United States of America
Foreign Intelligence Surveillance Court of Review

IN RE: CERTIFIED QUESTIONS OF LAW	No. FISCR 16-01

Motion for Reconsideration and for Certification and Leave to Participate as Amicus

Now comes Steven Presses, Michael Walsh, and John Walsh, who hereby move this Honorable Court for relief.

Background

On February 12, 2016, Judge Hogan of the Foreign Intelligence Surveillance Court ("FISC") certified questions of law to this Court. In Re: [Redacted] A U.S. Person, PR/TT 2016-[Redacted] ("Trial Court Opinion" or "In Re: A U.S. Person"). That certification, the first such certification under the new USA FREEDOM ACT, sought this Court's opinion on whether the Foreign Intelligence Surveillance Act's pen register provision allowed for the collection of Post-cut Through Dialed Digits ("PCTDD"). Judge Hogan opted not to appoint an amicus but rather to frame and certify questions of law under the authority of 50 U.S.C. §1803(j). The certification notes FISC practice and the universally contrary weight of authority under the domestic pen register statute, which cross-references and uses the same definitional and limitation language as the pen register provision contained in the Foreign Intelligence Surveillance Act.

Subsequently, this Court considered the issue of PCTDD and the pen register provisions. This Court appointed Attorney Marc Zwillinger to act as *amicus curie* before it under the authority of the USA FREEDOM ACT. 50 U.S.C. §1803(i). After briefing and reviewing the record, this Court issued a thoughtful and considered opinion on April 14, 2016. That opinion was approved for declassification by the Office of the Director of National Intelligence on August, 18, 2016. The opinion was subsequently published on August 22, 2016.

The Undersigned would-be *amici* sought to appeal that decision to the United States Supreme Court. A timely petition for *certiorari* was filed on November 21, 2016. The petition indicated that the issues decided in this Court's opinion were both novel and of significant importance. In support of the petition, the Undersigned wrote a computer program called CCAD which would sort out some content-noncontent information in an attempt to undermine the Government's technological unfeasibility argument. In the New Year, the petition for *certiorari* was returned to the Undersigned with a letter from the office of the Clerk of the Supreme Court dated December 23, 2016, rejecting the petition. The letter, signed by Mr. Jordan "Danny" Bicknell, indicated in relevant part that the Clerk rejected the petition because there was no standing and because there appeared to be a lack of authority to appeal the decision.

Concerned, the Undersigned visited to the Supreme Court Clerk's office on January 19, 2017, to clarify the matter. Mr. Bicknell graciously indicated that it was the opinion of the Clerk's office that, under the new provisions of the USA FREEDOM ACT, an *amicus* could seek review of this Court if designated as *amicus* by this Court. Mr. Bicknell was of the belief that without such designation no review was possible.

Argument

I. This Court has inherent power to reconsider its decision

This Court has made a significant and considered review of the pen register issue. Notwithstanding this, the Court has the inherent power to reconsider its decision in light of new information. "The granting of a motion for reconsideration is an extraordinary remedy which should be used sparingly." Palmer v. Champion Mortgage, 465 F.3d 24, 30 (1st Cir. 2006) *quoting* 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2810.1 (2d ed.1995). "Unless the court has misapprehended some material fact or point of law, such a motion [to reconsider] is normally not a promising vehicle." Id.

FICOR has erred in making findings about technological feasibility. Much as with this CCAD program, there are technological solutions to this problem of PCTDD which are best explored in the trial court. Given the potential solutions, and the inherent challenges of appellate fact-finding, the Court should reconsider its decision. At the least, the Court should ensure that FISC makes findings of fact sufficient to substitute for an appellate record.

II. In the alterative, this Honorable Court should designate the undersigned as *Amici* for purposes of allowing them to seek *certiorari*.

