No. 13-58

IN THE

Supreme Court of the United States

IN RE ELECTRONIC PRIVACY INFORMATION CENTER,

Petitioner

On Petition for a Writ of Mandamus and Prohibition, or a Writ of Certiorari, to the Foreign Intelligence Surveillance Court

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

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The Government seeks to shield from review by this Court a decision of the Foreign Intelligence Surveillance Court ("FISC") ordering the disclosure of all the telephone call records of all Americans. That Order is in direct contravention of the plain text of the Foreign Intelligence Surveillance Act ("FISA"), and implicates the privacy interests of all Americans. The telephone records that the Government has obtained pursuant to the FISC Order reveal detailed information about the private lives of Americans and cannot reasonably be said to be related to a foreign intelligence collection purpose. This is an extraordinary circumstance that warrants mandamus relief by this Court. Moreover, since Petitioner filed with this Court in early July, the Government has disclosed that the FISC has routinely interpreted key provisions of public law in secret opinions and that there has not been a single challenge to these orders by any party under the FISA. Nonetheless, it is the Government's position that these orders and opinions, implicating the privacy interests of every person in this country, cannot be subject to mandamus review by this Court. That simply cannot be correct.

I. According to the Government, This Court May Not Conduct Mandamus Review of Orders and Opinions of the Foreign Intelligence Surveillance Court, an Inferior Court

The Court has never held that issuance of a writ of mandamus correcting legal error by a lower court would not be "in aid" of the Court's appellate

jurisdiction. In its brief, the Government conflates the appellate procedures set out in the FISA, 50 U.S.C. §§ 1803(b) and 1861(f), with the extraordinary remedies authorized under the All Writs Act, 28 U.S.C. § 1651(a); the scope of the Court's power under the All Writs Act is plainly much broader. The Court has "full power in its discretion to issue the writ of mandamus to a" lower court, even where direct appellate jurisdiction is vested in an intermediate appellate court, because the Court has "ultimate discretionary jurisdiction by certiorari." *Ex parte United States*, 287 U.S. 241, 248 (1932). The Court will exercise that power in its discretion "where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate" for the Court to take action. *Id*. at 248-49.

The Government also conflates the standing requirement under Article III with the appellate procedures established in the FISA. EPIC has clearly shown that it has an "injury-in-fact" under Article III based on the ongoing collection of its telephone records, and the statutory limits on FISC and FISA Court of Review ("FISC-R") jurisdiction are inapposite. *See* Profs. James E. Pfander & Stephen I. Vladeck Amicus Br. 14-17. Having established standing, the only remaining jurisdictional issues are whether alternative relief would be unavailable in another court and whether mandamus would be "in aid" of this Court's appellate jurisdiction. Both are satisfied in this case, and the Court clearly has jurisdiction to issue a Writ of Mandamus to the FISC.

As to alternative relief, the Government argues simultaneously that EPIC should seek relief

in federal district court and also, in a related matter, that there is no relief in federal district court. *See* Defs' Mem. of Law in Supp. of Mot. to Dismiss Compl., *ACLU v. Clapper*, No. 13-cv-03994 (S.D.N.Y. Aug. 26, 2013). The Government has already argued that "FISA impliedly precludes a third party from seeking to enforce the requirements of Section 1861" in district court. Br. Opp'n 21. The Government cannot have it both ways; either statutory review is available in the district court or mandamus review is available in this Court. Moreover, the Government provides no jurisdictional theory under which a federal district court could vacate the FISC order or otherwise conduct appellate review, which is the relief that EPIC seeks here. Federal district courts are not empowered to issue writs of mandamus, Fed. R. Civ. P. 81(b), and do not have appellate jurisdiction. It is for precisely this reason that EPIC sought review in this Court, the only Court that has appellate jurisdiction to review an order from the FISC granting a Section 215 application.

The clear implication of the Government's argument is that the orders of the FISC can not be subject to mandamus review. It simply can not be the case that such orders of an inferior court are unreviewable by this Court. Extraordinary writs "afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction," *Ex parte Peru*, 318 U.S. 578, 583 (1943), and here EPIC seeks to confine the FISC to its lawful authority.

