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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

MEMORANDUM OPINION

This matter is before the Court on the Government's Ex Parte Submission [redacted] and Related Procedures and Request for an Order Approving [redacted] and Procedures, filed on January 12, 2009 ("January 12 Submission") pursuant to 50 U.S.C. § 1881a(g). For the reasons stated below, the government's request for approval is granted.

I. BACKGROUND

A. The FAA Certifications

The January 12 Submission includes [redacted] filed by the government pursuant to Section 702 of the Foreign Intelligence Surveillance Act ("FISA"), which was enacted as part of the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (Jul. 10, 2008) ("FAA"), and is now codified at 50 U.S.C. § 1881a. [redacted] certifications were submitted in 2008, [redacted] (collectively, the "2008 Dockets"). Like the government's submissions in the 2008 Dockets, the January 12 Submission in the above-captioned docket includes [redacted] by the Attorney General and the Director of National Intelligence

("DNI"); supporting affidavits by the Director of the National Security Agency ("NSA"), the Director of the Federal Bureau of Investigation ("FBI"), and the Director of the Central Intelligence Agency ("CIA"); two sets of targeting procedures, for use by the NSA and FBI respectively; and three sets of minimization procedures, for use by the NSA, FBI, and CIA respectively.

The certifications filed in the 2008 Dockets govern the acquisition of foreign intelligence information [redacted] certifications are limited to "the targeting of non-United States persons reasonably believed to be located outside the United States." [redacted]

On September 4, 2008, the Court issued a Memorandum Opinion and accompanying Order approving the certification filed in Docket Number 702(i)-08-01 and the use of the targeting and minimization procedures submitted with that certification. [redacted]

[redacted] A copy of each of those Memorandum Opinions is attached hereto at Tab A, and both are incorporated by reference herein.

B. The Overcollection Incidents Involving the 2008 FAA Certifications

On [redacted] 2008, the government filed, pursuant to Rule 10(c) of this Court's Rules of Procedure, a preliminary notice of compliance incidents involving intelligence gathering activities conducted by NSA pursuant to the certifications approved in the 2008 Dockets. The government explained in the notice that collection [redacted] had intercepted [redacted] communications unrelated to the targeted selector [redacted] 2008 Notice of Compliance Incident Regarding Collection Pursuant to Section 702 [of] the FISA Amendments Act of 2009 at 1-2 (internal quotation marks omitted). Each of the incidents involved what the government has since referred to as [redacted] overcollection [redacted]

[1] By letter dated [redacted] 2009, the Presiding Judge of this Court asked the Department of Justice to explain why it took the government nearly three months following the discovery of the [redacted] incident in September 2008 to notify the Court of the problem. [redacted] 2009 letter from Hon. Colleen Kollar-Kotelly to Assistant Attorney General J. Patrick Rowan at 1. In a response dated [redacted] 2009, the government acknowledged its noncompliance with Rule 10(c) of the FISC Rules of Procedure, which requires the government to "immediately inform" the Court in writing of instances of noncompliance, and assured the Court that it will endeavor to provide timely notice of such incidents in the future. [redacted], 2009 Letter from Acting Assistant Attorney General Matthew G. Olsen to Hon. Colleen Kollar-Kotelly at 1-2.

[redacted]

C. The Government's Reliance on Certain Prior Representations

On [redacted] 2009, the United States submitted the Government's Ex Parte Statement Concerning DNI/AG 702(g) [redacted] Submission"). In that submission, the government stated that some, but not all, of the representations it made to the Court concerning the certifications in the 2008 Dockets "are equally applicable" to [redacted] such that "it would be appropriate for the Court to rely on those prior representations" in reviewing [redacted] Submission at 3-4.[3] The

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[2] The government also has identified a number of additional compliance incidents of a different nature involving intelligence gathering under Section 702. Those incidents are discussed below in Section III.E.

[3] The prior representations referred to by the government appeared in portions of the record first developed [redacted] copies of which the government included as part of the [redacted] Submission in the above-captioned matter:

(1) the government's written responses to questions posed by the Court, first

(continued...)

government first asserted that because the NSA and FBI targeting procedures and the CIA minimization procedures included with [redacted] in the above-captioned docket "are identical to those submitted to and approved by the Court" in the 2008 Dockets, the representations made by the government with respect to those targeting and minimization procedures in the 2008 Dockets "are equally applicable" to the corresponding procedures now before the Court. Id. at 4. In a footnote, however, the government suggested that the overcollection incidents reported to the Court on [redacted], 2008, which were still under investigation, might affect the accuracy of prior government representations "concerning the efficacy of the [redacted] used to conduct acquisitions authorized under [the 2008 FAA] certifications." Id. at 4 n.2.