Due to the comparative novelty of the USA FREEDOM ACT, the judiciary and particularly FISC are still interpreting and apply its provisions. Some confusion has been engendered by the proper role of an *Amicus Curie* under 50 U.S.C. §1803(i). "As a general proposition, the authority of a court to appoint independent or *amicus curiae* counsel is broad and well-established. A federal [] court possesses the inherent authority to appoint an *amicus curiae* to assist the court in its proceedings." United States v. Davis, 180 F.Supp.2d 797, 800 (E.D. La 2001) (citation and quotation marks omitted).

a. Role of an *Amicus*

In relation to the Supreme Court, modern practice has given a specific taint to the role of *Amicus Curie*, normally that of a sort of judicial lobbyist filing briefs with facts and legal points not contained within the submissions of the parties. This modern role has become so notorious that the Rules of the Supreme Court now provide that an *amicus* must disclose if a party has authored part of the *amicus* brief or contributed money toward the cost. Rules of the Supreme Court Rule 37.6. There are a myriad of law review articles and political science journals who speculate about the ability and propriety of outsiders influencing litigation through briefs in matter in which they have no stake. "A legion of scholars has described the judicial lobbying efforts of

interest groups." Karen O'Connor and Lee Epstein, *Amicus Curie Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's Folklore*, 16 Law & Soc'y Rev. 311, 312 (1981).

However in the more traditional role an *amicus* simply enables the judiciary to continue their role as an adversarial crucible for finding truth. In this traditional capacity, an *amicus* will be appointed by the Supreme Court to represent and defend an argument or judgment that has been abandoned below. *See* Brian P. Goldman, *Should the Supreme Court Stop Inviting Amici Curie to Defend Abandoned Lower Court Decisions*, 63 Stanford L. Rev. 907 (2011). *See Also* Neonatology Associates P.A. v. Commissioner of Internal Revenue, 293 F.3d 128, 131 (3rd Cir. 2002) (suggesting that ideal of *amicus* as truly impartial individual working for court as "outdated.").

The change of the role of *Amicus Curie* from this traditional role into this modern one has been noted for a long time:

> The attribution of a brief to an organization belies the supposedly lawyerlike role of the amicus, but realistically embraces and ratifies the transformation of the actual pattern of behavior and its new function. The *amicus* is no longer a neutral, amorphous embodiment of justice, but an active participant in the interest group struggle…Thus the institution of the *amicus curiae* brief has moved from neutrality to partisanship, from friendship to advocacy

Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 703-704 (1963) (tracing inconsistent history and use of amicus as quasi-party dating to 1792). In one of the more noted cases where the amicus was invited to ensure an adversarial process the Supreme Court noted "In view of the lack of genuine adversary proceedings at any stage in this litigation, the outcome of which could have far-reaching consequences [] throughout the United States, the Court invited specially qualified counsel to appear and present oral argument, as amicus curiae, in support of the judgment below." Granville-Smith v. Granville-Smith, 349 U.S. 1, 4 (1955) *citing* earlier procedural order at 348 U.S. 54, 55 (1954). This role, of having *amicus* argue in the absence of a party to ensure an adversarial proceeding, has remained somewhat prevalent occurring roughly two times per term since 1954. 63 Stanford L. Rev. 907 (2011). "[T]he fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making. Thus, an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend" Neonatology Associates P.A., 293 F.3d at 131.

b. The USA FREEDOM ACT

The USA FREEDOM ACT was enacted in 2015 by Congress[1] to remedy perceived flaws in the legislative scheme of the Foreign Intelligence Surveillance Act of 1978 ("FISA") following contention in the wake of disclosures by indicted fugitive Edward Snowden. One of the

1 Congress had earlier failed to pass the bill when it was introduced in the 113th Congress in 2013 following disclosures of widespread surveillance by the Government of U.S. persons by Mr. Edward Snowden. So far as the public record discloses, Mr. Snowden has fled the country to escape apprehension upon an indictment under the Espionage Act of 1917.

criticisms was that the courts operating under FISA were one-sided rubber stamps based on lack of opposition to the government. To remedy this Title IV of the Act, titled "Foreign Intelligence Surveillance Court Reforms," allows and requires the appointment of *amici* and allows them access to the FISA court precedents and information, as relevant and determined by the court. 129 Stat. 267, 279 (2015) (Section 401 governing the appointment of *amici*).

