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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

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OPINION AND ORDER

(S) [redacted] the Court entered an order (the [redacted] Order”) in the above-captioned matter directing the government to file a memorandum addressing the Court’s concern that some of the conduct described in a “Return on Use of Roving Electronic Surveillance” filed by the government of [redacted] (the “Return”), may have exceeded the scope of the authorization reflected in the Court’s [redacted]. On [redacted] (S) [redacted] the government filed a Memorandum of Law (the “Memorandum”) addressing the issues raised by the Court in [redacted] Order. For the reasons set forth below, the Court (S) concludes that the government exceeded the authority granted in the [redacted]. (S)

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I. Background

(S) In the [redacted] the Court authorized the United States to conduct [redacted] (S) [redacted] (S) [redacted] also contained [redacted] (S) [redacted] of “any other [redacted] provided by the service provider(s) specified (S) herein” – i.e., [redacted] now subscribed to, or that hereafter are subscribed to, by [redacted] (S) Id. at 6. In addition, the [redacted] authorized so-called “roving” electronic surveillance of (S) [redacted] (S) requiring the assistance of heretofore unidentified persons within the meaning of 50 U.S.C. § 1805(c)(2)(B).” Id. at 5.

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According to the Return, the Federal Bureau of Investigation (“FBI”) learned in [redacted] (S) [redacted]

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(S) [redacted] which apparently provides service for the [redacted] informed the FBI that the [redacted] (S)
is [redacted] See id. The (S)
Return reported that on [redacted] the FBI, relying upon the "roving" provision in the (S)
(S) [redacted] initiated [redacted] on the [redacted] (S)

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(S) In the [redacted] the Court expressed concern that the commencement of surveillance (S)
of [redacted] number might have exceeded the authority granted in the (S)
(S) [redacted] The Court explained that "[b]ecause the [redacted] (S)
[redacted] for purposes of the roving authority granted by the Court (S)
(S) pursuant to Section 1805(c)(2), [redacted] Accordingly, the Court directed the (S)
government to file a memorandum explaining the basis for its belief that the roving authority (S)
granted by the Court permitted the FBI to initiate [redacted] or [redacted] (S)
(S) [redacted] and to "describe the government's proposed disposition of any (S)
communications acquired from 'roving' coverage of that facility in the event the Court concludes (S)
that such coverage was not authorized." Id. at 2.² As noted above, the government filed its (S)
Memorandum on [redacted] (S)

II. Analysis

(S) The government contends that the [redacted] authorized "roving" electronic (S)
surveillance of [redacted] (S)
(S) [redacted] Without endorsing or adopting every (S)
aspect of the government's statutory analysis, the Court agrees that it could have authorized such (S)
coverage. The language of the [redacted] however, precludes the conclusion that such (S)
(S) authority was in fact granted here.

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¹ The government acknowledged that the [redacted] (S)
(S) [redacted] (S)

² Or [redacted] the Court granted the government's application for [redacted] authority (S)

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[redacted] (S)

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(S) [redacted] At the government's request, the Court issued a [redacted] to assist in the [redacted] of these [redacted] (S)

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(S) The third category of [redacted] numbers authorized for surveillance included the so-called "roving" authority. Specifically, the [redacted] (S)

(S) requiring the assistance of heretofore unidentified persons within the meaning of 50 U.S.C. § 1805(c)(2)(B).³ *Id.* at 5 [redacted] roving authority is not routinely granted by the Court. Rather, it is granted only when the Court finds, upon request by the government and based on "specific facts," that "the actions of the target . . . may have the effect of thwarting the identification of a specified person" whose assistance is "necessary to accomplish the electronic surveillance." See 50 U.S.C. 1805(c)(2)(B). For example, the Court might approve a request for roving coverage when the specific facts presented (e.g., a history of service provider changes) suggest that the target is likely to [redacted] to, or obtain a [redacted] from, a different service provider. When the Court grants roving authority, (S)

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³ 50 U.S.C. § 1805(c) requires that an order authorizing electronic surveillance contain certain "specifications" and "directions." Subsection (c)(2)(B) requires that such an order direct

that, upon the request of the applicant, a specified communication or other common carrier, landlord, custodian, or other specified person, or in circumstances where the Court finds, based on specific facts provided in the application, that the actions of the target of the application may have the effect of thwarting the identification of a specified person, such other persons, furnish the applicant forthwith all information, facilities, or technical assistance necessary to accomplish the electronic surveillance

50 U.S.C. § 1805(c)(2)(B).

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(S) it issues a roving [redacted] directing the recipient thereof to assist the government in effecting [redacted]. In the event (S) that the assistance of a previously unidentified provider becomes necessary, the government can serve the roving [redacted] on that provider to implement coverage.

