**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

LARRY KLAYMAN, *et al.*,

Plaintiffs-Appellees,

v.

BARACK OBAMA, President of the United States, et al.,

Defendants-Appellants.

No. 15-5307

[Case No: 1:13-cv-00851-RJL]

APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO VACATE PRELIMINARY INJUNCTION AND DISMISS APPEAL ON GROUNDS OF MOOTNESS

Defendants-Appellants (hereinafter "Appellants" or "Government Defendants") have filed a motion, which effectively seeks to conveniently dispose of both their appeal and the appeal of Plaintiffs-Appellees (hereinafter "Appellees"), Larry Klayman, Charles and Mary Ann Strange and J.J. Little personally, and his law firm, J.J. Little & Associates. The Appellees state at the outset of their motion, "The government is no longer conducting the actions at issue now that they are not authorized by statute or court order." Unfortunately, by Appellants' own admission, this is not true, as material programs and functions of Section 215 remain in effect and operative, as Appellants are forced to admit in their non-meritorious motion. And, even if it were true, based on past lawlessness and unconstitutional conduct, the lower court's preliminary injunction must remain

in effect if for no other reason than it needs to retain jurisdiction to conduct oversight of the conduct of the Appellants to ensure that future violations do not occur.

I. **THE FACTS.**

Appellants, which consist of the so called "Government Defendants" including the National Security Agency ("NSA"), know full well that there is a long history of them unconstitutionally violating whatever statutory law is in effect concerning their bulk collection of telephonic metadata. To further their pattern of continuing violations of the Fourth Amendment to the Constitution, they have repeatedly lied to Congress, the Foreign Intelligence Surveillance Court ("FISC") and the American people about their activities, including but not limited to sworn perjured testimony by the Director of National Intelligence James Clapper that denied, prior to the revelations of Edward Snowden, that the indiscriminate bulk collection of metadata was occurring on nearly all American citizens. When asked under oath by Senator Ron Wyden of the Senate Intelligence Committee whether the NSA collected "any type of data at all on millions or hundreds of millions of Americans[,]" Clapper falsely answered "No, sir . . . not wittingly." Exhibit 1. Incredibly Clapper has never been prosecuted for lying under oath, particularly to Congress, as any other American citizen would be.

The lower court recognized and took judicial notice of this established pattern and practice of lying and violating prior statutes, much more violations of the Fourth Amendment of the Constitution, in its two preliminary injunction orders of December 16, 2013 (Lower Court Dkt. No. 48) (Exhibit 2) and November 9, 2015 (Lower Court Dkt. No. 159) (Exhibit 3), which are incorporated herein by reference. Specifically, the Honorable Richard J. Leon held in Preliminary Injunction Order of December 16, 2013, which he incorporated into the Preliminary Injunction Order of November 9, 2014 as the law of the case:

> The Government has nonetheless acknowledged, as it must, that failures to comply with the minimization procedures [i.e. the law] set forth in the orders have occurred. For instance, in January 2009, the Government reported to the FISC that the NSA had improperly used an "alert list" of identifiers to search the bulk telephony metadata, which was composed of identifiers that had *not* been approved under the RAS standard. Id. ¶ 37; Order, *In re Production of Tangible Things from [Redacted]*, No. BR 08-13, 2009 WL 9150913, at *2 (FISC Mar. 2, 2009) ("Mar. 2, 2009 Order"). After reviewing the Government' s reports on its noncompliance, Judge Reggie Walton of the FISC concluded that the NSA had engaged in "systematic noncompliance" with FISC-ordered minimization procedures over the preceding three years, since the inception of the Bulk Telephony Metadata Program, and had also repeatedly made misrepresentations and inaccurate statements about the program to the FISC judges. Mar. 2, 2009 Order, 2009 WL 9150913, at *2-5.[1] As a consequence, Judge

[1] Judge Walton noted that, "since the earliest days of the FISC-authorized collection of call- detail records by the NSA, the NSA has on a daily basis, accessed the BR metadata for purposes of comparing thousands of non-RAS-approved telephone identifiers on its alert list against the BR metadata in order to identify any matches. Such access was prohibited by the governing minimization procedures under each of the relevant Court orders." Mar. 2, 2009 Order, 2009 WL 9150913, at *2. He went on to conclude: "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

