Filed
United States Foreign
Intelligence Surveillance Court

OCT 18 2018

LeeAnn Flynn Hall, Clerk of Court

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

MEMORANDUM OPINION AND ORDER

The Foreign Intelligence Surveillance Court today addresses the "Government's Ex Parte Submission of Reauthorization Certifications and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certifications and Amended Certifications," filed on March 27, 2018 ("March 27, 2018, Submission"), and the "Government's Ex Parte Submission of Amendments to DNI/AG 702(h) Certifications and Related Procedures, Ex Parte Submission of Amendments to DNI/AG 702(g) Certifications, and Request for an Order Approving Such Amended Certifications," filed on September 18, 2018

("September 18, 2018, Submission"). The March 27, 2018, Submission, as amended by the September 18, 2018, Submission, is subject to review by the Court under Section 702 of the Foreign Intelligence Surveillance Act (FISA) as amended, codified at 50 U.S.C. § 1881a. The government's request for approval of the amended certifications and related procedures is *granted in part and denied in part* for the reasons stated in this Memorandum Opinion and Order.

Part I of this Opinion summarizes the government's submissions and the procedural history of these matters. In Part II, the Court finds that the certifications before it contain the elements required by Section 702(h).

Part III of the Opinion addresses the targeting procedures and issues relating to the scope of acquisition, including the "abouts limitation" at Section 702(b)(5). The Court finds that the targeting procedures satisfy the requirements of the statute and are consistent with the requirements of the Fourth Amendment and approves the proposed scope of acquisition.

The Court examines the querying procedures and minimization procedures in Part IV. After reviewing the applicable statutory provisions, see Part IV.A, the Court finds that the FBI's querying procedures do not comply with the requirement at Section 702(f)(1)(B) to keep records of U.S.-person query terms used to conduct queries of information acquired under Section 702. See Part IV.B. The Court next examines the prevalence of non-compliant queries conducted by FBI personnel to return information about U.S. persons from Section 702-acquired data. It ultimately finds the FBI's querying and minimization procedures, as implemented, to be inconsistent with statutory minimization requirements and the requirements of the Fourth

Amendment. See Part IV.C. The Court then examines and approves certain exemptions that appear in each agency's set of querying and minimization procedures, see Part IV.D, as well as certain changes to the FBI's minimization procedures. See Part IV.E.

Part V addresses certain other instances of non-compliance and the government's responses thereto. Those instances do not require any further findings of deficiency. In Part VI, the Court summarizes its disposition and imposes certain reporting and other requirements on the government.

I. PROCEDURAL HISTORY

The Court begins with a description of the 2018 certifications and their amendments ande then describes their subject matter.

A. The 2018 Certifications and Amendments

The March 27, 2018, Submission includes certifications executed by the Attorney General and the Director of National Intelligence pursuant to Section 702:

Each of those certifications (collectively referred to as "the March 27, 2018, Certifications") is accompanied by:

(1) Supporting affidavits of the Director of the National Security Agency, the Director of e the Federal Bureau of Investigation, the Director of the Central Intelligence Agency, ande the acting Director of the National Counterterrorism Center;e

(2)eTwo sets of targeting procedures, which govern NSA and the FBI respectively. Thee targeting procedures for NSA appear as Exhibit A to each certification and those for thee FBI appear as Exhibit C. The targeting procedures for each certification are identical;e

(3) Four sets of minimization procedures, which govern NSA, the FBI, the CIA, and NCTC respectively. The minimization procedures for NSA appear as Exhibit B to each certification, those for the FBI appear as Exhibit D, those for the CIA appear as Exhibit E, and those for NCTC appear as Exhibit G. (Exhibit F identifies entities targeted under those certifications, The minimization procedures for each certification are identical; and

(4) One set of querying procedures ("March 27, 2018, Querying Procedures") for NSA, the FBI, the CIA, and NCTC, which appears as Exhibit H to each certification.

The March 27, 2018, Submission also includes an explanatory memorandum prepared by the Department of Justice ("March 27, 2018, Memorandum").

The Court was initially required to review and rule on the certifications and procedures within 30 days of their submission – *i.e.*, by April 26, 2018. See § 702(j)(1)(B). In order to allow for participation of amici curiae, however, the Court extended this period by 90 days, until July 25, 2018, under Section 702(k)(2). See Order, April 5, 2018. The Court appointed Jonathan G. Cedarbaum, Esq., and Amy Jeffress, Esq., to serve as amici curiae. See Order Appointing Amici Curiae, Apr. 23, 2018. At the request of Ms. Jeffress, the Court later appointed John Cella, Esq., as amicus curiae to assist in amici's work. See Order Appointing Additional Amicus Curiae, May 7, 2018. The Court appreciates the diligent and learned assistance provided by amici, both in their written submissions and in their oral advocacy at hearings. Their efforts have greatly benefited the Court's review of these matters.

Following briefing by amici and the government, the Court heard oral arguments by amici and representatives from the government on July 13, 2018. At the Court's direction, staff orally

informed the government three days later of the Court's concerns regarding the procedures submitted by the government on March 27, 2018.

In particular, the Court raised the following significant concerns with the Government:

> (1)éThe querying and minimization procedures included exemptions frome otherwise applicable requirements for lawful training functions and lawfule oversight of an agency's personnel or systems. Those exemptions seemede unreasonably broad under the standards of the Fourth Amendment and FISA'se definition of "minimization procedures." <u>See</u> 50 U.S.C. §§ 1801(h), 1821(4);e
>
> (2)éUnder the querying procedures, the FBI would keep records of all queries rune against Section 702 data, but those records would not indicate whether the querye term used was associated with a United States person. This recordkeepinge practice appeared to be inconsistent with the statutory requirement that thee querying procedures "include a technical procedure whereby a record is kept ofe each United States person query term used for a query." § 702(f)(1)(B); ande
>
> (3)éThe querying procedures did not require FBI personnel to document the basise for finding that each United States-person query term satisfied the relevante standard – *i.e.*, that queries be reasonably designed to return foreign-intelligencee information or evidence of crime. Without such documentation and in view ofe reported instances of non-compliance with that standard, the procedures seemede unreasonable under FISA's definition of "minimization procedures" and possiblye the Fourth Amendment. The Court noted it was favorably inclined toward amici'se suggestions that the Court require that, if FBI personnel want to examine thee contents of Section 702 information returned by a United States-person query,e they would first be required to document why that query met the applicablee standard.e

On July 20, 2018, the government filed a motion seeking a further extension until October 18, 2018, in order for it to amend its procedures in an effort to address at least some of the Court's concerns. <u>See</u> Mot. for Order Extending Time Limit Pursuant to 50 U.S.C. §é881a(k)(2). That motion stated, "In particular, the government believes it would be consistente with national security for the extension to provide sufficient time both for the government to

formulate and execute amendments and for the Court to review the amended 2018 Certifications." Id. at 9. On that same day, the Court granted the motion.

The government timely filed its September 18, 2018, Submission, which includes amendments to the [redacted] March 27, 2018, Certifications: Amendment to [redacted] The Court will collectively refer to them as "the September 18, 2018, Amendments" and to the certifications, as thereby amended, as "the 2018 Certifications." The September 18, 2018, Amendments are accompanied by:

> (1) [redacted] supporting affidavits of the Director of NSA, the Director of the FBI, the Director of the CIA, and the acting Director of NCTC;
>
> (2) Amended minimization procedures for the four agencies, which are identical for each amended certification. The amended minimization procedures for NSA appear as Exhibit B to each of the September 18, 2018, Amendments; those for the FBI appear as Exhibit D; those for the CIA appear as Exhibit E; and those for NCTC appear as Exhibit G; and
>
> (3) Amended querying procedures, which are identical for each amended certification and are broken out by agency: NSA Querying Procedures, which appear as Exhibit H to the September 18, 2018, Amendments; FBI Querying Procedures, which appear as Exhibit I; CIA Querying Procedures, which appear as Exhibit J; and NCTC Querying Procedures, which appear as Exhibit K.

The September 18, 2018, Submission also includes an explanatory memorandum prepared by DOJ ("September 18, 2018, Memorandum") and a supplemental declaration of the Director of the FBI ("Supplemental FBI Declaration").

The September 18, 2018, Submission included a number of changes intended to address the Court's concerns. With regard to the concerns noted above, the government:

(1) significantly narrowed the scope of the exemptions for lawful traininga functions and lawful oversight of agency personnel or systems in the querying anda minimization procedures;a

(2)adid not alter the FBI's recordkeeping requirements, but in the Supplementala FBI Declaration described the operational consequences the FBI anticipates if it isa required to maintain records that distinguish U.S.-person query terms from othera query terms and to document why U.S.-person queries met the applicable standarda before viewing any Section 702 content retrieved by the query; anda

(3)aincluded in the FBI Querying Procedures supplemental procedures fora "categorical batch queries" (as opposed to queries conducted on the basis of a individualized assessments). Subject to certain exceptions, FBI personnel woulda be required to obtain the written approval of an FBI attorney before reviewinga Section 702 information retrieved using a categorical batch query.a

The September 18, 2018, Submission was provided to amici, and on September 28, the Court heard oral arguments from amici and the government on the amended certifications and procedures.

B. Subject Matter of the Certifications

Each certification involves "the targeting of non-United States persons reasonably believed to be located outside the United States to acquire foreign intelligence information."

The 2018 Certifications generally propose to continue acquisitions of foreign-intelligence information now being conducted under prior certifications that were initially submitted in 2016 ("the 2016 Certifications"). See March 27, 2018, Memorandum at 2. The 2016 Certifications,

amended by the government in March 2017 and approved by the FISC on April 26, 2017. See Docket Nos Mem. Op. and Order, Apr. 26, 2017 ("April 26, 2017, Opinion"), at 5-6, 95. The 2016 Certifications, in turn, generally renewed authorizations to acquire foreign-intelligence information under a series of certifications made by the AG and DNI pursuant to Section 702 that dates back to 2008. See Docket Nos.

Those dockets, together with Docket Numbers are collectively referred to as "the Prior 702 Dockets."

The government also seeks approval of amendments to the certifications in the Prior 702 Dockets, such that NSA, the CIA, the FBI, and NCTC henceforward would apply the same minimization and querying procedures to information obtained under prior certifications as they would to information to be obtained under the 2018 Certifications, as amended. See September 18, 2018, Memorandum [redacted]

II. REVIEW OF THE 2018 CERTIFICATIONS AND PRIOR CERTIFICATIONS, AS AMENDED

The Court must review a Section 702 certification "to determine whether [it] contains alle the required elements." § 702(j)(2)(A). The Court's examination of the 2018 Certifications confirms that:

> (1)ethe certifications, including their amendments, have been made under oath bye the AG and the DNI, as required by § 702(h)(1)(A), see [redacted]
>
> (2) the certifications, including their amendments, contain the attestations required by § 702(h)(2)(A), [redacted]
>
> (3)eas required by § 702(h)(2)(B), each certification is accompanied by targetinge procedures and minimization procedures adopted in accordance with § 702(d) ande (e), respectively;e
>
> (4) each certification is supported by affidavits of appropriate national-security officials,e as described in § 702(h)(2)(C); ande
>
> (5)eeach certification includes an effective date, which was changed by the September 18, 2018, Amendments as described in § 702(h)(3) – specifically, the certifications becomee effective on October 18, 2018, or the date upon which the Court issues an ordere

concerning the certifications under § 702(i)(3), whichever is sooner. See [redacted] The statement described in § 702(h)(2)(E) is not required because there was no "exigent circumstances" determination under § 702(c)(2).)

The Court therefore finds that the 2018 Certifications contain all the required statutory elements.

Similarly, the Court has reviewed the certifications in the Prior 702 Dockets, as amended by the 2018 Certifications, and finds they also contain all the elements required by the statute. Those amendments have the same effective dates as the 2018 Certifications. See [redacted]

III. TARGETING PROCEDURES AND SCOPE OF ACQUISITION

Section 702(d)(1) requires targeting procedures to be "reasonably designed" to "ensure that any acquisition authorized under [§ 702(a)] is limited to targeting persons reasonably believed to be located outside the United States" and to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." Additionally, the government uses the targeting procedures to ensure acquisitions do "not intentionally target a United States person reasonably believed to be located outside the United States." § 702(b)(3). Pursuant to §e702(j)(2)(B), the Court assesses whether the targeting procedures satisfy those criteria. Thee Court must also assess whether the targeting procedures, along with the querying and minimization procedures, are consistent with the requirements of the Fourth Amendment. See §e702(j)(3)(A)-(B).e

In January 2018, Congress enacted the FISA Amendments Reauthorization Act of 2017 ("Reauthorization Act"), Pub. L. No. 115-118, 132 Stat. 3 (2018). The Reauthorization Act

enacted Section 702(b)(5), which contains a limitation on the acquisition of "communications that contain a reference to, but are not to or from, a target of an acquisition authorized" under Section 702(a), which acquisition is colloquially referred to as "abouts" collection. Reauthorization Act § 103(a)(3). It specifically imposed, with narrow exceptions for exigent circumstances, a requirement of congressional notification and a 30-day congressional-review period before the government can resume abouts collection under Section 702. See id. §el 03(b)(1)-(4). This Opinion refers to that requirement as the "abouts limitation." In addition,e the government must "fully and currently inform" the Judiciary and Intelligence Committees of the House and Senate of "significant noncompliance . . . concerning any acquisition of abouts communications." § 702(m)(4) (enacted by Reauthorization Act § 103(b)(5)).

A. Background on Section 702 Acquisition

The government targets a person under Section 702 by tasking for acquisition one or more selectors (*e.g.*, identifiers for email or other electronic-communication accounts) associated with that person. Section 702 encompasses different forms of acquisition. The government may acquire information "upstream," as it transits the facilities of an Internet backbone carrier, as well as "downstream," from systems operated by providers of services [REDACTED] See April 26, 2017, Opinion at 15. Traditional telephone communications may also be acquired upstream, but those acquisitions have not presented issues regarding scope of acquisition in the way that upstream Internet acquisitions have. In the following discussion, "upstream" collection refers to upstream acquisition of Internet communications under Section 702.

NSA is the only agency to conduct upstream collection under Section 702, while both the NSA and FBI have roles in [redacted] downstream. Under the procedures, NSA is the lead agency in making targeting decisions under Section 702. The FBI Targeting Procedures come into play only when the government [redacted] See FBI Targeting Procedures § I.1 at 1. "Thus, the FBI Targeting Procedures apply *in addition to* the NSA Targeting Procedures," [redacted] See Docket No. [redacted] Mem. Op., Sept. 4, 2008 ("September 4, 2008, Opinion") at 20 (emphasis in original).

It is worth highlighting two salient features of upstream collection as conducted prior to March 17, 2017, that bear on the issues raised by the abouts limitation:

(1) NSA sometimes acquired "multiple communication transactions," or "MCTs," through upstream collection. An MCT is a bundle of communications transiting part of the Internet together [redacted] containing multiple messages [redacted] See April 26, 2017, Opinion at 15-16. ("Active user" refers to the user of a communication service to or from whom an MCT is in transit when it is acquired. See id. at 16.)

(2) In addition to information in transit to or from a tasked selector, NSA acquired communications, including MCTs, *about* – *i.e.*, containing a reference to – a tasked selector. For example, if a single email message within an MCT contained a reference to a tasked email account, the entire MCT could be acquired, including numerous additional email messages that

did not contain a reference to a tasked selector. See id. For that reason, and because such MCTs could be acquired regardless of whether the active user was a Section 702 target, those additional email messages could be wholly unrelated to any target. See id. at 16-17.

As a result, upstream collection as conducted prior to March 17, 2017, was "more likely than other forms of Section 702 collection to contain information of or concerning United States persons with no foreign intelligence value." Id. at 17 (internal quotation marks and citation omitted). Heightened restrictions were accordingly placed on NSA's retention, use, and dissemination of information acquired through upstream collection, including a prohibition on queries that used U.S.-person identifiers as query terms. See id. at 17-18.

Beginning in October 2016, while the 2016 Certifications were pending before the FISC, the government reported that NSA had violated that querying prohibition much more frequently than had been previously disclosed. The FISC discussed this issue at length in its opinion ultimately approving the 2016 Certifications, which were amended by the government to address that non-compliance. See id. at 14-30. Specifically, the government chose to stop acquiring abouts communications under Section 702 and memorialized that change in amended procedures for the 2016 Certifications. For example, the NSA Targeting Procedures were amended to state that "[a]cquisitions conducted under these procedures will be limited to communications *to or from* persons targeted in accordance with these procedures." 2016 NSA Targeting Procedures, as Amended, Mar. 30, 2017, § I at 2 (emphasis added). Consistent with that provision, NSA limited acquisition of MCTs to situations where a Section 702 target was the active user or, put another way, a sender or recipient of the entirety of each MCT acquired. NSA's current minimization

procedures ("2016 NSA Minimization Procedures") were amended to state that Internet transactions acquired after March 17, 2017, "that are not to or from a person targeted in accordance with NSA's section 702 targeting procedures are unauthorized acquisitions and therefore will be destroyed upon recognition." 2016 NSA Minimization Procedures, as Amended Mar. 30, 2017, § 3(b)(4)b at 4. Relying on those changes, the Court approved the amended 2016 Certifications and procedures. See April 26, 2017, Opinion at 23-30, 95.

The 2016 NSA Minimization Procedures (as amended in March 2017 and approved in April 2017) required the sequestration and destruction of all upstream Internet collection during the timeframe affected by the compliance incident. Aside from information retained subject to restricted access for litigation-hold purposes (see, e.g., Gov't Fifth Update Regarding Info. Acquired On or Before Mar. 17, 2017, Pursuant to NSA's Section 702 Upstream Internet Collection, July 18, 2018, at 5-8) NSA has completed the necessary destruction.

The government is not seeking Court approval to resume what it regards as the acquisition of abouts communications under the 2018 Certifications and accompanying procedures. The Court nonetheless identified issues concerning the potential applicability of the abouts limitation to some information within the proposed scope of acquisition under the 2018 Certifications and appointed amici to address the following:

> (a) Do the preconditions on acquiring "abouts communications" imposed by Section 103(b) of the [Reauthorization Act] apply only to forms of acquisition that the government discontinued under Section 702 in March 2017?
>
> (b) If the answer to (a) is "no," do any forms of acquisition to be conducted under the 2018 Certifications involve acquisition of abouts communications, with particular consideration of [REDACTED]

Order Appointing Amici Curiae, Apr. 23, 2018, at 4. The Court appreciates the helpful briefing it received from amici and the government on these issues.

B. Analysis

The Court's examination will begin with [redacted] collection. There is substantial agreement between the government and amici that such collection [redacted] comports with the abouts limitation.

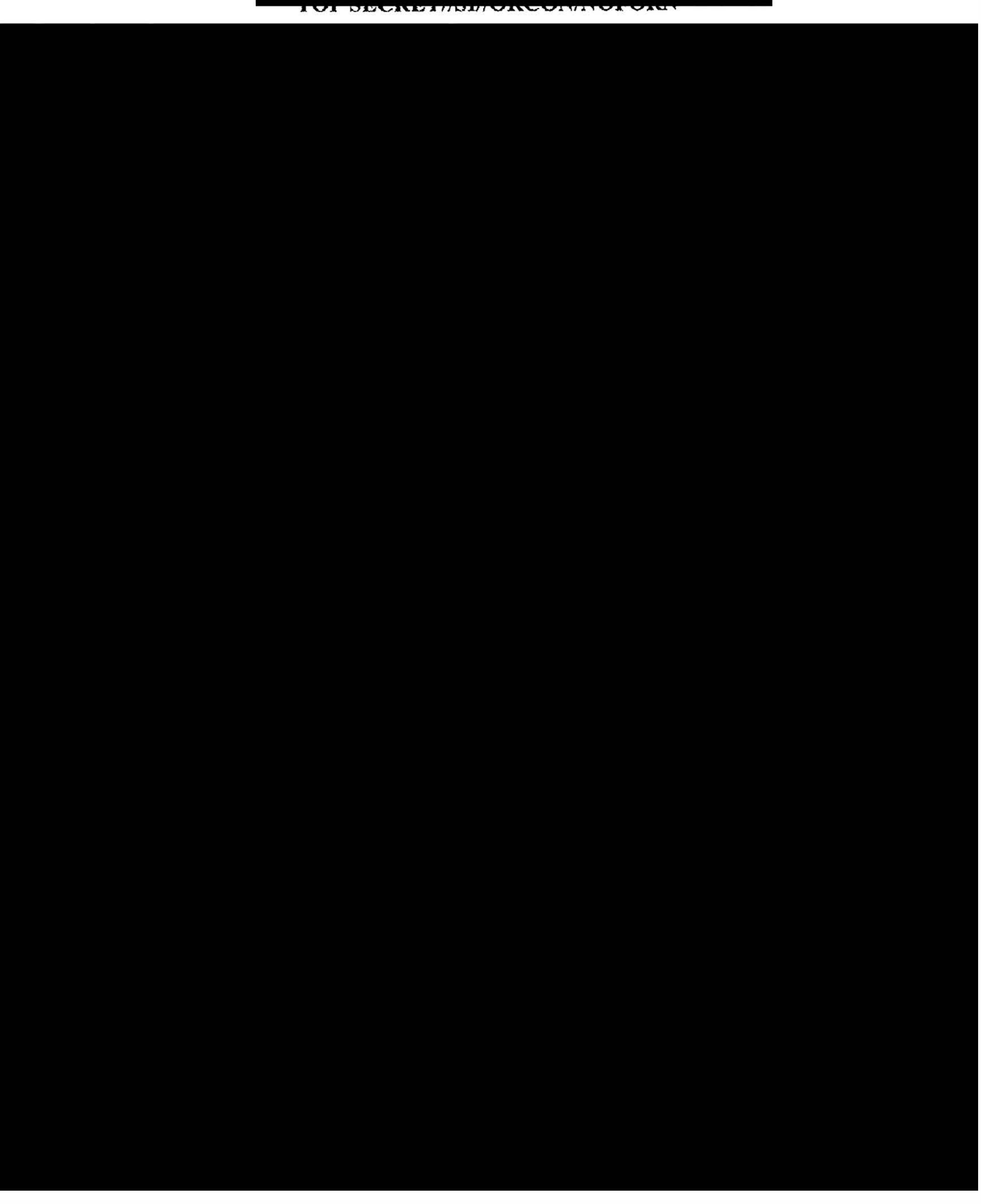
The Court next addresses [redacted] described in element (b)(i) above. It examines that information as acquired upstream (in-transit) and then as acquired downstream [redacted] With respect to upstream collection [redacted] the Court concludes, again based on substantial agreement between amici and the government, that [redacted] collection will be conducted in a manner that complies with the limitation.

The government and amici disagree as to whether the abouts limitation has any application to downstream collection. The Court, for reasons stated below, concludes that it does and addresses the application of the limitation to various types of downstream collection. The Court concludes that [redacted] downstream acquisition [redacted] comports with the abouts limitation. The Court further concludes that [redacted] comports with the abouts limitation because [redacted]

would be

consistent with the limitation.

1.



TOP SECRET//SI//ORCON/NOFORN

Amici agreed with the government, and the Court accepts, that the NSA's is consistent with the abouts limitation. See, e.g., Br. of Amici Curiae ("Amici Brief"), May 31, 2018, at 40 ("[T]he Government offers what to us are persuasive arguments that are limited to acquisitions of communications to or from targets and thus are not subject to the restrictions in section 103 of the Reauthorization Act.").

Amici conclude that the safeguards

and procedures being employed [redacted] "ensure that [redacted] will avoid intentional acquisition of abouts communications." Amici Brief at 41-42; see also § 702(b)(5) (authorized acquisition may not *intentionally* acquire abouts communications).

The Court is equally satisfied on the record before it that [redacted] is reasonably designed to avoid the acquisition of abouts communications (or any other non-target communications) and to require the destruction of any non-target communications unintentionally obtained through such collection.

[redacted] Amici make two sets of recommendations [redacted] First, they recommend that the Court require the government to explain to the Court why [redacted] will only acquire communications to or from a Section 702 target, and to report on the methods it uses to audit information [redacted] to determine what percentage, if any, of communications acquired are neither to nor from a Section 702 target, and the results of that auditing. See Amici Brief at 43. The Court adopts these recommendations, in part, as reflected in the reporting requirements set out at the end of this opinion.

