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

2009 AUG 28 PM 6:11

CLERK

IN RE DNI/AG 702(g) CERTIFICATION

(b)(1); (b)(3); (b)(7)(E)

~~UNDER SEAL~~

Docket No. 702(i)-08-01

NOTICE OF FILING ~~(S)~~

NOTICE IS HEREBY GIVEN that the United States of America, through the undersigned Department of Justice attorney, submits its analysis of 50 U.S.C. § 1806(i) (attached hereto at Tab 1).

Respectfully submitted,

(b)(6)

National Security Division
United States Department of Justice

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~~Classified by: Matthew G. Olsen, Deputy Assistant Attorney General, NSD, DOJ~~

~~Reason: 1.4(c)~~

~~Declassify on: 27 August 2033~~

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Question: Whether 50 U.S.C. 1806(i) requires that the Attorney General find that information acquired from a person targeted under section 702 of FISA while that person, reasonably believed to be outside the United States, is in the United States "indicates a threat of death or serious bodily harm" before the National Security Agency may retain such information. (U)

Answer: No. Because NSA has intentionally acquired the information, section 1806(i) does not apply and NSA may retain the information without such a determination. ~~(S)~~

- Under section 702 of FISA, as amended, the Attorney General and the Director of National Intelligence "may authorize jointly . . . the targeting of persons reasonably believed to be outside the United States to acquire foreign intelligence information." (U)
- The reasonable belief standard allows for an inadvertent erroneous determination of location and recognizes that a target's location may change before the Government learns of the movement. (U)
- Of course, the reasonable belief standard (as well as separate provisions of section 702) preclude the Government from "intentionally target[ing] any person known at the time of the acquisition to be located in the United States," section 702(b)(2), and from "intentionally acquir[ing] 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," section 702(b)(4). (U)
- Thus, provided that, at the time of the acquisition, the target was reasonably believed to be outside the United States (and thus not "known" to be here), the acquisition is authorized by section 702. (U)
- Subsection 1806(i) provides no limitation on the use of the information because the NSA's acquisition remains intentional even where the target is mistakenly, but reasonably, believed to be outside the United States. ~~(S)~~
- Subsection 1806(i) provides that "[i]n circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within in the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents indicates a threat of death or serious bodily harm to any person." (U)

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- The provision originally covered only radio communications, but was recently amended to cover all communications to make it technology neutral. See 154 Cong. Rec. S6133 (daily ed. June 25, 2008). (U)
- The plain language of subsection 1806(i) demonstrates that it only applies to “unintentional acquisition[.]” (U)
 - The legislative history of this provision as originally enacted indicates that it was meant to restrict the Government’s use of **unintentionally acquired** private domestic radio communications. Congress concluded that section 1806(i) was needed because “electronic surveillance” of radio communications, as defined in section 1801(f)(3), covered only the intentional acquisition of the contents of private domestic radio communications. Members had expressed concern that unless the use of **unintentionally acquired communications** was restricted, the Government might sidestep FISA by acquiring domestic communications without **intentionally targeting any particular communication**. Subsection 1806(i) minimized this possibility by restricting the use of any information acquired in this manner to only the gravest of circumstances, i.e., where the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person. H. Rep. 95-1283 (June 8, 1978) at 94. (U)
 - The legislative history also suggests that subsection 1806(i) was intended to address the risk inherent in radio collection of intercepting domestic communications. S. Rep. 95-701 (Mar. 14, 1978) at 36. (“Thus, intelligence collection may be targeted against foreign or international communications but accidentally and unintentionally acquire the contents of communications intended to be totally domestic.”) (U)
- In contrast, the NSA’s acquisition, which targeted a person reasonably believed to be outside the United States, is intentional and remains so even if the person has, unbeknownst to the NSA, moved here. ~~(S)~~
- Thus, section 1806(i) simply does not apply to information acquired under section 702 when the target, who is reasonably believed to be outside the United States is, in fact, here. (U)
- Accordingly, the domestic communications carve-out in the minimization procedures adopted by the Attorney General in consultation with the Director of National Intelligence in DNI/AG 702(g) Certification ^{(b)(1); (b)(3); (b)(7)(E)} [REDACTED] which is intended to apply to domestic communications acquired after a target has entered the U.S. but before NSA knows that the target has entered the U.S., is consistent with section 1806(i). ~~(S)~~
- Section 1806(i) would apply, however, to unintentional acquisitions under section 702(a) such as a circumstance where a selector appropriate for targeting under section 702(a) was incorrectly identified to an electronic communications service provider (e.g., as a result of a typographical error) or where a technical error resulted in the acquisition from

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a non-targeted selector. ~~(S)~~

- In those circumstances, the acquisition of the content of a communication would be accidental and unintentional. ~~(S)~~
- In addition, that the acquisition is authorized by section 702 (under the reasonable belief standard) renders inapplicable section 109's general prohibition on "the disclo[ure] or use [of] information obtained under color of law by electronic surveillance" with the knowledge or the reason to know "that the information was obtained through electronic surveillance not authorized by this Act . . ." (even assuming that the section 702 acquisition would constitute electronic surveillance). (U)
 - The electronic surveillance would indeed be "authorized by this Act" where the target was reasonably, even if mistakenly, believed to be outside the United States. (U)

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