Next, the government's [redacted] Submission noted the revision of Section 8 of the NSA minimization procedures. [redacted] Submission at 4-5. Specifically, the government asserted that Section 8(a) of the minimization procedures now before the Court "contains new language that clarifies NSA's authority to disseminate to foreign governments properly minimized information of or concerning United States persons that is acquired in accordance with [the accompanying] certification," and that Section 8(b) "contains language enabling NSA to seek linguistic and

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[3](...continued)
submitted on [redacted] 2008;

(2) the transcript of the hearing conducted on [redacted] 2008; and

(3) two documents, first submitted on [redacted] 2008, and [redacted] 2008, respectively, addressing the relationship between 50 U.S.C. § 1806(i) and certain provisions of the targeting and minimization procedures.

technical assistance from a greater array of NSA's foreign cryptologic partners" than is authorized under the NSA minimization procedures authorized in the 2008 Dockets. Id. at 5. Notwithstanding those differences, the government asserted that "it would be appropriate for the Court to rely upon representations previously made by the [g]overnment concerning the NSA minimization procedures submitted to and approved by the Court" in the 2008 Dockets. Id. at 6-7.

Lastly, the government stated that the Court should not rely on the government's prior representations regarding the FBI Minimization Procedures submitted to and approved by the Court in the 2008 Dockets, which incorporated by reference, with certain modifications, the FBI Standard Minimization Procedures ("SMPs") in their then-current form. [redacted] Submission at 7-8. The government explained that the FBI SMPs have since been substantially revised, and that the revised FBI SMPs are adopted with appropriate modifications for use in [redacted] in the above-captioned docket. Id.

D. The Court's Request for Additional Information

Following a careful review of the [redacted] and [redacted] Submissions, the Court identified 20 factual and legal questions regarding [redacted] in the above-captioned docket that merited further input from the government. On [redacted], 2009, the Court issued an order directing the government to file a brief addressing those questions. Many of the Court's questions concerned the overcollection incidents that were the subject of the government's [redacted] 2008, noncompliance notice, and their possible effect on the Court's ability to make the findings necessary to approve [redacted] 2009 Order at 2-4. On [redacted] 2009, the government submitted its responses to the Court's questions. See

Government's Response to the Court's Order of [redacted], 2009 ("[redacted] Submission").

E. The Government's Motion for an Extension of Time

On [redacted], 2009, following a meeting with the Court and Court staff, the government filed a motion seeking to extend until [redacted] 2009, the 30-day time limit for completion of the Court's review [redacted] in the above-referenced docket, which was then due to expire on [redacted], 2009. Motion for an Order Extending Time Limit Pursuant to 50 U.S.C. § 1881a(j)(2) at 4. The government noted in the motion that its efforts to address the overcollection incidents were still ongoing and that it expected remedial measures to be in place by the end of [redacted] 2009. Id. at 3. The government asserted that "providing the Court with additional details of the implementation of these remedial measures will aid the Court" in reviewing [redacted] and the targeting and minimization procedures submitted therewith, but that the government would not be able to supplement the record until after the [redacted] deadline. Id. at 4. The government further asserted that granting the requested extension of time would be consistent with national security, because, by operation of statute, the government's acquisition of foreign intelligence information concerning [redacted] pursuant to other authorities could continue pending completion of the Court's review. Id. at 6-7.[4]

[4] [redacted]

Section 702(j)(2) of FISA permits the Court, by order for reasons stated, to extend, as necessary for good cause in a manner consistent with national security, the time limit for this Court to issue an order under Section 702(i)(3) concerning the certification now before the Court. By operation of Section 404(a)(7) of the FAA, the authorization in [redacted] continues beyond its

(continued...)

On [redacted] 2009, the Court entered an order granting the government's motion. Based upon the representations in the motion, the Court found that there was good cause to extend the time limit for its review [redacted] 2009, and that the extension would be consistent with national security. [redacted] 2009 Order at 3.