Second, amici recommend that the Court require the government to brief Congress periodically

Id. at 43-44. Amici do not identify any particular reason to think ordinary oversight processes are inadequate for this subject, and the Court sees no need to dictate the terms of executive-branch disclosures to Congress. The Court anticipates that congressional committees of jurisdiction will receive copies of this opinion. See 50 U.S.C. § 1871(c)(1) (requiring Attorney General to submit to specified Congressional committees any decision, order, or opinion of this Court that includes a "significant construction or interpretation of any provision of law"). Congress will then have an informed opportunity to decide for itself what further information it may desire

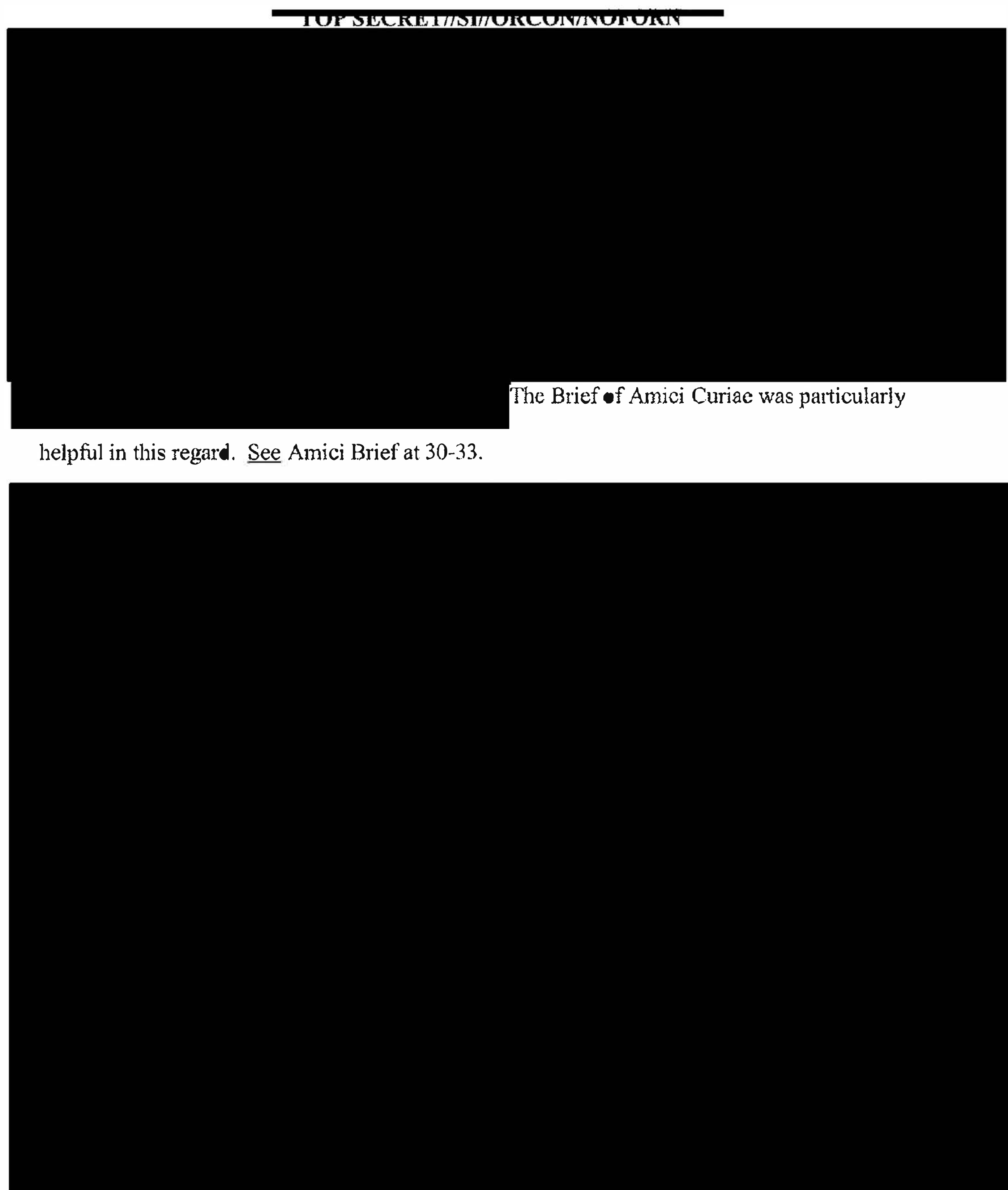
2.

the Court will first briefly review pertinent changes to the targeting procedures and acquired under Section 702. It will then examine the acquisition of such information through both upstream collection and downstream collection,

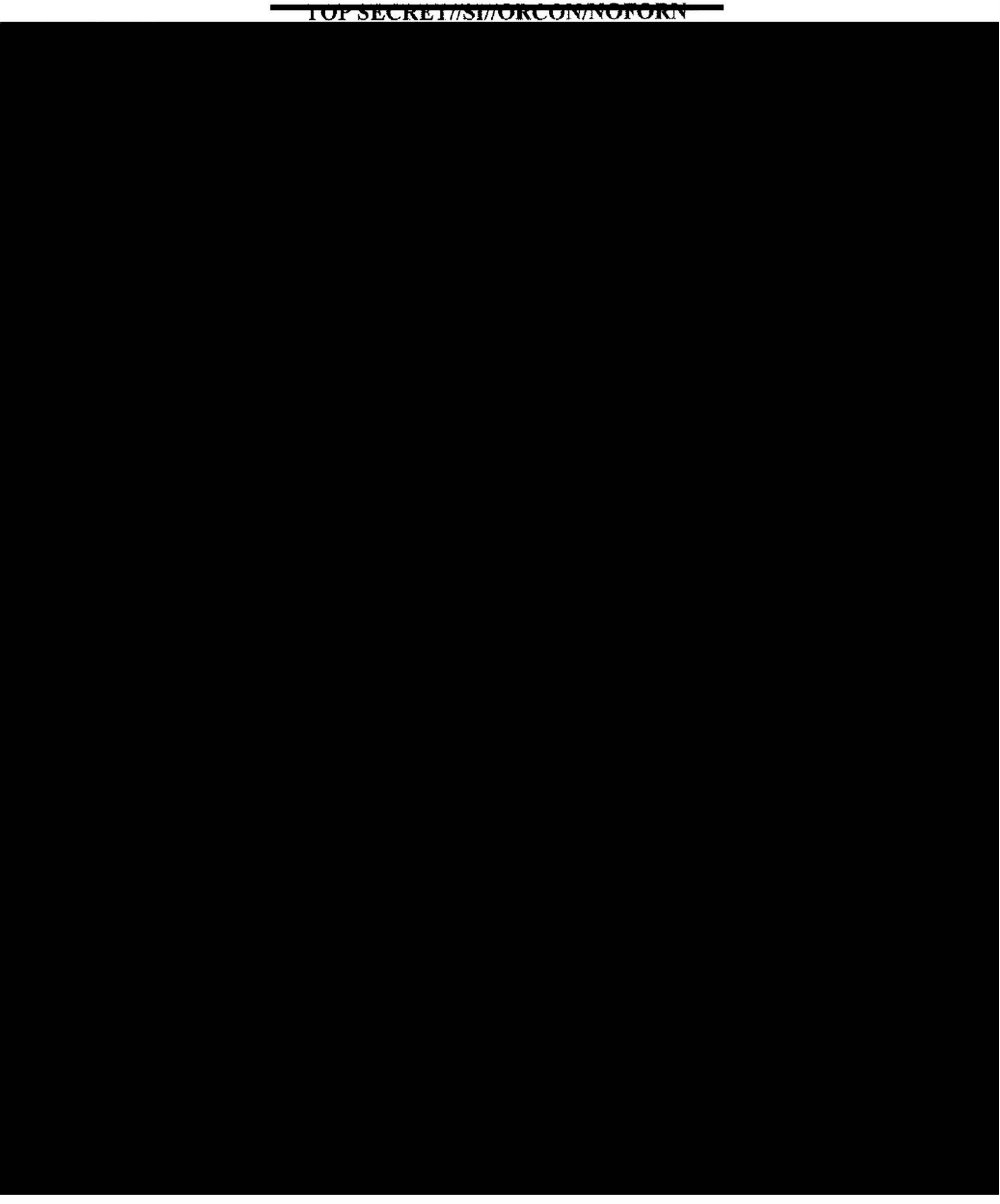
The Court concludes that, while the abouts limitation potentially applies to both upstream and downstream collection, the government may use both of those means to without acquiring abouts communications.

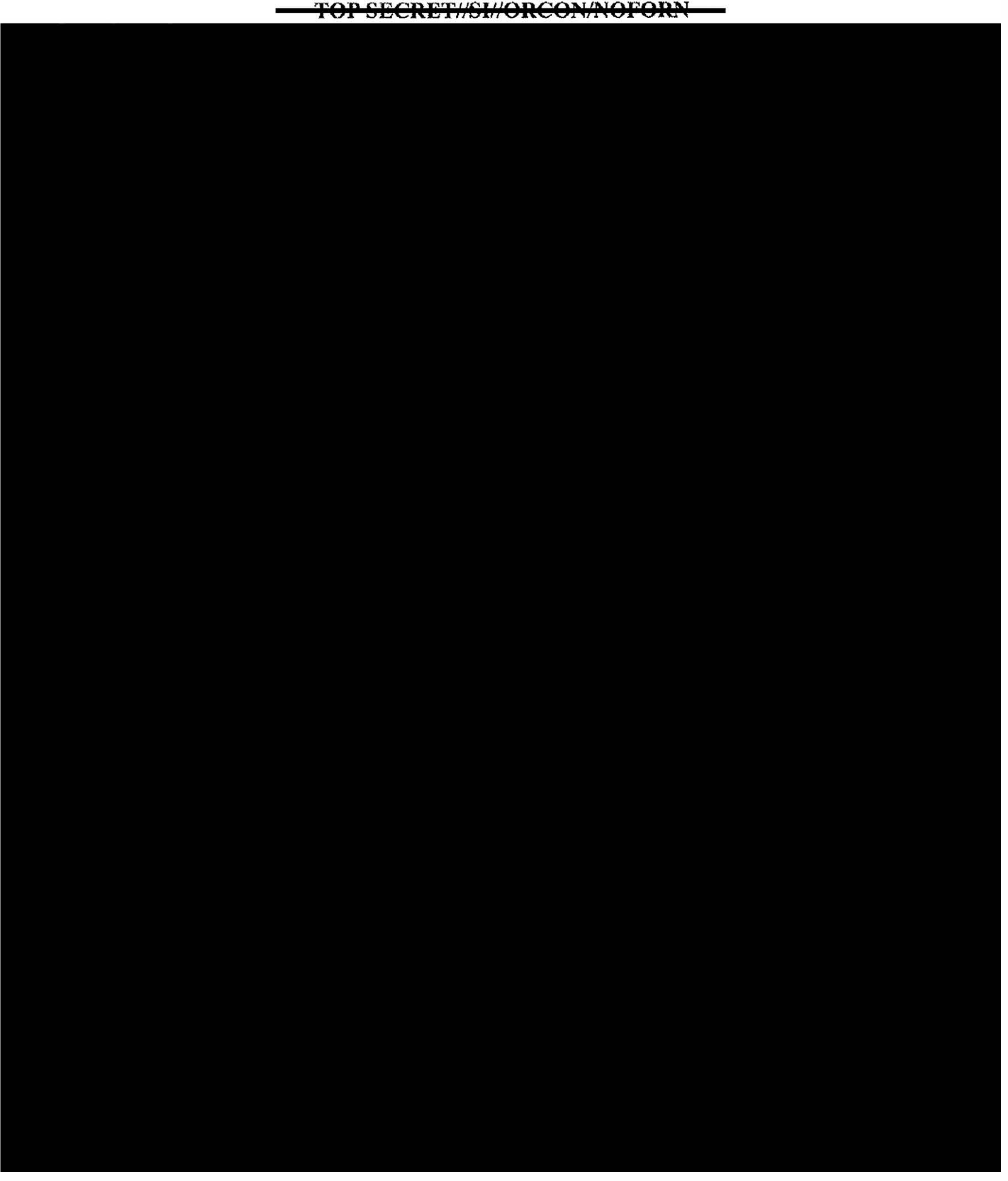
a. Background

The government's submission refers to [redacted] acquired pursuant to Section 702 [redacted] The government made what it regards as clarifying edits to its Section 702 procedures to account for [redacted]



The Brief of Amici Curiae was particularly helpful in this regard. See Amici Brief at 30-33.





The Court must now consider whether acquisition

is consistent with the abouts limitation. It is necessary to analyze that issue separately for each pertinent form of acquisition.

b. <u>Upstream Collection</u>

Amici contend, and the government does not contest, that such cases involve acquisition of "communications." In support of that conclusion, amici point to the broad definition of "electronic communication" in the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510(12) (1986), as "'any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic,

photoelectronic or photooptical system that affects interstate or foreign commerce,' subject to certain exceptions." Amici Brief at 26. This Court has previously understood that definition to

For purposes of the abouts limitation, it is important that all of the above-described communications would be in transit to or from a person who is accessing or using the account in question – *i.e.*, the active user – at the time they could be acquired by upstream collection. So long as the active user is properly targeted under Section 702, the acquired communications would be to or from that target and therefore would fall outside the abouts limitation. And generally speaking, the active user of the account in question will be an authorized Section 702 target if the account is properly tasked for acquisition under Section 702. That is because, with a narrow exception for all users of a facility tasked for acquisition under Section 702 are considered targets. See April 26, 2017, Opinion at 16 n.18; 2016 NSA Minimization Procedures, as Amended Mar. 30, 2017 § 4(c)(3) at 6 n.1 ("any user of a tasked selector is regarded as a person targeted for acquisition"). (If a tasking of a facility is found to be

improper for some other reason – *e.g.*, because one of its users is a U.S. person – further acquisition would be unauthorized, but not due to the abouts limitation.)

its procedures, as described above, now require it to limit acquisition to communications to or from a person targeted under Section 702. For example, NSA would not acquire See Gov't Response at 9. Amici agree that, so limited, acquisition consistent with the abouts limitation. See Reply Br. of Amici Curiae ("Amici Reply"), June 29, 2018, at 4 (acknowledging that account information "acquired as a result of collecting communications to or from a targeted account would "plainly fall outside" the abouts limitation).

Based on the foregoing, the Court holds that upstream collection under Section 702 may acquire [redacted] without implicating the abouts limitation.

Amici make two recommendations with respect to upstream collection generally: (i) the government should be required to report on how it will comply with the abouts limitation when it tasks any new type of selector to upstream collection; and (ii) the Court should ensure that the government is systematically auditing compliance with the abouts limitation in such collection. See Amici Brief at 34-35. The Court agrees with amici's first recommendation, and it is reflected in the reporting requirements included at the end of this opinion. As to the second, the government is directed to include information in any such report describing steps that will be taken to ensure that tasking the new type of selector will acquire only communications to or from a target. To the extent compliance problems arise in such collection, the government will apprise the Court in response to its compliance-reporting obligations, and the Court will have the opportunity to respond to the situation.

c. Downstream Collection [redacted]

The government raises a threshold issue about whether the abouts limitation has any application to downstream collection at all. After answering that general question affirmatively, the Court then assesses whether the downstream acquisition [redacted] falls within the abouts limitation.

(i) Applicability of Abouts Limitation to Downstream Collection

Relying on legislative history, the government posits that Congress intended that limitation to apply only to reinstatement of upstream abouts collection, as previously conducted by NSA and discontinued in March 2017, and not to affect downstream collection. See Gov't Response at 1-2. For example, a report of the Senate Select Committee on Intelligence (SSCI) described Section 103 of the Reauthorization Act as "codif[ying] the Intelligence Community's (IC's) current prohibition on a subset of FISA collection under [Section 702] known as 'Abouts' Upstream collection." S. Rep. No. 115-182 at 1 (2017). A report of the House Permanent Select Committee on Intelligence (HPSCI) stated:

> The Committee understands that the targeting procedures currently used by the NSA to conduct acquisitions pursuant to FISA Section 702 prohibit the acquisition of communications that are not "to" or "from" a FISA Section 702 target. *The new limitation established by Section [103] is intended to codify only current procedures and is not intended to affect acquisitions currently being conducted under FISA Section 702.*

H.R. Rep. No. 115-475, pt. 1, at 20 (2017) (emphasis added). Amici point out that the same general expectation was reflected in statements made by multiple members during floor debate on the Reauthorization Act. See Amici Brief at 22-23 & nn.24-25.

The government would have us take those statements to the bank. Amici largely concede the point of congressional intent, but argue that Congress might not have understood what particular kinds of information are acquired under Section 702. See id. at 28. They note that the legislative history of the Reauthorization Act does not discuss [REDACTED] They assert that silence with respect to a form of acquisition of which Congress

might not have been aware should not be taken to suggest that the abouts limitation does not apply. See id. at 17. The government, in response, points to, among other things, legislative history of the FISA Amendments Act of 2008 and litigation involving challenges to directives brought by providers as evidence that Congress is fully on notice that the government acquires [redacted] under Section 702. See Gov't Response at 2-4, 7.

The Court is not well positioned to assess congressional understanding on this point. In any event, it must be mindful that "[t]he starting point in discerning congressional intent is the existing statutory text." Laime v. U.S. Trustee, 540 U.S. 526, 534 (2004); accord, e.g., Sebelius v. Cloer, 133 S. Ct. 1886, 1893 (2013) ("As in any statutory construction case, '[w]e start, of course, with the statutory text . . . .'") (quoting BP America Production Co. v. Burton, 549 U.S. 84, 91 (2006)). The plain meaning of that text must be given effect if "the disposition required by the text is not absurd." Laime, 540 U.S. at 534. Here, the text of Section 702(b)(5) does not distinguish between upstream and downstream collection or otherwise refer to how acquisition is conducted. The provision merely describes communications that are not to or from a target, but contain a reference to a target, and subjects the intentional acquisition of such communications to the notification and delay requirements of Section 103(b) of the Reauthorization Act. The Court discerns no absurdity in applying the abouts limitation, by its terms, to downstream collection and will advert to legislative history below only insofar as ambiguities are confronted in doing so. See Barnhill v. Johnson, 503 U.S. 393, 401 (1992) ("appeals to statutory history are well taken only to resolve statutory ambiguity") (internal quotation marks omitted); see also Mohamad v. Palestinian Authority, 132 S. Ct. 1702, 1709

(2012) ("[R]eliance on legislative history is unnecessary in light of the statute's unambiguous language.") (internal quotation marks omitted); United States v. Gonzales, 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history.").

(ii) Applying Abouts Limitation to Downstream Acquisition

The above analysis of how upstream acquisition of such communications comports with the abouts limitation applies equally to effected downstream. The Court concludes that the downstream acquisition of such communications does not implicate the abouts limitation.

As discussed above, amici and the government disagree as to whether the abouts limitation applies to this information. The government asserts that, consistent with longstanding practice, acquisitions

under Section 702 can and do include

and that this was understood by Congress in passing the Reauthorization Act. See Gov't Response at 2-7.

Amici do not argue that cannot be collected under Section 702. Rather, they assert that

It is worth noting that clearly constitute "communications" for purposes of the abouts limitation. The Court does not understand the government to assert that

The Court finds in any case ere clearly communications for purposes of the abouts limitation. For their acquisition to be authorized under the 2018 Certifications, such communications must be to or from a target.

At the other end of the spectrum, it is conceivable that

The more difficult question, which is squarely presented here, is whether

The statutory provisions describing the abouts limitation do not speak to this question, so the Court looks next to the broader statutory text and framework of Section 702.

Upon a determination of exigent circumstances under Section 702(c)(2) or the issuance of a FISC order under Section 702(j)(3), "the [AG] and [DNI] may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information." §702(a). FISA does not define "foreign intelligence information" in terms of the nature of theo information itself, but rather the national-security purposes it may serve: for example, the definition includes "information that relates to, and if concerning a United States person is

necessary to, the ability of the United States to protect against . . . international terrorism, . . . the international proliferation of weapons of mass destruction, [and] . . . clandestine intelligence activities" by foreign powers and their agents, as well as "information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to . . . the national defense or the security of the United States." 50 U.S.C. § 1801(e)(1)(B)-(C), (2)(A).

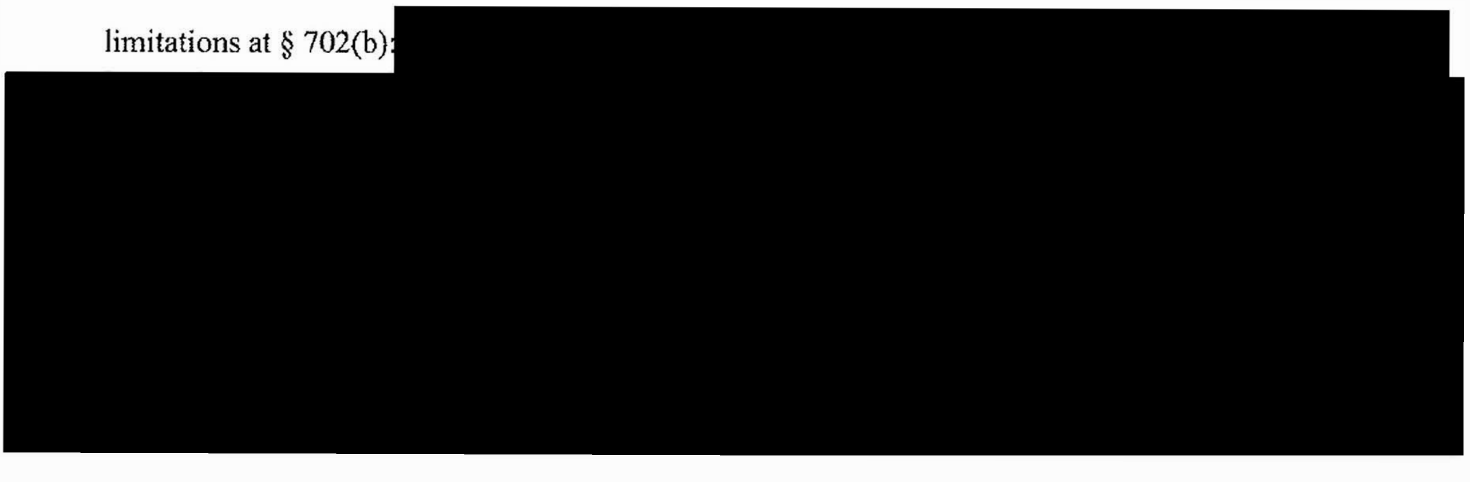
Notwithstanding this broad charge to acquire "foreign intelligence information" in furtherance of national-security objectives, there are limitations on how acquisitions authorized under Section 702(a) may be conducted and against whom they may be directed. The abouts limitation is now one of them. It appears in Section 702(b) along with five other limitations on acquisitions authorized under Section 702(a). One of those other limitations, like the abouts limitation, applies to a certain type of communication and provides that an acquisition "may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." § 702(b)(4). The other limitations do not refer to communications. Three of them prohibit the intentional targeting of persons under certain circumstances – *e.g.*, a U.S. person reasonably believed to be outside the United States or anyone known to be in the United States, § 702(b)(1)-(3) – while the remaining one states that acquisitions shall be conducted in a manner consistent with the Fourth Amendment. See § 702(b)(6).