> Walton concluded that he had no confidence that the Government was doing its utmost to comply with the court's orders, and ordered the NSA to seek FISC approval on a *case-by-case* basis before conducting any further queries of the bulk telephony metadata collected pursuant to Section 1861 orders. *Id*. at *9; Shea Decl. ¶¶ 38-39. This approval procedure remained in place from March 2009 to September 2009. Shea Decl. ¶¶ 38-39.
>
> Notwithstanding this six-month "sanction" imposed by Judge Walton, the Government apparently has had further compliance problems relating to its collection programs in subsequent years. In October 2011, the Presiding Judge of the FISC, Judge John Bates, found that the Government had misrepresented the scope of its targeting of certain internet communications pursuant to 50 U.S.C. § 1881a (i.e., a different collection program than the Bulk Telephony Metadata Program at issue here). Referencing the 2009 compliance issue regarding the NSA's use of unauthorized identifiers to query the metadata in the Bulk Telephony Metadata Program, Judge Bates wrote: "the Court is troubled that the government's revelations regarding NSA's acquisition of Internet transactions mark 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." Mem. Op., *[Redacted]*, No. *[redacted]*, at 16 n.14 (FISC Oct. 3, 201 1).[24] Both Judge Walton's and Judge Bates's opinions were only recently declassified by the Government in response to the Congressional and public reaction to the Snowden leaks.

Exhibit 2 at 22-23.

---

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 systemically violated that it can fairly be said that this critical element of the overall BR regime has never functioned effectively." *Id*. at *5.

Indeed, as set forth below, there is a body of black-letter law that stands for the proposition that conveniently claiming that the egregious conduct has ceased after the movant seeks preliminary injunctive relief, will not short circuit the entry of the injunction. Here, where there is a history and continuing pattern and practice of violating the Constitution and statutory law, and where there is already a preliminary injunction in place, it would not be proper, much less prudent, to vacate the preliminary injunction, particularly where it is based on the violation of the Fourth Amendment and there is every likelihood that no matter what new statute is in effect, specifically the USA Freedom Act, the Fourth Amendment of the Constitution, based on past history of record, will continue to be violated by Appellants.

The preliminary injunction entered by the lower court on November 9, 2015, should thus continue in effect so the lower court can continue to have oversight authority and jurisdiction, and thus contempt powers, to insure that the USA Freedom Act, like other previous statutes, is not violated in the future as it has repeatedly been done in the past, regardless of what law or regulation was in effect.

Incredibly, the Appellants are forced to admit in their motion that despite the claimed implementation of the USA Freedom Act on November 29, 2015, their overly broad surveillance activities continue:

> The FISC has authorized the government to retain technical (as opposed to analytic) access to the bulk telephony metadata previously

> collected for a three-month period, until February 29, 2016, to ensure the proper functioning of the new targeted collection program. Such technical access, however, is permitted 'solely for the purpose of verifying the completeness and accuracy of call detail records produced under the targeted (i.e. non-bulk) production orders issued by the [FISC] after November 28, 2015 . . . and does not permit 'queries of the bulk [bulk telephony metadata] for the purpose of obtaining foreign intelligence information[.]' In addition, although the FISC has authorized the government to retain the previously-collected bulk telephony metadata beyond next February to comply with civil litigation preservation obligations in certain cases, the FISC order only permits technical access 'solely to ensure continued compliance with the government's preservation obligations.'

Thus, the Appellants talk out of both sides of their mouths. It is clear that without the continued existence of the Preliminary Injunction Order of November 9, 2015 (Exhibit 3), which simply orders the Appellants to obey the Fourth Amendment to legally conduct legitimate surveillance only when there is probable cause to do so, that the Appellants will take license to lie about their conduct and violate the Fourth Amendment, as they have repeatedly done without hesitation or remorse in the past. Most recently, for instance, it was even revealed that in its zeal to enter into a nuclear treaty with Iran, the administration, though its executive agency the NSA, committed perhaps one of the most egregious violations of the Fourth Amendment of the Constitution in American history, by breaching not just the telephonic and other communications of Israeli Prime Minister Benjamin Netanyahu and his government, but also members of the U.S. Congress. One can only wonder what the motive and result of this was; namely, was this illegal and

unconstitutional surveillance by the executive branch against the legislative branch of government used to coerce or at a minimum influence members of Congress into voting for the treaty? This real possibility is self-evident. Why else would the communications of representatives and senators be surreptitiously violated in an executive overreach which defies all historical precedent? Even President Richard Nixon did not go this far when he was caught obstructing justice by covering up the break-ins at the Watergate offices of the Democratic National Committee, forcing him ultimately to resign from the Office of the President. *See* Exhibit 4 – (*U.S. Spy Net on Israel Snares Congress*, The Wall Street Journal).