F. The Government's [redacted] Submission

Following additional informal discussions with the FISC staff, the government filed, on [redacted] 2009, a supplemental response providing additional and updated information concerning the issues raised by the Court in its [redacted] Order. See generally [redacted] Submission.

II. REVIEW [redacted]

The Court must review a certification submitted pursuant to Section 702 of FISA "to determine whether [it] contains all the required elements." 50 U.S.C. § 1881a(i)(2)(A). The Court's examination [redacted] in the above-captioned docket confirms that:

(1) [redacted] been made under oath by the Attorney General and the DNI, as required by 50 U.S.C. § 1881a(g)(1)(A) [redacted];

(2) [redacted] each of the attestations required by 50 U.S.C. § 1881a(g)(2)(A), [redacted];

(3) as required by 50 U.S.C. § 1881a(g)(2)(B), [redacted] accompanied by the applicable targeting procedures[5] and minimization procedures;[6]

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[4](...continued)
stated expiration date until the Court enters an order on [redacted] submitted in the above-captioned docket. Pub. L. No. 110-261, 122 Stat. 2476.

[5] See Procedures Used by NSA for Targeting Non-United States Persons Reasonably Believed to be Located Outside the United States to Acquire Foreign Intelligence Information (continued...)

(4) [redacted] supported by the affidavits of appropriate national security officials, as described in 50 U.S.C. § 1881a(g)(2)(C));[7] and

(5) [redacted] an effective date for the authorization in compliance with 50 U.S.C. § 1881a(g)(2)(D). [redacted]

Accordingly, the Court finds that [redacted] submitted [redacted] all the required elements." 50 U.S.C. § 1881a(i)(2)(A).

III. REVIEW OF THE TARGETING AND MINIMIZATION PROCEDURES

The Court is required to review the targeting and minimization procedures to determine whether they are consistent with the requirements of 50 U.S.C. § 1881a(d)(1) and (e)(2). 50 U.S.C.

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[5](...continued)
Pursuant to Section 702 of FISA, as Amended ("NSA Targeting Procedures") (attached [redacted] as Exhibit A); Procedures Used by the FBI for Targeting Non-United States Persons Reasonably Believed to be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("FBI Targeting Procedures") (attached as Exhibit C).

[6] See Minimization Procedures Used by the NSA in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("NSA Minimization Procedures") (attached [redacted] as Exhibit B); Minimization Procedures Used by the FBI in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("FBI Minimization Procedures") (attached as Exhibit D); Minimization Procedures Used by the CIA in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("CIA Minimization Procedures") (attached as Exhibit E).

[7] See Affidavit of Lt. Gen. Keith B. Alexander, U.S. Army, Director, NSA (attached [redacted] at Tab 1); Affidavit of Robert S. Mueller, III, Director, FBI (attached at Tab 2); Affidavit of Michael V. Hayden, Director, CIA (attached at Tab 3).

[8] The statement described in 50 U.S.C. § 1881a(g)(E) is not required in this case because there has been no "exigent circumstances" determination under Section 1881a(c)(2).

§ 1881a(i)(3)(A). Section 1881a(d)(1) provides that the targeting procedures must be "reasonably designed" to "ensure that any acquisition authorized under [the certification] 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 known recipients are known at the time of the acquisition to be located in the United States." Section 1881a(e)(2) provides that the minimization procedures are subject to judicial review pursuant to Section 1881a(i), which, in turn, requires the Court to determine whether such procedures "meet the definition of minimization procedures under [50 U.S.C. § 1801(h) or § 1821(4)], as appropriate." Id. § 1881a(i)(2)(C). FISA defines "minimization procedures," in pertinent part, as follows:

> specific procedures, which shall be adopted by the Attorney General, 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;

50 U.S.C. § 1801(h) (emphasis added); see also id. § 1821(4).[9] Finally, the Court must determine whether the targeting and minimization procedures are consistent with the requirements of the Fourth Amendment. Id. § 1881a(i)(3)(A).

Based on the Court's review of the targeting and minimization procedures in the above-captioned docket, the representations of the government made in this matter and those carried forward from the 2008 Dockets, and the analysis set out below and in the Opinions of the Court in

[9] Sections 1801(h) and 1821(4) differ only in referring to electronic surveillance (§ 1801(h)) or physical search (§ 1821(4)), and to the procedure for emergency approval for those respective modes of collection in a context that does not apply here.

the 2008 Dockets, the Court finds that the targeting and minimization procedures are consistent with the requirements of 50 U.S.C. § 1881a(d)-(e) and with the Fourth Amendment.