The statute also provides the means of accomplishing acquisitions authorized under Section 702(a): the AG and DNI "may direct, in writing, an electronic communication service

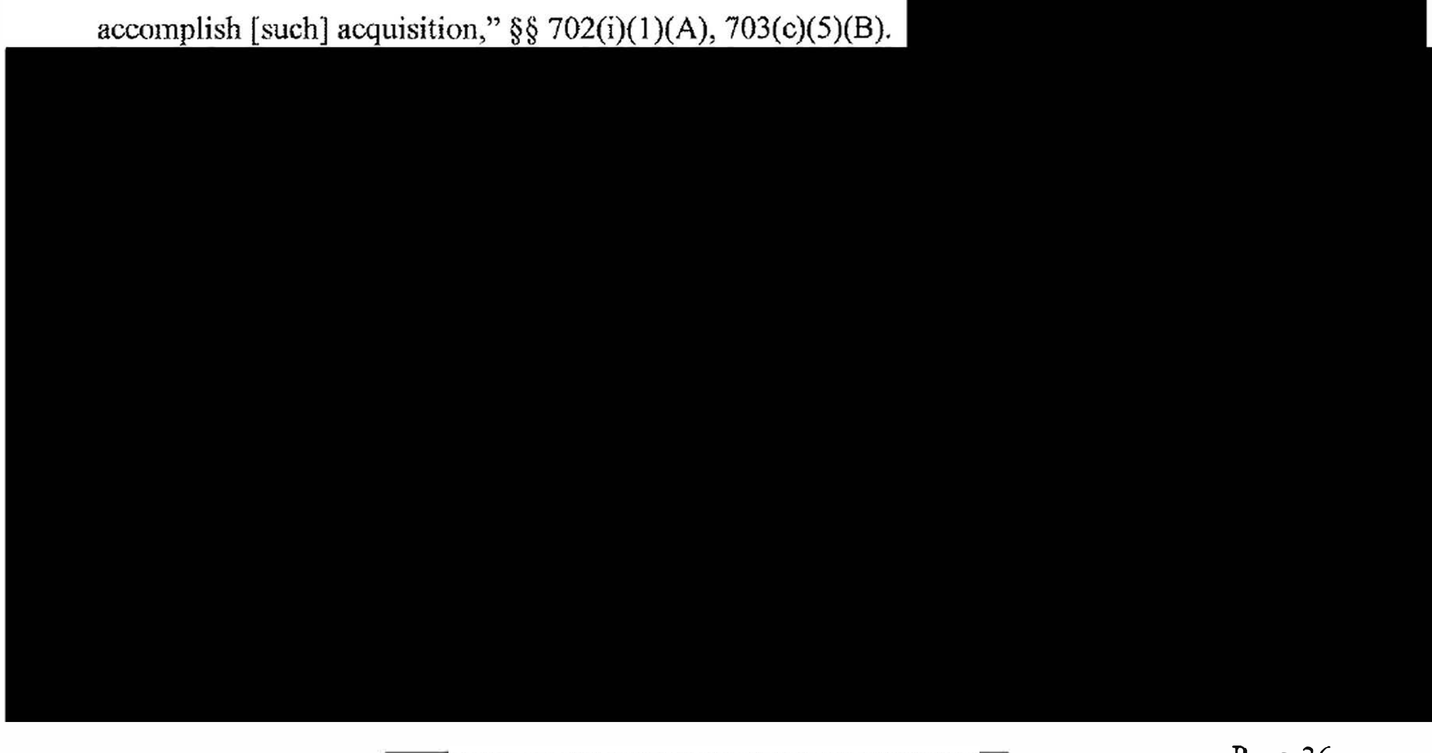
provider to . . . immediately provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition in a manner that will protect the secrecy of the acquisition and produce a minimum of interference with the services" provided to the target of acquisition. See § 702(i)(1)(A). Section 701 of FISA (codified at 50 U.S.C. § 1881) defines "electronic communication service provider" to include among other entities:

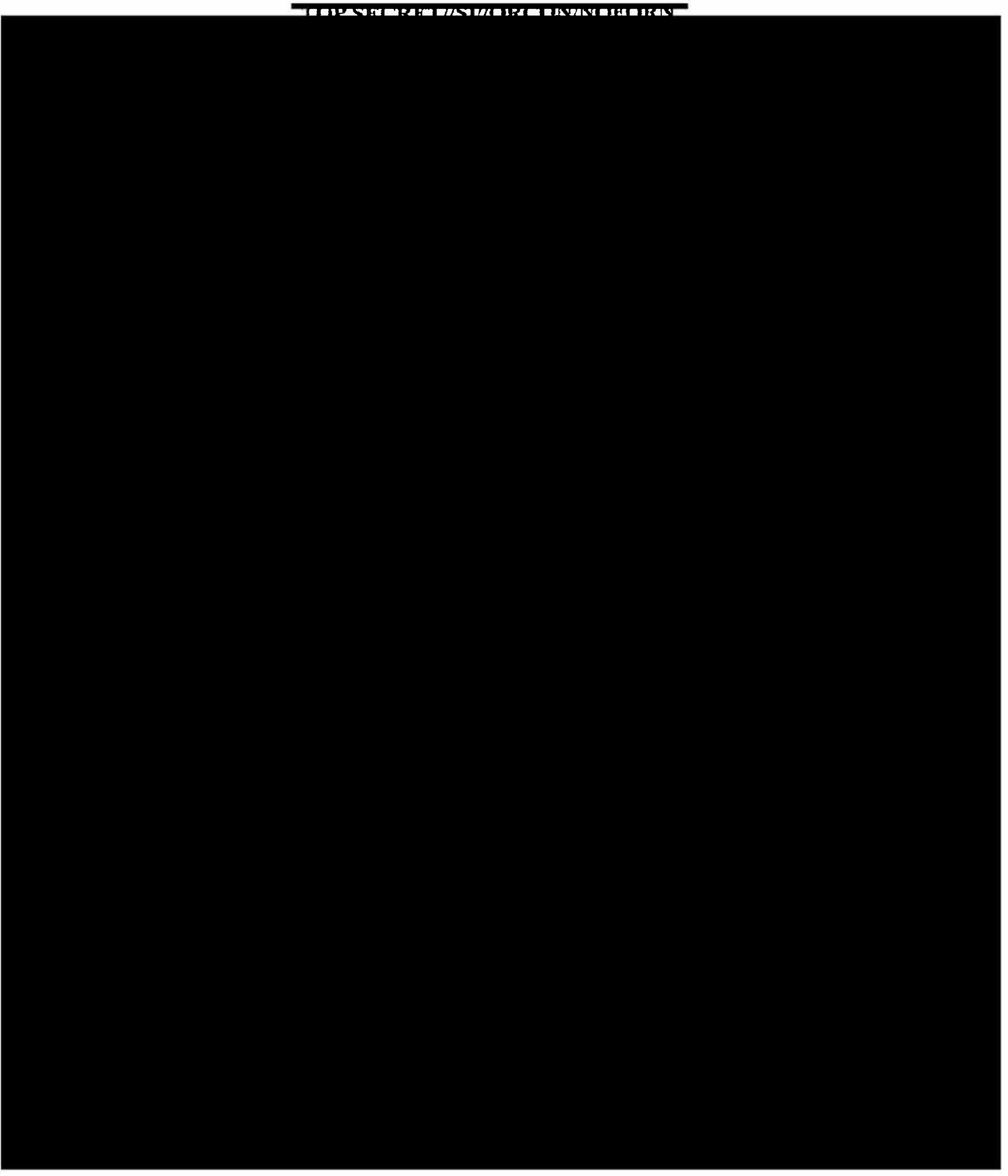
> (1) "a telecommunications carrier," as that term is defined at 47 U.S.C. § 153.e See § 701(b)(4)(A);e
>
> (2)é'a provider of electronic communication service, as that term is defined at [18e U.S.C. § 2510(15)]." § 701(b)(4)(B). Section 2510 defines "electronice communication service" as "any service which provides to users thereof thee ability to send or receive wire or electronic communications." 18 U.S.C.e §e2510(15). It defines "electronic communication," in turn, as "any transfer ofe signs, signals, writing, images, sounds, data, or intelligence of any naturee transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronice or photooptical system that affects interstate or foreign commerce," but excludinge "any wire or oral communication" and certain other types of communications note pertinent here. See § 2510(12); ore
>
> (3) "any other communication service provider who has access to wire ore electronic communications either as such communications are transmitted or ase such communications are stored." § 701(b)(4)(D).e

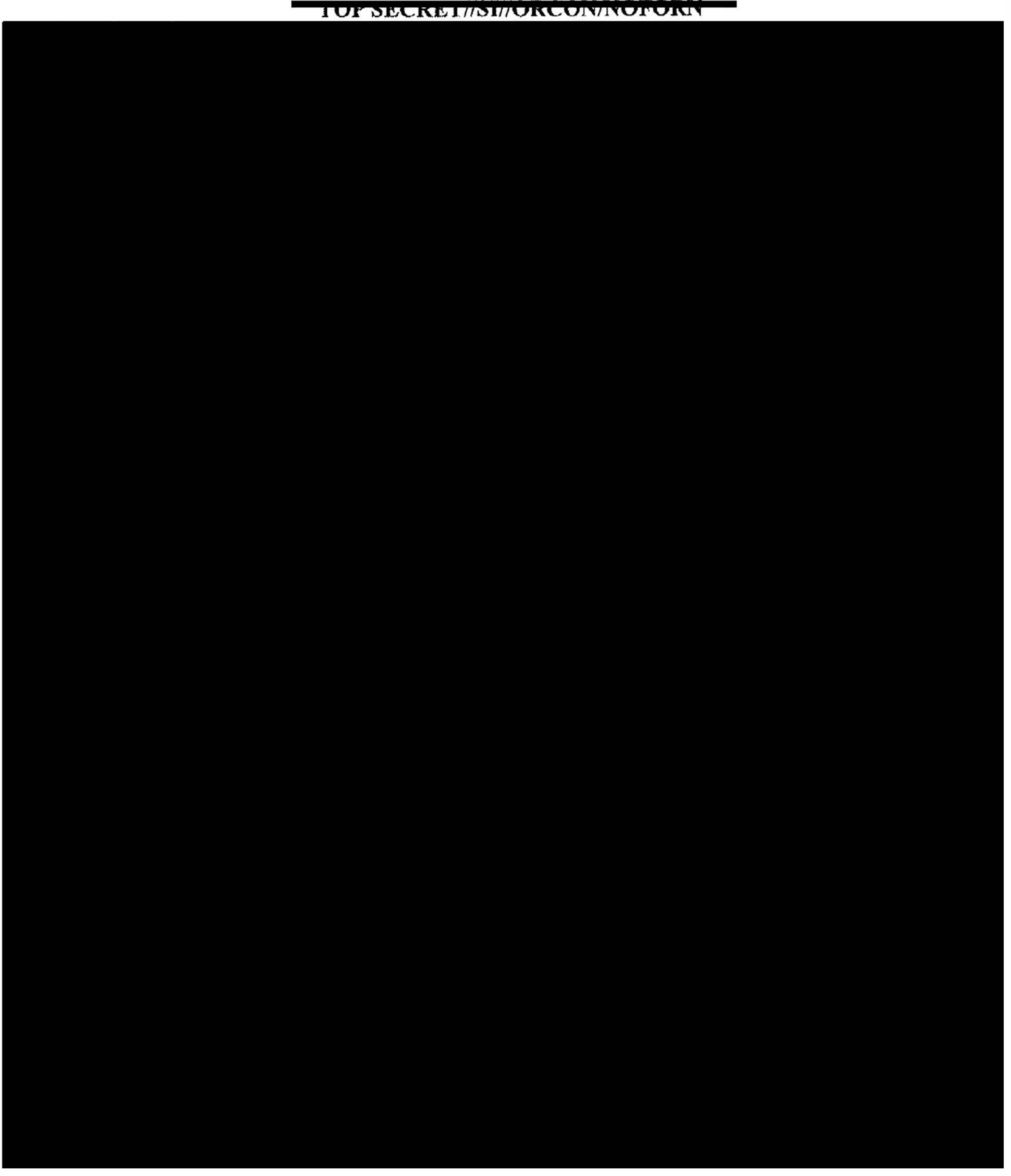
The government clearly may acquire communications under Section 702 subject to the limitations at § 702(b):



As the government suggests, see Gov't Response at 6-7, that conclusion draws further support from language in Section 703 of FISA (codified at 50 U.S.C. § 1881b). Section 703, the original version of Section 702, and the definition of "electronic communication service provider" at Section 701(b)(4) were all enacted by the same provision of the FISA Amendments Act of 2008. See Pub. L. No. 110-261, § 101(a)(2), 122 Stat. 2436, 2437-53 (2008). Although Sections 702 and 703 differ in a number of ways – *e.g.*, whether the targets are U.S. persons or non-U.S. persons – there are also similarities. Both sections involve "the targeting" of persons "reasonably believed to be located outside the United States to acquire foreign intelligence information," §§ 702(a), 703(a)(1), and both provide for directing "an electronic communication service provider" to give the government "all information, facilities, or assistance necessary to accomplish [such] acquisition," §§ 702(i)(1)(A), 703(c)(5)(B).







The government, in contrast, argues that Congress was probably silent on this point because it did not contemplate or intend that the abouts limitation would apply to downstream acquisitions at all. See Gov't Response at 2. Amici concede that there is substantial support in the legislative history of the Reauthorization Act for that proposition. See, e.g., Amici Brief at 28 ("[T]here is considerable legislative history evidence to suggest that Congress understood the statutory restrictions it was putting in place as covering the same universe of communications that the Government had discontinued acquiring in March 2017, and even some evidence that some legislators understood that universe as related to upstream Internet communications."). As noted above, the record evinces congressional concerns about a form of abouts collection that was unique to NSA upstream collection [REDACTED] nd that had been discontinued by NSA at the time the Reauthorization Act was passed. See, e.g., S. Rep. No. 115-182, at 1 (noting that abouts limitation was intended to codify current prohibition of subseto of Section 702 collection known as "'Abouts' Upstream collection"). The accompanying House Report expressly disavowed any intention "to affect acquisitions currently being conducted under FISA Section 702." See H.R. Rep. No. 115-475, pt. 1, at 20. There is little doubt that Congress had NSA's intentional upstream collection of "abouts" communications and MCTs in its crosshairs in enacting the abouts limitation [REDACTED]

The government also points to the legislative history of the FISA Amendments Act of 2008 to the effect that its various provisions were meant to enable [REDACTED]

In addition to their general oversight of Section 702 implementation, the government notes that congressional committees of jurisdiction have been specifically apprised of adversary proceedings brought by providers challenging directives. The government represents that those directives, and the judicial opinions addressing the provider challenges, have been produced to relevant committees and explicitly refer to See id. at 3 nn.1-3.

To be abundantly clear, the Court does not rely on this history to support a conclusion that the abouts limitation does not apply to downstream collection as a general matter; on the contrary, as noted above, it holds the revers

That conclusion does not leave the government at liberty to acquire merely because it contains a reference to an account tasked for acquisition under Section 702. The FBI Targeting Procedures only permit that is "contained in or pertains to" a tasked account. See FBI Targeting Procedures § 1.5 at 3. This accords with longstanding practice under Title III of FISA. See Gov't Response at 4-5, 7 n.6. So understood, the FBI Targeting Procedures do much if not all of the work that could be done by the abouts limitation if it were to appl y

In most cases, derives from *to or from* a target, to the exten See Part III.B.2.a above. For that independent reason,

limited information contrasts with the scope of NSA's pre-March 2017 upstream collection of abouts communications, including MCTs, which could acquire the contents of a large number of U.S.-person communications that were neither to nor from a target. See Part III.A above. In the present case, moreover,

Those circumstances

Section 702 target outside the United States, or even the target herself, which would further reduce the likely intrusion on U.S. persons' privacy. The Court is therefore satisfied

s consistento with both the spirit and the letter of the abouts limitation.

Indeed, even if one assumes that

mici point to no plausible acquisition of

hat crosses the line. Based on a strained reading of language appearing in certain directives, amici hypothesize that the government might

See July 13, 2018, Proposed Tr. at 30; see also Amici Brief at 27 n.33. (Even in that hypothetical, if the Court understands it correctly, the

communication *to the targeted account*, so as not to constitute an "about" communication.) Amici further question whether

so as to qualify as an "abouts" communication.) The Court views these examples as hypothetical and, so far as the Court is aware, counterfactual. In short, based on the current record, amici raise no serious concerns that any is remotely likely to be conducted under the FBI Targeting Procedures would run afoul of the abouts limitation, even if

That being said, the government notes that the above-described See, e.g., March 27, 2018, Memorandum at 34-35. The Court understands that Amici suggest that the government should be required to provide more information with regard to obtained under Section 702. See, e.g., Amici Brief at 37; Amici Reply at 2-3. The Court agrees with amici that a fuller accounting of acquired pursuant to Section 702 will inform future assessments of whether particular acquisitions may be subject to the abouts limitation and are otherwise properly authorized. The government has stated it would "endeavor to accommodate" a request for such an accounting. See July 13, 2018, Proposed Tr. at 23. The Court consequently is ordering the government to provide additional information in this regard, as stated at the end of this opinion.

C. Conclusion

The Court accordingly finds that [redacted] not involve the acquisition of abouts communications. Otherwise, the changes to the government's targeting procedures, see March 27, 2018, Memorandum at 37-43, present no impediment to the Court's finding that the targeting procedures comport with the requirements of § 702(d)(1) and the Fourth Amendment.

IV. THE QUERYING AND MINIMIZATION PROCEDURES

A. Statutory Provisions

Pursuant to § 702(j)(2)(C)-(D), the Court must assess whether the querying procedures and minimization procedures comply with specified statutory requirements. Those statutory requirements are summarized separately below.

1. Requirements for Querying Procedures

The Reauthorization Act required the government to adopt querying procedures and provided for FISC review of them. See Reauthorization Act § 101(a)(1)(B), (b)(1)(F), 132 Stat. 3. The 2018 Certifications are the first ones subject to that requirement. Id. § 101(a)(2). Specifically, the AG, in consultation with the DNI, must "adopt querying procedures consistent with the requirements of the fourth amendment . . . for information collected" pursuant to a Section 702 certification, see § 702(f)(1)(A), and must "ensure" those procedures "include a technical procedure whereby a record is kept of each United States person query term used for a query." § 702(f)(1)(B). "Query" is defined as "the use of one or more terms to retrieve the unminimized contents or noncontents located in electronic and data storage systems of

communications of or concerning United States persons obtained through acquisitions authorized" under a Section 702 certification. See § 702(f)(3)(B). The FISC must determine whether querying procedures satisfy the requirements of § 702(f)(1). See § 702(j)(3)(A)-(B).

The Reauthorization Act further amended Section 702 to require the government in specified circumstances to obtain a FISC order before accessing Section 702-acquired information. See Reauthorization Act § 101(a)(1)(B). Those amendments are codified at Section 702(f)(2). Specifically, that new statutory requirement applies:

> (1)eonly to the FBI, not the CIA, NSA or NCTC. See § 702(f)(2)(A);e
>
> (2)eonly to accessing "the contents of communications . . . that were retrieved pursuant toe a query made using a United States person query term." Id. For purposes of Sectione 702(f), the term "contents," "when used with respect to any wire, oral, or electronice communication, includes any information concerning the substance, purport, or meaninge of that communication." 18 U.S.C. § 2510(8) (incorporated by § 702(f)(3)(A)). The newe requirement does not limit the authority of the FBI to conduct a lawful query, by whiche the contents of communications may be retrieved. See § 702(f)(2)(F)(i);e
>
> (3)eonly with regard to "a query made using a United States person query term that wase not designed to find and extract foreign intelligence information." § 702(f)(2)(A). Thee new requirement does not limit the FBI's authority "to review, without a court order, thee results of any query . . . that was reasonably designed to find and extract foreigne intelligence information, regardless of whether such foreign intelligence informatione could also be considered evidence of a crime." § 702(f)(2)(F)(ii); ande
>
> (4)eonly "in connection with a predicated criminal investigation opened by the [FBI] thate does not relate to the national security of the United States." § 702(f)(2)(A). The newe requirement does not limit the FBI's ability "to access the results of queries conductede when evaluating whether to open an assessment or predicated investigation relating to thee national security of the United States." § 702(f)(2)(F)(iii).e

In addition, the FBI need not obtain a Court order if it "determines there is a reasonable belief" that the contents sought "could assist in mitigating or eliminating a threat to life or serious bodily harm." § 702(f)(2)(E).

When the triggering conditions are satisfied, FBI personnel must apply for and receive a FISC order before accessing contents retrieved by such a query. See § 702(f)(2)(A). The application must be made upon oath or affirmation and approved by the AG based upon a finding that the application satisfies the statutory requirements. See § 702(f)(2)(C). It must include "a statement of the facts and circumstances relied upon . . . to justify the belief . . . that the contents" sought "would provide evidence of: (I) criminal activity; (II) contraband, fruits of a crime, or other items illegally possessed by a third party; or (III) property designed for use, intended for use, or used in committing a crime." § 702(f)(2)(C)(ii). Upon such an application, "the Court shall enter an order approving the accessing of the contents of communications" if it "finds probable cause to believe that such contents would provide any of the evidence" described above. See § 702(f)(2)(D). If such an order is not obtained when required, information concerning a U.S. person obtained through the pertinent query may not be used in a criminal proceeding against that person unless the AG determines the criminal proceeding relates to the national security or one of several specified serious crimes. See 50 U.S.C. § 1881e(a)(2)(A).

2. Requirements for Minimization Procedures

Section 702(e)(1) requires minimization procedures that "meet the definition of minimization procedures under [50 U.S.C. § 1801(h) or 1821(4)]." That definition requires

> (1) specific procedures . . . that are reasonably designed in light of the purpose and technique of the particular surveillance [or physical search], to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

> (2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in [50 U.S.C. § 1801(e)(1)], shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; [and]
>
> (3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes[.]

§ 1801(h). The definition of "minimization procedures" at § 1821(4) is substantively identical to the definition at § 1801(h) (although § 1821(4)(A) refers to "the purposes . . . of the particular physical search"). For simplicity, subsequent citations refer only to § 1801(h).

Each agency having access to "raw," or unminimized, information obtained under Section 702 is governed by its own set of minimization procedures in handling that information. (This opinion uses the terms "raw" and "unminimized" interchangeably. The NCTC Minimization Procedures define "raw" information as "section 702-acquired information that (i) is in the same or substantially the same format as when NSA or FBI acquired it, or (ii) has been processed only as necessary to render it into a form in which it can be evaluated to determine whether it reasonably appears to be foreign intelligence information or to be necessary to understand foreign intelligence information or assess its importance." NCTC Minimization Procedures § A.3.d at 2).

The minimization procedures submitted in the Prior Dockets contained rules for querying raw Section 702 information. See, e.g., 2016 FBI Minimization Procedures § III.D at 11-12. In response to the enactment of § 702(f), the AG and DNI have adopted querying procedures for each agency that appear in a document separate from the relevant set of minimization procedures.

See page 6 above. Each agency's procedures nonetheless make clear that the querying and minimization procedures are to be read and applied together. See, e.g., NSA Querying Procedures § I at 1 ("These querying procedures should be read and applied in conjunction with [the separate] minimization procedures, and nothing in these procedures permits any actions that would otherwise be prohibited by those minimization procedures."); FBI Querying Procedures §d at 1 (same); NSA Minimization Procedures § I at 1 ("These minimization procedures apply ine addition to separate querying procedures. . . . [They] should be read and applied in conjunction with those querying procedures, and nothing in these procedures permits any actions that would otherwise be prohibited by those querying procedures."); FBI Minimization Procedures § I.A at 1 (same). The Court therefore will assess whether each agency's minimization procedures, in conjunction with the corresponding querying procedures, satisfy § 1801(h).

B. Recordkeeping Requirement for U.S.-Person Query Terms

The statute's text plainly requires the relevant agencies, including the FBI, to keep records of U.S.-person query terms used to query Section 702 information. The FBI's practice of keeping records of all query terms in a manner that does not differentiate U.S.-person terms from other terms is inconsistent with that requirement. The Court begins with the statute and a textual analysis and then separately explains why the government's arguments regarding text, legislative history, and policy considerations do not alter the outcome.

1.e Background

As noted above, the querying procedures must "include a technical procedure whereby a record is kept of each United States person query term used for a query." § 702(f)(1)(B). The

querying procedures for each agency define "United States person query term" as "a term that is reasonably likely to identify one or more specific United States persons," which "may be either a single item of information or information that, when combined with other information, is reasonably likely to identify one or more specific United States persons." CIA Querying Procedures § III.A at 1; NCTC Querying Procedures § III.A at 1; FBI Querying Procedures § III.A at 1; NSA Querying Procedures § III.A at 1. Depending on context, "names or unique titles," "government-associated personal or corporate identification numbers," [REDACTED] and "street address, telephone, and [REDACTED] could all constitute United States-person query terms. See CIA Querying Procedures § III.A at 2; NCTC Querying Procedures § III.A at 2; FBI Querying Procedures § III.A at 2; NSA Querying Procedures § III.A at 2.

Each agency's querying procedures require the agency to "generate and maintain an electronic record of each United States person query term used for a query of unminimized information acquired pursuant to section 702." CIA Querying Procedures § IV.B.1 at 3; NCTC Querying Procedures § IV.B.1 at 3; FBI Querying Procedures § IV.B.1 at 4; NSA Querying Procedures § IV.B.1 at 4. If, however, "it is impracticable" for a particular system "to generate an electronic record," or if "an unanticipated circumstance . . . prevents the generation" of an electronic record, the agency "must generate and maintain a written record of each United States person query term that contains the same information required for electronic records." CIA Querying Procedures § IV.B.3 at 4; NCTC Querying Procedures § IV.B.3 at 4; FBI Querying Procedures § IV.B.2 at 4; NSA Querying Procedures § IV.B.2 at 4. Agencies may run queries on

systems that do not generate electronic records only when necessary for "technical, analytical, operational, or security reasons." CIA Querying Procedures § IV.B.3 at 4; NCTC Querying Procedures § IV.B.3 at 4; FBI Querying Procedures § IV.B.2 at 4; NSA Querying Procedures §dIV.B.2 at 4. The agencies must maintain their electronic and written records for at least fivee years from the date of the query (or in the case of NSA for at least five years from the date of approval to use a United States-person query term to query content information). See CIA Querying Procedures § IV.B.4 at 4; NCTC Querying Procedures § IV.B.4 at 4; FBI Querying Procedures § IV.B.3 at 4-5; NSA Querying Procedures § IV.B.3 at 4.