Though the 2013 version of the bill did not pass until the following Congress, the language relating to the appointment of *amicus* did not change between versions. Both the House Judiciary Committee and the Select House Committee on Intelligence supported a position on the appointment of *amicus* which was advocated by the Administrative Office of the U.S. Courts by Judge Bates, himself formerly a member of FISC. The position advanced by the Administrative Office was made in response to requests by the Committees for views on the proposed legislation. In fact Judge Bates' letter, at his request, was included as an appendix to the Intelligence Committee report on the 2013 bill. H.R. 113-452 pt.2 at 41-43. Relating to *amicus*, Judge Bates wrote:

> The amicus curiae provisions in Section 401 of the bill are generally in keeping with the views set forth in the January 13 letter. Section 401 would facilitate the FISA Courts' receiving briefing or other assistance from a legal or technical expert outside the Executive Branch in particular matters where such assistance would be helpful, while not creating a permanent institution of a public advocate or imposing an adversarial process in the general run of cases where it would be unnecessary and even counterproductive to do so. We would recommend adjusting the language in H.R. 3361 to slightly clarify the breadth of the FISA Courts' discretion to appoint amici in any needed circumstance by deleting the words "of law" in the paragraph labeled "Designation."
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> Section 401 largely leaves it to the discretion of the FISA Courts when to appoint an amicus. We believe that this general approach is correct because those courts, operating in the context of specific cases, are best positioned to assess when amicus participation would be helpful. We do, however, question the need for providing that an amicus "shall" be appointed in any case "that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a written finding that such appointment is not appropriate." Section 401 (proposed Section 103(i)(I) of FISA). Not every novel or significant issue is necessarily difficult for a court to resolve, and the judges of the FISA Courts would have every incentive to appoint amici when they believe that their deliberations would benefit from doing so. The bill drafters seem to acknowledge this likelihood by allowing the FISA courts to provide, in the alternative, a written statement justifying the decision not to appoint an amicus.

The Report of the House Judiciary Committee on the successfully passed 2015 bill, H.R. 114-109 pt. 1, championed the *amicus* provisions. The Report also noted that §401 of the bill allowed further review, "[t]his section also permits the FISCR to certify questions of law to the U.S. Supreme Court" and to have *amicus* participate in that proceeding. H.R. 114-109 at 23. The House Committee report specially notes the language that the Court of Review shall be treated as a regular court of appeal for purposes of review.

It appears clear given the largely one-sided nature of FISA courts structure that the Congress has in mind the traditional role of an *amicus* as a quasi-party presenting argument when no one else can or would. The kind of role play in dozens of cases, even prominent ones. Nat'l Federation of Businesses v. Sebelius, 132 S. Ct. 2566, 2582 (2012) ("Because no party supports the Eleventh Circuit's holding that the individual mandate can be completely severed from the remainder of the Affordable Care Act, we appointed an *amicus curiae* to defend that aspect of the judgment below. And because there is a reasonable argument that the Anti-Injunction Act deprives us of jurisdiction to hear challenges to the individual mandate, but no party supports that proposition, we appointed an *amicus curiae* to advance it."); Unites States v. Windsor, 133 S. Ct. 2675, 2684 (2013) ("All parties agree that the Court has jurisdiction to decide this case; and, with the case in that framework, the Court appointed Professor Vicki Jackson as *amicus curiae* to argue the position that the Court lacks jurisdiction to hear the dispute."); Bond v. United States, 131 S. Ct. 2355, 2361 (2011) (Amicus appointed to brief, argue, and defend lower judgment) (*Bond I*); Pepper v. United States, 131 S. Ct. 1229, 1239 (2011) ("Because the United States has confessed error in the Court of Appeals' ruling on the first question, we appointed an *amicus curiae* to defend the Court of Appeals' judgment.");

c. Further Review

These provisions continue to have something of a mystique because they have not been regularly applied in practice yet. *See* In Re: [Redacted] A U.S. Person, PR/TT 15-52 (FISC June 18, 2015) (noting novel legal issue but declining to appoint amicus as Court has not yet designated any yet); 2015 Section 702 Certification, (FISC November 6, 2015) (allowing *amicus* to participate, substantially as a party, with briefing and oral argument).

The Undersigned would-be *Amicus* present argument about the ability of computer software to serve as a privacy-protecting differentiator. Further argument is presented about the fundamental content-noncontent distinction of the Fourth Amendment jurisprudence which traces excellent pedigree all the way back to the holding about envelope information in Ex Parte Jackson, 96 U.S. 727 (1978) which is, perhaps, the first application of modern Fourth Amendment law. In light of these fundamental issues, the Undersigned respectfully request all necessary relief to allow them to seek further review of this Court's considered decision, namely designation as *amicus* and certification of the questions to the Supreme Court.

Respectfully Submitted,

Date: June 23, 2017

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