Granting mandamus relief in this case would be "in aid" of the Court's broad constitutional and statutory appellate jurisdiction. It is indisputable

that the Court's "issuance of a writ of mandamus to an inferior *court* is an exercise of appellate jurisdiction." *Chandler v. Tenth Judicial Circuit of the U.S.*, 398 U.S. 74, 96 (1970). *See also Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807). Where lower court orders are an exercise of "judicial power," the Court "is constitutionally vested with the jurisdiction to review them, absent any statute curtailing such review." *Chandler*, 398 U.S. at 96. *See also Williams v. United States*, 289 U.S. 553, 566 (1933); *Old Colony Trust Co. v. Comm'r of Internal Revenue*, 279 U.S. 716, 723 (1929); *In re Sanborn*, 148 U.S. 222, 224 (1893). In this case, the FISC order is clearly an exercise of judicial power, which this Court has appellate jurisdiction to review.

The Government argues that the FISA precludes mandamus relief. But the Court's power to issue extraordinary writs to the FISC has not been expressly limited and cannot be "repealed by implication." *See Felker v. Turpin*, 518 U.S. 651, 660 (1996) (holding that the Antiterrorism and Effective Death Penalty Act of 1996 did not preclude the Court from entertaining an application for habeas corpus relief). *See also McQuiggin v. Perkins*, 133 S. Ct. 1924, 1938 (2013) (recognizing an explicit statutory bar to habeas relief under AEDPA); *Ex parte Yerger*, 8 Wall. 85, 105 (1869) (holding that statutory limitations on appeals in the 1867 Judiciary Act did not limit the Court's power to issue other extraordinary writs).

The Government also argues that the FISC-R "would appear to have the same mandamus authority" as this Court, but that is not the case. Br. Opp'n 23. Unlike the Supreme Court, which has

plenary appellate jurisdiction over lower courts, the FISC-R is a special court of review with narrow jurisdiction defined solely by the FISA. Even the Government "agrees that the statute precludes a person like petitioner from" seeking relief in the FISC-R. *Id*. The narrow jurisdiction of the FISC and FISC-R is consistent with the limited role established by Congress. But the FISC has issued orders to private parties and compelled production of records far in excess of the authority granted by Congress. That is why EPIC sought review directly with this Court.

The FISC-R has authority "to review the *denial* of any application under FISA." *In re Sealed Case*, 310 F.3d 717, 721 (Foreign Intel. Surv. Ct. Rev., 2002) (emphasis added). The FISC-R's only other appellate authority is to review decisions by *en banc* FISC panels either (1) reviewing the denial of a Section 215 application, or (2) reviewing a petition to reconsider the issuance of a Section 215 order filed by the recipient of such order. 50 U.S.C. §§ 1803(b), 1861(f)(3).[1] These are jurisdictional limitations under the clear statement principle established in *Gonzalez v. Thayer*, 132 S. Ct. 641, 648-49 (2012). *See also Ctr. for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013) (holding that statutory

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[1] Congress provided in the FISA that the "court of review shall have jurisdiction to review the *denial* of any application made under this chapter," 50 U.S.C. § 1803(b), and "jurisdiction to consider such petitions [for review of FISC *en banc* panel decisions issued pursuant to 50 U.S.C. § 1861(f)(2)]." 50 U.S.C. § 1861(f)(3) (emphasis added).

limitations on the appellate jurisdiction of the Court of Appeals for the Armed Forces meant that it lacked the power to issue a writ of mandamus). Congress has not granted the FISC-R authority to issue a writ of mandamus to review a granted FISC order.

