BEWARE THE FISCR FAST-TRACK

As promised, today ACLU asked the Second Circuit to enjoin the NSA's collection of their phone records under the renewed phone dragnet.

> Accordingly, Plaintiffs respectfully ask that the Court now grant the preliminary relief it refrained from granting in its earlier decision.
> Specifically, Plaintiffs ask that the Court issue a preliminary injunction (i) barring the government, during the pendency of this suit, from collecting Plaintiffs' call records under the NSA's call-records program; (ii) requiring the government, during the pendency of this suit, to quarantine all of Plaintiffs' call records already collected under the program; and (iii) prohibiting the government, during the pendency of this suit, from querying metadata obtained through the program using any phone number or other identifier associated with them.

The filing offers the Second Circuit to provide an alternative interpretation of the events of early June, one that actually incorporated their earlier opinion as binding. It even flips the ratification argument FISC has long clung to to argue that by not altering the program while taking explicit notice of the Second Circuit decision, Congress had to have been ratifying the Second Circuit's ruling that bulk collection under Section 215 was unlawful.

> In the present context, as in most others, the most reliable indicator of congressional intent is the text of the law. Here, that text admits no ambiguity. It makes clear that Congress intended to leave the government's surveillance authority with respect to

> call records unaltered for the 180 days after the passage of the Act.
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> The FISC seems to have reasoned that Congress must have intended to authorize bulk collection during the transitional period because it did not expressly prohibit it. See id. at 10–11 ("Congress could have prohibited bulk data collection . . . ."). But the FISC has it backwards. In our democracy, the government has only the powers the people have granted it; the question is not what surveillance Congress has proscribed, but what surveillance it has permitted. Moreover, here Congress was legislating in the shadow of this Court's May 7 opinion, which indicated that this Court—the only appellate court to have construed the statute—would continue to construe the statute to disallow bulk collection unless Congress amended it to expressly authorize such collection. See, e.g., Clapper, 785 F.3d at 818 (stating that the Court would read the statute to authorize bulk collection only if Congress authorized it in "unmistakable language"); id. at 819 (stating that the government's proposed construction of the statute would require "a clearer signal" from Congress); id. at 821 (indicating that, if Congress wanted to authorize bulk collection under the statute, it would have to do so "unambiguously"); see also id. at 826–27 (Sack, J., concurring).
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> This Court's May 7 opinion was cited hundreds of times in the legislative debate that preceded the passage of the Act; it was summarized at length in the committee report; and one senator even read large parts of the opinion into the legislative record. See 161 Cong. Rec. S3331-02 (daily ed. May 31, 2015) (statement of Sen. Rand Paul); H. Rep. No. 114-109, at 8–10 (2015); June 2

> Application at 9 n.2 ("Congress was aware of the Second Circuit's opinion . . . ."). Against this background, it would be bizarre to understand Congress's "failure" to expressly prohibit bulk collection as an implicit endorsement of it. Indeed, if it has any bearing at all, the doctrine of legislative ratification favors Plaintiffs.

The argument is not entirely convincing, but it has the advantage of being less ridiculous than FISC's claim that Congress ratified a court ruling that 1) Congress didn't know about and that 2) FISC had never written up into an opinion.

Ultimately, though, this seems to be an invitation to the Second Circuit to weigh in on FISC's surly refusal to pay attention to a Circuit Court ruling.

> The FISC specifically rejected the reasoning of this Court's May 7 ruling, writing that it rested "[t]o a considerable extent . . . on mischaracterizations of how [the call-records program] works and on understandings that, if they had once been correct, have been superseded" by the USA Freedom Act. Id. at 16. On the issue of the constitutionality of the call-records program, the FISC judge reaffirmed earlier FISC opinions holding that the issue was controlled by Smith v. Maryland, 442 U.S. 735 (1979), and that the call-records program was, therefore, consistent with the Fourth Amendment.

Of course, we're faced with a jurisdictional conflict, one discussed at length in a hearing immediately after the Second Circuit ruling.

> Sunlight Foundation's Sean Vitka: Bob, I

> have like a jurisdictional question that I honestly don't know the answer to. The Court of Appeals for the Second Circuit. They say that this is unlawful. Obviously there's the opportunity to appeal to the Supreme Court. But, the FISA Court of Review is also an Appeals Court. Does the FISC have to listen to that opinion if it stands?
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> Bob Litt: Um, I'm probably not the right person to ask that. I think the answer is no. I don't think the Second Circuit Court of Appeals has direct authority over the FISA Court. I don't think it's any different than a District Court in Idaho wouldn't have to listen to the Second Circuit's opinion. It would be something they would take into account. But I don't think it's binding upon them.
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> Vitka: Is there – Does that change at all given that the harms that the Second Circuit acknowledged are felt in that jurisdiction?
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> Litt: Again, I'm not an expert in appellate jurisdiction. I don't think that's relevant to the question of whether the Second Circuit has binding authority over a court that is not within the Second Circuit. I don't know Patrick if you have a different view on that?
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> Third Way's Mieke Eoyang: But the injunction would be, right? If they got to a point where they issued an injunction that would be binding…
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> Litt: It wouldn't be binding on the FISA Court. It would be binding on the persons who received the –
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> Eoyong: On the program itself.
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> Patrick Toomey: The defendants in the case are the agency officials. And so an

> injunction issued by the Second Circuit would be directed at those officials.

Because FISC has its own appellate court, the FISA Court of Review (FISCR), it doesn't have to abide by what the Second Circuit rules, especially not if FISCR issues its own ruling on the same topic.

For that reason, I reiterate my prediction that the FISC may resort to using a provision in the USA F-ReDux to eliminate the Second Circuit's ability to weigh in here. USA F-ReDux affirmatively permitted the FISC to ask the FISCR to review its own decisions immediately, what I've dubbed FISCR Fast Track. It was dubbed, naively, as a way to get appropriate appellate review of the FISC's secret decisions (yet the provision, as written, never requires any adversary, so it doesn't address the problems inherent to the FISC). But here, there's no reason for such secret review and an appellate court has already weighed in.

But that doesn't mean the government can't use it.

In other words, if the Second Court rules in a way the FISC doesn't like (which they already have), if the FISC just wants to reiterate that this is one situation where the FISC gets to override the judgments of appellate courts (which the FISC has already done), or if the FISC just wants to set the precedent that no FISC decision will ever be reviewed by a real court, it can ask the FISCR to weigh in (and given FISC's refusal to call in a real advocate, the FISCR would even have precedent to blow off that suggestion).

The FISC has the ability to undercut the Second Circuit. And they've already shown a desire to do just that.

Beware FISCR Fast Track, because it could really threaten any ability to review these kangaroo court decisions.