A. The Unchanged Procedures

The government represents that the following sets of procedures submitted in the above-captioned docket are identical to the corresponding procedures that were found by the Court in the 2008 Dockets to meet the applicable statutory and constitutional requirements: the NSA Targeting Procedures, the FBI Targeting Procedures, and the CIA Minimization Procedures. [redacted] Submission at 4. The Court has reviewed each of these sets of procedures and confirmed that this is the case.

B. The Modifications to the NSA Minimization Procedures

The NSA Minimization Procedures submitted in the above-captioned docket differ from the corresponding procedures submitted and approved in the 2008 Dockets.[10] Specifically, Sections 8(a) and 8(b) of the NSA Minimization Procedures now before the Court replace Sections 8(a) through (e) of the previously-approved procedures. The changes reflected in the new Section 8(a) regard the dissemination to foreign governments of information acquired by NSA pursuant to Section 702 of the Act. Sections 6(b) and 7 of the NSA Minimization Procedures approved by the Court in the 2008 Dockets authorize NSA to disseminate intelligence reports containing properly minimized information regarding U.S. persons, but those procedures nowhere specify the entities to

[10] The NSA Minimization Procedures submitted in the 2008 Dockets are not absolutely identical to each other, but the Court found the minor distinctions between the two to be immaterial to the determinations it made in approving them. See [redacted] Opinion at 5-6.

which such reports may be disseminated. The new Section 8(a) makes clear that reports containing information acquired pursuant to Section 702 of FISA may be disseminated by NSA to a foreign government, and that the dissemination of any such information of or concerning a U.S. person may only be made in a manner consistent with subsections 6(b) and 7 of the NSA Minimization Procedures. According to the government, "the changes to Section 8(a) clarify, but do not alter, NSA's existing authority to disseminate to foreign governments reports containing properly minimized information acquired in accordance with Section 702" of FISA. [redacted] Submission at 6 n.5.

The second change to the NSA Minimization Procedures appears in the new Section 8(b).

[redacted]

A third change effected by the revision of Section 8 is the deletion of Sections 8(a), (b), (c) and (d) of the NSA Minimization Procedures approved by the Court in the 2008 Dockets. Taken together, those provisions allow NSA to make limited disseminations to certain foreign

governments of information acquired under the authority of the certifications in the 2008 Dockets, in non-report form (i.e., "foreign plain text communications" and "foreign enciphered or encoded communications"), and for purposes unrelated to obtaining technical and linguistic assistance. Because the substance of Sections 8(a) through (d) of the 2008 procedures has not been carried forward, the Court understands (and the government has orally confirmed) that, unless and until the Court approves wider sharing with foreign governments, all disseminations to foreign governments of information acquired by NSA under [redacted] will comply with the terms of Section 6(b), 7 or 8 of the NSA Minimization Procedures submitted [redacted]

The foregoing changes to Section 8 of the NSA Minimization Procedures do not preclude the Court from relying on the representations made by the government regarding the corresponding procedures submitted in the 2008 Dockets. After reviewing the revised NSA Minimization Procedures in view of the government's representations, the Court finds that the revised procedures, like the corresponding procedures previously approved by the Court, meet FISA's definition of minimization procedures and satisfy the requirements of the Fourth Amendment. New Section 8(a) merely makes explicit what is implied by the NSA Minimization Procedures approved by the Court in the 2008 Dockets – that NSA can share reports containing Section 702 information with foreign governments, provided that such disseminations are made in accordance with Section 6(b) or 7.

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[11] [redacted]

Further, new Section 8(b) merely brings NSA's authority to seek technical and linguistic assistance from foreign governments into line [redacted], which is reflected in procedures that were approved by the Court in the 2008 Dockets. See Docket Number 702(i)-08-01, Opinion at 28. Finally, the elimination of former Sections 8(a) through (d) has the effect of narrowing NSA's ability to disseminate information, and therefore poses no obstacle to Court approval.