For the CIA, NCTC, and the FBI, the electronic record must include "the query term(s) used," "the date of the query," and "the identifier of the user who conducted the query." CIA Querying Procedures § IV.B.1 at 3; NCTC Querying Procedures § IV.B.1 at 3; FBI Querying Procedures § IV.B.1 at 4. NSA's use of United States-person query terms "to identify and select unminimized section 702-acquired content" information requires prior approval by its Office of General Counsel. See NSA Querying Procedures § IV.A at 3. The duration of such approvals may not exceed one year, but may be extended in increments of one year. Id. The electronic record for NSA's use of a United States-person query term accordingly must include "the query term(s) used or approved"; "the date of the query or approval of the query terms(s)"; "the identifier of the user who conducted the query or sought approval of the query term(s)"; and "in the case of content queries, the approving official in NSA's Office of General Counsel and duration of the approval." § IV.B.1 at 4.

Unlike the other agencies, the FBI "intends to satisfy the record-keeping requirement by keeping a record of *all* queries" of un-minimized Section 702 information. See FBI Querying Procedures § IV.B.3 at 4 n.4 (emphasis added). The resulting FBI records, in other words, will not distinguish between United States-person query terms and other query terms. See March 27, 2018, Memorandum at 27. In fact, the government represents that the FBI already keeps records of all Section 702 query terms without distinguishing between U.S.-person query terms and non-U.S.-person query terms and contends that Section 702(f)(1)(B) requires no change. See id. at 26.

2. Application of Section 702(f)(1)(B) to FBI Recordkeeping Practices

The issue presented by the FBI's current recordkeeping is straightforward: Is the requirement for "a technical procedure whereby a record is kept of each United States person query term used for a query" satisfied by a procedure that results in records that do not indicate whether terms are United States-person query terms? The plain meaning of the statutory text suggests that the answer is "no."

a. Textual Analysis

A "record" serves to memorialize information. See, e.g., Black's Law Dictionary (10th ed. 2014) (defining "record" as, among other things, "1. A documentary account of past events, usu. designed to memorialize those events"); Webster's II New College Dictionary 927 (2001) (defining "record" as "1. a. An account, as of information, set down esp. in writing as a way of preserving knowledge. b. Something on which such an account is made. . . 2. Information or data on a specific subject collected and preserved"). Section 702(f)(1)(B) identifies "each United

States person query term used for a query" as the information that must be memorialized.

The government argues that records that document *all* terms used to query Section 702 information, regardless of whether the term is a United States-person query term or not, satisfies Section 702(f)(1)(B) because that provision "does not include any other term, such as 'separately' or 'segregated,' specifying that United States person query terms must be retained apart from other queries." March 27, 2018, Memorandum at 27; see also Gov't Response at 28-29 (statute "does not include any additional language specifying that U.S. person query terms must be retained separate and apart from other queries"). The government's argument, however, misses the essential aim of the recordkeeping requirement, which is to memorialize when a United States-person query term is used to query Section 702 information. Just as records of all applicants admitted to a university are not records of out-of-state applicants admitted if they do not differentiate out-of-state from in-state, records that do not memorialize whether a query term used to query Section 702 data meets the definition of a United States-person query term do not preserve the information specifically required by Section 702(f)(1)(B).

Section 702(f)(1)(B), moreover, imposes a recordkeeping requirement only for queries that use United States-person query terms, not for all queries. It is not reasonable to expect Congress to have focused on the circumstance of an agency's generating records for *all* its Section 702 query terms and to have explicitly reiterated that, in such a case, the records must document which of those query terms are United States-person query terms. The language Congress chose to enact clearly conveys that the records are meant to memorialize when United

States-person query terms are used, and the FBI is obligated to keep records that do so, regardless of whether it also keeps records for other query terms.

The government also argues that, in light of an exemption from certain aspects of public reporting required by Section 603 of FISA (codified at 50 U.S.C. § 1873), Section 702(f)(1)(B) should not be read as requiring the FBI to alter its current recordkeeping practices. Section 603 requires the DNI to report publicly on, among other things, "the number of search terms concerning a known United States person used to retrieve the unminimized contents of electronic communications or wire communications obtained" under Section 702 and "the number of queries concerning a known United States person of unminimized noncontents information relating to electronic communications or wire communications obtained" under Section 702, §603(b)(2)(B)-(C); however, "information or records held by, or queries conducted by," the FBI are explicitly exempted from that reporting, except insofar they relate to FISC orders issued under Section 702(f)(2). See § 603(d)(2)(A). The government attributes this exemption of FBI queries to congressional recognition that the FBI lacked the capacity to provide the relevant information. See March 27, 2018, Memorandum at 29 (quoting H.R. Rep. No. 114-109, pt. 1, at 26 (2015) ("the FBI is exempted from reporting requirements that the agency has indicated it lacks the capacity to provide")).

The government suggests that because Congress generally exempted FBI queries from the DNI's annual reporting (only requiring reporting for FBI queries that relate to Section 702(f)(2) orders), the recordkeeping requirement of Section 702(f)(1)(B) should be read to make similar allowances for the FBI's limited capabilities. See March 27, 2018, Memorandum at 30

(Congress "presumably would have included such queries in the statistics required to be reported in the annual DNI report" if it had "intended for FBI to distinguish and separately track United States person queries."). The premise of the government's argument is that the only purpose for keeping records that identify United States-person query terms is to satisfy the DNI's reporting obligations. That premise is belied by the government's own briefing, which acknowledges oversight of the agencies' querying practices as another purpose of Section 702(f)(1)(B)'s recordkeeping requirement. See March 27, 2018, Memorandum at 27. Because the recordkeeping requirement serves a purpose separate from the reporting obligations, there is no inconsistency between exempting from public reporting the number of U.S.-person queries conducted by the FBI and requiring the FBI to keep records that identify which Section 702 query terms are United States-person query terms. The explicit exemption set forth in Section 603(d)(2)(A) demonstrates, moreover, that if Congress intended for Section 702(f)(1)(B) to make similar allowances for the FBI, it would have been easy to provide for them expressly.

In support of its position, the government also cites Section 112 of the Reauthorization Act, which requires the Inspector General of DOJ to report to Congress on the FBI's implementation of querying procedures within one year of their approval by the FISC. See March 27, 2018, Memorandum at 31. In addition to requiring the Inspector General to assess several aspects of FBI's implementation of the querying procedures, Section 112 requires the Inspector General to assess any

> *impediments, including operational, technical, or policy impediments, for the [FBI] to count -*
> (A) the total number of queries where the FBI subsequently accessed information acquired under . . . section 702;

> (B) *the total number of such queries that used known United States person identifiers*; and
> (C) the total number of queries for which the [FBI] received an order of the Foreign Intelligence Surveillance Court pursuant to [Section 702(f)(2)].

§ 112(b)(8) (emphasis added). The government argues that Congress recognized "the limitations of FBI systems' technical record-keeping function" when it enacted Section 112, and that this provision makes clear it "did not intend to impose any new obligation on the FBI to differentiate queries based on United States person status." March 27, 2018, Memorandum at 31; see also Gov't Response at 30 ("If, as amici claim, the Reauthorization Act newly mandates that FBI separately track U.S. person query terms, a new statutory directive requiring an IG report discussing 'impediments, including operational, technical or policy impediments' to do that very thing would be pointless."). The government's argument ignores that Section 112(b)(8)(C) of the Reauthorization Act directs the Inspector General to report on impediments to the FBI's counting of U.S.-person queries for which it receives a FISC order under Section 702(f)(2) – information the DNI is explicitly required to report under Section 603 of FISA, as amended by the Reauthorization Act. See FISA § 603(b)(2)(B) & (d)(2)(A), as amended by Reauthorization Act § 102(b)(2)(B)(ii).

Amici contend that Congress did not acquiesce in current FBI practices, but rather imposed new recordkeeping requirements and deputized the Inspector General to scrutinize how the FBI implements them. See Amici Brief at 80-81. Amici have the better of the exchange. Congress can sensibly be understood to have directed the Inspector General to assess impediments toward the FBI's counting queries that employ U.S.-person identifiers as query

terms (Reauthorization Act § 112(b)(8)(B)), while simultaneously requiring the FBI and other agencies to maintain records necessary to perform that count.

b. **Legislative History**

The government further argues that the legislative history of the Reauthorization Act supports its conclusion that the FBI's recordkeeping is consistent with Section 702(f)(1)(B). Even if one assumes *arguendo* that the statute is reasonably susceptible to the government's interpretation, such that ambiguity justifies recourse to legislative history, see Part III.B.2.c(i) above, the government's arguments are unavailing.

The government points to the following statement in a HPSCI report:

> [Section 702(f)(1)(B)] does not impose a requirement that an Intelligence Community element maintain records of *United States person query terms* in any particular manner, so long as appropriate records are retained and thus available for subsequent oversight. This section ensures that the manner in which [an agency] retains records of *United States person query terms* is within the discretion of the Attorney General, in consultation with the Director of National Intelligence and subject to the approval of the FISC.

H.eRep. No. 115-475, pt. 1, at 18 (emphasis added) (quoted in March 27, 2018, Memorandum ate 27). The government suggests that the FBI's recordkeeping practices reflect a permissible exercise of the discretion of the AG and the DNI "to determine *how* an agency would keep records of queries in a manner that allows for meaningful oversight." March 27, 2018, Memorandum at 27 (emphasis added). But the issue presented is *whether* the FBI's records will memorialize the information required by the statute. The passage from the HPSCI report clearly indicates that, however records are kept, they must be "records of United States query terms." It provides no reason to think that (1) HPSCI understood "records of United States person query

terms" to include records that do not indicate whether query terms are United States-person query terms, or (2) HPSCI intended to leave that determination to executive-branch discretion. In addition, the first sentence of the paragraph from which the above quotation is taken describes the required records in language that closely tracks the statutory text: "Section 201 [of the Reauthorization Act] further mandates that all querying procedures include a provision requiring that a record is kept for *each United States person query term used for a query* of FISA Section 702 data." H. Rep. No. 115-475, pt. 1, at 18 (emphasis added). HPSCI's reiteration of the "U.S. person" nature of query terms that must be recorded makes clear that the discretionary manner in which an agency keeps the required records does not include the freedom to decide not to record the fact that a query term is a United States-person query term.

The report's reference to "subsequent oversight," moreover, is consistent with an intent that the records document use of United States-person query terms, as such, particularly in view of HPSCI's acknowledgment "that certain lawmakers and privacy advocates worry about the ability of the Intelligence Community to query lawfully acquired data using query terms belonging to United States persons." Id. at 17. Such oversight would be best served if the records indicate whether a particular query term is a United States-person query term – *i.e.*, a term reasonably likely to identify one or more specific U.S. persons.

The government also relies on a statement in the same report that "the Committee believes that the Intelligence Community should have separate procedures documenting their *current* policies and practices related to the querying of lawfully acquired FISA Section 702 data." Id. at 17-18 (emphasis added) (quoted in March 27, 2018, Memorandum at 28). The

government argues that, because "Congress understood the FBI's existing practice . . . and the limitations of FBI systems' technical record-keeping," the reference to query procedures that document *current* policies and practices demonstrates HPSCI's intent that the FBI need not alter its recordkeeping in response to Section 702(f)(1)(B). See March 27, 2018, Memorandum at 26, 28. But the report's generic reference to current policies and practices of the Intelligence Community appears in a discussion of the general requirement to adopt querying procedures, not the specific recordkeeping requirements of Section 702(f)(1)(B). The report, furthermore, does not mention any technical limitations of FBI systems or describe, let alone endorse, the FBI-specific practice of keeping records that do not identify which query terms are United States-person query terms. Neither the plain language of the statute nor the plain language of the report cited by the government supports its contention that Congress intended no changes to FBI's existing querying practices in response to the Reauthorization Act.

c. Policy Considerations

Finally, the government contends that requiring the FBI to maintain records that differentiate United States-person query terms from other Section 702 query terms will have adverse consequences. See Supplemental FBI Declaration at 8-15. In his declaration, the Director of the FBI does not describe as a source of difficulty any "limitations of FBI systems' technical record-keeping functions." March 27, 2018, Memorandum at 26, 28. Instead, he posits that such a requirement would leave the FBI with two possible means of implementation, neither of which is desirable. Under one option, FBI personnel would conduct research in FBI holdings to inform their assessments of which proposed query terms are United States-person query terms

for purposes of Section 702(f)(1)(B). See Supplemental FBI Declaration at 8-9. The Director anticipates that approach would divert resources from investigative work, delay assessment of threat information, and discourage its personnel from querying unminimized FISA information, to the detriment of public safety. Id. at 9-12. He also describes an alternative approach whereby personnel would be allowed to forgo such research and rely solely on their "personal knowledge" in making those assessments. Id. at 12. The Director expects that practice would "result in inconsistent and unreliable information in FBI systems," id., thereby complicating other aspects of the FBI's work – *e.g.*, implementing its Section 702 targeting procedures. Id. at 13-14. The Director also expresses concern that such an approach would be inconsistent with the FBI's "strong culture that places great emphasis on personnel consistently conveying true and accurate information." Id. at 14.

All of those points raise policy considerations regarding the advisability of requiring the FBI to keep records that identify United States-person query terms it has used to query Section 702 information. The Court, it should be emphasized, makes no determination as to the advisability of a particular policy on this subject. Regardless of how persuasive the FBI's considerations may be, the Court is not free to substitute its understanding of sound policy – or, for that matter, the understanding of the Director of the FBI – for the clear command of the statute. See 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 270 (2009) ("Absent a constitutional barrier, 'it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress.'") (quoting Florida Dept. of Revenue v. Picadilly Cafeterias, Inc., 554 U.S. 33, 52 (2008)); Barnhart v. Sigmon Coal Co, 534 U.S. 438, 462 (2002) ("We will not alter

the [statutory] text in order to satisfy the policy preferences of the Commissioner [of Social Security]."); Herb's Welding, Inc. v. Gray, 470 U.S. 414, 427 (1985) ("[I]f Congress' . . . decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them."). In sum, the Court is it is merely enforcing what Section 702(f)(1)(B) plainly imposes.

d. **Conclusion**

In short, the Court should follow the "'first canon'" of statutory construction: to presume that Congress says in a statute what it means and means in a statute what it says. Barnhart, 534 U.S. at 461-62 (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)). Section 702(f)(1)(B) plainly states that the querying procedures must include "a technical procedure whereby a record is kept of each United States person query term used for a query." That requirement is not satisfied by procedures under which the FBI does not keep such records in a readily identifiable manner. The Court accordingly finds that the FBI Querying Procedures do not comport with Section 702(f)(1)(B).

The Supplemental FBI Declaration touches on another point that the Court will address because it may bear on curing this deficiency. Section III.B of the FBI Querying Procedures provides for certain presumptions regarding U.S.-person status. FBI Querying Procedures § III.B at 3. The Declaration, however, discounts their potential utility in alleviating the problems anticipated by the FBI because "they would generally require FBI personnel to evaluate information in FBI holdings before applying a presumption." Supplemental FBI Declaration at 13 n.7. But the government can revise those procedures to address specifically what, if any,

steps its personnel need to take before relying on presumptions in deciding what terms to treat as United States-person query terms for purposes of Section 702(f)(1)(B). Such revised procedures, of course, would be subject to FISC review pursuant to Section 702(j). In any event, there are clearly some queries for which FBI personnel *know* they are using United States-person query terms, and the obligation to keep adequate records of those terms pursuant to Section 702(f)(1)(B) will be readily apparent.

Finally, the Court does not hold that the FBI must immediately deploy a comprehensive technical means of generating appropriate records. So long as it is taking serious steps toward implementing such technical means, it may rely on "written" records, as described at FBI Querying Procedures § IV.B.2 at 4.

C. FBI Querying Practices and Statutory and Constitutional Requirements

The Court next independently finds that the FBI's repeated non-compliant queries of Section 702 information preclude (1) a determination that its minimization and querying procedures are reasonably designed to minimize the retention, and prohibit the dissemination, of private information concerning U.S. persons, consistent with the government's foreign-intelligence needs, and (2) a finding that such procedures are consistent with the requirements of the Fourth Amendment.

This section begins by describing the role of querying rules within minimization procedures and discussing the reasonableness of the FBI's querying standard, as written. The Court then reviews numerous instances of non-compliance with that standard and three factors that contribute to the Court's concerns about the FBI's querying practices. The Court then

considers steps the government has taken to respond to non-compliant queries, including requiring FBI personnel to obtain attorney approval before examining content information returned by certain categorically justified queries, and concludes they are insufficient to support the required findings. Finally, the Court examines amici's proposal regarding FBI documentation of query justifications, adoption of which the Court believes would remedy the deficiency.

1. Querying and Effective Minimization

The Foreign Intelligence Surveillance Court of Review (FISCR) has instructed:

> By minimizing *retention*, Congress intended that "information acquired, which is not necessary for obtaining[,] producing, or disseminating foreign intelligence information, be destroyed where feasible." Furthermore, "[e]ven with respect to information needed for an approved purpose, *dissemination* should be restricted to those officials with a need for such information."

In Re Sealed Case, 310 F.3d 717, 731 (FISCR 2002) (per curiam) (quoting H.R. Rep. No. 95-1283, pt. 1 at 56 (1978) and adding emphasis; internal citations omitted).

Notwithstanding that preference for destruction of non-pertinent information when feasible, the FISC has approved minimization procedures that permit retention for considerable periods of time, even after information has been reviewed and not found to relate to foreign intelligence or evidence of crime. See, e.g., 2016 FBI Minimization Procedures § III.G.1.b at 23 (such information may be retained for up to 15 years, with enhanced access controls in place after ten years). The FBI minimization procedures now before the Court propose the same approach. See September 18, 2018, FBI Minimization Procedures § III.D.4.c at 17 (same). The reasonableness of such a retention period rests in part on the "complex and time-intensive nature

of piecing together, and making sense of, the myriad pieces of information gathered during a lengthy surveillance." United States v. Mubayyid, 521 F. Supp. 2d 125, 134 (D. Mass. 2007) (finding retention of FISA intercepts for ten years reasonable in circumstances of case). But it also importantly depends on querying rules and other access restrictions that guard against the indiscriminate review and use of U.S.-person information. See [redacted] Op. and Order, May 17, 2016 ("May 17, 2016, Opinion") at 25 ("because raw FISA-acquired information [redacted] may be accessible by large numbers of persons in the FBI for a wide variety of investigative and analytical purposes, it is especially important for U.S. person information on those systems to be subject to appropriate access restrictions," including querying rules); id. at 43 ("substantive standards for querying data" "guard against indiscriminate or improper accessing or use of U.S. person information"); [redacted] Mem. Op. and Order, Nov. 6, 2015 ("November 6, 2015, Opinion") at 24 (relying on "several important restrictions" of CIA and NSA minimization procedures for §a702, "[m]ost notably" that all terms used to query the contents of communications must bea "reasonably likely to return foreign intelligence information") (internal quotation marks omitted).

The government notes that agency personnel do not need to run queries to find and examine Section 702 information concerning United States persons. They can, for example, review Section 702 data on a communication-by-communication basis and thereby encounter U.S.-person information. See Gov't Response at 14-15. Despite the availability of that alternative, the rules for U.S.-person queries – *i.e.*, queries that use a "United States person query term" as defined at FBI Querying Procedures § III.A – are important to proper minimization of

Section 702 information. The government's own submissions emphasize the operational importance of the FBI being able to *query* information and the large number of queries of FISA information conducted by the FBI. See, e.g., Supplemental FBI Declaration at 6 ("[d]atabase queries are a critical tool," and in one system during fiscal year 2017, FBI ran approximately 3.1 million queries "against raw FISA-acquired information . . ., including section 702-acquired information"). Given the importance and prevalence of querying, it is a logical focus for efforts to balance protection of U.S. persons' privacy interests against foreign-intelligence needs. The enactment of Section 702(f) indicates Congress drew a similar conclusion.

Indeed, the rules for U.S.-person queries are especially important for minimization of Section 702 information. Section 702 provides a means for the government to target individuals who are reasonably believed to be non-U.S. persons located outside the United States. See §e702(b)(1), (3) (prohibiting intentional targeting of U.S. persons and any persons located insidee United States); (d)(1)(A) (requiring targeting procedures reasonably designed to ensure only persons reasonably believed to be located outside United States are targeted). The government may acquire the full contents of communications under Section 702 without a finding of probable cause, as is needed for electronic surveillance and physical search under FISA. See 50 U.S.C. §§ 1805(a)(2), 1824(a)(2). When the government queries Section 702 data to identify ande examine information about a particular U.S. person, moreover, it typically has an investigative or analytical interest regarding that person, who necessarily was not a target of the acquisition. As suggested by amici, it can also result in a further intrusion into the privacy of such U.S. persons, who may have enjoyed "the protection of anonymity" until information concerning them was

retrieved by use of an individualized U.S.-person query directed at them. See Amici Reply at 9. And FBI queries intended to retrieve evidence of crime may be conducted in the course of law-enforcement investigations that are unrelated to national-security threats.

The FBI's querying practices under Section 702 are especially important because the FBI conducts many more U.S.-person queries than the other agencies. In 2017, NCTC, the CIA, and NSA collectively used approximately 7500 terms associated with U.S. persons to query content information acquired under Section 702, see Amici Brief at 51 n.47; Gov't Response at 32, while during the same year FBI personnel on a single system ran approximately 3.1 million queries against raw FISA-acquired information, including section 702-acquired information. See Supplemental FBI Declaration at 6. (As explained above in Part IV.B.1, FBI records do not differentiate between U.S.-person query terms and other query terms, but given the FBI's domestic focus it seems likely that a significant percentage of its queries involve U.S.-person query terms.) The large number of U.S.-person queries run by the FBI makes its querying practices significant, despite its receiving only a small percentage of the total information acquired under Section 702. See Gov't Response at 26-27 (it was reported in October 2017 that FBI received information for approximately 4.3% of persons targeted under Section 702).

2. The FBI's Querying Standard

The FBI Querying Procedures require: "Each query of FBI systems containing unminimized content or noncontent information acquired pursuant to section 702 of [FISA] must be *reasonably likely to retrieve foreign intelligence information*, as defined by FISA, *or evidence of a crime*, unless otherwise specifically excepted in these procedures." FBI Querying

Procedures § IV.A.1 at 3 (emphasis added). (Certain of those exceptions are discussed below in Part IV.D.) As written and in the context of restrictions on the use and disclosure of U.S.-person information within the FBI Minimization Procedures, that querying standard is consistent with the statutory definition of minimization procedures; however, as implemented by the FBI, it is not.

The minimization procedures now in effect articulate the standard for FBI queries of Section 702 information differently: "To the extent reasonably feasible," FBI personnel "must design" queries of unminimized Section 702 information "to find and extract foreign intelligence information or evidence of a crime." 2016 FBI Minimization Procedures § III.D at 11. The government represents that "[i]n practice, the applicable standard remains the same . . . ." March 27, 2018, Memorandum at 24. Counsel for the government has characterized the FBI querying standard as a high one, having three elements: (1) a query cannot be "overly broad," but rather must be designed to extract foreign-intelligence information or evidence of crime; (2) it must "have an authorized purpose" and not be run for personal or improper reasons; and (3) there must be "a reasonable basis to expect [it] will return foreign intelligence information or evidence of crime." July 13, 2018, Proposed Tr. at 9; see also March 27, 2018, Memorandum at 25 (there must be "a reasonable basis to believe the query is likely to return foreign intelligence information or, in the case of the FBI only, evidence of a crime.").

The FBI querying standard – as written and as explicated in the manner summarized above – presents no impediment to finding that the FBI Querying Procedures and FBI Minimization Procedures satisfy the definition at § 1801(h). Queries that are reasonably likely to

return foreign-intelligence information, are conducted for that purpose, and avoid overbreadth should contribute to the minimization of private U.S.-person information, consistent with foreign-intelligence needs, as contemplated by § 1801(h)(1). (The same conclusion holds for the querying standards applied by the other agencies, which require queries to "be reasonably likely to retrieve foreign intelligence information," unless specifically excepted. See NCTC Querying Procedures § IV.A at 3; CIA Querying Procedures § IV.A at 3; NSA Querying Procedures § IV.A at 3.) FBI queries that are reasonably likely to return evidence of crime comport with § 1801(h) for reasons explained at pages 30-36 of the November 6, 2015, Opinion and adopted herein.