(S) As the foregoing discussion establishes, the [redacted] (S)
(S) [redacted] The [redacted] (S)
(S) [redacted] provided by "the service provider(s) specified" in the order. For [redacted] (S)
(S) [redacted] The roving authority, on the other hand, applied to other, (S)
(S) persons whose assistance might become necessary but who were unidentified at the time of the (S)
(S) order. The [redacted] and roving provisions of the [redacted] clearly differed in another (S)
(S) important respect. The [redacted] (S)
(S) [redacted] but the roving authority applied more broadly to [redacted] (S)

(S) The government acknowledges that the [redacted] refers to both "specified" and (S)
(S) "unidentified" providers. Memorandum at 5. It contends, however, th [redacted] (S)
(S) [redacted] (S)
(S) [redacted] For purposes of later-identified (S)
(S) [redacted] the government contends that [redacted] is an "unidentified" provider (S)
(S) subject to the roving authority. *Id.* Those contentions are unpersuasive. Under the more (S)
(S) plausible and natural reading of the orders [redacted] was a "specified" provider and not an (S)
(S) "unidentified" provider for purposes of all authorities granted by the Court.

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(S) The Court does not doubt that it could have authorized coverage of [REDACTED] (S)
[REDACTED] In other cases in which the government has requested revolving authority and (S)
made the required thwarting showing, the government has proposed, and the Court has approved, (S)
various forms of language expressly authorizing [REDACTED] of any later-identified (S)
[REDACTED] during the period covered by the order, without the (S)
limiting language that appeared in the [REDACTED] at issue here. See, e.g., Docket No. [REDACTED] (S)
[REDACTED] Indeed, the Court approved such a (S)
request in the most recent renewal this matter. See Docket No. [REDACTED] (S)
[REDACTED] (S)

(S) But the government made no similar request in the above-captioned docket. The Court (S)
adopted without revision the proposed [REDACTED] that the government attached to its (S)
application. The application tracked the [REDACTED] by requesting [REDACTED] for (S)
additional [REDACTED] and serviced by the specified (S)
providers, see Docket No. [REDACTED] by separately requesting authority (S)
[REDACTED] (S)

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(S) ⁴ The corresponding provisions of the government's application likewise provide no (S)
basis for viewing [REDACTED] as an "unidentified" provider. See Docket No. [REDACTED] (S)
[REDACTED]

(S) ⁵ The Court acknowledges that the [REDACTED] could have been clearer and more (S)
consistent in its terminology. See, e.g., [REDACTED] at 5 & 11 (using terms "heretofore (S)
unidentified persons" and "persons . . . who have not yet been identified" to describe same (S)
category of providers); id. at 6 & 10 (using terms "service provider(s) specified herein" and (S)
"specified persons" to refer to same class of providers); id. at 11 (arguably referring to both (S)
categories of providers as "said specified persons"). Nevertheless, the language of the order does (S)
not support the conclusion that a provider such as [REDACTED] which was identified by name in the (S)
order, could also qualify as an unidentified provider. (S)

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(S) for surveillance of [redacted] and requiring assistance of
unidentified persons, id. at 47; and differentiating between [redacted] directed to specified
(S) persons and a "roving" [redacted] directed to unidentified persons, id. at 42. Although (S)
other portions of the application spoke more generally of a request for additional [redacted]
(S) [redacted] the application, read as a whole, cannot fairly be
understood to have requested authority for [redacted] (S)
(S) [redacted] (S)

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III. Conclusion

In light of the foregoing, the Court concludes that the [redacted] in the above
captioned-docket did not authorize [redacted] (S)
(S) [redacted] The government shall handle the fruits of the unauthorized surveillance in accordance
with applicable law and report to the Court in accordance with FISC Rule 10(c)(iv).⁶

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It is SO ORDERED, this [redacted] (S)

Thomas F. Hogan
THOMAS F. HOGAN
Judge, United States Foreign
Intelligence Surveillance Court

⁶ Although the Court concludes that there has been an overcollection, the Court sees no indication of bad faith on the part of the agents or attorneys involved. Arguably, at least, "roving" practice has not been entirely consistent, see Memorandum at 4 n.2., and the language in the application and orders in this matter could have been clearer, see note 5, supra. The government has agreed to make clarifying changes to its proposed orders in future "roving" cases that are likely to reduce the risk of misunderstandings like the one that occurred in this matter. Id. at 16-17.

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I, [redacted] Deputy Clerk,
FISC, certify that this document
is a true and correct copy of
the original. [redacted]