UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

MEMORANDUM OPINION

This matter is before the Foreign Intelligence Surveillance Court ("FISC" or "Court") on the "Government's Ex Parte Submission of Reauthorization Certification and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certification and Amended Certifications," which was filed on August 24, 2012

a. The Scope of NSA's Upstream Collection.

Last year, following the submission of Certifications [redacted] for renewal, the government made a series of submissions to the Court disclosing that it had materially misrepresented the scope of NSA's "upstream collection" under Section 702 (and prior authorities including the Protect America Act). The term "upstream collection" refers to the acquisition of Internet communications as they transit the "internet backbone" facilities of [redacted] as opposed to the collection of communications directly from Internet service providers like [redacted] See Docket Nos. [redacted] Oct. 3, 2011 Memorandum Opinion ("Oct. 3 Op.") at 5 n.3. Since 2006, the government had represented that NSA's upstream collection only acquired discrete communications to or from a facility tasked for acquisition and communications that referenced the tasked facility (so-called "about" communications). See id. at 15-16. With regard to the latter category, the government had repeatedly assured the Court that NSA only acquired [redacted] specific categories of "about" communications. Id.

The government's 2011 submissions made clear, however, that NSA's upstream collection was much broader than the government had previously represented. For the first time, the government explained that NSA's upstream collection results in the acquisition of "Internet transactions" instead of discrete communications to, from or about a tasked selector. See id. at 15. Internet transactions, the government would ultimately acknowledge, could and often do contain multiple discrete communications, including wholly domestic non-target communications and other non-target communications to, from, or concerning U.S. persons. Id.

While the government was able to show that the percentage of wholly domestic non-target communications and other non-target communications to, from, or concerning U.S. persons being acquired was small relative to the total volume of Internet communications acquired by the NSA pursuant to section 702, the acquisition of such communications nonetheless presented a significant issue for the Court in reviewing the procedures. In fact, it appeared that NSA was annually acquiring tens of thousands of Internet transactions containing at least one wholly domestic communication; that many of these wholly domestic communications were not to, from, or about a targeted facility; and that NSA was also likely annually acquiring tens of thousands of additional Internet transactions containing one or more non-target communications to or from U.S. persons or persons in the United States. Id. at 33, 37.

In the October 3 Opinion, the Court approved in large part Certifications [redacted] and the accompanying targeting and minimization procedures. The Court concluded, however, that one aspect of the proposed collection – NSA's upstream collection of Internet transactions containing multiple communications, or "MCTs" – was, in some respects, deficient on statutory and constitutional grounds. The Court concluded that although NSA's targeting procedures met the statutory requirements, the NSA minimization procedures, as the government proposed to apply them to MCTs, did not satisfy the statutory definition of "minimization procedures" with respect to retention. Oct. 3 Op. at 59-63. As applied to the upstream collection of Internet transactions, the Court found that the procedures were not reasonably designed to minimize the retention of U.S. person information consistent with the government's national security needs. Id. at 62-63. The Court explained that the net effect of the

procedures would have been that thousands of wholly domestic communications, and thousands of other discrete communications that are not to or from a targeted selector but that are to, from, or concerning United States persons, would be retained by NSA for at least five years, despite the fact that they have no direct connection to a targeted selector and, therefore, were unlikely to contain foreign intelligence information. Id. at 60-61. For the same reason, the Court concluded that NSA's procedures, as the government proposed to apply then to MCTs, failed to satisfy the requirements of the Fourth Amendment. Id. at 78-79. The Court noted that the government might be able to remedy the deficiencies that it had identified, either by tailoring its upstream acquisition or by adopting more stringent post-acquisition safeguards. Id. at 61-62, 79.

By operation of the statute, the government was permitted to continue the problematic portion of its collection for 30 days while taking steps to remedy the deficiencies identified in the October 3 order and opinion. See 50 U.S.C. § 1881a(i)(3)(B). In late October of 2011, the government timely submitted amended NSA minimization procedures that included additional provisions regarding NSA's upstream collection. The amended procedures, which took effect on October 31, 2011 ("Oct. 31, 2011 NSA Minimization Procedures"), require NSA to restrict access to the portions of its ongoing upstream collection that are most likely to contain wholly domestic communications and non-target information that is subject to statutory or Fourth Amendment protection. See Nov. 30 Op. at 7-9. Segregated Internet transactions can be moved to NSA's general repositories only after having been determined by a specially trained analyst not to contain a wholly domestic communication. Id. at 8. Any transaction containing a wholly domestic communication (whether segregated or not) would be purged upon recognition. Id. at

8, 9. Any transaction moved from segregation to NSA's general repositories would be permanently marked as having previously been segregated. Id. at 8. On the non-segregated side, any discrete communication within an Internet transaction that an analyst wishes to use is subject to additional checks. Id. at 8-10. NSA is not permitted to use any discrete, non-target communication that is determined to be to or from a U.S. person or a person who appears to be in the United States, other than to protect against an immediate threat to human life. Id. at 9. Finally, all upstream acquisitions are retained for a default maximum period of two, rather than five, years. Id. at 10-11.

The Court concluded in the November 30 Opinion that the October 31, 2011 NSA Minimization Procedures adequately remedied the deficiencies that had been identified in the October 3 opinion. Id. at 14-15. Accordingly, NSA was able to continue its upstream collection of Internet transactions (including MCTs) without interruption, but pursuant to amended procedures that are consistent with statutory and constitutional requirements.

