* (May 15, 2017), D.E. 16.

365. Notice, United States v. Zazi, No. 1:09-cr-663 (E.D.N.Y. July 27, 2015), D.E. 59.

366. Indictment, *id.* (Sept. 23, 2009), D.E. 1; *see* William K. Rashbaum, *Terror Suspect Is Charged with Preparing Explosives*, N.Y. Times, Sept. 25, 2009, at A1. *See generally* Matt Apuzzo & Adam Goldman, Enemies Within: Inside the NYPD's Secret Spying Unit and Bin Laden's Final Plot Against America (2013); Simon Akam, Alison Leigh Cowan, Michael Wilson & Karen Zraick, *From Smiling Coffee Vendor to Terror Suspect*, N.Y. Times, Sept. 26, 2009, at A1; Peter Bergen, United States of Jihad 113–23 (2016); *id.* at 114 (Zazi "wanted to blow up as many commuters as possible, and himself, on the New York City subway system").

367. Information, *Zazi*, No. 1:09-cr-663 (E.D.N.Y. Feb. 22, 2010), D.E. 29; Cooperation Agreement, *id.* (Feb. 22, 2010, filed June 30, 2010), D.E. 44; *see* Carrie Johnson & Spencer S. Hsu, *N.Y. Terror Plea Hailed as Validation of Court Strategy*, Wash. Post, Feb. 23, 2010, at A1; A.G. Sulzberger & William K. Rashbaum, *Guilty Plea Made in Plot to Bomb New York Subway*, N.Y. Times, Feb. 23, 2010, at A1; *see also* United States v. Medunjanin, 752 F.3d 576 (2d Cir. 2014); Mosi Secret, *Man Convicted of a Terrorist Plot to Bomb Subways Is Sent to Prison for Life*, N.Y. Times, Nov. 17, 2012, at A19.

368. Judgment, *Zazi*, No. 1:09-cr-663 (E.D.N.Y. May 3, 2019), D.E. 76; *see* Colin Moynihan, *Trained by Al Qaeda, He Later Switched Sides*, N.Y. Times, May 3, 2019, at A22; Emily

Zazi was under federal surveillance when he was stopped on September 10, 2009, by New York authorities on the George Washington Bridge during a drive from Colorado to New York.[369] A recipe for explosives was found on his computer.[370] Because of several signs of surveillance in New York, Zazi flew back to Colorado on September 12.[371] He and his father were arrested in Colorado on September 21 and initially charged with making false statements.[372]

The father was indicted on January 28, 2010, in the Eastern District of New York for conspiracy to obstruct justice, and six related counts were added on November 29.[373] Following a jury verdict of guilty, the father was sentenced on February 15, 2012, by Judge Gleeson to four years for the Eastern

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Saul, *NY Bomb Plotter Gets "Time Served,"* N.Y. Post, May 3, 2019, at 13 ("a sentence that amounts to time served").

Abid Naseer was initially sentenced on January 26, 2016, to forty years in prison. Judgment, United States v. Naseer, No. 1:10-cr-19-4 (E.D.N.Y. Jan. 28, 2016), D.E. 464 (noting credit of two and one-half years for pre-extradition detention in England), *aff'd*, 775 F. App'x 28 (2d Cir. 2019), D.E. 164, *cert. denied*, 589 U.S. ___, 140 S. Ct. 826 (2020); *see* BOP Locator, *supra* note 277 (noting a release date of September 2, 2044, reg. no. 05770-748); Transcript at 252–319, *Naseer*, No. 1:10-cr-19-4 (E.D.N.Y. Feb. 18, 2015, filed July 20, 2016), D.E. 468 (partial record of Zazi's testimony); *see also* Stephanie Clifford, *Defendant Tries to Foil a Witness at His Trial*, N.Y. Times, Feb. 19, 2015, at A20 (describing Zazi's testimony). The sentence was reduced to thirty years in December 2022 in light of intervening law on sentencing enhancements for crimes of violence. Amended Judgment, *Naseer*, No. 1:10-cr-19-4 (E.D.N.Y. Jan. 9, 2023), D.E. 537; Opinion, *id.* (Dec. 15, 2022), D.E. 536, 2022 WL 17718800, *appeal pending*, Docket Sheet, No. 23-37 (2d Cir. Jan. 10, 2023); *see* United States v. Davis, 588 U.S. ___, 139 S. Ct. 2319 (2019) (holding unconstitutionally vague a sentencing enhancement for using a firearm while committing a crime of violence).

Adis Medunjanin was sentenced on November 20, 2020, to ninety-five years in prison. Amended Judgment, United States v. Medunjanin, No. 1:10-cr-19-1 (E.D.N.Y. Nov. 20, 2020), D.E. 519; *see* www.bop. gov (noting a release date of January 15, 2091, reg. no. 65114-053); *see also* Mosi Secret, *Bomb-Making Described in Thwarted Subway Plot*, N.Y. Times, Apr. 19, 2012, at A23 (describing Zazi's testimony); Mosi Secret, *Organizer of Subway Plot Testifies About Plan's Evolution*, N.Y. Times, Apr. 18, 2012, at A21 (same).

369. *See* Transcript at 25–28, *Zazi*, No. 1:09-cr-663 (E.D.N.Y. Feb. 22, 2010, filed Apr. 4, 2013), D.E. 57 (defendant's recitation of facts at his plea colloquy); *see also* Al Baker & Karen Zraick, *F.B.I. Searches Colorado Home of Man in Terror Inquiry That Reached Queens*, N.Y. Times, Sept. 17, 2009, at A27; Greenberg, *supra* note 29, at 191.

370. *See* Carrie Johnson & Spencer S. Hsu, *U.S. Resident Held Without Bail in Terrorism Case*, Wash. Post., Sept. 22, 2009, at A6.

371. *See* William K. Rashbaum & Al Baker, *How Using Imam in Terror Inquiry Backfired on New York Police*, N.Y. Times, Sept. 23, 2009, at A1; Karen Zraick & David Johnston, *Man in Queens Raids Denies Any Terrorist Link*, N.Y. Times, Sept. 16, 2009, at A24.

372. Complaint, United States v. Zazi, No. 1:09-mj-3001 (D. Colo. Sept. 19, 2009), D.E. 1 (Najibullah Zazi); Complaint, United States v. Zazi, No. 1:09-mj-3000 (D. Colo. Sept. 19, 2009), D.E. 1 (Mohammed Wali Zazi); *see* William K. Rashbaum & David Johnston, *U.S. Agents Arrest Father and Son in Terror Inquiry*, N.Y. Times, Sept. 21, 2009, at A28.

373. Superseding Indictment, United States v. Zazi, No. 1:10-cr-60 (E.D.N.Y. Nov. 29, 2010), D.E. 42; Indictment, *id.* (Jan. 28, 2010), D.E. 1; *see* Order, United States v. Zazi, No. 1:09-cr-438 (D. Colo. Feb. 1, 2010), D.E. 50 (dismissing without prejudice an indictment in Colorado).

District indictment and to an additional six months for a Southern District of New York indictment for visa fraud, to which the father pleaded guilty.[374]

Mohammads and Salims

December 21, 2015, notices of intent to use section 702 evidence[375] were filed in a case against two pairs of brothers on a September 30 indictment in the Northern District of Ohio for conspiracy to provide material support to terrorism.[376]

Following a report that one of the defendants was seeking the murder of Judge Jack Zouhary, to whom the case was assigned, a second indictment was filed against Yahya Farooq Mohammad on July 6, 2016.[377] The circuit's chief judge reassigned the two cases to Judge Edmund A. Sargus, Jr., a judge in Ohio's other district.[378]

Mohammad pleaded guilty in both cases in July 2017,[379] and the case against the other defendants was reassigned to Northern District Judge Jeffrey J. Helmick.[380]

Mohammad was sentenced on November 8, 2017, to twenty-seven-and-a-half years in prison,[381] following which he will be deported to India.[382]

Judge Helmick denied Mohammad's motion to suppress section 702 evidence on March 20, 2018, in an opinion released on September 11 following a classification review.[383]

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374. Judgment, *Zazi*, No. 1:10-cr-60 (E.D.N.Y. Feb. 15, 2012), D.E. 195; *see* Jury Verdict, *id.* (July 22, 2011), D.E. 169; Consent to Transfer, United States v. Zazi, No. 1:11-cr-718 (E.D.N.Y. Oct. 21, 2011), D.E. 1; Indictment, United States v. Zazi, No. 1:11-cr-604 (S.D.N.Y. July 15, 2011), D.E. 1; *see* Mosi Secret, *Prison for Father Who Lied About Terror Plot*, N.Y. Times, Feb. 11, 2012, at A19.

375. Notices, United States v. Mohammad, No. 3:15-cr-358 (N.D. Ohio Dec. 21, 2015), D.E. 27, 28, 29; *see* Charlie Savage, *Disclosures in Cases Put Surveillance in Question*, N.Y. Times, Apr. 27, 2016, at A14.

376. Indictment, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio Sept. 30, 2015), D.E. 1; United States v. Mohammad, 339 F. Supp. 3d 724, 730 (N.D. Ohio 2018).

377. Indictment, United States v. Mohammad, No. 3:16-cr-222 (N.D. Ohio July 6, 2016), D.E. 1.

378. Order, *id.* (July 12, 2016), D.E. 3; Order, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio July 12, 2016), D.E. 108.

379. Minutes, *Mohammad*, No. 3:16-cr-222 (N.D. Ohio July 10, 2017), D.E. 59; Minutes, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio July 10, 2017), D.E. 252; *Mohammad*, 339 F. Supp. 3d at 730.

380. Order, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio July 7, 2017), D.E. 60.

381. Judgment, *Mohammad*, No. 3:16-cr-222 (N.D. Ohio Nov. 8, 2017), D.E. 68; Judgment, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio Nov. 8, 2017), D.E. 284; Transcript at 18, *Mohammad*, No. 3:16-cr-222 (filed Nov. 6, 2017, Apr. 27, 2021), D.E. 80; *see* BOP Locator, *supra* note 277 (noting a release date of April 18, 2039, reg. no. 86552-083); Opinion, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio June 27, 2019), D.E. 393, 2019 WL 2644211 (denying habeas relief); *see also* Earl Rinehart, *Ex-OSU Student Gets 27 ½ Years*, Columbus Dispatch, Nov. 7, 2017, at 1B.

382. Stipulated Judicial Order of Removal, *Mohammad*, No. 3:16-cr-222 (N.D. Ohio Nov. 7, 2017), D.E. 67; Stipulated Judicial Order of Removal, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio Nov. 7, 2017), D.E. 283.