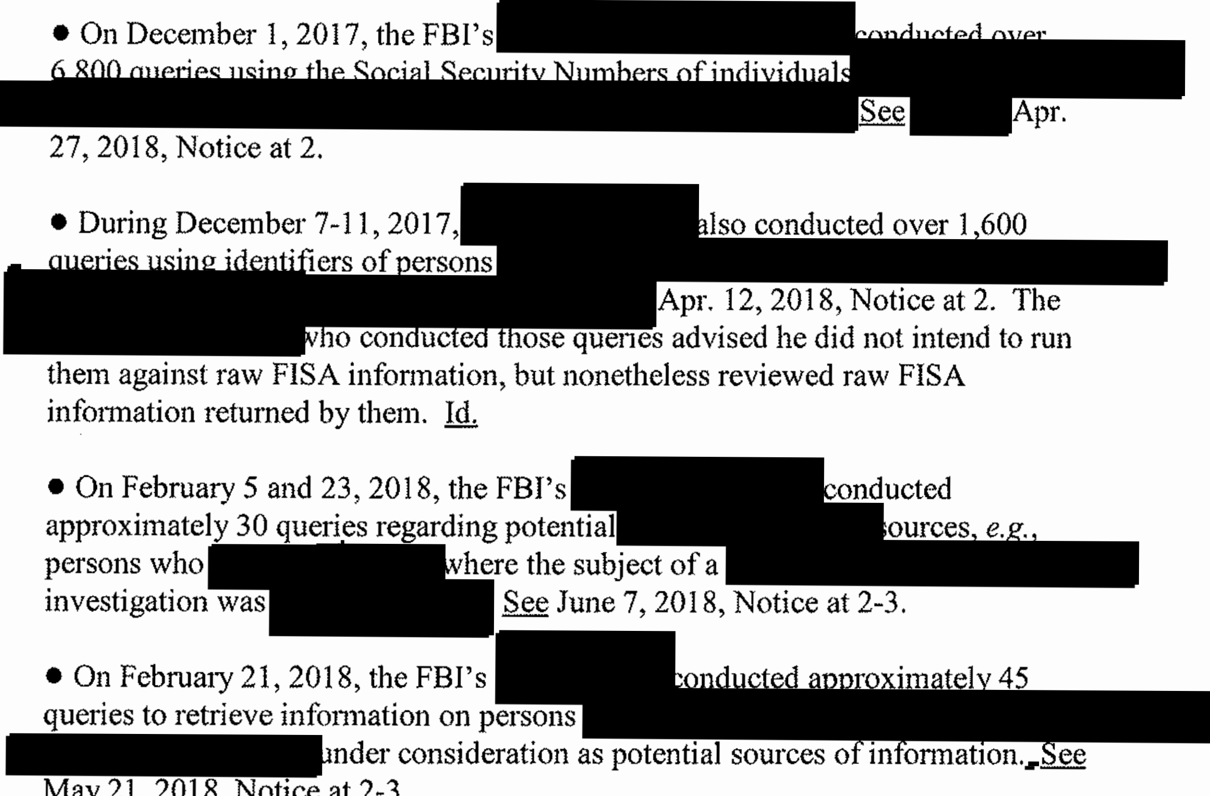
3.e Non-Compliance with the Querying Standard

FISC review of minimization procedures under Section 702 is not confined to the procedures as written; rather, the Court also examines how the procedures have been and will be implemented. See, e.g., Docket No. [redacted] Mem. Op., Apr. 7, 2009, at 22-24; Docket Nos. [redacted] Mem. Op., Aug. 30, 2013, at 6-11. In this case, the government contends that the FBI's implementation of the querying standard has provided appropriate protection for U.S. persons' privacy. See Gov't Response at 32-33. For reasons explained below, the Court does not agree.

Since April 2017, the government has reported a large number of FBI queries that were not reasonably likely to return foreign-intelligence information or evidence of crime. In a number of cases, a single improper decision or assessment resulted in the use of query terms corresponding to a large number of individuals, including U.S. persons. In brief:

- During March 24-27, 2017, the FBI's [redacted] conducted queries using identifiers for over 70,000 communication facilities "associated with"

persons with access to FBI facilities and systems. See Nov. 22, 2017, Notice at 2. proceeded with those queries notwithstanding advice from the FBI Office of General Counsel (OGC) that they should not be conducted without approval by OGC and the National Security Division (NSD) of the Department of Justice. Id. at 3. The FBI did not examine the results of those queries. Id. [Most of the notices of non-compliant queries cited herein have a title including the language: "Notice of Compliance Incident[s] Regarding FBI's Querying of Raw FISA-Acquired Information Including Information Acquired Pursuant to Section 702 of FISA, and Storage of those Query Results." Those notices are cited in the form of "[Filing Date] Notice." If multiple notices were filed on the same date, their citations are distinguished by reference to the relevant FBI office.]



- On December 1, 2017, the FBI's conducted over 6,800 queries using the Social Security Numbers of individuals See Apr. 27, 2018, Notice at 2.

- During December 7-11, 2017, also conducted over 1,600 queries using identifiers of persons Apr. 12, 2018, Notice at 2. The who conducted those queries advised he did not intend to run them against raw FISA information, but nonetheless reviewed raw FISA information returned by them. Id.

- On February 5 and 23, 2018, the FBI's conducted approximately 30 queries regarding potential sources, *e.g.*, persons who where the subject of a investigation was See June 7, 2018, Notice at 2-3.

- On February 21, 2018, the FBI's conducted approximately 45 queries to retrieve information on persons under consideration as potential sources of information. See May 21, 2018, Notice at 2-3.

The government acknowledges that such queries generally resulted from "fundamental misunderstandings by some FBI personnel [about] what the standard 'reasonably likely to return foreign intelligence information' means." July 13, 2018, Proposed Tr. at 49.

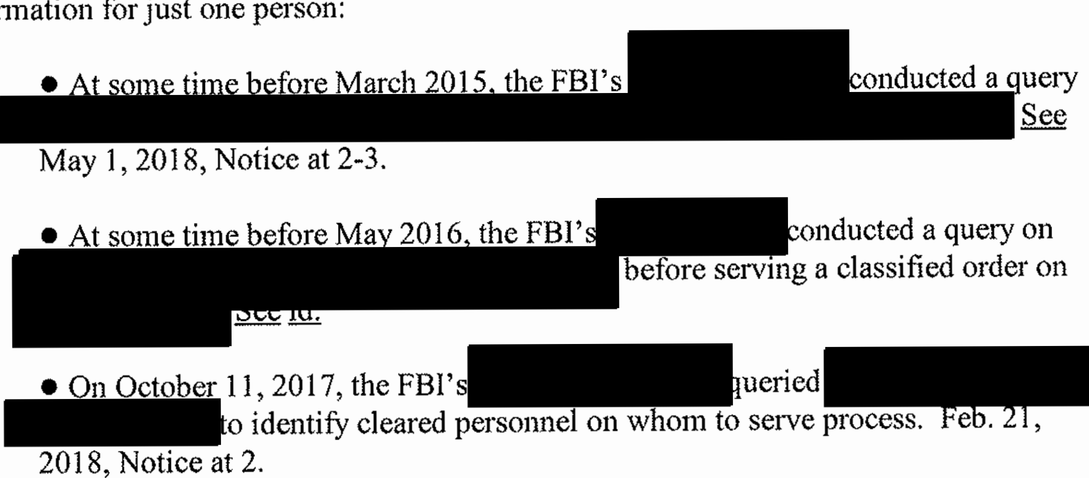
DATE: Oct 8, 2019 - Authorized Public Release

In addition, the government has reported queries of information believed to have been obtained under Title I or V of FISA (not Section 702) that it characterizes as potentially non-compliant. See Prelim. Notice of Possible Compliance Incident Regarding FBI's Querying of Raw FISA-Acquired Information, Apr. 27, 2018 [redacted] Apr. 27, 2018, Notice"). Those queries were governed by a querying standard that requires FBI personnel, "'[t]o the extent reasonably feasible,'" to "'design . . . queries to find and extract foreign intelligence information or evidence of a crime.'" Id. at 1 (quoting Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under FISA, May 17, 2016, § III.D.3.b at 18). The government understands that standard "to mean that the query terms must be reasonably likely to return foreign intelligence information,' [redacted] April 27, 2018, Notice at 2, which is equivalent to the Section 702 standard for foreign-intelligence queries.

Specifically, the government reported that an unspecified FBI unit "conducted what may be considered queries against raw FISA-acquired [metadata] . . . using what appear to be identifiers of approximately 57,000 individuals who work [redacted] [redacted] (The notice also refers to "queries of the 57,000 identifiers," vice "individuals." Id.) The date of the queries is not provided, though it is reported that the FBI informed NSD of them on April 13, 2018. Id. As of April 27, the government was examining whether the queries were reasonably likely to return foreign-intelligence information. Id. At the argument on September 28, 2018, counsel for the government advised that internal discussions of the adequacy of the justification for those queries were continuing and agreed to update the Court within 60 days. Sept. 28, 2018, Proposed Tr. at 30-31.

DATE: Oct 8, 2019 - Authorized Public Release

The government has also disclosed misapplications of the FBI querying standard that are similar to those described above, except that they involved queries of Section 702 data to return information for just one person:



- At some time before March 2015, the FBI's conducted a query See May 1, 2018, Notice at 2-3.

- At some time before May 2016, the FBI's conducted a query on before serving a classified order on See id.

- On October 11, 2017, the FBI's queried to identify cleared personnel on whom to serve process. Feb. 21, 2018, Notice at 2.

- On November 11, 2017, the FBI's conducted a query on a potential recipient of a FISA order. Apr. 24, 2018, Notice at 2.

The government has reported a number of other non-compliant queries of Section 702 information by the FBI, which do not appear to result from comparable misunderstandings of the querying standard. Those include:

- A small number of cases in which FBI personnel apparently conducted queries for improper personal reasons – for example, a contract linguist who ran queries on himself, other FBI employees, and relatives. See Jan. 30, 2018, Notice at 1-2.

- A number of instances in which FBI personnel inadvertently ran queries against Section 702 information. See, e.g., May 8, 2018, Notice Nov. 27, 2017, Notice

- A set of queries (overlapping to some extent with the set of inadvertent queries of Section 702 data) apparently intended to return FBI documents or material. See, e.g., May 17, 2018, Notice at 2 May 4, 2018, Notice at 2

DATE: Oct 8, 2019 - Authorized Public Release

Those instances of non-compliant queries, in the Court's view, do not present the same level of concern as those that evidence misunderstanding of the querying standard. It would be difficult to completely prevent personnel from querying data for personal reasons. As a general rule, inadvertent queries of Section 702 information and queries intended to retrieve finished intelligence reports or other FBI work product do not seem likely to return raw 702 information or, if they happen to do so, to result in personnel examining U.S.-person information contained therein, the above-described queries regarding [redacted] notwithstanding.

4. Factors Contributing to the Court's Concerns

Of serious concern, however, is the large number of queries evidencing a misunderstanding of the querying standard – or indifference toward it: [redacted] queries were conducted against the advice of FBI OGC. That concern is heightened by three factors: (1) limitations on the government's oversight mechanisms; (2) the FBI's policy to encourage routine and maximal querying of Section 702 information; and (3) apparent complications in applying the querying standard. The Court discusses each.

a. Limitations on Oversight

As noted above, in 2017 the FBI conducted over three million queries of FISA-acquired information on just one system, [redacted] See Supplemental FBI Declaration at 6. In contrast, during 2017 NSD conducted oversight of approximately 63,000 queries in [redacted] and 274,000 queries in an FBI system [redacted] See Gov't Response at 36.

Personnel from the Office of Intelligence (OI) within the Department of Justice's National Security Divsion (NSD) visit about half of the FBI's field offices for oversight purposes in a given year. Id. at 35 & n.42. Moreover, OI understandably devotes more resources to offices that use FISA authorities more frequently, so those offices, [REDACTED] are visited annually, id. at 35 n.42, which necessitates that some other offices go for periods of two years or more between oversight visits. The intervals of time between oversight visits at a given location may contribute to lengthy delays in detecting querying violations and reporting them to the FISC. See, e.g., Jan. 18, 2018, Notice [REDACTED] had been conducting improper queries in a training context since 2011, but the practice was not discovered until 2017).

When OI does visit a field office, it reviews queries conducted during a specific interval (e.g., 90 days) by a subset of the persons with access to FISA information. See Gov't Response at 35. OI receives from the FBI a list of queries conducted by the designated persons during the relevant time, which includes the "query terms, the user who conducted the query, the date and time of the query, the system queried," and in certain cases "information indicating which datasets [were] excluded from the query if the user chose to limit or opt out of certain datasets." Id. As discussed above, FBI does not keep records of which terms are U.S.-person query terms. Neither do FBI personnel currently memorialize their reasons for believing query terms are reasonably likely to return foreign-intelligence information or evidence of crime. In contrast, the CIA, NSA, and NCTC are all required to provide written statements of why queries using U.S.-person query terms are reasonably likely to return foreign-intelligence information. See NCTC

Querying Procedures § IV.B.2 at 4; CIA Querying Procedures § IV.B.2 at 4; NSA Querying Procedures § IV.B.1.d at 4. The FBI does not even record whether a query is intended to return foreign-intelligence information or evidence of crime. See July 13, 2018, Proposed Tr. at 14 (DOJ personnel "try to figure out" from FBI query records which queries were run for evidence-of-crime purposes). DOJ personnel ask the relevant FBI personnel to recall and articulate the bases for selected queries. Sometimes the FBI personnel report they cannot remember. See July 9, 2018, Notice.

The government contends that "oversight of FBI's queries is substantial and effective," Gov't Response at 35, but OI personnel review only a small portion of the queries conducted and the documentation available to them lacks basic information that would assist in identifying problematic queries. In particular, it is apparent that contemporaneous documentation of the bases for queries would facilitate oversight efforts. By way of comparison, the Court understands that the oversight conducted by NSD and the Office of the Director of National Intelligence (ODNI) of NSA's queries makes use of such documentation. See April 26, 2017, Opinion at 28 n.32 ("DOJ and ODNI review all U.S.-person identifiers approved for [NSA's] use in querying contents of Section 702-acquired communications as well as the written documentation of the foreign intelligence justifications for each such query during bi-monthly compliance reviews."). Given the limitations on the oversight of FBI querying practices, it appears entirely possible that further querying violations involving large numbers of U.S.-person query terms have escaped the attention of overseers and have not been reported to the Court.

b. **FBI Policy on Queries**

In addition to articulating the above-described querying standard, the 2016 FBI Minimization Procedures require FBI personnel, to the extent reasonably feasible, to design queries of Section 702 data to find and extract foreign-intelligence information or evidence of crime. See 2016 FBI Minimization Procedures § III.D at 11. They also state it is "a routine and encouraged practice for the FBI to query" 702 information in furtherance of authorized intelligence and law-enforcement activities, including when "making an initial decision to open an assessment." Id. at 11 n.3. The FISC previously approved FBI minimization procedures containing that statement prior to the disclosure of the above-described querying violations. See November 6, 2015, Opinion at 29 n.27. The FBI Querying Procedures do not contain the quoted language, but the FBI's policy has not changed. See Supplemental FBI Declaration at 6 (FBI uses queries, among other reasons, "to quickly determine whether a new tip or lead . . . warrants opening an investigation, is related to an existing investigation," or requires no further action); id. at 7 ("FBI encourages its personnel to make maximal use of queries – provided they are compliant with the FBI's minimization procedures and other applicable law – in order to perform their work.").

On the one hand, the FBI is obligated to query Section 702 and other FISA information only in circumstances satisfying a querying standard that does not apply to FBI information generally. On the other hand, it has set up its systems to facilitate running the same query simultaneously across FISA and non-FISA datasets, id. at 5, and encourages personnel to make maximal use of such queries, even at the earliest investigative stages. Those policy decisions

may well help FBI personnel work efficiently and "'connect dots'" to protect national security, id. at 7, but they also create an environment in which unduly lax applications of the Section 702 querying standard are more likely to occur.

c. Complications in Applying the Querying Standard

Delays in reporting some of the querying violations discussed in Part IV.C.3 above suggest that FBI and NSD personnel charged with applying the querying standard may lack a common understanding of it. On May 1, 2018, the government first reported to the FISC non-compliant queries at t[redacted] that had been examined during oversight reviews that took place in March 2015 and May 2016, respectively. See May 1, 2018, Notice at 2 n.2. The government did not identify them as non-compliant during those reviews; it did so only upon re-examination in the wake of incidents [redacted], and "the government's interpretation of the query provision as reflected in recent compliance notices." May 1, 2018, Notice at 2-3.

Another instance of delayed notice concerned the non-compliant queries conducted by the [redacted] during March 24-27, 2017. FBI OGC and NSD were aware of the proposal to conduct those queries before they were run, and FBI OGC learned they had been conducted on March 29, 2017. See Nov. 22, 2017, Notice at 2-3. The government did not notify the FISC, however, until November 22, 2017. The government attributed that delay of nearly eight months "to the time needed by FBI to gather facts regarding the matter and for the government to determine whether the queries were consistent with the FBI minimization procedures." Id. at 3 n.6. That sequence of events is similar to the government's ongoing assessment of the queriese

that used approximately 57,000 identifiers for persons [REDACTED] In April 2018, the government was examining whether that standard was met by those queries, see [REDACTED] Apr. 27, 2018, Notice at 2, and counsel for the government represented at the September 18, 2018, oral argument that discussions of the FBI's justifications for those queries were still ongoing. Sept. 28, 2018, Proposed Tr. at 30.

It is reasonable to suspect from the facts available to the Court, including the broad and apparently suspicionless nature of those queries, that the government's prolonged deliberations in those matters resulted in part from the lack of a common understanding within FBI and NSD of what it means for a query to be reasonably likely to return foreign-intelligence information or evidence of crime. The government addressed another set of potentially non-compliant queries at the September 28, 2018, oral argument. Id. at 28-30. [REDACTED] The government generally referenced those queries in a notice that was primarily directed at other compliance problems and filed on February 15, 2018. See Feb. 15, 2018, Notice at 2 n.1. As of that time, the government was "continuing to review whether [certain] queries of raw-FISA datasets [REDACTED] . . . complied with the query standard." Id. Counsel for the government reported at the September 28, 2018, oral argument that such examination had not been completed and agreed to update the Court within 60 days. Sept. 28, 2018, Proposed Tr. at 29-30.

Finally, it appears that the government may interpret the FBI querying standard more leniently than its language fairly conveys. The FBI Querying Procedures state: "*Each query* . . . must be reasonably likely to retrieve foreign intelligence information . . . or evidence of a crime. . . ," FBI Querying Procedures § IV.A.1 at 3 (emphasis added), which seems to indicate that each individual query must have an adequate justification. The government nonetheless expresses the view that an aggregation of individual queries can satisfy the querying standard, even if each individual query in isolation would not be reasonably likely to return foreign-intelligence information or evidence of crime. Specifically, the government describes a situation in which "threat information" indicates "that there is an employee at a cleared defense contractor who has access to certain technology" and plans to sell it [redacted] See September 18, 2018, Memorandum at 22 n.20. If 100 employees of the contractor are known to have access to that technology, the "government assesses that the FBI could run a categorical query of the identifiers associated with these 100 employees as there is a reasonable basis to assess that the queries would return foreign intelligence information of evidence of a crime." Id.

By no stretch of language could one say that an individual query for a randomly selected one of those 100 employees would be reasonably likely to return foreign-intelligence information or evidence of crime. The government's assessment that it nonetheless would be permissible to query using the identifiers of all 100 employees must rest on the idea that, if those identifiers are aggregated and run together in ostensibly a single query, there would be a reasonable likelihood that foreign-intelligence information or evidence of crime would be returned. Perhaps in the abstract it would be reasonable for the FBI to run such an aggregated query, but it is by no means

obvious how such justification-by-aggregation would be consistent with the requirement that "[e]ach query" must be reasonably likely to return foreign-intelligence information or evidence of crime. See FBI Querying Procedures § IV.A.1 at 3.

5. The Government's Response to the Non-Compliant Queries

The government has taken steps in response to the FBI's non-compliance with the querying standard. It reports that it now emphasizes issues related to categorical query justifications in training, see Gov't Response at 38, and has promulgated within the FBI detailed guidance on querying requirements, which also focused on categorical justifications for queries. See id.; July 13, 2018, Proposed Tr. at 50. That guidance recommended consultation with FBI lawyers regarding queries based on a "categorical reason," rather than an "individual reason for each identifier." July 13, 2018, Proposed Tr. at 50.

As part of the amended procedures submitted on September 18, 2018, the government has added to the FBI Querying Procedures a requirement in certain circumstances to consult with an FBI attorney regarding queries supported by categorical justifications. That provision, which apparently formalizes a version of the above-noted recommendation, states:

> Prior to reviewing the unminimzed content of section 702-acquired information retrieved *using a categorical batch query (as opposed to queries conducted on the basis of individualized assessments)*, FBI personnel will obtain approval from an attorney from either their Chief Division Counsel's Office or the National Security and Cyber Law Branch. This requirement does not apply if the persons whose identifiers are queried are (1) targets of lawful collection, (2) subjects of predicated investigations, or (3) in contact with targets of lawful collection or subjects of predicated investigation. Approvals to review the content returned by such queries will include a justification for the queries, the approving official, and the duration of such approval.

FBI Querying Procedures § IV.A.3 at 4 (emphasis added).

The government apparently promulgated the enhanced guidance in June 2018. See Gov't Response at 38 (guidance "expected to be provided to appropriate FBI personnel in June 2018"). There accordingly has been insufficient time to assess its effect. As to Section IV.A.3, the requirement to consult with an attorney applies in narrow circumstances: after a categorical batch query has been conducted and prior to FBI personnel's reviewing content information returned by the query, unless one of three exceptions applies. The government explains that the provision is "tailored to focus on a particular type of query that potentially presents greater compliance risk and privacy impact" – those "based on a categorical, rather than individualized, justification." See September 18, 2018, Memorandum at 21. At the oral argument on September 18, 2018, counsel for the government stated that querying to retrieve information regarding as few as two persons, based on a common justification, would be regarded as a categorical batch query for purposes of § IV.A.3. Sept. 28, 2018, Proposed Tr. at 24, 26.

6. Analysis

The Court finds that the FBI's Section 702 minimization procedures, as they have been implemented, are not consistent with the requirements of Section 1801(h)(1) and (h)(3), or the Fourth Amendment.

a. Statutory Deficiency

As noted above, minimization procedures must be

> reasonably designed in light of the purpose and technique of the particular surveillance, to minimize . . . the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information.

§ 1801(h)(1). In this case, the "purpose and technique" of Section 702 collection involvese targeting non-U.S. persons reasonably believed to be located outside the United States to obtain foreign-intelligence information with the assistance of communications service providers. See § 702(a), (b)(3), (i)(1). Those acquisitions include the contents of communications to or from non-target U.S. persons. Queries that are in fact reasonably likely to return foreign-intelligence information are responsive the government's need to obtain and produce foreign-intelligence information, and ultimately to disseminate such information when warranted. For that reason, queries that comply with the querying standard comport with § 1801(h), even insofar as they result in the examination of the contents of private communications to or from U.S. persons. On the other hand, queries that lack a sufficient basis are not reasonably related to foreign-intelligence needs and any resulting intrusion on U.S. persons' privacy lacks any justification recognized by § 1801(h)(1). Because the FBI procedures, as implemented, have involved a large number of unjustified queries conducted to retrieve information about U.S. persons, they are not reasonably designed, in light of the purpose and technique of Section 702 acquisitions, to minimize the retention and prohibit the dissemination of private U.S. person information.

With regard to evidence-of-crime queries, the FISC has previously found that by providing for minimization procedures that permit the retention and dissemination of evidence of crime for law-enforcement purposes, Section 1801(h)(3) fairly contemplates queries reasonably designed to return evidence of crime. See November 6, 2015, Opinion at 32-33. The issue in this case, however, is the prevalence of FBI queries that were unlikely to return evidence of crime (even though they may have been subjectively intended to do so). The government has not

argued that Section 1801(h)(3) permits such queries, and the Court declines to adopt such a conclusion.