C. Changes to the FBI Minimization Procedures

The FBI Minimization Procedures submitted in the matter at bar also differ from the corresponding procedures approved by the Court in the 2008 Dockets. Specifically, the FBI Minimization Procedures approved by the Court in the 2008 Dockets incorporate by reference, with certain modifications, the FBI SMPs that were in effect at the time the Court conducted its review and issued its approval orders. Subsequently, on [redacted] 2008, the FBI began to implement new SMPs -- the "Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under the Foreign Intelligence Surveillance Act" ("revised FBI SMPs") -- that were approved by the Attorney General on [redacted] 2008. The FBI Minimization Procedures now before the Court incorporate, by reference, the revised FBI SMPs, with certain modifications.

As the Court observed in approving certain retroactive applications of the revised FBI SMPs to orders authorizing electronic surveillance pursuant to Section 1805 or physical search pursuant to Section 1824 of FISA, the revised procedures are the product of a "systematic revision" conducted with the Court's input over the course of several years. [redacted] 2008 Opinion and Order at 2-3. As the Court further noted, "[i]n large measure," the revised FBI SMPs

"represent an improvement upon prior sets of FBI standard minimization procedures, which themselves were generally found by this Court to comport with the statutory definition of minimization procedures at 50 U.S.C. §§ 1801(h) and 1821(4)." Id. at 4. Indeed, the judges of this Court have found the revised FBI SMPs to meet the statutory definition of minimization procedures in issuing scores of recent orders authorizing electronic surveillance under Section 1805 or physical search under Section 1824.

Although the government has proposed certain modifications to the revised FBI SMPs for application [redacted] now before the Court, nothing in those modifications presents additional concern. A number of the modifications are merely terminological clarifications – e.g., explaining that references to "information acquired pursuant to FISA" and "FISA-acquired information" should be understood to include communications acquired pursuant to Section 702, [redacted] FBI Minimization Procedures at 1. Other modifications closely track provisions approved by the Court in the 2008 Dockets. Compare id. at 1-2 (¶ e.2) (allowing FBI Director or Deputy Director, under certain circumstances, to authorize retention of information from communications acquired when the government reasonably believed that the target was a non-U.S. person outside the United States, when in fact the target was a U.S. person or was inside the United States), with Docket Number 702(i)-08-01, Opinion at 24-28 (approving similar special retention provisions)[12]; also compare

[12] The government represented in the 2008 Dockets that such special retention

(continued...)

[redacted], FBI Minimization Procedures at 2 (¶ e.2) (permitting retention and dissemination of technical information regarding domestic communications for purposes of avoiding overcollection), with Docket Number 702(i)-08-01, NSA Minimization Procedures at 6 (¶ 5) (same).

Another noteworthy change to the FBI Minimization Procedures would allow the National Security Division of the Department of Justice ("NSD"), rather than the Court, to approve exceptions and modifications to the minimization rules for attorney-client communications in criminal matters. [redacted] FBI Minimization Procedures at 3 (¶ i). That change would give NSD the same latitude it possesses under the attorney-client minimization provisions of the CIA Minimization Procedures that were approved by the Court in the 2008 Dockets. [redacted], CIA Minimization Procedures at 3 (¶ 4.a).

In sum, neither the modifications discussed above nor any of the others proposed by the government precludes the Court from finding, in the context of [redacted] authorizing the targeting of non-U.S. persons reasonably believed to be outside the United States, that the FBI Minimization Procedures submitted [redacted] meet the statutory definition of

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[12](...continued)
determinations would be made, in writing, on a case-by-case basis, and consistent with the government's explanations of 50 U.S.C. § 1806(i). [redacted] Opinion at 25 n. 24 & 27 n. 28. The government has confirmed that the same will be true of similar determinations made under [redacted] submitted in this matter. See [redacted] Submission at 24.

minimization procedures and are consistent with the requirements of the Fourth Amendment.[13]

D. The Overcollection Incidents

The final question before the Court is whether the incidents of overcollection by NSA during signals intelligence activities conducted pursuant to the 2008 FAA certifications preclude the Court from approving, in whole or in part, the targeting and minimization procedures submitted [redacted]

1. [redacted]

To place the issue in context, it is helpful to note that the overcollection incidents in question involve only one aspect of NSA's intelligence gathering conducted pursuant to Section 702: the means of acquiring Internet communications [redacted] Submission at 2; [redacted] Submission at 2.[14] The incidents do not involve NSA's acquisition of telephone communications. [redacted] Submission at 2.