> [The] facts do not evince a voluntary connection to the United States sufficient to bestow on Farooq the Fourth Amendment's protections. Farooq studied in the United States for roughly five years. But Farooq finished his studies in the United States years before the acquisitions at issue occurred. And after finishing his studies and leaving the United States in 2004, Farooq returned to visit the country only twice in the subsequent years—for around 25 days in 2007 and for around 16 days in 2008.
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> . . .
>
> That Farooq's wife is a United States citizen does little to alter the Fourth Amendment analysis. Farooq's marriage is to an individual, not a nation.[384]

Judge Helmick also concluded the following: (1) "When a search is electronic, the location of the search carries less weight."[385] (2) "[N]o warrant was required."[386] (3) "I agree an individual loses some expectation of privacy in an electronic communication after it has reached its recipient."[387] "When this limited expectation of privacy in delivered electronic communications is weighed against the Government's interest in acquiring foreign intelligence information through Section 702, the Government's interest prevails."[388]

The case against the other three defendants was dismissed on the government's motion.[389]

Aws Mohammed Younis al-Jayab

Aws Mohammed Younis al-Jayab received a section 702 notice on April 8, 2016,[390] in a material-support case filed in the Northern District of Illinois on March 17.[391] Later transferred to the Northern District of Illinois[392] was a January 14 indictment filed in the Eastern District of California for failure to disclose travel to Syria to recruit terrorists.[393]

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383. *Mohammad*, 339 F. Supp. 3d at 730, 746–53; Docket Sheet, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio Sept. 30, 2015).

The motion had been joined by the other two defendants who received section 702 notices. *Mohammad*, 339 F. Supp. 3d at 730 n.1; Motion, *Mohammad*, No. 3:15-cr-358 (N.D. Ohio Oct. 16, 2016), D.E. 160; Motion, *id.* (Oct. 7, 2016), D.E. 155.

384. *Mohammad*, 339 F. Supp. 3d at 748–49.

385. *Id.* at 749.

386. *Id.* at 750.

387. *Id.* at 752.

388. *Id.* at 753.

389. Judgment, United States v. Mohammad, No. 3:15-cr-358 (N.D. Ohio Jan. 22, 2019), D.E. 384 (Ibrahim Mohammad); Judgment, *id.* (Jan. 16, 2019), D.E. 378 (Sultane Roome Salim); Judgment, *id.* (Nov. 9, 2018), D.E. 377 (Asif Ahmed Salim).

390. Notice, United States v. Al-Jayab, No. 1:16-cr-181 (N.D. Ill. Apr. 8, 2016), D.E. 14; *see* Savage, *supra* note 375.

391. Indictment, *Al-Jayab*, No. 1:16-cr-181 (N.D. Ill. Mar. 17, 2016), D.E. 1.

392. Docket Sheet, United States v. Al-Jayab, No. 1:18-cr-721 (N.D. Ill. Oct. 22, 2018).

393. Indictment, United States v. Al-Jayab, No. 2:16-cr-8 (E.D. Cal. Jan. 14, 2016), D.E. 13.

On June 28, 2018, Judge Sara L. Ellis held that the section 702 surveillance was constitutional in al-Jayab's case.[394] Warrants are not required for surveillance of persons in foreign countries who are not United States persons.[395] Judge Ellis found the surveillance a constitutionally reasonable way to obtain foreign intelligence information.[396]

Both cases were resolved by a guilty plea in October.[397] Al-Jayab was sentenced to five years in prison on October 31, 2019.[398] He was released on April 10, 2020.[399]

Moalin, Mohamud, Doreh, and Nasir

Southern District of California Judge Jeffrey T. Miller denied a new trial motion on November 14, 2013, a motion based in part on postconviction Snowden revelations.[400] "Here, when Defendant Basaaly Saeed Moalin used his telephone to communicate with third parties, whether in Somalia or the United States, he had no legitimate expectation of privacy in the telephone numbers dialed."[401]

The defendants—also including Mohamed Mohamed Mohamud, Issa Doreh, and Ahmed Nasir Taalil Mohamud—were indicted in San Diego late in 2010 for sending money to support Al Shabaab in Somalia.[402] A jury found them guilty on February 22, 2013.[403] Sentences ranged from six to eighteen years.[404] Affirming the convictions in all respects on September 2, 2020, the court of appeals concluded

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394. Redacted Opinion at 38–64, 84, *Al-Jayab*, No. 1:16-cr-181 (N.D. Ill. June 28, 2018), D.E. 115.

395. *Id.* at 43–45.

396. *Id.* at 48–56.

397. Plea Agreement, *id.* (Oct. 31, 2018, filed Nov. 2, 2018), D.E. 129; *see* Revised Superseding Information, *id.* (Nov. 5, 2018), D.E. 131; Superseding Information, *id.* (Oct. 29, 2018), D.E. 125.

398. Judgment, *id.* (Oct. 31, 2019), D.E. 154; Judgment, United States v. Al-Jayab, No. 18-cr-721 (Oct. 31, 2019), D.E. 31; Transcript at 59, *Al-Jayab*, No. 1:16-cr-181 (N.D. Ill. Oct. 3, 2019, filed Oct. 23, 2019), D.E. 153.

399. BOP Locator, *supra* note 277 (reg. no 74900-097).

400. Amended Opinion, United States v. Moalin, No. 3:10-cr-4246 (S.D. Cal. Nov. 18, 2013), D.E. 388 [hereinafter Amended S.D. Cal. *Moalin* Opinion], 2013 WL 6079518; United States v. Moalin, 973 F.3d 977, 987–88 (9th Cir. 2020).

401. Amended S.D. Cal. *Moalin* Opinion, *supra* note 400, at 12; *see* Smith v. Maryland, 442 U.S. 735 (1979); *see also Moalin*, 973 F.3d at 989–90.

402. Indictment, United States v. Mohamud, No. 3:10-cr-4645 (S.D. Cal. Nov. 19, 2010), D.E. 1 (Nasir); Indictment, *Moalin*, No. 3:10-cr-4246 (S.D. Cal. Oct. 22, 2010), D.E. 1 (Moalin, Mohamud, and Doreh); *see* Second Superseding Indictment, *id.* (June 8, 2012), D.E. 147 (all four defendants); Superseding Indictment, *id.* (Jan. 14, 2011), D.E. 38 (same); *Moalin*, 973 F.3d at 985.

403. Jury Verdict, *Moalin*, No. 3:10-cr-4246 (S.D. Cal. Feb. 22, 2013), D.E. 303; *Moalin*, 973 F.3d at 987.

404. Judgment, *Moalin*, No. 3:10-cr-4246 (S.D. Cal. Jan. 31, 2014), D.E. 431 (six years for Nasir); Judgment, *id.* (Nov. 21, 2013), D.E. 394 (ten years for Doreh); Judgment, *id.* (Nov. 12, 2013), D.E. 393 (thirteen years for Mohamud); Judgment, *id.* (Nov. 22, 2013), D.E. 392 (eighteen years for Moalin); *see also* BOP Locator, *supra* note 277 (noting releases from pris-

> that the government may have violated the Fourth Amendment and did violate the Foreign Intelligence Surveillance Act ("FISA") when it collected the telephony metadata of millions of Americans, including at least one of the defendants, but suppression is not warranted on the facts of this case. Additionally, we confirm that the Fourth Amendment requires notice to a criminal defendant when the prosecution intends to enter into evidence or otherwise use or disclose information obtained or derived from surveillance of that defendant conducted pursuant to the government's foreign intelligence authorities. We do not decide whether the government failed to provide any required notice in this case because the lack of such notice did not prejudice the defendants.[405]

Summary of Section 702 Notice Cases

So far, no court has found a constitutional infirmity in section 702 surveillance. All of the section 702 notice cases described here are included in a list maintained by the University of Michigan Law School's Civil Rights Litigation Clearinghouse, a list which also includes a couple of other cases that did not involve section 702 litigation.[406]

President Obama's Reforms

On December 12, 2013, the President's Review Group on Intelligence and Communications Technologies issued a 303-page report presenting forty-six recommendations for surveillance reform.[407] One month later, Judge Bates, who served as Director of the Administrative Office of the U.S. Courts from July 1, 2013, to January 5, 2015, submitted to Congress a report on behalf of

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on on February 22, 2016, for Nasir, reg. no. 23137-298; July 18, 2019, for Doreh, reg. no. 22869-298; November 29, 2021, for Mohamud, reg. no. 22868-298; and noting a release date of March 2, 2026, for Moalin, reg. no. 22855-298).

405. *Moalin*, 973 F.3d at 984; *see* Devlin Barrett, *Court: Effort That Collected Phone Data Was Illegal*, Wash. Post, Sept. 3, 2019, at A2; Kristina Davis, *NSA Program Illegal, but S.D. Convictions Upheld*, San Diego Union-Trib., Sept. 3, 2020, at A1.

In 2021, Judge Miller denied Moalin's motions for compassionate release. Opinion, *Moalin*, No. 3:10-cv-4246 (S.D. Cal. Sept. 29, 2021), D.E. 554; Opinion, *id.* (Aug. 4, 2021), D.E. 553, 2021 WL 3419417.

406. Civil Rights Litigation Clearinghouse, www.clearinghouse.net/results.php?searchSpecialCollection=55; *see* Docket Sheet, United States v. Daher, No. 2:18-cr-20559-2 (E.D. Mich. Aug. 14, 2018); Docket Sheet, United States v. Gartenlaub, No. 8:14-cr-173 (C.D. Cal. Oct. 23, 2014).

407. Liberty and Security in a Changing World (Dec. 12, 2013), obamawhitehouse.archives.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf; *see* Donohue, *supra* note 159, at 611–12; Siobhan Gorman, *Panel Pushes Revamp of NSA*, Wall St. J., Dec. 13, 2013, at A1; Siobhan Gorman, Devlin Barrett & Carol E. Lee, *Obama Urged to Curb NSA Spying*, Wall St. J., Dec. 19, 2013, at A1; Ellen Nakashima & Ashkan Soltani, *Panel Urges New Curbs on Surveillance by U.S.*, Wash. Post, Dec. 19, 2013, at A1; David E. Sanger, *Obama Panel Said to Urge N.S.A. Curbs*, N.Y. Times, Dec. 13, 2013, at A1; David E. Sanger & Charlie Savage, *Obama Is Urged to Sharply Curb N.S.A. Data Mining*, N.Y. Times, Dec. 19, 2013, at A1.

the judiciary urging moderation in any reforms that would substantially change the work of the FISA court.[408]

At a televised address to the Justice Department on January 17, 2014, President Obama announced that he was "ordering a transition that will end the Section 215 Bulk metadata program as it currently exists, and establish a mechanism that preserves the capabilities we need without the government holding this bulk metadata."[409]

Among the ordered changes, the President decided that the NSA's extensive database of who has called whom now "can be queried only after a judicial finding or in the case of a true emergency."[410] On February 6, the Director of National Intelligence reported that the FISA court had approved such a change in procedures.[411]

President Obama ordered the attorney general and the intelligence community to present by March 28 alternatives to the NSA's maintaining the metadata database.[412] On March 25, newspapers reported that a proposal in development would cease the government's bulk harvesting of metadata and rely on individual orders for metadata customarily held by telecommunication companies.[413] In the event, "the deadline came and went, and the program continued."[414]

The Freedom Act

The House of Representatives' Permanent Select Committee on Intelligence proposed to the House on May 8, 2014, a Uniting and Strengthening Ameri-

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408. Comments of the Judiciary on Proposals Regarding the Foreign Intelligence Surveillance Act, Jan. 10, 2014, www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=70bed5e2-c28f-4f3c-ad94-7cb6d647f328; Letter from John D. Bates to Senator Dianne Feinstein, Jan. 13, 2014, www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=3bcc8fbc-d13c-4f95-8aa9-09887d6e90ed; *see* Peter Baker & Charlie Savage, *Obama to Place Some Restraints on Surveillance*, N.Y. Times, Jan. 15, 2014, at A1; Ellen Nakashima, *Judges Oppose Secret-Court Changes*, Wash. Post, Jan. 15, 2014, at A3; Mike Scarcella, *FISA Judges' Concerns*, Nat'l L.J., Jan. 20, 2014, at 16; *see also* FJC Biographical Directory, *supra* note 8.