The Court also has considered carefully whether the recently improved guidance and training referenced by the government adequately addresses the problems with the FBI's querying practices such that the Court should find that the FBI's querying and minimization procedures, as amended, comport with § 1801(h). It has concluded that, while the government has taken constructive steps, they do not adequately justify such a finding.

First, as discussed above in Part IV.C.2, many, though not all, recent misapplications of the querying standard by the FBI involved categorical batch queries. More significantly, the Court is doubtful that in practice FBI personnel will consistently channel categorical batch queries into § IV.A.3's approval process before they examine content information retrieved by those queries. As stated in § IV.A.3, a query conducted on the basis of an individualized assessment is not a categorical batch query. Implementation of § IV.A.3 will depend on the ability of the FBI's front-line personnel to determine which queries are supported by individualized assessments, and therefore not subject to the approval requirement of § IV.A.3, and which rely on categorical justifications and are subject to the approval requirement. Given the documented misunderstandings of the querying standard among FBI personnel, the government's reliance on them to make those distinctions seems misplaced. Indeed, the personnel most in need of guidance from an attorney may not receive it because they have difficulty in determining when they are supposed to consult with one.

Finally, the broad exceptions to Section IV.A.3's approval requirement are also of concern. Most notably, one of those exceptions applies if the persons whose identifiers are queried are "in contact with targets of lawful collection or subjects of predicated investigations." § IV.A.3. There are two levels of FBI predicated investigations: full and preliminary. See Att'ya General Guidelines for Domestic FBI Operations § II.B.4 at 21, Sept. 29, 2008. The FBI may initiate a full investigation "if there is an articulable factual basis for the investigation that reasonably indicates" that, for example:

> a.aAn activity constituting a federal crime or a threat to the national security *has or may have occurred, is or may be occurring, or will or may occur* and thea investigation may obtain information relating to the activity or the involvement ora role of an individual, group, or organization in such activity[; or]a
>
> b.aAn individual, group, organization, entity, information, property, or activity *is or may be* a target of attack, victimization, acquisition, infiltration, or recruitmenta in connection with criminal activity in violation of federal law or a threat to thea national security and the investigation may obtain information that would help toa protect against such activity or threat.a

Id. at §§ II.B.3, II.B.4.b.i at 21-22 (emphasis added). The FBI may open a preliminary investigation with even less of a factual predicate: "on the basis of *information or an allegation* indicating the existence of a circumstance" described in paragraph a. or b. above. Id. § II.B.4.a.i at 21 (emphasis added). A query using identifiers for persons known to have had contact with any subject of a full or preliminary investigation would not require attorney approval under § IV.A.3, regardless of the factual basis for opening the investigation or how it has progresseda since then.

b. Fourth Amendment Deficiency

Applying the totality-of-circumstances analysis the FISC employed in previous Section 702 proceedings, the Court finds that the FBI Minimization Procedures and Querying Procedures are similarly unreasonable under the Fourth Amendment.

(i) Applicable Fourth Amendment Framework

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

"The touchstone of the Fourth Amendment is reasonableness." In re Certified Question of Law, 858 F.3d 591, 604 (FISA Ct. Rev. 2016) (per curiam) ("In re Certified Question"). Although "[t]he warrant requirement is generally a tolerable proxy for 'reasonableness' when the government is seeking to unearth evidence of criminal wrongdoing, . . . it fails properly to balance the interests at stake when the government is instead seeking to preserve and protect the nation's security from foreign threat." Id. at 593. Accordingly, a warrant is not required to conduct surveillance "to obtain foreign intelligence for national security purposes . . . directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States." See In re Directives Pursuant to Section 105B of FISA, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008) ("In re Directives"). The FISC has repeatedly reached the same conclusion

regarding Section 702 acquisitions. See, e.g., November 6, 2015, Opinion at 36-37; September 4, 2008 Opinion at 34-36.

In assessing the reasonableness of a governmental intrusion under the Fourth Amendment, a court must "balance the interests at stake" under the "totality of the circumstances." In re Directives, 551 F.3d at 1012. In prior reviews of Section 702 procedures, the FISC has assessed the reasonableness of the government's procedures as a whole, rather than separately analyzing the reasonableness of discrete forms of action taken thereunder, such as querying. See, e.g., November 6, 2015, Opinion at 39 (assessing "the combined effect" of the targeting and minimization procedures).

Amici, however, argue that the Court should regard querying as a separate Fourth Amendment event subject to its own reasonableness analysis. See Amici Brief at 57-59. First, they contend that the Reauthorization Act mandates that the querying procedures be constitutional in their own right. Id. at 48 ("Section 101 requires the Attorney General, in consultation with the DNI, to establish Querying Procedures relating to 702-acquired information that comport with the Fourth Amendment" and citing § 702(f)). Amici also point to Section 702(f)(2), which requires the FBI, in specified narrow circumstances, to obtain a FISC order before examining content information retrieved by querying Section 702 data, as mandating a change to the Court's analysis. See id. Amici argue that by enacting that requirement "Congress has acknowledged the reality that FBI agents querying databases containing raw 702 information for a variety of purposes are, in effect, undertaking new 'searches,' some of which now require a court order." Amici Brief at 56-57.

Amici also argue that reviewing querying as an independent Fourth Amendment event would be in line with evolving case law. See id. at 57 (citing Riley v. California, 134 S.Ct. 2473, 2493 (2014), as "requiring law enforcement to obtain a warrant before searching a cell phone lawfully seized incident to arrest"); see also id. at 58 (citing Walter v. United States, 447 U.S. 649, 654 (1980), United States v. Mulder, 808 F.2d 1346 (9th Cir. 1987), United States v. Bowman, 215 F.3d 951 (9th Cir. 2001) and United States v. Runyan, 275 F.3d 449, 461 (5th Cir. 2001), for the proposition that "even if law enforcement comes into possession of an object lawfully because it has been seized or searched by a private party, subsequent actions taken by law enforcement to inspect or review the object's contents constitute separate events for purposes of the Fourth Amendment"). Amici also point to the recent holding in Carpenter v. United States, 138 S.Ct. 2206 (2018), for further support. See July 13, 2018, Proposed Tr. at 37. They analogize (1) a cellular-phone provider's collection of cell-site location information (CSLI) to the government's acquisition of Section 702 information, and (2) the provider's subsequent compiling and production to the government of CSLI revealing the location of a particular suspect over time to the FBI's subsequent querying of Section 702 information for a particular U.S. person. Based on those analogies, they contend that the Supreme Court's holding in Carpenter that the government's obtaining and accessing CSLI information involved a search under the Fourth Amendment has implications for whether querying Section 702 data might also be a Fourth Amendment search. See id.

The Court has considered these authorities and declines to find that they require that querying of information lawfully acquired under Section 702 be considered a distinct Fourth

Amendment event requiring a reasonableness determination independent of the other circumstances of acquisition.

With regard to the Reauthorization Act, the provisions cited by amici reflect congressional views on the reasonableness of certain querying practices and strongly suggest congressional recognition that Fourth Amendment concerns are implicated by the querying of Section 702 information. Their effect, however, is to expand *statutory* protections, not the scope of what constitutes an independent search under the Fourth Amendment.

The Court also declines to find that the case law cited by amici mandate that queries of Section 702 information be considered distinct Fourth Amendment events. Three of the cases involved property voluntarily provided to law enforcement by a third party and subsequent law-enforcement searches that exceeded the scope of the prior examination by that third party. See Walter, 447 U.S. at 654-57 (finding that FBI's screening of films that had been contained in shipment mistakenly sent to and opened by third party violated Fourth Amendment); Runyan, 275 F.3d at 464 (finding that police examination of compact disks that had not been viewed by third party who turned them over violated Fourth Amendment); Bowman, 215 U.S. at 963 (government conceded that viewing of film contained in footlocker provided by third party exceeded third party's prior examination). In Mulder, the court found that toxicology lab tests of tablets, which a hotel employee had turned over to law enforcement, exceeded the scope of the "field test" exception to the warrant requirement. Mulder, 808 F.2d at 1348-49 (citing United States v. Jacobsen, 466 U.S. 109, 123 (1984)). None of these cases is instructive regarding circumstances like those present in this case, which involve the government's examination of

information lawfully acquired under a statutory framework that requires a judicial determination that the totality of attendant circumstances, including the government's acquisition, retention, use, and dissemination of such information, is reasonable under the Fourth Amendment.

In any event, the Court arrives at the same conclusions as amici, albeit under a totality-of-circumstances analysis: the FBI's procedures are unreasonable under the Fourth Amendment and the amici's proposal to require the FBI to document the basis for its queries in certain additional circumstances, see Part IV.C.7 below, would cure that deficiency.

(ii) Reasonableness Under the Totality of Circumstances

Under the totality-of-circumstances approach, a court must balance "'the degree to which [governmental action] intrudes upon an individual's privacy'" against "'the degree to which it is needed for the promotion of legitimate governmental interests.'" In re Certified Question, 858 F.3d at 604-05 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)). "The moree important the government's interest, the greater the intrusion that may be constitutionally tolerated." In re Directives, 551 F.3d at 1012.

> If the protections that are in place for individual privacy interests are sufficient in light of the governmental interest at stake, the constitutional scales will tilt in favor of upholding the government's actions. If, however, *those protections are insufficient to alleviate the risks of government error and abuse*, the scales will tip toward a finding of unconstitutionality.

Id. (emphasis added).

The Court regards the privacy interests at stake as substantial. As described above in Part IV.C.3, the FBI has conducted tens of thousands of unjustified queries of Section 702 data. Based on the information available – *e.g.*, queries for [REDACTED] and for [REDACTED]

persons with access to FBI facilities – it appears that many subjects of those queries were U.S. persons. Beyond that, it is difficult on the record before the Court to assess to what extent U.S.-person information was returned and examined as a result of those queries. At a minimum, however, the reported querying practices present a serious risk of unwarranted intrusion into the private communications of a large number of U.S. persons.

The Court believes that serious risk weighs substantially in the assessment of reasonableness. The goal of the Fourth Amendment is to protect individuals from arbitrary governmental intrusions on their privacy. See Carpenter, 138 S. Ct. at 2213 ("'basic purpose'" of the Fourth Amendment "'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials'") (quoting Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 528 (1967)). The FBI's use of unjustified queries squarely implicates that purpose: the FBI searched for, and presumably examined when found, private communications of particular U.S. persons on arbitrary grounds [REDACTED] See Part IV.C.3 above.

The government is not at liberty to do whatever it wishes with those U.S.-person communications, notwithstanding that they are "incidental collections occurring as a result of" authorized acquisitions. In re Directives, 551 F.3d at 1015. The FISCR in In re Directives relied on the government's assurance "that it does not maintain a database of incidentally collected information from non-targeted United States persons" when it held on the facts of that case that "incidentally collected communications of non-targeted United States persons do not violate the

DATE: Oct 8, 2019 - Authorized Public Release

Fourth Amendment." Id. In this matter, while the FBI may not maintain a *separate* database of U.S.-person communications acquired under Section 702, it routinely queries raw Section 702e data in order to identify and examine communications of particular U.S. persons. Whether those querying practices adequately protect the privacy of those U.S. persons, or instead unjustifiably invade U.S. persons' privacy, bears on the analysis of reasonableness under the Fourth Amendment. See In re Certified Question, 858 F.3d at 609 (examining intra-FBI restrictions on access to information acquired pursuant to a FISA pen register/trap-and-trace authorization as part of assessment of Fourth Amendment reasonableness).

Under the totality-of-circumstances framework, the Court must take into account protections afforded by other provisions of the government's procedures and assess whether their combined effect is reasonable under the Fourth Amendment. Those protections include requirements in the targeting procedures that "direct the government's acquisitions toward communications that are likely to yield foreign intelligence information" and "substantial restrictions on the use and dissemination of information derived from queries." November 6, 2015, Opinion at 41-42. Compliance with those provisions mitigates the intrusion on U.S. persons' privacy resulting from unjustified queries, either by limiting the scope of information acquired and therefore subject to querying or limiting the further use or disclosure of U.S.-person information returned by queries. The Court nonetheless views as substantial the intrusion on U.S. persons' privacy inherent in FBI personnel's examination of information – especially content information – returned by unjustified U.S.-person queries.

On the other side of the balance, it must be acknowledged that acquiring "foreign intelligence with an eye toward safeguarding the nation's security serves . . . a particularly intense interest." In re Certified Question, 858 F.3d at 606 (internal quotation marks omitted). For that reason, the FISCR has observed that "the government's investigative interest in cases arising under FISA is at the highest level and weighs heavily in the constitutional balancing process." Id. at 608. The Court must also consider, however, the degree to which the governmental action in question is needed for the promotion of the relevant governmental interest. Id. at 605. Here, the relevant governmental action is the FBI's continuing to run queries without taking further measures to ensure they actually satisfy the querying standard FBI personnel are supposed to apply.

Whether the balance of interests ultimately tips in favor of finding the procedures to be inconsistent with the Fourth Amendment is a close question. Reasonableness under the Fourth Amendment does not require perfection. See In Re Directives, 551 F.3d at 1015 ("the fact that there is some potential for error is not a sufficient reason to invalidate" surveillances as unreasonable under the Fourth Amendment). Nonetheless, if "the protections that are in place for individual privacy interests are . . . insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality." Id. at 1012. Here, there are demonstrated risks of serious error and abuse, and the Court has found the government's procedures do not sufficiently guard against that risk, for reasons explained above in the discussion of statutory minimization requirements.

Finally, for reasons explained below, the government has not made a persuasive case that the documentation requirement proposed by amici, which would provide a further check against unjustified intrusions on the privacy of U.S. persons and should also enhance oversight of FBI queries, would impede the FBI's ability to respond to national-security threats. On the current record and subject to future oversight of the FBI's querying practices, the Court believes that its adoption would remedy the statutory and Fourth Amendment deficiencies discussed above.

The Court accordingly finds that the FBI's querying procedures and minimization procedures are not consistent with the requirements of the Fourth Amendment.

7.e Amici's Documentation Proposal as a Remedy

The government offers § IV.A.3 in part as an alternative to a proposal made by amici. See September 18, 2018, Memorandum at 21. Amici propose that FBI personnel be required to document in writing their bases for believing that queries of Section 702 data using U.S.-person query terms were reasonably likely to return foreign-intelligence information or evidence of crime *before* they examine content information returned by such queries. See Amici Brief at 69, 72. (Amici alternatively discussed a more far-reaching requirement to document the basis for queries before they are conducted, see July 13, 2018, Proposed Tr. at 34, but stated at the September 28, 2018, argument that the above-described option would be adequate. The FISC declined to adopt a pre-querying documentation requirement in a prior Section 702 proceeding, see November 6, 2015, Opinion at 39-41, though the record in that case did not reflect similar problems with the FBI's querying practices.)

Like § IV.A.3, the documentation requirement proposed by amici would apply only when a query has returned Section 702-acquired content information that FBI personnel wish to examine. The amici proposal is further limited to U.S.-person queries. Because of those limitations, it applies only to the subset of queries that are particularly likely to result in significant intrusion into U.S. persons' privacy. In contrast to § IV.A.3, the documentation requirement proposed by amici would impose a less onerous requirement on FBI personnel who wish to examine such contents (written memorialization of the basis for the query vs. attorney approval), but in a larger number of cases (U.S.-person queries vs. categorical batch queries).

In the Court's assessment, the documentation requirement proposed by amici would facilitate oversight of queries likely to have intruded on U.S. persons' privacy interests by providing contemporaneous documentation of why FBI personnel believed the querying standard was satisfied. The requirement to create that documentation would also help ensure that FBI personnel, in fact, have thought about the querying standard and articulated why they believe it has been met. By so doing, it would prompt FBI personnel – much more frequently than the attorney-approval process under § IV.A.3 – to recall and apply the guidance and training they have received on the querying standard. Over time and with review by oversight personnel, those written statements may also suggest how to improve that guidance and training, or even the formulation of the standard in the querying procedures.

The government, however, objects that such a requirement would not be effective and would unduly burden and hinder the FBI's work. Regarding effectiveness, the government contends that such a documentation requirement would not have prevented the most serious

reported instances of non-compliance, such as the queries performed at [redacted] for persons with [redacted] July 13, 2018, Proposed Tr. at 12. In the government's estimation, the relevant personnel in those cases mistakenly but genuinely thought they had a sufficient basis for the queries, so they would have documented that basis and proceeded to examine the content information retrieved. See Gov't Response at 36-37; July 13, 2018, Proposed Tr. at 9-10. The Court has not heard from the personnel who conducted those non-compliant queries and is not well positioned to assess what courses of action they would have taken if they had been obligated to state in writing why they thought the queries were justified. But it accords with common sense and experience that some persons in comparable circumstances may, as amici suggest, realize their queries "could not be justified" when they are required to articulate the justification. See Amici Brief at 54.

The government further objects that requiring a written justification to examine the contents provided in response to U.S.-person queries of Section 702 information "would substantially hinder the FBI's ability to investigate and protect against threats to national security." Supplemental FBI Declaration at 17. Different forms of hindrance are claimed.

First, the government identifies burdens and potential error costs associated with identifying which terms are U.S.-person query terms. Id. at 15; July 13, 2018, Proposed Tr. at 13, 15. But those are the same burdens and costs anticipated by the government with regard to the statutory obligation to keep records that differentiate U.S.-person query terms from other terms. See Part IV.B.2.c above. If for some reason, moreover, FBI personnel are in doubt about

whether a particular query used a U.S.-person query term, they can always choose to document the justification for the query rather than try to resolve that doubt.

The government also assesses that "there is a substantial likelihood" that the impact on the FBI's "resources and operations" of amici's documentation proposal "would be significant." Supplemental FBI Declaration at 16. The government is not, however, able to quantify that impact. Id. at 15-16. For example, given the above-described FBI recordkeeping practices, it cannot say how often the FBI conducts U.S.-person queries, nor can it state how often queries return content information acquired under Section 702, id. at 6 n.3, or how often FBI personnel review FISA information returned in response to a query. Id. at 15-16. The government does acknowledge, however, that a U.S.-person query of Section 702 information may not return any such information, and even if it does, the FBI may not review it. See Gov't Response at 35 n.41. In either of those situations, the documentation requirement would not apply.

The government nonetheless contends that "a requirement that FBI must include a written justification prior to reviewing *any* section 702-acquired results that are returned using a U.S. person query term would . . . hinder the FBI's ability to perform its national security and public safety missions." Supplemental FBI Declaration at 15 (emphasis added). But the burden associated with documenting the basis for any particular query should be minimal. FBI personnel must determine that every query they conduct is reasonably likely to return foreign-intelligence information or evidence of a crime before they run it. See Gov't Response at 33-34 ("The lack of a requirement for written documentation of the query justification does not mean that FBI personnel are not required to have a justification for each query" and they are "required

to have a justification for each query of raw FISA-acquired information, as each query has to meet the substantive query standard . . . ."). For that reason, memorializing the basis for a query should involve no additional research or analysis. Nor should composing the written statement be time consuming. The Court contemplates a brief statement of the query justification – in many cases it should suffice to succinctly complete a sentence that starts "This query is reasonably likely to return foreign-intelligence information [or evidence of crime] because . . . ."

At the heart of the government's objections to the documentation requirement proposed by amici is an understandable desire to ensure that FBI personnel can

> perform their work with the utmost efficiency and "connect dots" in an effort to protect the national security. Given the lessons learned following 9/11 and the Fort Hood shooting, as well as the FBI's significant reliance on queries to effectively and efficiently identify threat streams in its holdings, the FBI is *extremely concerned about anything that would impede, delay, or create a disincentive* to querying FBI databases.

Supplemental FBI Declaration at 7 (emphasis added). But amici's documentation proposal would in no way affect the FBI's ability to query its databases. Only if a U.S.-person query returns Section 702 content information *and* the FBI decides to review that information is the documentation requirement triggered. Non-content metadata, which may help the FBI "connect the dots," will be immediately available without having to document the basis for a query. And FBI personnel could dispense with the otherwise-required documentation if needed to protect against an immediate threat to human life. See FBI Querying Procedures § II at 1.

The Court regards amici's documentation proposal as a measured and reasonable response to the statutory and Fourth Amendment deficiencies it has found in the FBI's implementation of its querying standard. The Court believes that adopting and implementing

that proposal, in combination with the other protections of the FBI Querying Procedures and FBI Minimization Procedures, would satisfy the definition of "minimization procedures" at § 1801(h) and render those procedures consistent with the requirements of the Fourth Amendment. Indeed, while other modifications to the procedures could have the same effect, it is difficult to conceive of their doing so while imposing so modest a burden on the FBI's work.

D. Exemptions in the Minimization and Querying Procedures

The minimization and querying procedures proposed by the government contain several exemptions for activities relating to oversight and training, as well as activities responsive to congressional mandates. Although the Court assessed that the oversight and training exemptions included in the March 27, 2018, Submission were unreasonably broad, it concludes that the revised exemptions in the September 18, 2018, Submission comport with the statutory requirements and the Fourth Amendment.

1. Exemptions for Oversight Activities

One broad category of exemptions proposed by the government in March 2018 concerned oversight activities conducted by independent executive-branch entities or the agencies themselves.

The first type of exemption, which is not new, addresses oversight conducted by independent executive-branch entities. This exemption is included in each of the four sets of minimization procedures. For example, Section 1 of NSA's proposed minimization procedures provides: "Nothing in these procedures shall restrict the lawful oversight functions of [NSD, ODNI] or the applicable Offices of the Inspectors General, or the provision by NSA of the

assistance necessary for these entities to perform their lawful oversight functions." March 27, 2018, NSA Minimization Procedures § 1 at 1; see also March 27, 2018, FBI Minimization Procedures § I.G at 4; March 27, 2018, CIA Minimization Procedures § 6.f at 4; March 27, 2018, NCTC Minimization Procedures § 6.e at 4. The initially proposed querying procedures contained a similar provision, see March 27, 2018, Querying Procedures § III.E at 1, which is carried forward in the amended querying procedures for each agency submitted in September 2018. See FBI Querying Procedures § IV.C at 5; NSA Querying Procedures § IV.C at 5; CIA Querying Procedures § IV.C at 4; and NCTC Querying Procedures § IV.C at 4.

The second type of exemption – for oversight conducted by the agencies themselves – was quite broad as initially proposed by the government. For example, the exemption initially proposed for FBI provided:

> [N]othing in these procedures shall restrict the FBI's performance of lawful oversight functions of its personnel or systems, which includes activities performed: in support of FBI's investigation and remediation of a possible compliance incident; in support of FBI's application of the destruction requirements in these minimization procedures; in support of [redacted] and in support of FBI Inspection Division and Records Management Division audits.

March 27, 2018, FBI Minimization Procedures § I.H at 4. The minimization procedures proposed for the other three agencies contained similar exemptions. See March 27, 2018, NSA Minimization Procedures § 1 at 2; March 27, 2018, CIA Minimization Procedures § 6.h at 5; March 27, 2018, NCTC Minimization Procedures § 6.g at 4.

Amici challenged the breadth of these proposed exemptions as insufficiently defined, see Amici Brief at 63-67, 82-84, and asserted the exemptions allow any deviation from otherwise-

applicable restrictions "no matter how disproportionate the Government's purpose may be to the deviation," Amici Reply at 13, and "do not aim for a reasonable balance between the Government's interest in performing . . . oversight, on the one hand, and the privacy interest of U.S. persons affected by deviations from the procedures on the other . . . ." Id. at 13-14.

In support of the lawful-oversight exemption, the government emphasized that the exemption furthers its interest in ensuring that the Section 702 procedures are correctly implemented, which should increase protection of U.S. persons' privacy. See Gov't Response at 21 (asserting "a strong government interest in supervising personnel to mitigate the risk of non-compliance by government employees accessing raw section 702 information"); id. at 43 (the exemption "permits the government to engage in essential oversight activities that in fact promote the privacy interests of U.S. persons"). The government also contended that the proposed exemption provided greater specificity without expanding the scope of exempted conduct as previously approved by the FISC. See Gov't Response at 42-43.

The Court did not accept the government's premise that the proposed modifications resulted in exemptions that were no broader than those previously approved. Although similar language did appear in previously approved minimization procedures, the government did not disclose, nor did the Court recognize, how broadly the government understood "lawful oversight functions" until June 2017. In an attempt to mitigate the scope of the minimization violations raised by the FBI's retention of unminimized Section 702-acquired information in repositories containing [redacted] classified email and instant messages (see Part IV.E.2 below), the government articulated a view of "lawful oversight functions" that spanned a wide range of

disparate functions, such as overseeing compliance with federal records-management requirements, identifying executive-level email messages subject to an archiving requirement imposed by the National Archives and Records Administration, and conducting

See Report Regarding Retention of Raw FISA-Acquired Information in Certain FBI Special Purpose Systems, June 16, 2017, at 4-5, 10-12. The Court, moreover, agreed with amici regarding the unjustified breadth and lack of specificity of the lawful-oversight exemption initially proposed by the government.

