UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE APPLICATION OF THE FEDERAL BUREAU OF INVESTIGATION FOR AN ORDER REQUIRING THE PRODUCTION OF TANGIBLE THINGS

Docket No. BR 14-01

RESPONSE OF THE UNITED STATES OF AMERICA TO THE COURT'S MARCH 21, 2014, OPINION AND ORDER RE: MOTION OF PLAINTIFFS IN *JEWEL V. NSA* AND *FIRST UNITARIAN CHURCH V. NSA*, BOTH PENDING IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FOR LEAVE TO CORRECT THE RECORD

The United States respectfully submits this filing pursuant to the Court's Opinion and Order issued in the above-captioned matter on March 21, 2014 ("March 21 Order"), which directed the Government to make a filing pursuant to Foreign Intelligence Surveillance Court (FISC) Rule of Procedure 13(a),[1] and explain why it failed to notify this Court during its consideration of the Government's Motion for Second Amendment to Primary Order of preservation orders issued in two lawsuits, *Jewel v. NSA*, No. 08-cv-4373 (N.D. Cal.), and *Shubert v. Obama*, No. 07-cv-0693 (N.D. Cal.), and of the plaintiffs' understanding of the scope of those orders, following the Government's receipt of plaintiffs' counsel's February 26, 2014, email.

Based upon the nature of the claims made in *Jewel* and *Shubert*, which the Government has always understood to be limited to certain presidentially authorized intelligence collection

1 FISC Rule of Procedure 13(a), Correction of Material Facts, provides in relevant part that,
"[i]f the government discovers that a submission to the Court contained a misstatement or omission of material fact, the government, in writing, must immediately inform the Judge to whom the submission was made of:
(1) the misstatement or omission;
(2) any necessary correction;
(3) the facts and circumstances relevant to the misstatement or omission."

activities outside FISA, the Government did not identify those lawsuits, nor the preservation orders issued therein, in its Motion for Second Amendment to Primary Order filed in the above-captioned Docket number on February 25, 2014. For the same reasons, the Government did not notify this Court of its receipt of plaintiffs' counsel's February 26, 2014, e-mail. With the benefit of hindsight, the Government recognizes that upon receipt of plaintiffs' counsel's e-mail, it should have made this Court aware of those preservation orders and of the plaintiffs' disagreement as to their scope as relevant to the Court's consideration of the Government's motion and regrets its omission. The Government respectfully submits that in light of this submission, and this Court's Opinion and Order dated March 12, 2014, granting the Government's motion for temporary relief from the destruction requirement in subsection (3)E of the Court's Primary Order, no additional corrective action on the part of the Government or this Court is necessary. The facts and circumstances relevant to the Government's omission are set out below.

The Government takes its preservation obligations with the utmost seriousness, as it does its duty of candor to the Court, particularly in the setting of *ex parte* proceedings. As explained further below, it was not the Government's intention to omit information that it believed this Court would find relevant and material to its consideration of the Government's Motion for Second Amendment to Primary Order. In light of this Court's rulings on March 7 and 21 and the reasoning contained therein, the Government understands why this Court would have considered the *Jewel* plaintiffs' recently-expressed views regarding the scope of the preservation orders in *Jewel* and *Shubert* as material to its consideration of the Government's motion. The Government sincerely regrets not having brought these matters to the Court's attention prior to its March 7, 2014, ruling and assures the Court that it will apply utmost attention to its submissions in this and all other matters before this Court.

On February 25, 2014, the Government filed its Motion for Second Amendment to Primary Order. In the Motion, the Government requested that this Court amend minimization procedures related to the destruction of metadata acquired pursuant to authority of this Court so that the information could be maintained under strict conditions, for the limited purpose of ensuring that the Government continues to comply fully with its preservation obligations related to certain identified civil litigation. The cases that the Government listed in its February 25 Motion were all filed after last year's unauthorized public disclosures concerning the collection of telephony metadata pursuant to FISA authority, and all challenge the lawfulness of the collection of telephony metadata pursuant to this Court's authorization. Motion for Second Amendment at 3-5;[2] *see, e.g.*, *American Civil Liberties Union v. Clapper*, No. 13-cv-3994 (WHP) (S.D.N.Y.), Complaint ¶ 1 (ECF No. 1) ("This lawsuit challenges the government's dragnet acquisition of Plaintiffs' telephone records under Section 215 of the Patriot Act, 50 U.S.C. § 1861.").

The Government did not notify the Court of *Jewel* and *Shubert* in the Motion because the Government has always understood those matters to challenge certain presidentially authorized intelligence collection activities and not metadata subsequently obtained pursuant to orders issued by this Court under FISA, and because the preservation issues in those cases had been previously addressed before the district court in which those matters are pending. *Jewel* and *Shubert*, filed in 2008 and 2007, respectively, challenge particular NSA intelligence activities authorized by President Bush after the September 11, 2001, terrorist attacks without statutory or

[2] Known active civil cases challenging bulk telephony metadata collection under FISC orders pursuant to FISA as unauthorized by statute and/or unconstitutional are those listed in the Motion for Second Amendment. In an additional *pro se* case, *Ndiaye v. Baker*, No. 13-cv-1701 (D. Md.), the plaintiff alleges collection of metadata pertaining to his telephone calls under FISA, among numerous other alleged acts by federal and local officials, as part of a scheme to persecute and harass him because of his ethnicity and religion. No preservation order has been entered in *Ndiaye* and the plaintiff has not expressed a view to the Government regarding preservation.