409. Remarks by the President on Review of Signals Intelligence, Jan. 17, 2014 [hereinafter President's Jan. 17, 2004, Remarks], www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence; *see* ACLU v. Clapper, 785 F.3d 787, 798 (2d Cir. 2015); *see also* Anita Kumar, *Days Later, Obama's Speech on Surveillance Perplexes*, Miami Herald, Jan. 23, 2014, at 3A; Mark Landler & Charlie Savage, *Obama Outlines Calibrated Curbs on Phone Spying*, N.Y. Times, Jan. 18, 2014, at A1; Carol E. Lee & Siobhan Gorman, *Obama Shakes Up Surveillance Program*, Wall St. J., Jan. 18, 2014, at A1; Ellen Nakashima & Greg Miller, *Obama Moves to Rein in Surveillance: Orders Limits on Phone Data*, Wash. Post, Jan. 18, 2014, at A1.

410. President's Jan. 17, 2004, Remarks, *supra* note 409.

411. FISC Approves Government's Request to Modify Telephony Metadata Program, IC on the Record (Feb. 6, 2014), icontherecord.tumblr.com/post/75842023946/test.

412. President's Jan. 17, 2004, Remarks, *supra* note 409.

413. Ellen Nakashima, *Bill Will Target NSA Phone Program*, Wash. Post, Mar. 25, 2014, at A3; Charlie Savage, *Obama Will Seek Limits for N.S.A. on Call Records*, N.Y. Times, Mar. 25, 2014, at A1; *see* Andrews *et al.*, *supra* note 137, at 203.

414. Donohue, *supra* note 11, at 51.

ca by Fulfilling Rights and Ending Eavesdropping, Dragnet Collection, and Online Monitoring Act (USA FREEDOM Act), which would modify the NSA's surveillance authority.[415] Judge Bates, on May 13, asked that the committee's report include another letter by him on behalf of the judiciary recommending that Congress not impose on the FISA court "a permanent institution of a public advocate or impose[e] an adversarial process in the general run of cases" or create a requirement for public summaries of secret FISA-court opinions, because summaries in the absence of access to the originals could be misleading.[416] Judge Bates expressed similar sentiments in an August 5 letter to Senate Judiciary Committee Chair Patrick Leahy, explaining that while occasional amicus curiae participation in FISA-court proceedings could be helpful, a special advocate would interfere with the court's special ex parte relationship with the government.[417]

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415. 160 Cong. Rec. D486 (May 8, 2014); *see* ACLU v. Clapper, 785 F.3d 787, 799 (2d Cir. 2015); Greenberg, *supra* note 29, at 261; Ellen Nakashima, *NSA Reform Measure to Move to House Floor*, Wash. Post, May 9, 2014, at A3; Charlie Savage, *House Panel Passes Bill to Replace N.S.A. Program*, N.Y. Times, May 9, 2014, at A17; *see also* Savage, *supra* note 16, at 600 (reporting that the initial spell-out for the acronym was created by a Republican congressional staffer and two high school friends). *See generally* Thomas Massie, Opening Remarks, Cato Conference, *supra* note 1.

416. Letter from John D. Bates to Representative Mike Rogers, May 13, 2014, *in* Committee Report for H.R. 3361, www.congress.gov/113/crpt/hrpt452/CRPT-113hrpt452-pt2.pdf (page 41). *See generally Lawfare Podcast: The Case For and Against a FISA Advocate* (episode 79, June 14, 2014), www.lawfareblog.com/2014/06/lawfare-podcast-episode-79-the-case-for-and-against-a-fisa-advocate/.

417. Letter from John D. Bates to Senator Patrick J. Leahy, Aug. 5, 2014, online.wsj.com/public/resources/documents/Leahyletter.pdf; *see* Siobhan Gorman, *Federal Judge Blasts Bill to Revamp Surveillance*, Wall St. J., Aug. 7, 2014, at A2.

On August 14, 2014, the Ninth Circuit's Chief Circuit Judge Alex Kozinski, an ex officio member of the Judicial Conference of the United States, wrote to Senator Leahy to state, "I was not aware of Director Bates's letter before it was sent, nor did I receive a copy afterwards. I first learned of the letter this past weekend when a copy was sent to me by a distinguished law professor." Letter from Alex Kozinski to Senator Patrick J. Leahy, Aug. 14, 2014, images.politico.com/global/2014/08/20/kozinski_to_leahy.html (archived at web.archive.org/web/20170226214128/http://images.politico.com/global/2014/08/20/kozinski_to_leahy.html). Judge Kozinski concluded, "I have serious doubts about the views expressed by Judge Bates. Insofar as Judge Bates's August 5th letter may be understood as reflecting my views, I advise the Committee that this is not so." *Id.* Judge Kozinski retired on December 18, 2017. FJC Biographical Directory, *supra* note 8.

Retired District of Massachusetts Judge Nancy Gertner opposed Judge Bates's letter in a *National Law Journal* opinion essay on September 22. Nancy Gertner, Opinion Essay, *One Voice on Surveillance Doesn't Make a Chorus*, Nat'l L.J., Sept. 22, 2014, at 34.

On November 18, retired Southern District of New York Judge Michael B. Mukasey, who also was President George W. Bush's third attorney general, co-authored with Michael V. Hayden, a former director of both the NSA and the CIA, a newspaper column opposing the USA FREEDOM Act. Michael V. Hayden & Michael B. Mukasey, Opinion Essay, *NSA Reform That Only ISIS Could Love*, Wall St. J., Nov. 18, 2014, at A19; *see* Ellen Nakashima & Ed O'Keefe, *NSA Reform Measure's Shifting Fortunes*, Wash. Post, Nov. 20, 2014, at A2.

President Obama signed the USA FREEDOM Act on June 2, 2015.[418] By then, the acronym stood for "Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring," which changed what the letters EDO stood for.

The new act ended bulk metadata surveillance by the government, and the act required telecommunication companies to maintain metadata for at least eighteen months.[419] The act also required the FISA court and the FISA court of review to jointly appoint at least five persons to act as occasional amici curiae in cases deemed by the courts to involve novel or significant interpretations of the law.[420]

The new act provided for a delay of 180 days, from June 2 until November 29, before curtailment of bulk metadata surveillance.[421] On June 17, FISA Court Judge Saylor determined that although bulk metadata surveillance authority had sunsetted on June 1, the Freedom Act's establishment of December 15, 2019, as a new sunset date revived bulk surveillance authority.[422] On June 29, 2015, Judge Mosman agreed with Judge Saylor and disagreed with the Second Circuit conclusion that bulk metadata collection was not authorized by FISA.[423]

On October 29, 2015, the Second Circuit's court of appeals agreed that Congress had authorized bulk collection for the Freedom Act's first 180 days,

418. Pub. L. No. 114-23, 129 Stat. 268 (2015) [hereinafter Freedom Act]; *see* Klayman v. NSA, 280 F. Supp. 3d 39, 47 (D.D.C. 2017). *See generally* Donohue, *supra* note 11, at 51–53; Mondale *et al.*, *supra* note 1, at 2268–69, 2273–75; Savage, *supra* note 16, at 616–20.

419. *See* Mike DeBonis, *Senate Vote Rolls Back a Post-9/11 Spy Power*, Wash. Post, June 3, 2015, at A1; Ellen Nakashima, *Two Years After Snowden's Leaks, Law Marks a Milestone*, Wash. Post, June 3, 2015, at A2; Jennifer Steinhauer & Jonathan Weisman, *U.S. Surveillance in Place Since 9/11 Is Sharply Limited*, N.Y. Times, June 3, 2015, at A1.

420. Freedom Act, § 401; *see* 50 U.S.C. § 1803(i) (2020).

421. Pub. L. No. 114-23, Freedom Act § 109(a), 50 U.S.C. § 1861 note; Opinion at 10, *In re* Tangible Things, Nos. BR 15-75 and Misc. 15-1 (FISA Ct. June 29, 2015) [hereinafter Mosman Freedom Act Opinion], www.fisc.uscourts.gov/sites/default/files/BR%2015-75%20Misc%2015-01%20Opinion%20and%20Order.pdf, 2015 WL 5637562.

422 Opinion, *In re* Tangible Things, Nos. BR 15-77 and BR 15-78 (FISA Ct. June 17, 2015), www.fisc.uscourts.gov/sites/default/files/BR%2015-77%2015-78%20Memorandum%20Opinion.pdf.

423. Mosman Freedom Act Opinion, *supra* note 421; ACLU v. Clapper, 804 F.3d 617, 621 (2d Cir. 2015); *see* Mondale *et al.*, *supra* note 1, at 2273, 2302–03 (noting that FISA-court proceedings are less adversarial than proceedings before the circuits' courts of appeals); Charlie Savage, *Surveillance Court Rules That N.S.A. Can Resume Bulk Data Collection*, N.Y. Times, July 1, 2015, at A14; *see also* Order, *Tangible Things*, No. BR 15-75 (FISA Ct. June 29, 2015), www.fisc.uscourts.gov/sites/default/files/BR%2015-75%20Primary%20Order%20%28redacted%29%20.pdf, 2015 WL 5662641 (surveillance order, a companion to Judge Mosman's opinion).

as a transition period.[424] The court also declined to enjoin bulk collection during the transition period on constitutional grounds.[425]

> We need not, and should not, decide such momentous constitutional issues based on a request for such narrow and temporary relief. To do so would take more time than the brief transition period remaining for the telephone metadata program, at which point, any ruling on the constitutionality of the demised program would be fruitless.[426]

On November 24, Judge Mosman determined that metadata collected before November 29 could be retained only pursuant to evidence preservation obligations in the warrantless wiretap litigation in the Northern District of California and for limited data-quality purposes to expire on February 29, 2016.[427]

A key document leaked in 2013 by Edward Snowden and made public by journalists was an April 25, 2013, secondary FISA-court order issued by Judge Vinson requiring Verizon Business Network Services to continue to provide "all call detail records or 'telephony metadata' created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls."[428] On August 28, 2015, the U.S. Court of Appeals for the District of Columbia Circuit reversed Judge Leon's injunction against bulk surveillance for lack of standing because "plaintiffs are Verizon *Wireless* subscribers and not Verizon *Business Network Services* subscribers. Thus, the facts marshaled by plaintiffs do not fully establish that their own metadata was ever collected."[429] Although Circuit

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424. *ACLU*, 804 F.3d at 625–26; *see* Charlie Savage, *No Early End to Collection of Records by the N.S.A.*, N.Y. Times, Oct. 30, 2015, at A16.