In response to those concerns, the government significantly modified the proposed exemption. In the modified procedures submitted on September 18, 2018, it described more particularly the types of activity conducted by each agency that constitute lawful-oversight functions. For example, the FBI's modified procedures identify the following types of activity as lawful-oversight functions: (1) review of Section 702-acquired information the FBI determines is necessary to remediate a potential spill of Section 702-acquired information; (2) review, retention, and disclosure of Section 702-acquired information subject to destruction, including under these minimization procedures; and (3) review and retention of unminimized Section 702-acquired information contained in employee electronic communications by the FBI's Inspection Division, as part of its record of what it has provided to the Office of the Inspector General. See September 18, 2018, FBI Minimization Procedures § II.H at 5. Notably, the amended provisions

do not specify activities relating to [redacted] and no longer reference investigations intc [redacted]

The modified provision also limits the scope of the authorized deviation by requiring (1)ecompliance with the minimization procedures to the maximum extent practicable, seee September 18, 2018, NSA Minimization Procedures § 2 at 3; September 18, 2018, FBI Minimization Procedures § I.H at 5 n.4; September 18, 2018, CIA Minimization Procedures § 6 at 4 n.2; September 18, 2018, NCTC Minimization Procedures § A.6 at 4 n.1; and (2) destruction of information in accordance with the applicable procedures once it is no longer reasonably believed to be necessary to the lawful-oversight function. See September 18, 2018, NSA Minimization Procedures § 2(b)(5) at 2; September 18, 2018, FBI Minimization Procedures § I.H at 6; September 18, 2018, CIA Minimization Procedures § 6.i at 5; and September 18, 2018, NCTC Minimization Procedures § A.6.g at 4-5.

Each agency is also permitted to deviate from the procedures when necessary to conduct lawful-oversight functions that are not described in the procedures, but only after consultation with NSD and ODNI, followed by prompt reporting of the deviation to the FISC. See September 18, 2018, NSA Minimization Procedures § 2(b)(5) at 2; September 18, 2018, FBI Minimization Procedures § I.H at 5-6; September 18, 2018, CIA Minimization Procedures § 6.i at 5; September 18, 2018, NCTC Minimization Procedures § A.6.g at 4. At the hearing on September 28, 2018, the government confirmed that this provision is not intended to include activities related to investigations o [redacted] See September 28, 2018, Proposed Tr. at 12-13.

The amended querying procedures contain corresponding exemptions. For example, NSA's provide:

> [N]othing in these procedures shall prohibit NSA from conducting queries it determines are necessary to: . . . perform the following lawful oversight functions of NSA's personnel or systems:
> a. support NSA's investigation and remediation of a possible section 702 compliance incident;
> b. remediate a potential spill of classified section 702-acquired information in NSA systems;
> c. identify section 702-acquired information subject to destruction, including under NSA's section 702 minimization procedures;
> d. ensure the effective application of marking or segregation requirements in NSA's section 702 minimization procedures; and
> e. support NSA's audit or review, for quality control purposes, of work done related to section 702 collection by NSA personnel[.]

NSA Querying Procedures § C.6 at 5-6 (followed by corresponding catchall provision permitting deviations from querying procedures for unspecified lawful-oversight functions after consultation with NSD and ODNI followed by prompt reporting to the FISC); see also CIA Querying Procedures § IV.C.7 at 5 (similar); NCTC Querying Procedures § IV.C.6 at 5 (similar); and FBI Querying Procedures § IV.C.7 at 6 (delineating similar exemptions as well as an exemption for queries conducted to "assess compliance with federal record-keeping requirements, where such queries are conducted [redacted] or audit and oversight systems, as defined in FBI's section 702 minimization procedures, that contain FBI personnel e-mails [redacted] that may contain unminimized section 702-acquired information").

The Court is satisfied that the exemptions for lawful-oversight functions conducted by the agencies are sufficiently defined and no broader than reasonable to permit the effective exercise of those functions. To the extent the need to conduct additional but unspecified lawful-oversight

activities arises and those activities require deviation from applicable procedures, the Court views the required pre-implementation consultation with NSD and ODNI and prompt notification to the FISC as reasonable means of monitoring and, if necessary, checking any other deviations from applicable procedures based on the lawful-oversight exemption.

2. Exemptions for Training Activities

Each agency's initially proposed minimization procedures also contained a broad exemption from otherwise-applicable rules for activities conducted during training or for system-administration purposes. See March 27, 2018, NSA Minimization Procedures § 1 at 1 ("Nothing in these procedures shall restrict NSA's performance of lawful training functions of its personnel or activities undertaken for creating, testing, or maintaining its systems."); March 27, 2018, FBI Minimization Procedures § I.G at 4 ("Nothing in these procedures shall restrict the FBI's performance of lawful training functions of its personnel or creating, testing, or maintaining the functions of its systems."); March 27, 2018, CIA Minimization Procedures § A.6.g at 4-5 ("Nothing in these procedures shall prohibit . . . CIA's performance of lawful training functions of its personnel, or activities undertaken for creating, testing, or maintaining its systems."); March 27, 2018, NCTC Minimization Procedures § A.6.f at 4 ("Nothing in these procedures shall prohibit . . . NCTC's performance of lawful training functions of its personnel, or creating, testing, or maintaining its systems."). A similar provision was included in the querying provisions. See March 27, 2018, Querying Procedures § III at 1 ("Nothing in these procedures shall restrict a covered agency's performance of lawful training functions of its personnel, or creating, testing, or maintaining its systems.").

Prior minimization procedures under Section 702 did not have a comparable exemption for training, which the government proposed in March 2018 after numerous instances of queries conducted during training that did not comply with the FBI minimization procedures. See March 27, 2018, Memorandum at 8 n.9. The Court notes that the practice of conducting queries of unminimized Section 702-acquired information that do not meet the querying standard during training was not limited to isolated mistakes, see, e.g., Jan. 5, 2018, Notice at 2; May 2, 2018, Notice at 2, but appears to have been a systemic practice that went largely undetected for years. See Jan. 18, 2018, Notice at 2-3 (reporting that since 2011, a unit in FBI's [redacted] had been routinely conducting training sessions with FBI employees on the use of databases containing FISA-acquired information, including Section 702 information, during which trainees were asked to conduct queries using terms provided by the trainers, which generally involved the use of names of former subjects of FBI investigations as query terms).

Amici objected to the provisions proposed in March 2018 insofar as they sought a wholesale exemption from otherwise-applicable querying, retention, and dissemination rules. See Amici Brief at 61-63, 82-84; Amici Reply at 13-16. Specifically, amici questioned whether effective training really required the use of U.S.-person query terms, see Amici Brief at 62, or departures from retention and dissemination standards. Id. at 83. Amici also noted that "the procedures do not assign any responsibility for training, provide any guidance as to what it should entail, or describe how it must be designed . . . ." Id. at 61.

The government responded that queries "conducted for training purposes promote both the government interest in ensuring an effective workforce while simultaneously protecting the

interests of U.S. persons by reducing the risk of non-compliant use or disclosure of sensitive data." Gov't Response at 19. That rationale was undercut by the breadth of the provisions, which by their terms were not limited to training that pertains to protecting U.S.-person information. The government also disclaimed any intent to use the exemptions to retain information otherwise subject to destruction requirements or to make otherwise prohibited disseminations. Id. at 41-42.

In response to concerns regarding the breadth of the proposed training exemption raised by amici and the Court, the government narrowed the training exemption in the procedures in three significant ways. First, the training exemption in the minimization procedures was narrowed to only permit deviations from procedures governing access and review of information, and limited those deviations to only those reasonably necessary for effective training. See, e.g., September 18, 2018, NSA Minimization Procedures § 2(b) at 2; September 18, 2018, FBI Minimization Procedures § I.G at 4; September 18, 2018, NCTC Minimization Procedures § B.1 at 5. The training exemption in the CIA minimization procedures was removed after the CIA determined that such an exemption was unnecessary. See September 18, 2018, Memorandum at 6. In addition, the government limited the exemption for training queries to queries the agency determines are necessary to the training of its personnel regarding proper implementation of FISA and FISA procedures, and to permit the use of U.S.-person identifiers to perform such queries only when there is a particular need to do so in the conduct of such training. See FBI Querying Procedures § IV.C.1 at 5; NSA Querying Procedures § IV.C.1 at 4; CIA Querying Procedures § IV.C.1 at 4; NCTC Querying Procedures § IV.C.1 at 4.

These modifications appear to meaningfully limit the types of training activity exempted from otherwise-applicable rules. In light of the long-term non-compliance with the querying standard during training sessions conducted by the FBI's [redacted] however, it appears prudent to clarify the Court's understanding of the limited exemption from the querying procedures sought for queries conducted using U.S.-person query terms deemed necessary for effective training. It is not apparent why U.S.-person query terms that are known to objectively meet the general querying standard (*i.e.*, reasonably likely to retrieve foreign-intelligence information or evidence of a crime) should not be used whenever U.S.-person query terms are necessary to effective training. Trainers should pre-select U.S.-person query terms known to return foreign-intelligence information to prevent any unnecessary querying of U.S.-person identifiers unassociated with national-security investigations. The deviation from the querying standard for training queries should be understood to permit the use of queries conducted for training rather than foreign-intelligence purposes, but which nevertheless are reasonably likely to return foreign-intelligence information or evidence of a crime.

3. Exemptions for Responding to Congressional Mandates

Each set of proposed minimization procedures includes new language regarding agency compliance with congressional mandates that would require the agency to deviate from otherwise-applicable rules. The new language describes the types of process that would trigger this exemption as "a subpoena or similar process consistent with congressional oversight." See September 18, 2018, NSA Minimization Procedures § 2(b)(3) at 2 ("Nothing in these procedures shall restrict: . . . the retention, processing, analysis, or dissemination of information necessary to

comply with an order of a court within the United States or a specific congressional mandate, *such as a subpoena or other similar process consistent with congressional oversight*") (emphasis added); see also September 18, 2018, FBI Minimization Procedures § I.G at 4; September 18, 2018, CIA Minimization Procedures § 6.h at 4-5; September 18, 2018, NCTC Minimization Procedures § A.6.d at 4. The proposed querying procedures also permit queries the agency determines are necessary to comply with "a specific congressional mandate, such as a subpoena or similar process consistent with congressional oversight[.]" NSA Querying Procedures § IV.C.3 at 5; FBI Querying Procedures § IV.C.3 at 5; CIA Querying Procedures § IV.C.3 at 4; NCTC Querying Procedures § IV.C.3 at 4.

The Court has previously observed that procedures that permit exemptions "based on unspecified mandates could undermine the Court's ability to find that the procedures satisfy statutory requirements." See April 26, 2017, Opinion at 53 (citing November 6, 2015, Opinion at 22) (internal quotation marks omitted). In approving this provision in 2015, the Court emphasized that the language, which at that time referred to "specific constitutional, judicial or legislative mandates," must be interpreted narrowly to include only those mandates containing language "that clearly and specifically requires action in contravention of an otherwise-applicable provision of the requirement of the minimization procedures," and directed the government to report any action taken in reliance on this provision. See April 26, 2017, Opinion at 53 (internal citation omitted).

The government sought to modify this provision in September 2016 to describe the contemplated activity requiring a departure as "necessary to comply with a specific congressional

mandate or order of a court within the United States." See id. at 53-54. The Court approved the revised language but reiterated its expectation that the provision be narrowly interpreted, id., and directed the government to provide prompt written notification of any instance in which an agency acted in contravention of otherwise-applicable minimization procedures in reliance on that provision. See id. at 96-97.

To date, the government has not relied on the exemption for activities responsive to a specific congressional mandate. The government did, however, receive a congressional request to calculate the number of communications of U.S. persons that have been acquired pursuant to Section 702. That request "was not in the form of a subpoena or other legal process" and therefore would not have constituted a legal mandate for purposes of the exemption. See id. at 54. The government asserted, however, that any action it undertook in response to the request in contravention of otherwise-applicable minimization requirements would be permitted under the lawful-oversight exemption. Id. Although the Court believed both provisions could be clearer, it did not take issue with the government's interpretation. The Court did, however, direct the government to provide prompt notification of any instance in which an agency acts in contravention of otherwise-applicable minimization requirements to respond to an oversight request from any outside entity other than the executive-branch entities specified in the procedures. See id. at 55, 97. The government filed a notice of such actions taken in an effort to respond to the above-described congressional request. See Report on NSA Action Pursuant to Section 1 of Section 702 Minimization Procedures in Response to Oversight Request of

Congress, June 19, 2017 (advising that NSA conducted queries of Section 702 data in attempt to provide requested estimates).

In response to the government's March 2018 submission (which described the exempted activity as that "necessary to comply with a specific congressional mandate," see, e.g., March 27, 2018, NSA Minimization Procedures § 1 at 1), amici asserted that the exemption concerning congressional mandates did not adequately protect privacy interests because it was not clear whether a letter from a single member of Congress could be considered a mandate for purposes of the exemption. See Amici Brief at 67. Amici also recommended that the Court's interpretation of the term as directives in "the form of a subpoena or other legal process" be added to the querying procedures. Id. at 67-68. And, given the government's historical intent to rely on the "lawful oversight function" exemption when a congressional request for information does not qualify as a "mandate," amici argued that the congressional-mandate exemption appeared to be superfluous, unless it could be narrowed in a way that made it distinct from the "lawful oversight" exception. Id. at 68.

In response to these concerns, the government proffered the revisions to the congressional-mandate language noted above – *i.e.*, adding the descriptor "such as a subpoena or other similar process consistent with congressional oversight" in both the minimization procedures and querying procedures. The Court believes that the requirement that such process be "consistent with congressional oversight" sufficiently circumscribes the type of mandate subject to the exemption.

The Court also believes that the modifications made to the lawful-oversight functions provision (discussed above) help clarify the respective spheres of that exemption and the exemption for specific congressional mandates: responding to a congressional request is not among the specified lawful-oversight functions, and the provision permitting deviations necessary to the conduct of unspecified lawful-oversight functions only applies to such functions of the agency over its personnel and systems. See, e.g., September 18, 2018, FBI Minimization Procedures § I.H at 5. Should an agency rely on this provision to deviate from generally applicable rules to respond to a request from a member of Congress, it would be required to consult with NSD and ODNI beforehand and report promptly to the FISC the specific oversight activity involved. Id. § I.H at 5-6. Any such submission should also explain why the action taken constitutes lawful oversight of the agency's personnel or systems.

The Court is satisfied that the congressional-mandate provisions and lawful-oversight provisions of the procedures as now proposed adequately address the concerns raised regarding the potential breadth of the congressional-mandate exemption. Consistent with prior approvals, however, the Court will require the government to promptly report the circumstances of any deviation from applicable minimization or querying procedures taken in reliance on the congressional-mandate provision.

E. Other Changes to the FBI Minimization Procedures

The government proposes changes to the FBI's minimization procedures concerning retention of Section 702-acquired metadata and retention of unminimized Section 702

information in copies of emails and instant messages in [redacted] The Court assesses each proposal below.

1. Retention of Metadata

In assessing the metadata proposals, it is useful to distinguish between provisions relating to the use of metadata for link analysis and those relating to queries for other purposes.

a. Metadata Used for Link Analysis

Section III.G.1 of the 2016 FBI Minimization Procedures currently exclude Section 702-acquired metadata in systems used solely for link analysis from the retention timetables that generally apply to raw Section 702 information in electronic storage. See 2016 FBI Minimization Procedures § III.G.1 at 22. The government seeks to modify Section III.G to permit the FBI to indefinitely retain such metadata for purposes of link analysis on all electronic and data-storage systems and ad hoc systems. See September 18, 2018, FBI Minimization Procedures § III.G.2 at 32. This change would harmonize the FBI's Section 702 minimization procedures with a parallel provision of the FBI's minimization procedures applicable to electronic surveillance and physical search under Titles I and III of FISA, which the Court approved in May 2016. See May 17, 2016, Opinion at 46-48.

One incident of FBI over-retention of Section 702-acquired metadata was reported during the prior authorization period and is worth noting here. In implementing the change allowing indefinite retention of metadata acquired pursuant to Title I and III, the FBI mistakenly reconfigured its systems to eliminate the time limits on retention for all FISA-acquired metadata, including Section 702-acquired metadata that should have aged off systems not used solely for

link analysis. See Preliminary Notice of Compliance Incident Involving Retention of Raw Section 702-Acquired Metadata by FBI, April 27, 2018, at 2-3 (reporting improper retention of unminimized Section 702-acquired metadata that should have been purged from systems not solely used for link analysis within five years of expiration of certification under which it was obtained pursuant to Section III.G.1 of FBI's current Section 702 minimization procedures). The FBI remediated the violation by limiting access to the over-retained Section 702-acquired metadata to a tool used solely for link analysis. See Supplemental Notice of Compliance Incident Involving Retention of Raw Section 702-Acquired Metadata by FBI, July 2, 2018, at 2-3. That restriction would become unnecessary if the Court approves the proposed modification to Section III.G to permit indefinite retention of Section 702-acquired metadata on systems other than thosee used solely for link analysis.

In support of the modification to the FBI Title I and III minimization procedures requested in 2016, the government argued that the limitations on retention periods for FISA-acquired metadata based on the nature of the system on which the metadata resides impaired the FBI's ability to use metadata in data-storage systems not solely used for link analysis without commensurately increasing privacy protections, and that the ability to conduct link analysis of metadata in other systems would enhance the FBI's capacity to make connections about targets and their networks. See Gov't Mot. to Amend Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under FISA, May 17, 2016, at 35-38. The Court concluded that the FBI's compliance with the querying standard as well as other protections set forth in the applicable minimization procedures strikes a reasonable balance

between the government's foreign-intelligence needs and the protection of U.S. persons' privacy, and approved the modification. See May 17, 2016, Opinion at 47-48.

The government presents similar arguments now. See March 27, 2018, Memorandum at 71-73. When evaluating the government's current request to add Section 702-acquired metadata to the cache of information indefinitely retained on all electronic-data storage and ad hoc systems, the Court must consider the same governmental and privacy interests in relation to the protections afforded by the applicable procedures.

The FBI's procedures seek to protect privacy in a variety of ways. Most pertinent to the requested modification is the requirement that FBI personnel may only conduct queries of Section 702-acquired information that are "reasonably likely to retrieve foreign intelligence information" or "evidence of a crime." FBI Querying Procedures § IV.A.1 at 3. That standard applies to queries of Section 702-acquired metadata, not just content information. (For reasons discussed in Part IV.B above, the Court has found the FBI's querying practices deficient and is contemporaneously ordering the government to correct that deficiency.) In addition, any dissemination of metadata acquired under Section 702 that is of or concerning a U.S. person must meet the criteria of Section IV of the September 18, 2018, FBI Minimization Procedures, and disclosure for law-enforcement purposes must comply with Section III.H.2 of those procedures.

Consistent with the May 2016 approval of the FBI's standard minimization procedures for electronic surveillance and physical search, the Court finds that the FBI's proposed Section 702 minimization and querying procedures provide sufficient protection for U.S.-person privacy

concerns related to the indefinite retention of Section 702-acquired metadata on all FBI data-storage and ad hoc systems when balanced against the important and substantial interests asserted by the government. The Court notes, however, that for purposes of evaluating Section 702 minimization procedures, the *diminished* privacy interest in non-content information generally recognized (including by amici, see Amici Brief at 73), does not equate to *no* privacy interest. And, in a digital era in which U.S. persons share an expanded amount of data electronically, the type and volume of metadata associated with U.S. persons' communications acquired under Section 702 may also expand. It is not unreasonable to expect that the type of metadata available for querying across all FBI data-storage and ad hoc systems, particularly when retained indefinitely and aggregated over longer periods of time, could provide a cache of information the use of which might implicate greater privacy concerns. Cf. Carpenter, 138 S.Ct. at 2215-17 ("the unique nature of cell phone location records" at issue distinguished it from other third-party records such as dialed numbers or negotiable instruments). Mindful of the need to consider the type and volume of metadata acquired under Section 702 and the manner in which the government uses such metadata when evaluating the sufficiency of the targeting, minimization, and querying procedures, the Court will require the government to describe the types of information acquired by the FBI under Section 702 that the government regards as metadata and the extent to which such metadata can reveal location information about U.S. persons.

b. Metadata Queried for Other Purposes

As noted above, Section III.G.1 of the FBI's current minimization procedures permits the indefinite retention of Section 702-acquired metadata only on systems used solely for link

analysis. Section 702 metadata stored on other systems must be aged off those systems pursuant to the same retention limits applicable to the contents of the corresponding communications. Specifically, information that has not been reviewed must be purged within five years of the date of expiration of the certification under which it was acquired, unless a specific extension is obtained. See 2016 FBI Minimization Procedures § III.G.1.a at 22. Information that has been reviewed but not identified as meeting the retention standard – *i.e.*, information that reasonably appears to be foreign-intelligence information, to be necessary to understand foreign-intelligence information or assess its importance, or to be evidence of a crime – must be access-restricted after ten years and purged after fifteen years, unless a specific extension is obtained. See id. §III.G.1.b at 23. Information that is subject to those access restrictions may be queried, but personnel must obtain approval from a designated FBI official before accessing the results of the query.

The government has advised that it intends to implement the ten-year access-restriction provision (under both the FBI's standard minimization procedures for electronic surveillance and physical search and its Section 702 minimization procedures) to allow immediate access to metadata responsive to a query, regardless of whether the query was run for purposes of link analysis or for other analytical purposes. See Letter Regarding FBI's Implementation of Section III.D.4.c of Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under FISA, Feb. 5, 2018, at 2. The ten-year mark will be reached in November 2018 for data acquired under FISA Title I and Title III but not until September 2019 for Section 702 information. Id. at 1 n.1, 2. The government also advised that if access to a

restricted communication is approved, the FBI intends to make the communication, including the contents, accessible in a non-restricted state "to all users who would otherwise be authorized to access such information" in the pertinent system for six months or until fifteen years from the expiration of the authority under which the communication was acquired, whichever is sooner. Id. at 3. In order to fully assess the reasonableness of the intended action, FISC Presiding Judge Rosemary M. Collyer directed the government to, among other things, submit a written explanation of the basis for its assessment that access to the metadata results of queries that are not conducted for purposes of link analysis is permitted under the applicable retention limits and describe how metadata may be queried or analyzed for purposes of link analysis and how it may be queried or analyzed for other purposes. See Docket Nos. [REDACTED] Order, July 26, 2018, at 3. The Court anticipates that the information regarding the actual implementation of these provisions provided by the government will significantly inform the Court's evaluation of the reasonableness of the government's actions in the context of Titles I and III and, beginning in [REDACTED] under Section 702.

2. Retention on Email and Instant-Messaging [REDACTED]

The government seeks modifications to the FBI's 702 minimization procedures that would permit the FBI to retain unminimized Section 702 information in certain repositories that do not comply with the FBI's current minimization procedures. The government seeks these modifications as part of an effort to address such noncompliance, which was first reported to the Court in the context of information acquired pursuant to Titles I and III of FISA in December 2016.

In December 2016, the government informed the Court that FBI systems containing classified email and instant messages might be retaining unminimized FISA information in violation of FBI's standard minimization procedures. See April 26, 2017, Opinion at 88 n.70. In March 2017, the government identified the same systems as presenting compliance issues under the FBI's 702 minimization procedures. See Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, Mar. 17, 2017 ("March 2017 Quarterly Report") at 78-79.e According to that report, all email messages on the FBI's secret-level email system are [redacted] etained i[redacted] maintained by the FBI' [redacted] assist the FBI in responding to discovery requests. Id. Tha[redacted] is also used for records management and FOIA processing, and by the FBI's [redacted] investigative purposes. Id. [redacted] is also storing instant messages from FBI's secret-level instant-messaging system in a separate system used primarily for investigative purposes. See id. at 79. The April 26, 2017, Opinion directed the government to report the extent to which unminimized FISA, including Section 702, information was being retained on those systems and to assess whether such retention complied with applicable minimization requirements; and to the extent that noncompliance was found, to describe the remediation steps the government was taking. See April 26, 2017, Opinion at 97-98.