II. The Foreign Intelligence Surveillance Court is Routinely Issuing Orders and Opinions Interpreting the Acts of Congress and the Law of this Court

Petitioner and the public have recently learned that, since 2006, the FISC has routinely issued lengthy opinions interpreting Section 215, other statutory provisions, and the Constitution. *See*, *e.g.*, Supplemental Opinion, *In re Production of Tangible Things From [Redacted]*, No. BR 08-13, 2008 WL 9475145 (FISC Dec. 12, 2008) (finding that production of telephone records under Section 215 is not inconsistent with 18 U.S.C. §§ 2702 and 2703); Memorandum Opinion, *[Redacted]*, 2011 WL 10945618 (FISC Oct. 3, 2011) (holding that "upstream collection" was insufficiently targeted and minimized in violation of the Fourth Amendment). *See also* Ellen Nakashima & Carol D. Leonnig, *Effort Underway to Declassify Document That is Legal Foundation for NSA Phone Program*, Wash. Post (Oct. 12, 2013) (describing an 80-page opinion issued in 2006 by Judge Kollar-Kotelly that provided the initial legal justification for metadata collection under Section 215). These decisions constitute a body of secret case law that has evaded appellate review by the FISC-R and the Supreme Court. And it is the Government's position that neither a federal district court nor this Court may determine whether those decisions are correct.

The NSA's telephone record collection program has never been subject to review by the Supreme Court or the FISC-R. And under the jurisdictional theory advanced by the Government, the program will remain unreviewable. "To date, no holder of records who has received an Order to produce bulk telephony metadata has challenged the legality of such an Order. Indeed, no recipient of any Section 215 Order has challenged the legality of such an Order, despite the explicit statutory mechanism for doing so." Amended Mem. Op., Docket No. BR 13-109, 15-16 (FISC Aug. 29, 2013); *see also* Letter from Hon. Reggie B. Walton, Presiding Judge, FISA Court, to Hon. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary 8 (July 29, 2013) ("To date, no recipient of a production order has opted to invoke [Section 1861(f)(2)(A)(i)].").[2]

Lack of review is especially significant given the extraordinary implications of the Government's data collection program. No court has ever determined that "relevance" permits the compelled production of such vast quantities of irrelevant personal information. The government claims that call detail records are unique in their "highly standardized and interconnected nature—that make[s] them readily susceptible to analysis in large datasets," Br. Opp'n 31, but these characteristics are present in nearly every form of transactional or communicative metadata. Under the government's theory, all email metadata, location metadata, financial metadata, and Internet metadata would also be "relevant" to an

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[2] http://www.uscourts.gov/uscourts/courts/fisc/honorable-patrick-leahy.pdf.

authorized investigation. And despite collecting the telephone records of millions of Americans, only about 300 "seed" selectors have been queried in 2012. *See Intelligence Community Backgrounder* 1 (June 15, 2013);[3] *see also* Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Hon. F. James Sensenbrenner, Jr., Chairman, Subcomm. on Crime, Terrorism, Homeland Sec., & Investigations 2 (July 16, 2013) (conceding that "most of the records in the dataset are not associated with terrorist activity").[4]

Ordinarily such an overbroad request would be reined in through review by appellate courts and by the Supreme Court. *See*, *e.g.*, *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951) (invalidating a subpoena's "catch all provision" that was "merely a fishing expedition to see what may turn up"); *In re Subpoena Duces Tecum*, 827 F.2d 301 (8th Cir. 1987) (approving subpoena for Western Union's Monthly Summary of Activity Report of wire transactions at the Royalle Inn from Jan 1985 through Feb 1986 and Western Union's Telegraphic Money Order Applications from Jan 1984 through Feb 1986, but instructing the district court to consider narrowing the request under the Rules of Criminal Procedure). The current structure of the FISC, however, limits ordinary appellate review.

The secrecy and unchecked nature of the FISC opinions fatally undermines the Government's argument that "Congress extended the authorization

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[3] http://www.fas.org/sgp/news/2013/06/ic-back.pdf.

[4] http://1.usa.gov/12GN8kW.

in Section 1861 after being notified that the Executive Branch and the FISC had interpreted the law to permit the Telephony Records Program." Br. Opp'n 32. The legal fiction of congressional awareness of background judicial precedent is simply inapplicable to secret opinions of which many members of Congress admit they were unaware. Indeed, the plain reading of the text and the legislative history points in the opposite direction. Congress specifically added the relevance requirement to Section 215 in 2006 to limit the scope of materials of which the FISC could order disclosure, *see* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-77, § 106(b), 120 Stat. 196, and several members of Congress have subsequently rejected the government's understanding of "relevance." As the co-author of the USA PATRIOT Act explained:

> This expansive characterization of relevance makes a mockery of the legal standard. According to the administration, everything is relevant provided something is relevant. Congress intended the standard to mean what it says: The records requested must be reasonably believed to be associated with international terrorism or spying. To argue otherwise renders the standard meaningless.