"Such a transitional period would likely have been appropriate even had we held § 215 unconstitutional in our earlier decision in the instant matter." *ACLU*, 804 F.3d at 626.

425. *ACLU*, 804 F.3d at 623–25.

426. *Id.* at 626 (footnote omitted).

427. Opinion, *In re* Tangible Things, No. BR 15-99 (FISA Ct. Nov. 24, 2015), www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Opinion%20and%20Order.pdf, 2015 WL 12696366; *see* Order, *id.* (Sept. 17, 2015), www.fisc.uscourts.gov/sites/default/files/BR%2015-99%20Order%20Appointing%20Amicus%20Curiae.pdf (order appointing amicus curiae); *see also* Ellen Nakashima, *NSA's Bulk Collection of Americans' Phone Records to End*, Wash. Post, Nov. 28, 2015, at A2; Damian Paletta, *NSA Won't Extend Phone Program*, Wall St. J., Nov. 28, 2015, at A3.

428. Secondary Order at 2, *In re* Tangible Things, No. BR 13-80 (FISA Ct. Apr. 25, 2013), www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order; Klayman v. NSA, 280 F. Supp. 3d 39, 45 (D.D.C. 2017); *see* Savage, *supra* note 16, at 168.

429. Obama v. Klayman, 800 F.3d 559, 563 (D.C. Cir. 2015) (Judge Janice Rogers Brown); *see id.* at 565 (Judge Williams: "plaintiffs are subscribers of Verizon Wireless, not of Verizon Business Network Services, Inc.—the sole provider that the government has acknowledged targeting for bulk collection."); *Klayman*, 280 F. Supp. 3d at 49; Docket Sheets, Klayman v. Obama, No. 14-5016 and 14-5017 (D.C. Cir. Jan. 15, 2014) (cross-appeals); Docket Sheets, Klayman v. Obama, Nos. 14-5004 and 14-5005 (D.C. Cir. Jan. 9, 2014) (appeals); Oral Argument, *id.* (Nov. 4, 2014), www.cadc.uscourts.gov/recordings/recordings2015.nsf/B35F13E83B42FB8485257D860062C672/$file/14-5004.mp3 (audio recording); *see also* Devlin Barrett, *Panel Rules Collection of Phone Data Legal*, Wall St. J., Aug. 29,

Judge David Sentelle would have ordered the case dismissed, Circuit Judges Janice Rogers Brown and Stephen Williams agreed to remand the case to Judge Leon for a possible standing cure.[430]

Following amendment of the complaint to include Verizon Business customers,[431] Judge Leon again enjoined the surveillance program on November 9, 2015.[432] On November 16, the court of appeals stayed the injunction pending another appeal,[433] and the court of appeals vacated Judge Leon's injunction as moot on April 4, 2016.[434] Judge Leon determined on November 21, 2017, that the claims the plaintiffs had standing to pursue were mooted by the Freedom Act.[435] On March 5, 2018, Judge Leon dismissed a June 5, 2017, complaint of widespread improper government surveillance filed by Larry Klayman and Dennis Montgomery.[436] On February 5, 2019, the court of appeals affirmed Judge Leon's 2017 and 2018 rulings.[437]

Senator Rand Paul had filed an action in the district court for the District of Columbia challenging bulk surveillance on February 18, 2014.[438] Judge Leon dismissed Paul's action in 2019 for want of prosecution.[439]

2015, at A4; Ellen Nakashima, *Court Deals Blow to NSA Call Records Suit*, Wash. Post, Aug. 29, 2015, at A2; James Risen, *N.S.A. Phone Program Can Go On, Court Says*, N.Y. Times, Aug. 29, 2015, at A13.

430. *Obama*, 800 F.3d 559; *see Klayman*, 280 F. Supp. 3d at 49.

Judge Brown retired on August 31, 2017, and Judge Williams died on August 7, 2020. FJC Biographical Directory, *supra* note 8.

431. Fourth Amendment Complaint, Klayman v. Obama, No. 1:13-cv-851 (D.D.C. Sept. 8, 2015), D.E. 145-1.

432. Klayman v. Obama, 142 F. Supp. 3d 172 (D.D.C. 2015); *Klayman*, 280 F. Supp. 3d at 49; *see* Spencer S. Hsu, *Judge Again Hits NSA Program*, Wash. Post, Nov. 10, 2015, at A7; Charlie Savage, *Judge Curbs N.S.A. Data Collection*, N.Y. Times, Nov. 10, 2015, at A17.

433. Order, Klayman v. Obama, No. 15-5307 (D.C. Cir. Nov. 16, 2015); *Klayman*, 280 F. Supp. 3d at 49; *see* Klayman v. Obama, 805 F.3d 1148 (2015) (Circuit Judge Brett M. Kavanaugh concurring in the denial of rehearing en banc).

434. Order, *Klayman*, No. 15-5307 (D.C. Cir. Apr. 4, 2016); *Klayman*, 280 F. Supp. 3d at 49.

435. *Klayman*, 280 F. Supp. 3d at 50–58; *see* Opinion, Klayman v. Obama, No. 1:14-cv-92 (D.D.C. Mar. 28, 2018), D.E. 55 (dismissing the third class action, observing that accusations that the judge had been coopted by the Deep State was no substitute for a well-pleaded complaint).

436. Montgomery v. Comey, 300 F. Supp. 3d 158 (D.D.C. 2018); *see* Complaint, Montgomery v. Comey, No. 1:17-cv-1074 (D.D.C. June 5, 2017), D.E. 1; *Klayman*, 280 F. Supp. 3d at 42 n.1.

437. Klayman v. Obama, 759 F. App'x 1 (D.C. Cir. 2019) (2017 ruling); Montgomery v. Comey, 752 F. App'x 3 (D.C. Cir. 2019) (2018 ruling).

438. Complaint, Paul v. Obama, No. 1:14-cv-262 (D.D.C. Feb. 18, 2014), D.E. 3; Amended Complaint, *id.* (Mar. 26, 2014), D.E. 17; *see also* Dana Milbank, *In Rand Paul's NSA Sideshow, a Plaintiffs Tiff*, Wash. Post, Feb. 20, 2014, at A2.

The court of appeals dismissed as frivolous appeals from denials of intervention by a pro se litigant in Senator Paul's case and Larry Klayman's cases. Orders, Nos. 14-5207 to 14-5209 and 14-5212 (D.C. Cir. Mar. 4, 2015).

439. Order, *Paul*, No. 1:14-cv-262 (D.D.C. Feb. 7, 2019), D.E. 39.

Also because of Congress's passing the Freedom Act, the Ninth Circuit's court of appeals remanded the District of Idaho case back to Judge Winmill on March 22, 2016.[440] The plaintiff did not pursue the case further.[441]

Section 402(a) of the Freedom Act requires the declassification and public release of any opinion by the FISA courts that "includes a significant construction or interpretation of any provision of law."[442] The Electronic Frontier Foundation filed an April 19, 2016, federal complaint to enforce a March 7 FOIA request for FISA-court opinions and orders covered by section 402(a).[443] Eighty-five redacted opinions and orders were produced:[444] eighteen on June 13, 2017,[445] twenty-three on September 25, 2017,[446] thirteen on January 30, 2018,[447] and thirty-one on August 20, 2018.[448] Among the redactions were dates of issue and case numbers. Northern District of California Judge Haywood S. Gilliam, Jr., determined on March 26, 2019, that an additional six court rulings were properly withheld in full.[449] A stipulated payment of attorney fees and costs brought the case to a close.[450]

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440. Smith v. Obama, 816 F.3d 1239 (9th Cir. 2016); *see* Oral Argument, Smith v. Obama, No. 14-35555 (9th Cir. Dec. 8, 2014), www.ca9.uscourts.gov/media/video/?20141208/14-35555/ (video recording).

441. Docket Sheet, Smith v. Obama, No. 2:13-cv-257 (June 12, 2013) (April 14, 2016, minute order, D.E. 43, noting that the plaintiff was given two weeks to express an intention to pursue the case).

442. 50 U.S.C. § 1872(a) (2020).

443. Complaint, Electronic Frontier Found. v. U.S. Dep't of Just., No. 4:16-cv-2041 (N.D. Cal. Apr. 19, 2016), D.E. 1; *see* Significant FISC Opinions, www.eff.org/cases/significant-fisc-opinions (the plaintiff's website).

444. *See* Release of FISA Title IV and V Documents, icontherecord.tumblr.com/post/165800143933/release-of-fisa-title-iv-and-v-documents.

445. FISC Opinions on Sec. 702, www.eff.org/document/fisc-opinions-sec-702; Status Report, *Electronic Frontier Found.*, No. 4:16-cv-2041 (N.D. Cal. June 21, 2017), D.E. 49; *see* Additional Release of FISA Section 702 Documents, icontherecord.tumblr.com/post/161824569523/additional-release-of-fisa-section-702-documents.

446. Update: EFF Lawsuit Results in Release of More FISC Opinions, www.eff.org/deeplinks/2017/09/update-eff-lawsuit-results-release-more-fisc-opinions; Status Report, *Electronic Frontier Found.*, No. 4:16-cv-2041 (N.D. Cal. Sept. 28, 2017), D.E. 53.

447. Newly Released Surveillance Orders Show That Even with Individualized Court Oversight, Spying Powers Are Misused, www.eff.org/deeplinks/2018/02/newly-released-surveillance-orders-show-even-individualized-court-oversight-spying; *see* Status Report, *Electronic Frontier Found.*, No. 4:16-cv-2041 (N.D. Cal. Jan. 8, 2018), D.E. 57.

448. New Surveillance Court Orders Show That Even Judges Have Difficulty Understanding and Limiting Government Spying, www.eff.org/deeplinks/2018/09/new-surveillance-court-orders-show-even-judges-have-difficulty-understanding-and; *see* Status Report, *Electronic Frontier Found.*, No. 4:16-cv-2041 (N.D. Cal. June 7, 2018), D.E. 62.

449. Electronic Frontier Found. v. U.S. Dep't of Just., 376 F. Supp. 3d 1023 (N.D. Cal. 2019).

450. Stipulated Dismissal, *Electronic Frontier Found.*, No. 4:16-cv-2041 (N.D. Cal. July 3, 2019), D.E. 82; Joint Status Report, *id.* (June 10, 2019), D.E. 81.