In short, the preliminary injunction entered by the lower court is not moot, and in the interests of the sanctity of the Constitution and as a result of lying and lawless past history of Appellants, it must continue in effect. There certainly is no harm to anyone to have a preliminary injunction remain in effect which simply orders that the government obey the Fourth Amendment to the Constitution and allows the lower court continuing jurisdiction to monitor – and if necessary, enforce through its inherent contempt powers – that this indeed occurs.

II. THE LAW.

A. Appellants Cannot Simply Claim that the Constitutional Violations Have Ceased to Argue That the Preliminary Injunction Should Be Vacated As Moot.

Even while remanding this case to the lower court on standing grounds, this

Court recognized that the expiration of Section 215 of the USA Patriot Act caused by the recent passage of the USA Freedom Act does not render moot the need for a preliminary injunction. This Court clarified that cessation of a challenged practice moots a case only if "there is no reasonable expectation . . . that the alleged violation will recur." *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008). Here, any lapse in bulk collection was temporary. Immediately after Congress acted on June 2 the FBI moved the FISC to recommence bulk collection, United States' Mem. of Law, *In re Application of the FBI*, No. BR 15-75 (FISC, filed Jun. 2, 2015), and the FISC confirmed that it views the new legislation as effectively reinstating Section 215 for 180 days, and as authorizing it to resume issuing bulk collection orders during that period. *See* Opinion and Order, *In re Application of the FBI*, Nos. BR 15-75, Misc. 15-01 (FISC June 29, 2015) (Mosman, J.); Mem. Op., In re Applications of the FBI, Nos. BR 15-77, BR 15-78 (FISC Jun. 17, 2015) (Saylor, J.). Now we have learned that material portions of Section 215 will remain in effect indefinitely by order of the FISC. Accordingly, plaintiffs and the government stand in the same positions that they did before June 1, 2015.

Where during litigation a defendant ceases to engage in challenged conduct and restores the status quo ante, the Supreme Court has said that such a case is moot only if the defendant meets his "heavy burden" of persuading the court that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be

expected to recur." *See Friends of the Earth, Inc., v. Laidlaw Envtrl. Servs., Inc.*, 528 U.S. 167, 189, (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)); accord *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974). In *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944), the Supreme Court refused to declare moot a wage and hours enforcement case where the defendant had latterly altered his wage schedule to conform to the law. The Court observed that defendant "has consistently urged the validity of the [original schedule] and would presumably be free to resume this illegal plan were not some effective restraint made." *Id*. at 43. Similarly, in *Kescoli v. Babbitt*, 101 F. 3d 1304, 1309 (9th Cir. 1996), a plaintiff challenged an Office of Surface Mining permit to a coal company on the ground that a special condition in the permit did not adequately protect an ancient native American burial site. While the appeal was pending, the permit expired. The Office of Surface Mining had issued a new permit, however, which contained the same special condition challenged by the plaintiff. The Ninth Circuit concluded that, despite the expiration of the original permit, the special condition was still in effect, so that the case was NOT moot. Here, even though section 215 has only in part expired, the "special condition" of the NSA's pattern of unconstitutional actions has to be presumed to remain in effect, as the agency has never obeyed any law enacted by Congress and has lawlessly done as it pleased, including recently been found to have been spying

on Congress over the Iran Nuclear Treaty and later ratification.

Here, the Appellants originally asserted the “right to”, and did illegally engage in, the domestic surveillance programs in the absence of any express statutory authorization. The Appellants have been persistent in their determination to illegally engage in these programs and practices and are unrepentant. Moreover, as set forth above, Appellants’ surveillance under Section 215 continues, although they disingenuously and defensively claim it has been scaled back.

Worse still, the Appellants have proven determined to conduct this surveillance in secrecy and then lie about it under oath to Congress, the courts and the public illegally and unconstitutionally to prevent the disclosure of these criminal acts. The violations are likely to reoccur without the judiciary or the Congress or the Plaintiffs and the rest of the American people ever being aware of the unconstitutional surveillance programs being continued and/or restarted.

Therefore, the expiration parts of Section 215 does not in itself provide an adequate remedy and a preliminary injunction remains necessary and of compelling importance.