Rep. Jim Sensenbrenner, *How Secrecy Erodes Democracy*, Politico, July 22, 2013.

III. A Judicial Order to Compel the Disclosure by a U.S. Telephone Company of All Telephone Records of All U.S. Customers is an Extraordinary Circumstance Warranting This Court's Review

The Government's attempt to minimize the extraordinary nature of the telephone records collection ordered by the FISC ignores the privacy impact of bulk collection and Congress' clear statutory command. The telephone records of EPIC and every other American whose calls are routed by Verizon Business Network Services ("Verizon") are now routinely collected by the National Security Agency. None of those orders have been subject to appellate review by the FISC-R or this Court. These telephone records are unique and identifiable, and reveal a great deal of private information about millions of telephone users. In no instance has the Government established any individualized suspicion to support the collection of this information.

The Court has never before considered the impact of the Government's collection of telephone records on a national scale or when phone numbers were so easily linked to individuals or provided such detailed information about activities and locations. When pen registers were first deployed for law enforcement purposes, phone numbers were associated with households and businesses, not individual subscribers, the network was analog, and telephones had rotary dials. In 1983, the first year the FCC began collecting telephone subscribership data, 91.4% of American households had a telephone. Fed. Commc'ns Comm'n, *Telephone Subscribership in*

the United States (through July 2011) (December 2011). Since then, the total number of telephones has grown exponentially due to the development of mobile phones. The FCC's first estimate of mobile phone usage in 2001 was 128.5 million connected devices. Fed. Commc'ns Comm'n, *16th Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Radio Services*, 10 (March 2013). Over the past twelve years, that number has grown to an estimated 317.3 million devices; there are now more cell phones then people in the United States. *Id.*

The telephone records collected on hundreds of millions of customers can then be "queried" by the NSA pursuant to the FISC order. Br. Opp'n 9. This means that analysts review "records of communications within three 'hops' from the seed." *Id*. Even a single query can implicate an exponentially large set of records. *Id*. at 9-10 (describing the first, second, and third "hops").[5] Advanced data analytics can reveal detailed private information about individuals whose records are collected. And telephone numbers are also commonly linked with other subscriber information. For example, intelligence and law enforcement agencies use Pen-Link and FMS Advanced System Group's Sentinel Visualizer, which includes a link-charting tool to map relationships between millions of data subjects. Pen-Link, Ltd., *Unique Features of Pen-Link*

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[5] If every number contacts X other numbers, then "three hops" would include X^3 telephone numbers.

v8 at 9 (2008).[6] These charts automatically link call data with other subscriber information (such as photos, addresses, and aliases). *Id.* Sentinel Visualizer, a similar service, also includes Geospatial analysis and social network analysis to identify clusters and patterns. FMS Advanced Sys. Group, *Sentinel Visualizer: The Next Generation in Visualization and Analysis* (last accessed Oct. 25, 2013).[7]

Many phone numbers reveal information about the caller without any additional data. These include hotlines for suicide-prevention, victims of domestic and sexual violence, and substance abuse treatment. Calls to those numbers would reveal important information about the mental health of the caller or their domestic circumstances, even without any knowledge of the contents of the communications. Charities often collect donations by phone or text message. *See* Aaron Smith, *Real Time Charitable Giving*, Pew Internet & Am. Life Project 2 (Jan. 12, 2012). Thus, telephone records also reveal the political and social views of telephone customers.

All of this information is now in the possession of the Government, and the Government now contends that this Court may not consider whether the collection of this data was lawful.

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[6] A*vailable at*:
http://egov.ci.miami.fl.us/Legistarweb/Attachments/52124.pdf.

[7] *Available at:*
http://www.fmsasg.com/LinkAnalysis/fliers/next-generation.pdf.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to grant the petition for a writ of mandamus and prohibition, or, in the alternative, the petition for a writ of certiorari.

Respectfully submitted,

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