In 2020, the government allowed authorization to lapse for some surveillance activities that began as part of Stellar Wind and came to be authorized by the Freedom Act.[451]

Additional Rulings

On August 6, 2015, Western District of Texas Judge Kathleen Cardone stayed and administratively closed a February 18, 2014, action filed in El Paso, noting the plaintiffs' heavy reliance on pending appeals in other circuits for authority.[452]

An attorney's pro se complaint filed in the Western District of Pennsylvania on June 2, 2014, alleged that "[n]ow, for the first time in history, a small group of persons within the United States government is attempting to seize all of the private, electronic communications of the American citizenry, with little or no independent review."[453] Judge Cathy Bissoon dismissed the complaint, observing that "courts have refused to find standing based on naked averments that an individual's communications must have been seized because the government operates a data collection program and the individual utilized the service of a large telecommunications company or companies."[454] The court of appeals determined that the plaintiff "alleged a program of government surveillance that, though universal in scope, is unmistakenly personal in the purported harm."[455] On remand, Judge Bissoon concluded, "Defendants have shown, by a preponderance of the evidence, that the government did not engage in dragnet-type collection activity . . . ."[456] A differ-

451. *See* Devlin Barrett & Ellen Nakashima, *Democrats Wary of Administration Bid to Renew NSA Surveillance Program*, Wash. Post, Sept. 19, 2019, at A19; Ellen Nakashima, *NSA Halts Program Using Phone Logs After Value Doubted*, Wash. Post, Mar. 6, 2019, at A6; Andrew Restuccia & Dustin Volz, *Surveillance Powers Are Nearing Expiration*, Wall St. J., Mar. 5, 2020, at A3; Charlie Savage, *McConnell Appears Set to Let Long-Debated Surveillance Bill Wither*, N.Y. Times, Aug. 15, 2020, at A16; Charlie Savage, *N.S.A. Has Ended Gleaning of Data from U.S. Phones*, N.Y. Times, Mar. 5, 2019, at A1; Aruna Viswanatha & Dustin Volz, *Surveillance Law's Lapse Limits Terror Probes, Justice Official Says*, Wall St. J., Apr. 13, 2020, at A3; Dustin Volz, *NSA Eyes Killing Call Monitoring Program*, Wall St. J., Mar. 5, 2019, at A6; Dustin Volz, *NSA Urges Dropping Call-Data Collection*, Wall St. J., Apr. 25, 2019, at A1.

452. Order, Perez v. Clapper, No. 3:14-cv-50 (W.D. Tex. Aug. 6, 2015), D.E. 79; *see* Third Amended Complaint, *id.* (Oct. 31, 2014), D.E. 26; Second Amended Complaint, *id.* (Sept. 12, 2014), D.E. 21; Amended Complaint, *id.* (May 27, 2014), D.E. 12; Complaint, *id.* (Feb. 5, 2014), D.E. 1.

453. Complaint at 5, Schuchardt v. Obama, No. 2:14-cv-705 (W.D. Pa. June 2, 2014), D.E. 1; Schuchardt v. President, 839 F.3d 336, 340 (3d Cir. 2016); *see* Second Amended Complaint, *Schuchardt*, No. 2:14-cv-705 (W.D. Pa. Nov. 24, 2014), D.E. 19; Amended Complaint, *id.* (Sept. 1, 2014), D.E. 9.

454. Opinion at 10, *Schuchardt*, No. 2:14-cv-705 (W.D. Pa. Sept. 30, 2015), D.E. 28, 2015 WL 5732117; *Schuchardt*, 839 F.3d at 342.

455. *Schuchardt*, 839 F.3d at 346.

456. Opinion at 2, *Schuchardt*, No. 2:14-cv-705 (W.D. Pa. Feb. 4, 2019), D.E. 77, 2019 WL 426482.

ent panel of the court of appeals concluded on April 23, 2020, that Judge Bissoon did not abuse her discretion.[457]

Judge Hogan issued an opinion on November 6, 2015, which was publicly released in redacted form on April 19, 2016, that blessed law enforcement searches of foreign intelligence surveillance collected pursuant to section 702.[458] FISA section 101 defines minimization procedures to include "the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes."[459] Judge Hogan reasoned,

> It would be a strained reading of the definition of minimization procedures to permit FBI personnel to retain and disseminate Section 702 information constituting evidence of a crime implicating a United States person for law enforcement purposes, but to prohibit them from querying Section 702 data in a manner designed to identify such evidence.[460]

The FISA court of review issued an opinion on April 14, 2016,[461] which was made public in redacted form on August 22,[462] that validated an interpretation of pen-register authority by FISA-court judges that differed from the consensus of judges in the district courts.[463] A pen register is a surveillance device that records the digits entered when initiating a telephone call.[464] Digits entered after a call is established are post-cut-through digits, which might (1) be entered to complete the intended call if the first digits merely establish access to a long-distance service and additional digits are required to establish access to the intended recipient of the call or (2) be communication content, such as a password, account number, or instruction.[465] The FISA court of review determined that "a court can authorize the use of a pen register to collect post-cut-through digits, as long as the collecting agency takes all reasonably available steps to minimize the collection of content in-

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457. Schuchardt v. President, 802 F. App'x 69 (3d Cir.), *cert. denied*, 592 U.S. ___, 141 S. Ct. 367 (2020).

458. Opinion, ___, No. ___ (FISA Ct. Nov. 6, 2015) [hereinafter Nov. 6, 2015, Hogan Opinion], *as redacted*, www.dni.gov/files/documents/20151106-702Mem_Opinion_Order_for_Public_Release.pdf; *see* Ellen Nakashima, *Court Rejects Assessment of FBI Use of Surveillance Data*, Wash. Post, Apr. 21, 2016, at A3; Charlie Savage, *Judge Rejects Challenge to Searches of Emails Gathered Without a Warrant*, N.Y. Times, Apr. 20, 2016, at A7; *cf.* Donohue, *supra* note 29, at 265 ("The best example of practice beyond the pale is in the query of Section 702 data using U.S. person information for potential violations of criminal law.").

459. 50 U.S.C. §1801(h)(3) (2020).

460. Nov. 6, 2015, Hogan Opinion, *supra* note 458, at 33.

461. *In re* Certified Question of Law, 858 F.3d 591 (FISA Ct. Rev. 2016) (redacted).

462. Release of FISC Question of Law & FISCR Opinion, icontherecord.tumblr.com/post/149331352323/release-of-fisc-question-of-law-fiscr-opinion.

463. Certification of Question at 9–10, *In re* A U.S. Person, No. PR/TT 2016-___ (FISA Ct. Feb. 12, 2016) (redacted), www.fisc.uscourts.gov/sites/default/files/PCTD%20FISC-R%20Certification%20Redactions%2020160818%20pdf.pdf.

464. 18 U.S.C. § 3127(3).

465. *E.g.*, *In re* Pen Register and Trap and Trace Device or Process, 411 F. Supp. 2d 816, 818 (S.D. Tex. 2006).

formation and is prohibited from making use of any content information that may be collected."[466]

The question came to the court of review as a certified question of law from Presiding FISA Court Judge Hogan on February 12, following a discussion of the issue by the FISA-court judges at their semiannual conference in October 2015.[467]

Following an extensive review of compliance, Judge Collyer approved section 702 certifications on April 26, 2017, in an opinion that began with a recognition of violations brought to the court's attention in 2016 and 2017.[468]

> On October 24, 2016, the government orally apprised the Court of significant noncompliance with the NSA's minimization procedures involving queries of data acquired under Section 702 using U.S. person identifiers. The full scope of non-compliant querying practices had not been previously disclosed to the Court. . . .
>
> On January 3, 2017, the government made a further submission describing its efforts to ascertain the scope and causes of those compliance problems and discussing potential solutions to them. The Court was not satisfied that the government had sufficiently ascertained the scope of the compliance problems or developed and implemented adequate solutions for them and communicated a number of questions and concerns to the government.[469]

On April 11, 2019, Presiding Judge Collyer denied

> a motion for appointment as amicus curiae and for leave to file an amicus curiae brief to assist the Court in deciding whether the appointment of Matthew Whitaker as Acting Attorney General was unlawful, such that he could not properly act as Attorney General pursuant to the Foreign Intelligence Surveillance Act.[470]

Judge Collyer observed that by the time of her ruling William P. Barr had been confirmed as attorney general and "[t]he government has not relied on any action taken by Mr. Whitaker as the Acting Attorney General in any submission to the Court."[471]

The FISA Amendments Reauthorization Act of 2017 added to section 702 a new subsection (f) regulating queries of surveillance data collected pur-

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466. *Certified Question*, 858 F.3d at 598.

467. Certification of Question, *supra* note 463, at 5.

468. Opinion, ___, No. ___ (FISA Ct. Apr. 26, 2017) [hereinafter Apr. 26, 2017, Collyer Opinion], www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf; *see* Tim Johnson, *Secret Court Rebukes NSA for Illegal Surveillance of U.S. Citizens*, Miami Herald, May 27, 2017, at 16A.

469. Apr. 26, 2017, Collyer Opinion, *supra* note 468, at 4–5.

470. Order, *In re* Appointment of Goldstein, No. Misc. 18-4 (FISA Ct. Apr. 11, 2019) [hereinafter Goldstein Order], www.fisc.uscourts.gov/sites/default/files/Misc%2018-04%20Order%20190411.pdf; *see* Motion, *id.* (Dec. 11, 2018), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2018-04%20Motion%20of%20Thomas%20C.%20Goldstein%20181211.pdf.

471. Goldstein Order, *supra* note 470, at 1.

suant to FISA.[472] On July 12, 2019, the FISA court of review agreed with FISA Court Judge James E. Boasberg, of the district court for the District of Columbia, that the government was not adequately memorializing whether query terms were United States persons, and the court ordered the government to revise its procedures.[473]

On July 16, 2013, a collection of eighteen organizations, including the First Unitarian Church of Los Angeles, Greenpeace, the California Association of Federal Firearms Licensees, and the National Organization for the Reform of Marijuana Laws, filed a complaint against the government in the Northern District of California alleging "an illegal and unconstitutional program of dragnet electronic surveillance."[474] Judge White accepted the case as related to the warrantless wiretap litigation.[475] The Court of appeals determined in 2021 that plaintiffs in the litigation did not have standing.[476]

Carter Page's Surveillance

The presentation to the FISA court of political opposition research to obtain a surveillance order embroiled the FISA court in significant partisan politics.

A dossier was compiled by former British intelligence officer Christopher Steele, who was stationed in Russia in the 1990s.[477] It was prepared as part of opposition research commissioned by opponents of presidential candidate

472. Pub. L. No. 115-118, 132 Stat. 3 (2018), 50 U.S.C. § 1881a(f) (2020); *see* Karoun Demirjian, *Senate Votes to Reauthorize Surveillance Program One Day Before Deadline*, Wash. Post, Jan. 19, 2018, at A13; Charlie Savage, *Surveillance Program Is Extended for 6 Years*, N.Y. Times, Jan. 19, 2018, at A14.

473. *In re* DNA/AG 702(h) Certifications 2018, 941 F.3d 547 (FISA Ct. Rev. 2019), *aff'g in part* Secret Court Opinion, 402 F. Supp. 3d 45 (FISA Ct. 2018).

Available on Westlaw is an earlier "Secret Court Opinion," (FISA Ct. Aug. 24, 2012), 2012 WL 9189263.

474. Complaint, First Unitarian Church of L.A. v. NSA, No. 4:13-cv-3287 (N.D. Cal. July 16, 2013), D.E. 1; *see* Second Amended Complaint, *id.* (Aug. 20, 2014), D.E. 119; Amended Complaint, *id.* (Sept. 10, 2013), D.E. 9 (adding six additional plaintiff organizations); *see also* Bob Egelko, *Suit Seeks Limit on Government Data Collection*, S.F. Chron., July 16, 2013, at D1.

