

No. 14-35555

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ANNA J. SMITH,

Plaintiff–Appellant,

v.

BARACK OBAMA, *et al.*,

Defendant–Appellees.

On Appeal from the United States District Court
for the District of Idaho, Boise; Case No. 2:13-cv-00257-BLW
The Honorable B. Lynn Winmill, Chief District Judge

APPELLANT’S SUPPLEMENTAL BRIEF RE USA FREEDOM ACT

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On June 3, 2015, this Court ordered the parties to submit supplemental briefs by June 19 addressing the effect on this litigation of the USA FREEDOM Act of 2015, Pub. L. 114-23, ___ Stat. ___ (2015). Specifically, the Court asked whether the Act renders this lawsuit moot. It does not, for two independent reasons.

First, the government still possesses Mrs. Smith's call records, going back at least five years. In her complaint, Mrs. Smith requested an order requiring the government to purge all of her call records obtained as part of the government's call-records program. Although the government stopped the program on May 31, 2015, the government has not, as far as Mrs. Smith is aware, purged all of the call records it collected. *See Mayfield v. United States*, 599 F.3d 964, 971 (finding plaintiff "continue[s] to suffer a present, on-going injury due to the government's continued retention of . . . material from the FISA seizure").

Second, although the government suspended the call-records program on May 31 in anticipation of the impending expiration of Section 215, on June 2 the government filed an application with the Foreign Intelligence Surveillance Court ("FISC") for an order permitting it to restart the program.¹ In its application, the government argues that the USA FREEDOM Act permits it to resurrect the

¹ See Gov't Mem. of Law, *In re Application of the FBI for an Order Requiring the Production of Tangible Things*, No. BR 15-75 (FISC June 2, 2015), <http://www.fisc.uscourts.gov/sites/default/files/Misc%2015-01%20Memorandum%20of%20Law.pdf>.

program for a 180-day period following enactment of the statute. While Mrs. Smith disagrees with the government's understanding of its authority under the Act, the relevant fact here is that the government has sought to continue the very conduct that Mrs. Smith has challenged as unconstitutional.

For these two reasons, this case is not moot.

It is possible, of course, that the case will become moot at some indefinite point in the future, depending upon a number of factors. Those factors, however, are within the government's exclusive control. They include: (1) whether, assuming the FISC permits the NSA to resume its bulk collection of call records for the 180-day period it has requested, the government ends bulk collection under Section 215 at the conclusion of that period, (2) whether the government, at that time, disavows the legal authority and the intent to resume the bulk collection of Americans' call records under *any* authority, and (3) whether the government purges, from all of its databases and from any derivative reports, the call records it has collected in bulk. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000) (“[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.”).

At this point, however, the infringement of Mrs. Smith's constitutional rights continues, and accordingly the Court should decide the constitutional question before it.

DATED: June 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 19, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: June 19, 2015

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