[redacted]

[13] Like Paragraph b of the FBI Minimization Procedures approved by the Court in the 2008 Dockets, Section I.C of the revised FBI SMPs adopts certain presumptions regarding U.S. person status. The government has confirmed that those presumptions, like the identical presumptions applicable under the 2008 procedures, will be applied in the Section 702 context "only after the exercise of due diligence." [redacted] Submission at 23.

[14] [redacted]

[redacted]

2. The Overcollection Incidents and the Government's Remedial and Preventative Measures

The government has identified [redacted] overcollection incidents involving [redacted]

[redacted]

See [redacted] Submission at 13. The government reports that NSA has been able to identify the causes [redacted] incidents.

[redacted] resulted from a [redacted] error on one [redacted] Further, NSA has purged all files that were erroneously acquired in the incident. Id.

[redacted]

[redacted]

~~The cause~~ of the overcollection involving [redacted] remains undetermined. [redacted] Submission at 5. Nevertheless, NSA technical personnel have confirmed that [redacted] and that [redacted] Moreover, the government reports that an "end-to-end test [redacted]

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15 [redacted]

[redacted] produced no overcollection. Id.

The government represents that it has adopted substantial remedial and preventative measures in response to the overcollection incidents. [redacted] NSA has updated and improved [redacted] Submission at 6; see also March 2009 Semiannual Report of the U.S. Department of Justice Concerning Acquisitions Under Section 702 of the FISA Amendments Act of 2008 ("DOJ Semiannual Report") at 17. Additionally, NSA has [redacted] Submission at 7; DOJ Semiannual Report at 17-18. This new system is designed to recognize possible overcollected data and alert NSA technical personnel so that corrective actions may be taken. DOJ Semiannual Report at 17-18.[16]

To ensure that these tools are properly installed and functioning, NSA has improved its [redacted] DOJ Semiannual Report at 18. NSA is also working to improve its [redacted] and compliance procedures. See [redacted] Submission at 7; DOJ Semiannual Report at 18. NSA has alerted its analysts to the risk [redacted] and is

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16 [redacted]

providing them with instruction and training on how to recognize and promptly report potential cases of overcollection. [redacted] Submission at 9; DOJ Semiannual Report at 18. When overcollected information is discovered, NSA isolates and purges it from the on-line databases that are used by analysts. [redacted] Submission at 10.[17] Finally, the government represents that NSA has not disseminated any overcollected data obtained by NSA in intelligence gathering activities conducted pursuant to Section 702. See id.[18]

3. Effect of Overcollection Incidents on Statutory and Constitutional Analysis

(i) Statutory Requirements

The government asserts that the overcollection problems discussed above do not preclude a finding that the NSA Targeting Procedures filed in this matter are "reasonably designed" to "ensure that any acquisition authorized under [the certification] 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 known recipients are known at the time of the acquisition to be located in the United States." See 50 U.S.C. § 1881a(d)(1). The Court agrees, but

17 [redacted]

18 In it[redacted] Submission, the government reported that NSA has confirmed that no "serialized product reporting" containing overcollected information has been disseminated. [redacted] Submission at 10. In addition, the government has orally represented that no overcollected data has been disseminated by NSA in any form.

for reasons somewhat different than those put forth by the government.

Pointing to this Court's conclusion in the 2008 Dockets that the "target" of an acquisition is the user of the tasked email account, see Docket Number 702(i)-08-01, Opinion at 18-19, the government contends that the unintentional collection of communications unrelated to such an email account and its user is irrelevant to whether NSA's targeting procedures comply with Section 1881a(d)(1). [redacted] Submission at 3-4, 11. The Court is unpersuaded by the government's contention that compliance with Section 1881a(d)(1) is purely a matter of intent. Substantial implementation problems can, notwithstanding the government's intent, speak to whether the applicable targeting procedures are "reasonably designed" to acquire only the communications of non-U.S. persons outside the United States. If, for example, NSA unintentionally obtained 100 domestic communications for every properly targeted and acquired communication, one might reasonably question whether its targeting procedures were "reasonably designed" to target only non-domestic communications. In any event, the government's narrow reading of the statutory requirements would only defer consideration of NSA's implementation problems, because such errors plainly are relevant to the required Fourth Amendment analysis. See In re Directives, Docket No. 08-01, Opinion at 20 (FISA Ct. Rev. Aug. 22, 2008) (stating, in articulating the analytical framework for assessing reasonableness under the Fourth Amendment, that if, considering the governmental and privacy interests at stake, the protections in place "are insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality").