475. Order, *First Unitarian Church of L.A.*, No. 4:13-cv-3287 (N.D. Cal. July 24, 2013), D.E. 7.

476. Jewel v. NSA, 856 F. App'x 640 (9th Cir. 2021), *aff'g* Opinion, No. 4:08-cv-4373 (N.D. Cal. Apr. 25, 2019), D.E. 462, *cert. denied*, 596 U.S. ___, 142 S. Ct. 2812 (2022).

477. *See* Jane Mayer, *The Man Behind the Dossier*, New Yorker, Mar. 12, 2018, at 48; Tom Hamburger & Rosalind S. Helderman, *How a British Ex-Spy Became a Flash Point in Russia Probe*, Wash. Post, Feb. 7, 2018, at A1; Evan Perez, Jim Sciutto, Jake Trapper & Carl Bernstein, *Intel Chiefs Presented Trump with Claims of Russian Efforts to Compromise Him*, CNN, Jan. 12, 2017, www.cnn.com/2017/01/10/politics/donald-trump-intelligence-report-russia/index.html; *see also* www.documentcloud.org/documents/3259984-Trump-Intelligence-Allegations.html (apparent posting of dossier documents by BuzzFeed); Ken Bensinger, Miriam Elder & Mark Schoofs, *These Reports Allege Trump Has Deep Ties to Russia*, BuzzFeed, Jan. 10, 2017, www.buzzfeed.com/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia?utm_term=.yk261zjg3#.gla5RWwK9.

Donald Trump: Republicans during the primary elections and Democrats during the general election.[478]

Among the dossier's assertions was that Carter Page represented the Trump campaign in meetings with senior Russian officials to negotiate deals on business, sanctions, and Russia's interference with the presidential election.[479]

Page was a witness in a 2013 federal prosecution of a Russian spy.[480]

The intelligence community presented the dossier to a FISA-court judge in July 2016 to justify permission to surveil Page as an agent of a foreign power.[481]

A two-page synopsis of the dossier was presented to President Obama and President-Elect Trump in January 2017.[482]

Republican Representative Devin Nunes oversaw the preparation of a four-page memo concluding that the Page FISA surveillance order was part of an abuse of surveillance authority.[483] Two Republican senators referred Steele to the Justice Department for a criminal investigation into whether he falsely represented to the FISA court that he had not discussed the dossier with journalists.[484]

Public release of the classified memo became a partisan issue: one party appeared motivated to discredit the Justice Department's investigation of President Trump, and the other party argued that the memo was not an objective assessment but rather a collection of partisan talking points.[485]

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478. *See* U.S. Dep't of Just. Office of the Inspector Gen., Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation 93 (Dec. 2019) [hereinafter DOJ OIG Crossfire Hurricane Review], www.justice.gov/storage/120919-examination.pdf (revised, and redacted for public release); Jeremy Herb, *GOP Considers Releasing Intel Behind Memo Alleging FISA Abuses*, CNN, Jan. 22, 2018, www.cnn.com/2018/01/22/politics/gop-classified-intelligence-fisa-memo/index.html; Mayer, *supra* note 477, at 54; Perez et al., *supra* note 477.

479. *See* Evan Perez, Shimon Prokupecz & Manu Raju, *FBI Used Dossier Allegations to Bolster Trump-Russia Investigation*, CNN, Apr. 18, 2017, www.cnn.com/2017/04/18/politics/fbi-dossier-carter-page-donald-trump-russia-investigation/index.html.

480. *See* Perez et al., *supra* note 479.

481. *See* Herb, *supra* note 478; Josh Meyer, *Former Trump Adviser Page Says He Welcomes FISA Warrant Against Him*, Politico, Apr. 11, 2017, www.politico.com/story/2017/04/carter-page-fisa-russia-trump-237137; Perez et al., *supra* note 479.

482. *See* Perez et al., *supra* note 477.

483. *See* Devlin Barrett, Karoun Demirjian & Philip Rucker, *Memo Released, and Recriminations Fly*, Wash. Post, Feb. 3, 2018, at A1; Herb, *supra* note 481.

484. *See* Glenn Kessler, *What You Need to Know About Christopher Steele, the FBI and Trump "Dossier,"* Wash. Post, Jan. 14, 2018, at A4.

485. *See* Herb, *supra* note 481; Ellen Nakashima, Devlin Barrett & Karoun Demirjian, *GOP Memo on Surveillance "Abuse" Targets Dossier*, Wash. Post, Jan. 21, 2018, at A2; Charlie Savage, Nicholas Fandos & Adam Goldman, *Justice Dept. Challenges Republican Chief of Intelligence Committee Over Memo*, N.Y. Times, Jan. 25, 2018, at A20.

Following FOIA actions,[486] the government released redacted FISA filings in Page's case on July 21, 2018.[487] The October 21, 2016, FISA application stated, "The target of this application is Carter W. Page"; it further stated, "The target of this application is an agent of a foreign power."[488]

The Department of Justice's inspector general issued a report of more than four hundred pages: "Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation."[489] The report disclosed

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486. *E.g.*, Settlement Order, N.Y. Times Co. v. Dep't of Just., No. 1:18-cv-2054 (S.D.N.Y. Aug. 9, 2018), D.E. 16.

FISA-court filings in February 2018 also sought Page FISA order records. Motion, *In re* Matters Before the Foreign Intelligence Surveillance Court Relating to Carter Page, No. Misc. 18-2 (FISA Ct. Feb. 8, 2018), www.fisc.uscourts.gov/sites/default/files/Misc%2018-02%20Motion%20For%20Leave%20to%20File.pdf; Motion, *In re* Orders and Records of This Court Related to the Surveillance of Carter Page, No. Misc. 18-1 (FISA Ct. Feb. 6, 2018), www.fisc.uscourts.gov/sites/default/files/Case%20No%20Misc%2018-01.pdf. A July 25 motion, later dismissed voluntarily, sought transcripts of any Page application hearings. Order, *In re* Transcripts of This Court Related to the Surveillance of Carter Page, No. Misc. 18-3 (FISA Ct. July 13, 2020), www.fisc.uscourts.gov/sites/default/files/Misc%2018%2003%20Order%20JEB%20July%2013%202020%20200713.pdf; Motion, *id.* (July 25, 2018), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2018-03%20Judicial%20Watch%20Inc%27s%20Motion%20For%20Publication%20of%20Transcripts%20180725_2.pdf.

487. *See* Charlie Savage, *FISA Files on Former Trump Aide Are Released*, N.Y. Times, July 22, 2018, at 18; *see also* Shane Harris, *Justice Department Releases Application to Wiretap Page*, Wash. Post, July 22, 2018, at A6; Elise Viebeck & David A. Fahrenthold, *Carter Page Denies Spying Allegations After FISA Release*, Wash. Post, July 23, 2018, at A3; Del Quentin Wilber & Byron Tau, *Carter Page Records Revive Partisan Spat*, Wall St. J., July 23, 2018, at A4.

A FOIA action seeking fewer redactions was unsuccessful. Opinion, James Madison Project v. U.S. Dep't of Just., No. 1:17-cv-597 (D.D.C. Mar. 3, 2020), D.E. 62, 2020 WL 1033301; *see* Notice, *id.* (July 31, 2020), D.E. 70 (voluntary dismissal); Opinion, *id.* (May 4, 2020), D.E. 67 (clarifying a denial of relief); Opinion, *id.* (July 30, 2019), D.E. 51, 2019 WL 3430728 (requiring more information to resolve summary-judgment motions).

488. Application, *In re* Page, No. 16-1182 (FISA Ct. Oct. 21, 2016), vault.fbi.gov/d1-release/d1-release (FBI's electronic reading room), int.nyt.com/data/documenthelper/95-carter-page-fisa-documents-foia-release/full/optimized.pdf (New York Times posting of produced documents); *see* Order, *id.* (Jan. 7, 2020), www.fisc.uscourts.gov/sites/default/files/FISC%20Declassifed%20Order%2016-1182%2017-52%2017-375%2017-679%20%20200123.pdf (disclosing the application's case number); DOJ OIG Crossfire Hurricane Review, *supra* note 478, at vi, 5, 121 (disclosing October 21 as the date of the application).

489 DOJ OIG Crossfire Hurricane Review, *supra* note 478; *see* Devlin Barrett, Matt Zapotosky, Karoun Demirjian & Ellen Nakashima, *FBI Probe of Trump Not Biased, Report Says*, Wash. Post, Dec. 10, 2019, at A1; Adam Goldman & Charlie Savage, *Report Is Said to Clear F.B.I. of Bias Claims*, N.Y. Times, Nov. 23, 2019, at A1; Shane Harris, Carol D. Leonnig & Rosalind S. Helderman, *Tip About Possible Russian Assistance Shook FBI Officials*, Wash. Post, Dec. 10, 2019, at A8; Mark Mazzetti, *Trump's Allies Look to the Next Query*, N.Y. Times, Dec. 10, 2019, at A1; Charlie Savage, *Surveillance Court Orders Review of Actions by an Ex-F.B.I. Lawyer*, N.Y. Times, Dec. 21, 2019, at A20; Charlie Savage, Adam Goldman & Katie Benner, *Report Debunks Anti-Trump Plot in Russia Inquiry*, N.Y. Times, Dec. 10, 2019, at A1; Scott Shane, *Report Details Bungled Relationship Between F.B.I. and Dossier Author*, N.Y. Times, Dec. 10, 2019, at A18; Aruna Viswanatha, Sadie Gurman & Byron Tau, *Report Points to FBI Failures, Sees No Bias in Russia Probe*, Wall St. J., Dec. 10, 2019, at A1; *see also*

that surveillance of Page was part of an operation called Crossfire Hurricane "into whether individuals associated with the Donald J. Trump for President Campaign were coordinating, wittingly or unwittingly, with the Russian government's efforts to interfere in the 2016 U.S. presidential election."[490] Three FISA-court renewal applications in 2017 followed the initial FISA Page surveillance application.[491] Although the inspector general "did not find documentary or testimonial evidence that political bias or improper motivation influenced the FBI's decision to seek FISA authority on Carter Page,"[492] he

> found that FBI personnel fell far short of the requirement in FBI policy that they ensure that all factual statements in a FISA application are "scrupulously accurate." We identified multiple instances in which factual assertions relied upon in the first FISA application were inaccurate, incomplete, or unsupported by appropriate documentation, based upon information the FBI had in its possession at the time the application was filed.[493]

On December 17, 2019, Presiding FISA Court Judge Collyer issued a published order that the government inform her court "what it has done, and plans to do, to ensure that the statement of facts in each FBI application accurately and completely reflects information possessed by the FBI that is material to any issue presented by the application."[494] In March 2020, Presiding Judge Boasberg determined that the government's remedial measures held promise and that the court would continue to oversee improvements.[495] Later

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Ellen Nakashima, *After Finding Surveillance Errors in Trump Probe, IG Looks For Pattern*, Wash. Post, Dec. 15, 2019, at A6.

490. DOJ OIG Crossfire Hurricane Review, *supra* note 478, at i.

491. *Id.* at vi ("A different FISC judge considered each application . . . .").