judicial authorization (i.e., the Terrorist Surveillance Program (TSP), and the Internet and telephony metadata programs).[3] The *Jewel* plaintiffs stated in 2008 when they filed their complaint and asked that it be related to *Hepting v. AT&T* (a precursor to *Shubert*), "both cases allege the same facts: that in 2001 the *President authorized* a program of domestic surveillance *without court approval or other lawful authorization*, and that through this Program, the government illegally obtains and continues to obtain with AT&T's assistance the contents of Plaintiffs' and class members' telephone and internet communications, as well as records concerning those communications." Admin. Motion by Plaintiffs To Consider Whether Cases Should be Related at 3 (*Jewel* ECF No. 7) (emphasis added) (attached hereto as Exhibit A).[4]

---

[3] The Government's recent filing before the Northern District of California regarding its preservation obligations in cases before that court cites various portions of the *Jewel* and *Shubert* complaints that made clear to the Government that they challenge presidentially-authorized, non-court-authorized, programs. *See, e.g.*, *Jewel* Complaint (attached as Exhibit B to Plaintiffs' Motion for Leave to Correct the Record) ¶ 39 (President Bush "authoriz[ed] "a range of surveillance activities . . . without statutory authorization or court approval, including electronic surveillance of Americans' telephone and Internet communications (the 'Program')"), ¶ 76 ("Defendants' above-described acquisition in cooperation with AT&T of . . . communications content and non-content information is done without judicial, statutory, or other lawful authorization, in violation of statutory and constitutional limitations, and in excess of statutory and constitutional authority."), ¶ 92 ("Defendants' above-described solicitation of the disclosure by AT&T of . . . communications records . . . is done without judicial, statutory, or other lawful authorization, in violation of statutory and constitutional limitations, and in excess of statutory and constitutional authority."), ¶¶ 110, 120, 129, 138 ("Defendants have [acquired] . . . contents of communications, and records pertaining to . . . communications . . . without judicial, statutory, or other lawful authorization, in violation of statutory and constitutional limitations, and in excess of statutory and constitutional authority."); *Shubert* Second Amended Complaint (MDL ECF No. 771) (attached hereto as Exhibit B) ¶ 2 ("Without the approval of Congress, without the approval of any court, and without notice to the American people, President George W. Bush authorized a secret program to spy upon millions of innocent Americans, including the named plaintiffs."), ¶ 9 ("This class action is brought on behalf of all present and future United States persons who have been or will be subject to electronic surveillance by the National Security Agency without a search warrant, a court order, or other lawful authorization since September 12, 2001."), ¶ 55 ("Although it is true that federal law requires law enforcement officers to get permission from a federal judge to wiretap, track, or search, President Bush secretly authorized a Spying Program that did none of those things."), ¶ 66 ("The Program admittedly operates 'in lieu of' court orders or other judicial authorization . . . ."), ¶ 93 ("Prior to its initiation, defendants never sought authorization from the FISA Court to conduct the Spying Program."). The district court has set a further briefing schedule to assess the Government's compliance with the preservation order in *Jewel*.

[4] *Hepting* is the lead case in the Multidistrict Litigation (MDL) proceeding in the Northern District of California (*In re NSA Telecommunications Records Litigation Multi-District Litigation* (designated as 3:06-md-1791-VRW)), which includes *Shubert*. *Hepting* and the other MDL cases (including *Shubert*) concern activity authorized by the President, without court approval. Among other things, these suits were brought against telecommunications companies (as opposed to the Government), and such companies are statutorily immune from suit for providing assistance to the Government pursuant to court order.

In 2007, the Government informed the district court in a then-classified submission (prior to the entry of the MDL preservation order, upon which the *Jewel* preservation order was based) that the Government did not understand the MDL proceedings to challenge FISC-authorized programs: "Because Plaintiffs have not challenged activities occurring pursuant to an order of the FISC, this declaration does not address information collected pursuant to such an authorization or any retention policies associated therewith." Declassified Declaration of National Security Agency ¶ 12 n.4.[5] (attached hereto as Exhibit C). In the same 2007 submission, consistent with the Government's stated view that FISC-authorized collections were not at issue, the Government informed the district court that it was preserving a range of documents and information concerning only the presidentially-authorized activities at issue in the plaintiffs' complaints. *See* Declass. NSA Decl. ¶¶ 6, 12-13, 16, 18-28. Thereafter, the court issued a preservation order that directed the parties to preserve "relevant" evidence that was "reasonably anticipated to be subject to discovery," without instructing the Government then, or at any other time, that its understanding of its preservation obligations was erroneous. Nov. 6, 2007 Preservation Order (MDL ECF No. 393). An identical order was issued in *Jewel*, on stipulation by the parties, in 2009. (*Jewel* ECF No. 50).[6]

A day after the Government filed its Motion for Second Amendment with this Court on February 25, 2014, counsel for the *Jewel* plaintiffs sent an email to Civil Division counsel representing the Government in *Jewel*, suggesting that the preservation orders in *Jewel* and *Shubert* required the Government to preserve telephony metadata acquired under FISA. For the

[5] A classified submission was necessary at that time because the existence of the presidentially-authorized program was classified and remained so until December 2013.

[6] Consistent with the Government's understanding of these orders in *Jewel* and *Shubert*, until the district court's March 10, 2014, temporary restraining order and the subsequent March 12, 2014, order of this Court, the Government has complied with this Court's requirements that metadata obtained by the NSA under Section 215 authority be destroyed no later than five years after their collection.