B. The Lower Court’s Preliminary Injunction Orders Set Forth All of the Required Elements for Injunctive Relief.

Appellees incorporate by reference pages 34 to 66 of the lower court’s Preliminary Injunction Order of December 16, 2013 (Exhibit 2) and pages 13 to 43 of the Preliminary Injunction Order of November 9, 2014 (Exhibit 3), where the

Honorable Richard J. Leon correctly reasoned and ruled that all of the necessary factual and legal criteria to enter injunctive relief were more than satisfied.

C. The Appeals of the Appellants and Appellees Must Be Allowed to Run Their Course.

It is incumbent upon this Court not to vacate the lower court's preliminary injunctive relief and to allow the appeals of the parties to run their course. This must respectfully occur in the interests of justice and because the American people need to have a definitive appellate judicial ruling from this Circuit, the most prestigious in the nation, on this matter which the lower court called "the pinnacle of national importance" even during the first status conference. Indeed, many of the current presidential candidates from Senator Marco Rubio, to Governors Jeb Bush and Chris Christie have, to win votes, demagogued on restoring the full reach of section 215 of the Patriot Act, by disingenuously blaming the recent terrorist attacks in Paris and San Bernardino on the passage of the USA Freedom Act and its support by other presidential candidates. In reality, when these attacks occurred the USA Freedom Act was not even in full force and effect, as it was not totally implemented by the November 29, 2015 deadline. This remains true to today by the Appellants' own forced admissions. Thus, the real prospect exists that any new president, Republican or Democrat, will be tempted to push Congress to restore the unconstitutional overreach of section 215 – even if its clear that the Appellants

will, in any event, more than likely continue their illegal practices, based on their factually uncontroverted past lying and lawless history.

As the lower court recognized in its Preliminary Injunction Order of November 9, 2014 (Exhibit 3) "In my December 2013 Opinion I explained at length why both the indiscriminate bulk collection of telephony metadata and the analysis of that data each separately constitute a search within the meaning of the Fourth Amendment. *Klayman*, 957 F. Supp. 2d at 30-37. Neither the recent changes in the operation of the Program, nor the passage of the USA Freedom Act has done anything to alter this analysis." Exhibit 3 at 26.

III. CONCLUSION.

In sum, the Preliminary Injunction Order of November 9, 2015, should not be found to be moot and vacated, as the lower court needs to retain jurisdiction under this order to monitor compliance with the Fourth Amendment of the Constitution and use its contempt powers if necessary. In addition, these appeals should proceed in order that the American people can get clear judicial ruling from this circuit, and perhaps later the Supreme Court, concerning the reach of executive authority to indiscriminately spy on millions of citizens where probable cause is lacking --simply on the false premise that an Orwellian government is necessary to protect them from terrorists. As the lower court observed in its two preliminary injunction rulings, the Appellants, despite having been repeatedly challenged by

Judge Leon to do so, were unable to come forward with any evidence that their unconstitutional surveillance had prevented and stopped even one terrorist attack. What then is its broad collateral purpose? To spy on members of Congress to "persuade" them into, for example, ratifying the Iran Nuclear Treaty, or legislation. Even the judges of this Court are are not immune from this potentially coercive unconstitutional surveillance. And, the people must not be chilled in their ability to legally communicate with each other and wage dissent against the government.

As our Founding Father and third president, Thomas Jefferson, proclaimed: "When the people fear the government there is tyranny." The judiciary and this Court are the sole legal protectors of the people under these regrettable circumstances.

Dated: February 5, 2016 Respectfully Submitted,

/s/ Larry Klayman

Larry Klayman, Esq.
General Counsel
Freedom Watch, Inc.
D.C. Bar No. 334581
2020 Pennsylvania Ave. NW #345
Washington, DC 20006
Tel: (310) 595-0800
Email: leklayman@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2016, I caused the foregoing Appellees' Opposition to Appellants' Motion to Vacate Preliminary Injunction and Dismiss Appeal on Grounds of Mootness to be filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by causing an original to be electronically filed via ECF, along with four copies to be hand delivered to the court, and by causing one copy to be served on the following counsel by ECF:

DOUGLAS N. LETTER
H. THOMAS BYRON III
(202) 616-5367
CATHERINE H. DORSEY
(202) 514-3469
Attorneys, Appellate Staff
Civil Division, Room 7236
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

/s/ *Larry Klayman*
Larry Klayman, Esq.