492. *Id.*

493. *Id.* at viii.

The wrongdoing led to a criminal prosecution. *See* Adam Goldman, *Ex-F.B.I. Lawyer Expected to Plead Guilty in Review of Russia Inquiry*, N.Y. Times, Aug. 15, 2020, at A16; Charlie Savage, *Ex-F.B.I. Lawyer Who Altered Email in Russia Case Is Given Probation*, N.Y. Times, Jan. 30, 2021, at A20; Byron Tau, *Ex-FBI Lawyer Admits Altering Warrant Email*, Wall St. J., Aug. 15, 2020, at A3; Byron Tau, *Former FBI Lawyer Sentenced to Probation*, Wall St. J., Jan. 30, 2021, at A3; Matt Zapotosky & Devlin Barrett, *Ex-FBI Lawyer to Plead Guilty in Case Tied to Russia Probe*, Washington Post, Aug. 15, 2020, at A1.

494. *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, 411 F. Supp. 3d 333, 337 (FISA Ct. 2019); *see* Government Response, *In re* Accuracy Concerns Regarding FBI Matters Submitted to the FISC, No. Misc. 19-2 (FISA Ct. Jan. 10, 2020), www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Response%20to%20the%20Court%27s%20Order%20Dated%20December%2017%202019%20200110.pdf; Order, *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, No. ___ (FISA Ct. Dec. 5, 2019), www.fisc.uscourts.gov/sites/default/files/FISC%20Dec%205%20Redacted%20Order%20191220.pdf (noting that an FBI attorney who altered an email in evidence had resigned and become the object of a criminal referral); *see also* Devlin Barrett, *Court Orders Explanation of FBI Failings in 2016 Case*, Wash. Post, Dec. 18, 2019, at A1; Charlie Savage, *Berating F.B.I., Federal Court Orders Fix to Wiretap Process*, N.Y. Times, Dec. 18, 2019, at A1; Byron Tau & Dustin Volz, *FISA Court Rebukes FBI on Wiretap*, Wall St. J., Dec. 18, 2019, at A1.

495. Corrected Opinion, *Accuracy Concerns*, No. Misc. 19-2 (FISA Ct. Mar. 5, 2020), www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Corrected%20Opinion%20and%20Order%20JEB%20200305.pdf; *see* Charlie Savage, *F.B.I. Pledges Fixes to Wiretap Requests*,

that month, the inspector general revealed "that his investigators found errors in every FBI application to [the FISA] court examined as part of an ongoing review."[496]

Judge Boasberg ordered additional reporting from the government on its FISA application procedures.[497] The most recent report was filed on November 28, 2022.[498]

A May 23, 2019, FISA-court motion for publication of records sought orders, opinions, and other records concerning the "Carter Page FISA application."[499] Presiding Judge Boasberg determined on September 15, 2020, that the FISA court

> is not empowered by Congress to consider constitutional claims generally, First Amendment claims specifically, or freestanding motions filed by persons who are not authorized by FISA to invoke this Court's jurisdiction. By the same token, FISA does not grant the FISC jurisdiction over claims asserting a common-law right of access either.[500]

N.Y. Times, Jan. 11, 2020, at A16; Charlie Savage, *F.B.I.'s Proposals to Fix Surveillance Fall Short, Expert Tells FISA Court*, N.Y. Times, Jan. 16, 2020, at A15; Charlie Savage, *Surveillance Court Bars F.B.I. Agents from Page Case*, N.Y. Times, Mar. 5, 2020, at A18; Byron Tau, *DOJ Rethinks Basis for Surveillance*, Wall St. J., Jan. 24, 2020, at A4; Matt Zapotosky, *Justice Dept. Cites Flaws in 2 Requests to Monitor Page*, Wash. Post, Jan. 24, 2020, at A6.

496. Devlin Barrett & Ellen Nakashima, *Audit of FBI Surveillance Finds Chronic Problems*, Wash. Post, Apr. 1, 2020, at A1; *see* Aruna Viswanatha & Dustin Volz, *FBI Wiretap Requests Show Persistent Flaws*, Wall St. J., Apr. 1, 2020, at A1.

497. Opinion, *In re* Page, Nos. 16-1182, 17-52, 17-375, and 17-679 (FISA Ct. June 25, 2020), www.intelligence.gov/assets/documents/702%20Documents/declassified/June_2020_FISC_Opinion.pdf; Order, *Accuracy Concerns*, No. Misc. 19-2 (FISA Ct. Apr. 3, 2020), www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Order%20PJ%20JEB%20200403.pdf, 2020 WL 1975053; *see* Charlie Savage, *Secret Court Orders F.B.I. to Reassess Its Wiretaps*, N.Y. Times, Apr. 4, 2020, at A21.

498. Letter, *Accuracy Concerns*, No. Misc. 19-2 (FISA Ct. Nov. 28, 2022), fisc.uscourts.gov/sites/default/files/Misc.%2019-02%20Letter%20of%20November%2028%2C%202022_0.pdf.

499. Motion, *In re* Motion for Publication of Records, No. Misc. 19-1 (FISA Ct. May 23, 2019), www.fisc.uscourts.gov/sites/default/files/Misc%2019-01%20Motion%20of%20John%20Solomon%20and%20Southeastern%20Legal%20Foundation%20for%20Publication%20of%20Records%20190523.pdf; *see* Notice of Supplemental Information, *id.* (Jan. 6, 2020), www.fisc.uscourts.gov/sites/default/files/Misc%2019%2001%20Notice%20of%20Supplemental%20Information%20200106.pdf (discussing additional public disclosures).

500. Opinion at 3, *id.* (Sept. 15, 2020), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2019%2001%20PJ%20JEB%20Opinion%20and%20Order%20September%2015%202020%20200915.pdf, 2020 WL 5637506 (citations omitted); *see* Opinion, *In re* Release of Court Records, No. Misc. 13-9 (FISA Ct. Sept. 15, 2020), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2013%2009%20PJ%20JEB%20Opinion%20and%20Order%20September%2015%202020%20200915.pdf, 2020 WL 5637412 (similar holding).

Steele Dossier controversy continued in 2021 with the indictment of Igor Danchenko, one of Steele's researchers, for lying to the FBI about his sources.[501] He was acquitted in October 2022.[502]

The Public's Right of Access to Statutory Interpretation

Over nearly a decade of litigation, efforts to establish a qualified First Amendment right of access to judicial interpretations of FISA were unsuccessful.

On November 7, 2013, the ACLU filed a motion with the FISA court "to unseal its opinions addressing the legal basis for the 'bulk collection' of data by the United States government under the Foreign Intelligence Surveillance Act."[503] ProPublica filed a similar motion on November 12.[504] On December 5, Presiding Judge Walton granted permission for the Reporters Committee for Freedom of the Press and twenty-five other media organizations to file an amicus curiae brief.[505]

Over three years later, noting that "the four opinions that address the legal bases for bulk collection were made public in 2014 after classification reviews [and redaction]," Presiding Judge Collyer relied in part on Judge Bates's 2007 opinion and concluded that the public does not have a qualified

501. Minutes, United States v. Danchenko, No. 1:21-cr-245 (Aug. 1, 2022), D.E. 63 ("Government estimates their case to take approximately 5–6 trial days."); Indictment, *id.* (Nov. 3, 2021), D.E. 1; *see* Devlin Barrett & Tom Jackman, *Trump Dossier Source Charged*, Wash. Post, Nov. 5, 2021, at A1; Adam Goldman & Charlie Savage, *Contributor to Steele Dossier Is Arrested*, N.Y. Times, Nov. 5, 2021, at A14; Glenn Kessler, *The Steele Dossier: A Guide to Latest Revelations, Allegations*, Wash. Post, Nov. 21, 2021, at A4; Michael Kranish & Isaac Stanley-Becker, *Questions Intensify Over Sourcing of Steele Dossier*, Wash. Post, Nov. 26, 2021, at A1; Salvador Rizzo, *In a "Close Call," Judge Declines to Toss Out Case Against Steele Dossier Source*, Wash. Post, Sept. 30, 2022, at A4; Salvador Rizzo & Devlin Barrett, *"Steele Dossier" Source Heads to Trial in Durham Probe*, Wash. Post, Oct. 11, 2022, at A3; Charlie Savage, *Why Discredited Dossier Does Not Undercut Russia Inquiry*, N.Y. Times, Dec. 2, 2021, at A210; Byron Tau & Alan Cullison, *Dossier Source Arrested, Accused of Lying to FBI*, Wall St. J., Nov. 5, 2021, at A3.

502. Judgment of Acquittal, *Danchenko*, No. 1:21-cr-245 (E.D. Va. Oct. 19, 2022), D.E. 132 (counts 2–5 by jury verdict); Judgment of Acquittal, *id.* (Oct. 17, 2022), D.E. 128 (count 1 by judge's order); *see* Salvador Rizzo, Rachel Weiner & Perry Stein, *Source for Allegations on Trump Acquitted*, Wash. Post, Oct. 19, 2022, at A1; Charlie Savage & Linda Qiu, *Russia Analyst Behind Dossier Wins Acquittal*, N.Y. Times, Oct. 19, 2022, at A1; *see also* Perry Stein, *Durham's Inquiry Has Cost Taxpayers at Least $6.5 Million*, Wash. Post, Dec. 24, 2022, at A2.

503. Motion, *In re* Bulk Collection Orders and Opinions, No. Misc. 13-8 (FISA Ct. Nov. 7, 2013), www. fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Motion-2.pdf.

504. Motion, *In re* Release of Court Records, No. Misc. 13-9 (FISA Ct. Nov. 12, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-09%20Motion-2.pdf ("opinions that appear to underlie the government's collection of telephone metadata").

505. Order, *Orders and Opinions*, No. Misc. 13-8 (FISA Ct. Dec. 5, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Order-6.pdf; *see* Brief, *id.* (Nov. 26, 2013), www.fisc.uscourts.gov/sites/default/files/Misc%2013-02%20Brief-2.pdf.

First Amendment right to FISA-court opinions.[506] Judge Collyer dismissed the motion for lack of jurisdiction, concluding that the movants did not have standing to pursue meritless First Amendment rights.[507] En banc, the FISA court decided on November 9, 2017, by a vote of six to five, that a standing analysis requires a presumption of merit, and the court remanded the motion to Judge Collyer for reconsideration.[508] Dissenting from the en banc holding, Judge Collyer certified the standing question to the FISA court of review.[509]

The court of review agreed, on March 16, 2018,

> with the majority of the FISC judges that the movants have standing to seek disclosure of the classified portions of the opinions at issue. As the majority explained, standing is a prerequisite to a party's filing suit. It entails a threshold inquiry, one that is separate from the merits of the underlying claim—and one that requires far less substantiation. Movants need not show that they are ultimately entitled to access the materials in question. Instead, they need only show that their claim is not immaterial nor wholly insubstantial and frivolous. Regardless of whether the movants are entitled to relief on their claim, they have standing to present that question to the court.[510]

The court cautioned, however, that

> while we agree with the movants that they have standing to litigate the issue of access to the redacted portions of the court's opinions, our decision should not be taken as an endorsement of their suggestion that First Amendment analysis applies to the FISC in the same manner that it applies to more conventional courts.[511]

A couple of years later, Judge Collyer decided that the public was not entitled to any more in the four opinions than what had already been disclosed.[512] She rejected the government's argument that access to court opinions was beyond the court's subject-matter jurisdiction.[513]

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506. Collyer Right-of-Access Opinion, *supra* note 158 (holding that the court did not have jurisdiction to hear the motion, because the movants lacked standing to pursue a motion without merit); *see In re* Motion for Release of Court Records, 526 F. Supp. 2d 484 (FISA Ct. 2007).