In subsequent months, the government provided the Court additional details regarding the FBI's retention of Section 702 and other FISA information on those systems and reported ane additional discovery – namely, that the FBI's [redacted] was [redacted] instant messages on the FBI's top secret enclave. See March 27, 2018, Memorandum at 80. In

December 2017, the government notified the Court that the FBI intended to prohibit users from placing unminimized FISA-acquired information in classified instant messages, but because FBI personnel needed the ability to include unminimized Section 702 and other FISA information in classified emails, that practice would not be prohibited. See Supplemental Information Regarding Retention of Raw FISA-Acquired Information in Certain FBI Special Purpose Systems, Dec. 14, 2017, at 2. The government further advised that the FBI was working on a solution that would require [REDACTED] instant messages and emails (except for those subject to litigation holds) to age off within five years. See id. at 2-3. Recognizing these measures would not bring the FBI into full compliance with the minimization procedures, the government advised the Court it also intended to seek modifications to the applicable procedures. See id. at 3.

In the March 27, 2018, Submission, the government proposed changes to the FBI's current Section 702 minimization procedures. The first change would prohibit the further placement of unminimized Section 702-acquired information in classified-email and instant-message systems. See March 27, 2018, Memorandum at 81-82. Even though the FBI assesses there is still an operational need to place such information on classified email systems, the government is prepared to take that step because of its inability to delete information from the [REDACTED] email system and instant-message repositories in conformance with the generally applicable retention limits while still retaining information subject to a litigation hold. See id. at 81-82. Because the non-compliant systems will not ingest any additional unminimized Section 702-acquired information, the volume of information "over-retained" in those systems willa effectively be capped.

With regard to information already in [redacted] email system and instant-message repositories, the government contends that it is not currently possible to globally search for messages containing unminimized Section 702-acquired information. Id. at 82-83. The government therefore proposes two new provisions to the FBI's Section 702 minimization procedures, which would permit the indefinite retention of unminimized Section 702-acquired information on these systems notwithstanding otherwise-applicable retention limits. See September 18, 2018, FBI Minimization Procedures § III.F.5 at 30-31 ("FBI-Designated [redacted] System") and § III.F.6 at 31-32 ("FBI-Designated [redacted] Systems") (exempting those systems from specified retention rules). Although no maximum retention period would apply to either system, access to the databases would be limited to "FBI personnel who require access to perform their official duties or assist in a lawful and authorized governmental function, including system administrators and other technical personnel, and who have received training on these minimization procedures and the Querying Procedures." Id. §§ III.F.5 at 30 and III.F.6 at 31. The proposed provisions also require that the FBI maintain records of all personnel who have been granted access to such repositories and all accesses to such repositories. Id. at 30-32. Finally, FBI personnel authorized to access these repositories may do so only "to assist in [redacted] investigations, and to respond to inquiries related to records management and discovery," and may only query those systems to find and provide information, which may include raw FISA-

acquired information, in furtherance of such inquiries, functions, and investigations. Id. Any queries in those repositories must also comply with the querying standard described above. Id.

Amici expressed several concerns regarding the government's proposal, including lack of specificity regarding who may have access to [redacted] email system and instant-message repositories, the purposes for which those repositories are used, and the justification for exempting them from U.S.-person masking requirements. See Amici Brief at 92-94. Amici also recommended that the FBI be required to provide a written statement justifying access. Id. at 94.

The Court shares amici's concerns to some extent but is also cognizant of the general nature and purpose of these systems, which do not include the retention of unminimized Section 702 information in any amount approaching the quantity found in systems primarily used by the FBI for analytical and investigative work. In that light, the proposed modifications to the FBI's minimization procedures greatly mitigate the potential impact of indefinite retention of unminimized Section 702 information in those systems. The necessity of categorically exempting them from *any* limits on retention, however, is not apparent. The Court will therefore approve proposed Sections III.F.5 and III.F.6 subject to the following: in the event the FBI recognizes unminimized Section 702-acquired information in a system defined by Section III.F.5 or III.F.6, and seeks to retain such information in that system, the government shall report in its next quarterly report concerning compliance matters under Section 702: (1) whether the information could be retained on an FBI classified-email or instant-messaging system as described in Section III.F.4, or in connection with litigation matters as described in Section

III.1.3; and (2) if not, the reason retention of the information in that system is necessary to the purposes served by the system.

F. **Conclusion**

For the reasons stated in Parts IV.B and IV.C above, the Court finds that the FBI Querying Procedures do not comply with the recordkeeping requirement at § 702(f)(1)(B) and that, in view of the FBI's querying practices, the FBI Querying Procedures and FBI Minimization Procedures do not, as implemented, satisfy the definition of "minimization procedures" at 50 U.S.C. § 1801(h) and are unreasonable under the Fourth Amendment.

In other respects, the government's querying and minimization procedures, including those provisions examined in Parts IV.D and IV.E above, comport with applicable statutory requirements and the Fourth Amendment. In particular, the changes to the FBI Minimization Procedures that provide more detailed guidance on the storage and handling of information on various types of systems and related organizational changes to those procedures, see March 27, 2018, Memorandum at 43-70, 74-75, present no impediment to making those findings.

V. OTHER NON-COMPLIANCE

Although the other instances of non-compliance reported by the government do not beare significantly on the Court's disposition of these matters, it is desirable to touch briefly on the current status of two additional matters discussed in the April 26, 2017, Opinion, as well as two more recent matters.

A. Incidents Addressed in the April 26, 2017, Opinion

Several significant compliance issues were addressed in the April 26, 2017, Opinion, four of which were not fully resolved at the time of the Opinion: (1) issues arising from NSA's upstream collection of Internet communications, see April 26, 2017, Opinion, at 78-81; (2) improper disclosure of unminimized Section 702 information by the FBI, id. at 83-87; (3) concerns about the frequency of NSA's post-tasking review of contents, id. at 75-78; and (4) the potential over-retention of unminimized Section 702 information by the FBI [redacted] Id. at 87-89. The first and fourth issues are discussed above in Part III.A and Part IV.E.2, respectively. The other two are discussed briefly below.

1. Frequency of NSA's Post-Tasking Review of Contents

NSA's targeting procedures require that analysts take reasonable steps to confirm that a selector continues to be used by a non-U.S. person located outside the United States. Such steps may include content review, as well as ascertaining whether a tasked facility is being used inside the United States, such as [redacted] see NSA Targeting Procedures § II at 6-7. NSA's targeting procedures provide that content review "will be conducted according to analytic and intelligence requirements and priorities" and do not require analysts to review the contents of communications acquired from tasking a particular selector at fixed intervals. See id. at 7. The government has advised the Court, however, that NSA follows a policy whereby such content review is performed no later [redacted] after the first acquisition and at intervals of

no more than [redacted] thereafter. See Update Regarding Post-Targeting Content Reviews, Sept. 13, 2016, at 2.

As indicated in the April 26, 2017, Opinion, the Court has had concerns about the government's ability to monitor analysts' compliance with this policy. See April 26, 2017, Opinion at 76-77 (citing Supplement Letter Regarding Post-Targeting Content Reviews, Mar. 13, 2017 (indicating that NSA had [redacted] for monitoring compliance with the policy in only one of its Section 702 repositories and therefore does not comprehensively monitor or verify analysts' compliance with the policy)). To address the Court's concern, the government undertook to include in its quarterly reports any instances in which a failure to conduct timely content review in accordance with this policy was discovered, whether or not such failure resulted in a violation of the targeting procedures themselves (*e.g.*, a delayed detasking resulting from the failure to conduct timely post-targeting content review). April 26, 2017, Opinion at 77.

The information submitted in the six quarterly reports filed since April 2017 revealed several instances in which NSA did not comply with the policy, only a small fraction of which led to violations of the targeting procedures. See, e.g., Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, Sept. 14, 2018 ("September 2018 Quarterly Report") at 97 (reporting [redacted] of failure to conduct timely post-targeting content review, [redacted] likely resulted in delayed detasking); see also Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, June 15, 2018 ("June 2018 Quarterly Report") at 101 (reporting [redacted] of failure to conduct timely post-targeting content review, [redacted] associated with delayed detaskings); Quarterly Report to FISC Concerning

Compliance Matters Under Section 702 of FISA, Mar. 16, 2018, at 91 (reportin[redacted] of failure to conduct timely post-targeting content review [redacted] associated with delayed detaskings); Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, Dec. 15, 2017 ("December 2017 Quarterly Report") at 89 (reportin[redacted] of failure to conduct timely post-targeting content review [redacted] associated with delayed detaskings); Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, Sept. 15, 2017 ("September 2017 Quarterly Report") at 81 (reporting [redacted] of failure to conduct timely post-targeting content review, [redacted] associated with delayed detaskings); Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, June 16, 2017 ("June 2017 Quarterly Report") at 99 (reportin[redacted] of failure to conduct timely post-targeting content review [redacted] associated with delayed detaskings).

The quarterly reports also revealed that in several of these incidents the CIA or the FBI was responsible for conducting post-targeting content review but did not conduct timely reviews. See, e.g., June 2017 Quarterly Report at 99 n.54 (identifying incidents for which FBI had responsibility for conducting timely post-targeting content review); September 2017 Quarterly Report at 81 n.39 (same); September 2018 Quarterly Report at 64 & n.40 (identifying incident in which CIA had responsibility for conducting timely post-targeting content review).

In addition, in June 2018, the government notified the Court that because of reliability issues, NSA had disabled two features of the system used to remind analysts of their obligations

to conduct post-targeting content review. See Supplemental Letter Regarding Post Targeting Content Reviews, June 12, 2018, at 1.

Despite these setbacks, the Court does not view the reported deviations from the policy as presenting significant concerns, principally because (1) only a small fraction of the deviations from NSA's post-tasking content review policy resulted in an improper delay in detasking; and (2) the number of missed or untimely reviews reported, regardless of whether a delay ine detasking resulted, is small when viewed in relation to the total number of current taskings. See, e.g., September 2018 Quarterly Report at 1, 97 (reporting [redacted] facilities under task at any given time between June 1, 2018, and August 31, 2018 [redacted] failures to conduct timely post-targeting content review during the same period). The Court notes, however, that compliance with NSA's post-targeting content-review policy remains an area susceptible to improvement. The government is encouraged to continue to explore additional means of prompting analysts to conduct the content reviews required by NSA's policy and, to the extent the FBI or the CIA is responsible for conducting such review, to ensure compliance with the policy. The government is also expected to continue to report instances of non-compliance with the policy in its quarterly reports.

2. Improper Disclosures of Unminimized Information by the FBI

The April 26, 2017, Opinion also discussed [redacted] the FBI allowed unauthorized personnel to access Section 702 information, only one of which presented a continuing issue of concern to the Court. See April 26, 2017, Opinion at 83-87. That matter involved the provision of unminimized Section 702 information pertaining to [redacted]

contractor that was developing software intended to facilitate review of Section 702 information. See Quarterly Report to FISC Concerning Compliance Matters Under Section 702 of FISA, Sept. 15, 2016, at 131. At the time of the Court's April 2017 decision, returned the information in question to the FBI, but the FBI still planned personnel to install the software on an FBI system. See April 26, 2017, Opinion at 86. The Court ordered the government to report (1) the results of an investigation it had undertaken to determine whether there were other instances of improper access or disclosures, and (2) to report the circumstance nticipated installation of the software on an FBI system, including whether its personnel received access to unminimized Section 702 information in the course of their work; and if so, an assessment whether such access complied with the FBI's minimization procedures. See April 26, 2017, Opinion at 98.

On June 8, 2017, the government reported that its investigation had revealed no additional instances of improperly accessed, unminimized FISA-acquired information on FBI systems between 2008 and March 2017. See Supplemental Response Regarding Improper Disclosures by FBI of Raw FISA-Acquired Information, Including Section 702-Acquired Information, June 8, 2017, at 2. The government also reported not installed the software and undertook to inform the Court of the circumstances of any future installation. Id at 4.

The results of the FBI's investigation reported in June 2017 eased the Court's concerns regarding the possibility of further noncompliance with access restrictions. The FBI must, of course, report any future unauthorized access of Section 702 information; however, in the event

[redacted] software is installed in a manner fully consistent with the FBI's minimization procedures, such installation need not be reported to the Court.

B. New Compliance Issues

In addition to the incidents of non-compliance concerning querying practices and over-retention of Section 702-acquired information discussed above, the government has identified a number of other incidents of noncompliance with the applicable procedures. For example, there have been several instances in which NSA has tasked selectors under Section 702 without conducting the necessary foreignness checks, failing to perform timely foreignness checks (*i.e.*, the results of a foreignness check had grown stale by the time the selector was tasked), or failing to consider the totality of circumstances when making a foreignness determination. See, e.g., September 2017 Quarterly Report at 6-41. In other instances, the government failed to timely detask accounts because of human error, staffing issues, communications failures between agencies, or misunderstandings of the rules. See, e.g., December 2017 Quarterly Report at 28-63. Notices filed over the last year also indicate that the FBI continues to encounter difficulty with the timely establishment of review teams, which its minimization procedures require when a Section 702 target has been charged with a federal crime, see, e.g., Supplemental Notice of Compliance Incident Regarding Two Section 702-Tasked Facilities, Aug. 8, 2018; Rule 13 Notice Regarding [Target and Multiple Docket Numbers] and Three Section 702-Tasked Facilities, Jan. 11, 2018, and that NSA continues to experience problems of varying magnitude with the over-retention of 702-acquired information on its many systems. See, e.g., June 2018 Quarterly Report at 85-87, 93, 97.

After considering these and other incidents reported since April 2017, the Court finds reasonable and sufficient the steps taken by the government to address them and to prevent similar occurrences. It concludes that only one new incident and one potential compliance incident merit specific discussion here.

1. **NSA's Backlog in Processing Purge Orders**

In addition, when reporting incidents of non-

compliance to the FISC, the government frequently represents that information has been placed on the MPL

On May 25, 2018, the government reported to the FISC that, since September 2017, NSA had a growing backlog of purge-discovery orders, which resulted in significant delays in placing information on the MPL. Id. at 2. The majority of the backlogged orders pertained to Section 702 collection id., which suggested that NSA was not timely complying with its purge obligations under the applicable Section 702 procedures. See, e.g., 2016 NSA Minimization Procedures, as amended Mar. 30, 2017, § 3 at 4, 6-10, § 5 at 12, § 6 at 13-14. On May 29, 2018, Judge Collyer held a hearing to learn how the government proposed to address backlog. She directed the government to report on its progress in writing every two weeks.

As of October 1, 2018, NSA has successfully automated its processing of purge-discovery orders in some but not all of its SSRs, and is processing new purge-discovery orders at a rate similar to its pre-September 2017 rate. See Ninth Update at 2. Accordingly, the NSA considers backlog to have been eliminated. The government has not yet, however, provided to the Court a proposed standard for determining whether a backlog in processing purge-discovery orders develops in the future. As a result, until the government is able to assure the Court that purge-discovery orders are being timely processed, NSA will continue to: (1) ; and (2) provide bi-weekly reports with the number of pending purge discovery orders. See id.

Based on the NSA's processing of previously backlogged purge-discovery orders and its bi-weekly checks and updates, the Court finds that the backlog issue does not impede a finding that the NSA's purge procedures, as currently implemented, are consistent with statutory and Fourth Amendment requirements.

2. **Insider-Threat Monitoring**

In the March 27, 2018, Submission, the government informed the Court that it had identified certain insider-threat-monitoring activities, id the subsequent placement of that information into systems maintained by insider-threat personnel. See March 27, 2018, Memorandum at 11. The government refers to those activities as "user activity monitoring" or "UAM." See September 18, 2018, Memorandum at 24.

The government is currently investigating "to what extent the agencies' UAM processes . . . encounter raw section 702-acquired information" and "whether such activities implicate the section 702 minimization and querying procedures." Id. at 27. The government's submission also includes a timeline: (1) NSD has requested that the covered agencies provide information concerning the user-activity-monitoring practices that may implicate raw section 702-acquired information no later than November 1, 2018; (2) the government anticipates that it will conclude any subsequent investigation by mid-January; and (3) "[b]y the end of February 2019, the government intends to provide the Court with a written update on whether UAM activities at each agency implicate the section 702 minimization and/or querying procedures and, if so, the extent to which those procedures need to be amended in order to address those UAM activities." Id. at 28.

The timeline proposed by the government for its investigation of the reported practices appears reasonable, except to the extent it intends to delay reporting any discovery of actual noncompliance with applicable minimization or querying procedures. At present, the government has advised the Court only that user-activity monitoring *may have* resulted in violations of applicable procedures. Any confirmation of that concern should be immediately reported to the Court in accordance with Rule 13(b) of the Court's Rules of Procedure, even though the Court anticipates that any report of such an incident may be limited in content until

the completion of the investigation described by the government. And, to the extent noncompliance with applicable procedures is identified, the government is directed to consider and address options other than amending the procedures to remediate the violations.

V. CONCLUSION

For the foregoing reasons, the Court finds that:

(1) The 2018 Certifications, as amended by the September 18, 2018, Submission, as well as the certifications in the Prior 702 Dockets, as amended by those documents, contain all the required statutory elements;

(2) The targeting procedures for acquisitions conducted pursuant to the 2018 Certifications, as amended, are consistent with the requirements of Section 702(d) and of the Fourth Amendment;

(3) With respect to information acquired under the 2018 Certifications, as amended, the minimization procedures and querying procedures to be implemented by NSA, the CIA, and NCTC are consistent with the requirements of Section 702(e) and Section 702(f)(1)(A)-(B) respectively and of the Fourth Amendment;

(4) With respect to information acquired under the certifications in the Prior Section 702 Dockets, as amended, the minimization procedures to be implemented by NSA, the CIA, and NCTC (to include, as referenced therein, the requirements of the respective agencies' querying procedures) are consistent with the requirements of Section 702(e) and of the Fourth Amendment. (The Court makes no findings regarding whether any querying procedures, as applied to information acquired under the certifications in the Prior Section 702 Dockets, are

consistent with the requirements of Section 702(f)(1) because Section 702(f) only applies "with respect to certifications submitted under [Section 702(h)] . . . after January 1, 2018." Reauthorization Act § 101(a)(2).);

(5) With respect to information acquired under the 2018 Certifications, as amended, the minimization procedures and querying procedures to be implemented by the FBI are consistent with the requirements of Section 702(e) and Section 702(f)(1)(A)-(B) respectively and of the Fourth Amendment, except insofar as they are inconsistent with (a) the recordkeeping requirement at Section 702(f)(1)(B) because they do not require the FBI to keep records of United States-person query terms used to conduct queries of Section 702 information in a manner that fairly identifies United States-person query terms as such or differentiates them from other terms used to query Section 702 information and (b) the requirements of Section 702(e) and Section 702(f)(1)(A) respectively and of the Fourth Amendment because they do not require adequate documentation of the justifications for queries that use United States-person query terms. In those two respects, the Court finds deficiencies in those procedures within the meaning of Section 702(j)(3)(B); and

(6) With respect to information acquired under the certifications in the Prior Section 702 Dockets, as amended, the minimization procedures to be implemented by the FBI (to include, as referenced therein, the requirements of the FBI's querying procedures) are consistent with the requirements of Section 702(e) and of the Fourth Amendment, except insofar as they are inconsistent with those requirements because they do not require adequate documentation of the justifications for queries that use United States-person query terms. In that respect, the Court

finds a deficiency in those procedures within the meaning of Section 702(j)(3)(B); and, accordingly,

IT IS HEREBY ORDERED AS FOLLOWS:

(1) The government's request for approval of the March 27, 2018, Submission, ase amended by the September 18, 2018, Submission, is approved in part and denied in part, as set out below:

a.eThe 2018 Certifications, as amended, and the certifications in the Prior Sectione 702 Dockets, as amended, are approved;

b.eThe use of the targeting procedures for acquisitions conducted pursuant to thee 2018 Certifications, as amended, is approved;

c.eWith respect to information acquired under the 2018 Certifications, ase amended, the use of the minimization procedures and querying procedures to be implemented by NSA, the CIA, and NCTC is approved;

d.eWith respect to information acquired under the certifications in the Priore Section 702 Dockets, as amended, the use of the minimization procedures to be implemented by NSA, the CIA, and NCTC (to include, as referenced therein, the requirements of the respective agencies' querying procedures) is approved;

e.eWith respect to information acquired under the 2018 Certifications, ase amended, the use of the minimization procedures and querying procedures to be implemented by the FBI is approved, except insofar as they (a) do not require the FBI to keep records of United States-person query terms used to conduct queries of Section 702 information in a manner that

fairly identifies United States-person query terms as such or differentiates them from other terms used to query Section 702 information and (b) do not require adequate documentation of the justifications for queries that use United States-person query terms; and

f.e With respect to information acquired under the certifications in the Priore Section 702 Dockets, as amended, the use of the minimization procedures to be implemented by the FBI (to include, as referenced therein, the requirements of the FBI's querying procedures) is approved except insofar as those procedures do not require adequate documentation of the justifications for queries that use United States-person query terms;

(2)eSeparate orders memorializing the dispositions described above are being issuede contemporaneously herewith pursuant to Section 702(j)(3)(A)-(B);

(3)eThe following provisions of the April 26, 2017, Opinion shall remain in effect for thee reasons stated therein. Prospectively, the government need not comply with reporting requirements imposed by the April 26, 2017, Opinion, except as reiterated below:

a.e Raw information obtained by NSA's upstream Internet collection undere Section 702 shall not be provided to the FBI, the CIA or NCTC unless it is done pursuant to revised minimization procedures that are adopted by the AG and DNI and submitted to the FISC for review in conformance with Section 702;

b.e On or before December 31 of each calendar year, the government shall submite a written report to the FISC: (a) describing all administrative-, civil- or criminal-litigation matters necessitating preservation by the FBI, NSA, the CIA or NCTC of Section 702-acquired information that would otherwise be subject to destruction, including the docket number and

court or agency in which such litigation matter is pending; (b) describing the Section 702-acquired information preserved for each such litigation matter; and (c) describing the status of each such litigation matter;

c. The government shall promptly submit a written report describing each instance in which an agency invokes the provision of its minimization or querying procedures providing an exemption for responding to congressional mandates, as discussed in Part IV.D.3 above. Each such report shall describe the circumstances of the deviation from the procedures and identify the specific mandate on which the deviation was based; and

d. The government shall promptly submit in writing a report concerning each instance in which FBI personnel receive and review Section 702-acquired information that the FBI identifies as concerning a United States person in response to a query that is not designed to find and extract foreign-intelligence information. The report should include a detailed description of the information at issue and the manner in which it has been or will be used for analytical, investigative, or evidentiary purposes. It shall also identify the query terms used to elicit the information and provide the FBI's basis for concluding that the query was consistent with applicable minimization procedures. The government need not file such a report for a query for which it files an application with the FISC pursuant to Section 702(f)(2); and

(4) For the reasons stated herein, the government shall comply with the following requirements:

a. The government shall submit reports to the Court on a quarterly basis, beginning not more than 90 days after the issuance of this Memorandum Opinion and Order, on

This report shall: (i) describe the (ii) explain how the government is ensuring that it will only acquire communications to or from a Section 702 target nd (iii) describe methods the government is using to monitor compliance with the abouts limitation and report on the results of such monitoring;

b. No later than ten days after tasking for upstream collection under Section 702 a he government shall submit a notice to the Court. This notice shall: (i) describe (ii) explain how vill comply with the abouts limitation; and (iii) describe steps that will be taken during the course of the proposed acquisition to ensure tha s only acquiring communications to or from authorized Section 702 targets;

c. By January 31, 2019, the government shall make a written submission: (i) describing t acquires with the assistance of downstream providers under Section 702; and (ii) stating to what extent derives from any communication(s), and if so, whether those communications uthorized Section 702 targets. For any communications that n authorized Section 702 target, the government's submission shall describe the source and nature of those communications, to include a description of the parties thereto;

d. By January 31, 2019, the government shall submit a written report that describes the types of information acquired by the FBI under Section 702 that the government regards as metadata and the extent to which such metadata can reveal location information about U.S. persons; and

e. In the event the FBI recognizes unminimized Section 702-acquired information in a system defined by Section III.F.5 or III.F.6 of its September 18, 2018, Minimization Procedures, and seeks to retain such information in that system, the government shall report in its next quarterly report concerning compliance matters under Section 702: (i) whether the information could be retained on an FBI classified-email or instant-messaging system as described in Section III.F.4 of those procedures, or in connection with litigation matters as described in Section III.I.3 of those procedures; and (ii) if not, the reason retention of the information in that system is necessary to the purposes served by that system.

ENTERED this 18 day of October, 2018.

JAMES E. BOASBERG
Judge, United States Foreign
Intelligence Surveillance Court