However, issues remained with respect to the past upstream collection residing in NSA's databases. Because NSA's upstream collection almost certainly included at least some acquisitions constituting "electronic surveillance" within the meaning of 50 U.S.C. § 1801(f), any overcollection resulting from the government's misrepresentation of the scope of that collection implicates 50 U.S.C. § 1809(a)(2). Section 1809(a)(2) makes it a crime to "disclose[] or use[] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized" by statute. The Court therefore directed the government to make a written submission addressing

the applicability of Section 1809(a), which the government did on November 22, 2011. See [redacted], Oct. 13, 2011 Briefing Order, and Government's Response to the Court's Briefing Order of Oct. 13, 2011 (arguing that Section 1809(a)(2) does not apply).

Beginning late in 2011, the government began taking steps that had the effect of mitigating any Section 1809(a)(2) problem, including the risk that information subject to the statutory criminal prohibition might be used or disclosed in an application filed before this Court. The government informed the Court in October 2011 that although the amended NSA procedures do not by their terms apply to information acquired before October 31, NSA would apply portions of the procedures to the past upstream collection, including certain limitations on the use or disclosure of such information. See Nov. 30 Opinion at 20-21. Although it was not technically feasible for NSA to segregate the past upstream collection in the same way it is now segregating the incoming upstream acquisitions, the government explained that it would apply the remaining components of the amended procedures approved by the Court to the previously-collected data, including (1) the prohibition on using discrete, non-target communications determined to be to or from a U.S. person or a person in the United States, and (2) the two-year age-off requirement. See id. at 21.

Thereafter, in April 2012, the government orally informed the Court that NSA had made a "corporate decision" to purge all data in its repositories that can be identified as having been acquired through upstream collection before the October 31, 2011 effective date of the amended NSA minimization procedures approved by the Court in the November 30 Opinion. NSA's

effort to purge that information, to the extent it is reasonably feasible to do so, is now complete. See Aug. 24 Submission at 9-10.[17]

Finally, NSA has adopted measures to deal with the possibility that it has issued reports based on upstream collection that was unauthorized. NSA has identified [redacted] reports that were issued from the inception of its collection under Section 702 to October 31, 2011, that rely at least in part on information derived from NSA's upstream acquisitions from that period. See Sept. 12, 2012 Supplement to the Government's Ex Parte Submission of Reauthorization Certifications at 2 ("Sept. 12 Submission"). The government advises that, of the [redacted] reports, [redacted] have been confirmed to be based entirely upon communications that are to, from or about persons properly targeted under Section 702 and therefore present no issue under Section 1809(a)(2). See id. The government is unable to make similar assurances, however, regarding the remaining [redacted] reports. Accordingly, NSA will direct the recipients of those [redacted] reports (both within NSA and outside the agency) not to further use or disseminate information contained therein without first obtaining NSA's express approval. Id. at 3-4. Upon receipt of such a request, NSA will review the relevant report to determine whether continued use thereof is

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[17] The government has informed the Court that NSA stores some of the past upstream collection in repositories in which it may no longer be identifiable as such. [redacted] See Aug. 24 Submission at 14-16. Assuming that NSA cannot with reasonable effort identify information in its repositories as the fruit of an unauthorized electronic surveillance, such information falls outside the scope of Section 1809(a)(2), which by its terms applies only when there is knowledge or "reason to know that the information was obtained through electronic surveillance not authorized" by statute.

appropriate. Id. at 4.[18] Finally, the government has informed the Court that it will not use any report that cites to upstream collection acquired prior to October 31, 2011 in an application to this Court absent express notice to, and approval of, the Court. Aug. 24 Submission at 24.

Taken together, the remedial steps taken by the government since October 2011 greatly reduce the risk that NSA will run afoul of Section 1809(a)(2) in its handling of the past upstream acquisitions made under color of Section 702. NSA's self-imposed prohibition on using non-target communications to or from a U.S. person or a person in the United States helped to ensure that the fruits of unauthorized electronic surveillance were not used or disclosed while it was working to purge the pre-October 31, 2011 upstream collection. And NSA's subsequent purge of that collection from its repositories and the above-described measures it has taken with respect to derivative reports further reduce the risk of a problem under Section 1809(a)(2). Finally, the amended NSA minimization procedures provide that in the event, despite NSA's effort to purge the prior upstream collection, the agency discovers an Internet transaction acquired before October 31, 2011, such transaction must be purged upon recognition. See Amended NSA Minimization Procedures at 8 § 3(c)(3). In light of the foregoing, it appears to the Court that the outstanding issues raised by NSA's upstream collection of Internet transactions have been resolved, subject to the discussion of changes to the minimization procedures that appears

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[18] For instance, NSA may determine that the report is fully supported by cited communications other than the ones obtained through upstream communication. Sept. 12 Submission at 4. In other instances, NSA may revise the report so that it no longer relies upon upstream communications and reissue it. Id. If such steps are not feasible because the report cannot be supported without the upstream communication, NSA will cancel the report. Id.

below.[19]

[redacted]

[19] Under the circumstances, the Court finds it unnecessary to further address the arguments advanced by the government in its November 22, 2011 response to the Court's October 13, 2011 briefing order regarding Section 1809(a), particularly those regarding the scope of prior Section 702 authorizations.