507. Collyer Right-of-Access Opinion, *supra* note 158.

508. Opinion, *Orders and Opinions*, No. Misc. 13-8 (FISA Ct. Nov. 9, 2017), www.fisc.uscourts.gov/sites/default/files/Misc%2013-08%20Opinion%20November%209%202017.pdf, 2017 WL 5983865.

509. Certification, *id.* (Jan. 5, 2018), www.fisc.uscourts.gov/sites/default/files/Misc%2013%2008%20Certification%20Order%20with%20Attached%20En%20Banc%20Decision.pdf, 2018 WL 396244.

510. Opinion at 2, *In re* Certification of Questions of Law, No. 18-1 (FISA Ct. Rev. Mar. 16, 2018), www.fisc.uscourts.gov/sites/default/files/FISCR%2018-01%20Opinion%20March%2016%202018.pdf, 2018 WL 2709456.

511. *Id.* at 3–4.

512. Opinion, *Orders and Opinions*, No. Misc. 13-8 (FISA Ct. Feb. 11, 2020), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2013%2008%20Opinion%20RMC%20200211.pdf, 2020 WL 897659.

513. *Id.* at 4–11.

The ACLU's appeal from Judge Collyer's decision, however, was beyond the FISA court of review's jurisdiction; the appellate court was established to provide the *government* with appeals.[514]

In November 2020, the court of review affirmed[515] another decision by Judge Collyer[516] that the FISA court did not have jurisdiction to consider the ACLU's 2016 motion for the unsealing of FISA-court "opinions and orders containing novel or significant interpretations of law issued between September 11, 2001, and the passage of the USA FREEDOM Act on June 2, 2015."[517] The Supreme Court denied review on November 1, 2021.[518]

On August 12, 2022, the Office of the Director of National Intelligence publicly released "redacted versions of all seven remaining [FISA-court] opinions and orders" "containing a significant interpretation of law" not previously released publicly.[519]

Section 702 Certifications

FISA's section 702, enacted in 2008 as part of the FAA, provides for the FISA court's judicial review of the government's certification that it is complying with FISA requirements.[520] From time to time, the Director of National Intelligence releases redacted certification opinions.[521] Case numbers for these

514. *In re* Opinions & Orders by the FISC Addressing Bulk Collection of Data, 957 F.3d 1344 (FISA Ct. Rev. 2020).

515. Opinion, *In re* Opinions and Orders of the FISC, No. Misc. 20-2 (FISA Ct. Rev. Nov. 19, 2020), www.fisc.uscourts.gov/sites/default/files/FISCR%20Misc%2020%2002%20Opinion%20and%20Order%20Nov%2019%202020%20201119.pdf, 2020 WL 6888073 (also declining to certify a question to the Supreme Court).

516. Opinion, *In re* Opinions and Orders of This Court, No. Misc. 16-1 (FISA Ct. Sept. 15, 2020), www.fisc.uscourts.gov/sites/default/files/FISC%20Misc%2016%2001%20PJ%20JEB%20Opinion%20and%20Order%20September%2015%202020%20200915.pdf, 2020 WL 5637419.

517. Motion at 1, *id.* (Oct. 19, 2016), www.fisc.uscourts.gov/sites/default/files/Misc%2016%2001%20Motion%20of%20the%20ACLU%20for%20the%20Release%20of%20Court%20Records%20161019.pdf.

518. ACLU v. United States, 595 U.S. ___, 142 S. Ct. 22 (2021); *see id.* at ___, 142 S. Ct. at 23 (Gorsuch, joined by Sotomayor, dissenting: "On the government's view, literally *no court* in this country has the power to decide whether citizens possess a First Amendment right of access to the work of our national security courts."); *see also* Charlie Savage, *Justices Are Asked to Open Secret Rulings of Spy Court*, N.Y. Times, Apr. 20, 2021, at A16.

519. ODNI Releases All Remaining FISA Decisions Determined to Contain Significant Construction of Law (Aug. 12, 2022), icontherecord.tumblr.com/post/692398319938535424/odni-releases-all-remaining-fisa-decisions.

520. 50 U.S.C. § 1881a(h), (j) (2020).

521. IC on the Record, icontherecord.tumblr.com/tagged/declassified. Certification opinions include the following:

1. Opinion, *In re* DNI/AG Certification ___, No. 702(i)-08-1 (FISA Ct. Sept. 4, 2008), www.dni.gov/files/documents/0315/FISC%20Opinion%20September%204%202008.pdf; *see* Release of Documents Concerning Activities Under the Foreign Intelligence Surveillance Act (Last Updated 9/29/15) (Mar. 3, 2015), icontherecord.tumblr.com/post/112610953998/release-of-documents-concerning-activities-under.
2. Opinion, ___, No. ___ (FISA Ct. Nov. 30, 2011), www.dni.gov/files/documents/November%202011%20Bates%20Opinion%20and%20Order%20Part%201.pdf

opinions typically are redacted, and the opinions are not posted on the FISA court's website, which organizes public FISA-court filings by case number.[522]

Among other things, certification opinions describe and discuss compliance issues.[523] The Director of National Intelligence also issues semiannual compliance reports.[524]

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and www.dni.gov/files/documents/November%202011%20Bates%20Opinion%20and%20Order%20Part%202.pdf; *see* DNI Declassifies Intelligence Community Documents Regarding Collection Under Section 702 of the Foreign Intelligence Surveillance Act (FISA) (Aug. 21, 2013), icontherecord.tumblr.com/post/58944252298/dni-declassifies-intelligence-community-documents.

3. Opinion, ___, No. ___ (FISA Ct. Aug. 26, 2014), www.dni.gov/files/documents/0928/FISC%20Memorandum%20Opinion%20and%20Order%2026%20August%202014.pdf; *see* Statement by the Office of the Director of National Intelligence and the Department of Justice on the Declassification of Documents Related to Section 702 of the Foreign Intelligence Surveillance Act (Sept. 29, 2015), icontherecord.tumblr.com/post/130138039058/statement-by-the-office-of-the-director-of.
4. Nov. 6, 2015, Hogan Opinion, *supra* note 458; *see* Release of Three Opinions Issued by the Foreign Intelligence Surveillance Court (Apr. 19, 2016), icontherecord.tumblr.com/post/143070924983/release-of-three-opinions-issued-by-the-foreign.
5. Apr. 26, 2017, Collyer Opinion, *supra* note 468; *see* Release of the FISC Opinion Approving the 2016 Section 702 Certifications and Other Related Documents (May 11, 2017), icontherecord.tumblr.com/post/160561655023/release-of-the-fisc-opinion-approving-the-2016.
6. Secret Court Opinion, 402 F. Supp. 3d 45 (FISA Ct. 2018), *aff'd in part*, *In re* DNA/AG 702(h) Certifications 2018, 941 F.3d 547 (FISA Ct. Rev. 2019).
7. Opinion, ___, No. ___ (FISA Ct. Dec. 6, 2019), www.intelligence.gov/assets/documents/702%20Documents/declassified/2019_702_Cert_FISC_Opinion_06Dec19_ OCR.pdf; *see* Release of Documents Related to the 2019 FISA Section 702 Certifications (Sept. 4, 2020), icontherecord.tumblr.com/post/628356110309572608/release-of-documents-related-to-the-2019-fisa; *see also* Charlie Savage, *Court Approves Warrantless Surveillance Rules While rebuking the F.B.I.*, N.Y. Times, Sept. 6, 2020, at 26.
8. Opinion, ___, No. ___ (FISA Ct. Nov. 18, 2020), www.intel.gov/assets/documents/702%20Documents/declassified/20/2020_FISC%20Cert%20Opinion_10.19.2020.pdf; *see* Release of Documents Related to the 2020 FISA Section 702 Certifications (Apr. 26, 2021), icontherecord.tumblr.com/post/649560355508486144/release-of-documents-related-to-the-2020-fisa; *see also* Charlie Savage, *Special Court Scolds F.B.I for Monitoring of Americans*, N.Y. Times, Apr. 27, 2021, at A17.

522. Public Filings—U.S. Foreign Intelligence Surveillance Court, www.fisc.uscourts.gov/public-filings.

523. *See* Charlie Savage, *Court Approves Warrantless Surveillance Rules While Rebuking the F.B.I.*, N.Y. Times, Sept. 6, 2020, at 26; Charlie Savage, *Special Court Scolds F.B.I. for Monitoring of Americans*, N.Y. Times, Apr. 27, 2021, at A17.

524. *E.g.*, ODNI Releases 23rd Joint Assessment of Section 702 Compliance (July 18, 2022), icontherecord.tumblr.com/post/690141801614540800/odni-releases-23rd-joint-assessment-of-section-702.

In addition, the Director of National Intelligence annually releases, on behalf of the intelligence community, a transparency report of "statistics and context regarding the government's use of FISA authorities, National Security Letters, and other national security authorities. *E.g.*, ODNI Releases Annual Intelligence Community Transparency Report (Apr. 29,

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The twentieth-century FISA court approved surveillance orders for foreign intelligence. In the twenty-first century, the court also assesses the propriety of surveillance programs and interprets surveillance statutes, sometimes in secret and sometimes publicly.

Over time, litigation in and about the Foreign Intelligence Surveillance Court became increasingly complex. The Georgetown University Law Center maintains a useful and comprehensive archive of records of that litigation.[525] The Director of National Intelligence occasionally releases FISA-court records on Tumblr, often as a result of FOIA lawsuits.[526]

2022), icontherecord.tumblr.com/post/682887513999818752/odni-releases-annual-intelligence-community; *see* Charlie Savage, *Report Shows N.S.A. Use of Court-Approved Domestic Surveillance Fell to a New Low*, N.Y. Times, Apr. 30, 2022, at A15.

> Court-approved national security surveillance on domestic soil fell for the third straight year in 2021, extending a trend that has coincided with the decline of the Islamic State, the rise of the coronavirus pandemic and the tightening of procedures after the F.B.I.'s botching of wiretap applications in the Trump-Russa investigation.

Savage, *supra*; *see also* Charlie Savage, *F.B.I. Surveillance Cases Plummet Amid Pandemic and Inquiry Fallout*, N.Y. Times, May 2, 2021, at A15; Dustin Volz, *Fewer Are Targeted for FISA Wiretaps*, Wall St. J., May 1, 2021, at A5.

525. Foreign Intelligence Law Collection, repository.library.georgetown.edu/handle/10822/1052698.

526. IC on the Record, icontherecord.tumblr.com.