Instead of regarding the above-described overcollection incidents as irrelevant under Section 1881a(d)(1), the Court concludes that the enhanced measures recently implemented by NSA to

detect and filter out such non-targeted communications [redacted] before such communications enter repositories that are accessible to analysts (see pages 21-22, supra), provide a basis for finding, despite the overcollections, that the NSA Targeting Procedures are reasonably designed to ensure that an acquisition authorized under Section 702 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 known recipients are known at the time of the acquisition to be located in the United States.[19]

Further, the overcollection issues do not undermine the Court's ability to find that the NSA Minimization Procedures in this matter meet the definition of "minimization procedures" under FISA. See page 10, supra. In accordance with its obligation to minimize the acquisition of nonpublicly available information concerning unconsenting U.S. persons, NSA has [redacted] to preven[redacted] With regard to minimizing the retention of such information, NSA has enhanced [redacted] to ensure that overcollections are identified and purged before non-targeted information enters NSA's data repositories. See pages 21-22, supra. Should any overcollected information regarding U.S. persons

[19] With respect to the latter requirement, the Court notes that NSA uses Internet Protocol filters and [redacted] to ensure that it is not intentionally acquiring a communication for which all of the communicants are located in the United States. In Docket Number 702(i)-08-01, the Court found that these measures were "reasonably designed to prevent the intentional acquisition of communications as to which all parties are in the United States." Docket Number 702(i)-08-01, Opinion at 20. According to the government, the [redacted] "in no way affects the efficacy of [these] measures," [redacted] Submission at 5, and nothing in the record suggests otherwise.

survive those safeguards, it would have to be destroyed upon recognition. [redacted] NSA Minimization Procedures at 3; [redacted] Submission at 7; [redacted] Submission at 10. With respect to dissemination, the government has represented that NSA has not disseminated any overcollected information to anyone outside NSA. See page 22 & n. 18, supra. In the event that any such information is somehow disseminated -- e.g., in raw form pursuant to Section 8(b) of the NSA Minimization Procedures – the Court expects NSA, upon recognition, to alert the recipients so that they make take necessary remedial measures.

(ii) The Fourth Amendment

The Court concludes that the overcollections by NSA do not warrant a finding that the targeting and minimization procedures fail to satisfy the requirements of the Fourth Amendment. To determine whether a particular governmental action is reasonable, and thus permissible, under the Fourth Amendment, the Court must balance the governmental interests at stake against the degree of the intrusion on Fourth Amendment-protected interests, taking into account the totality of the circumstances. See Docket Number 702(i)-08-01, Opinion at 37 (citing cases). As this Court has previously acknowledged, the government's national security interest in collecting foreign intelligence information pursuant to Section 702 "'is of the highest order of magnitude.'" Id. (quoting In re Directives, Opinion at 20). And, the government has persuasively explained that the form of intelligence gathering involved in the overcollections [redacted] is particularly important because it is "uniquely capable of acquiring certain types of targeted communications containing valuable foreign intelligence information." [redacted] Submission at 3. The government represents, for instance, that [redacted] permits

NSA to acquire electronic communications even if the targeted communication is not to or from the targeted email address (i.e., "about" communications); [redacted] Id.

In assessing the privacy interests at stake, this Court noted in Docket Number 702(i)-08-01 that intelligence gathering under Section 702 may target only non-U.S. persons reasonably believed to be located outside the United States, who enjoy no protection under the Fourth Amendment. Docket Number 702(i)-08-01, Opinion at 37. The Court also recognized, however, the existence of circumstances (e.g., situations in which U.S. persons, or persons located in the United States, are mistakenly targeted, and situations in which U.S. persons, or persons located in the United States, are parties to communications to, from, or that contain a reference to a tasked selector) that present a "real and non-trivial likelihood of intrusion on Fourth Amendment-protected interests." Id. at 38. Weighing the interests at stake in light of the various protections built into the Section 702 intelligence gathering regime, the Court concluded that the procedures were reasonable under the Fourth Amendment, notwithstanding the likelihood that some Fourth Amendment-protected communications would be acquired. Id. at 38-41.

As the government notes ([redacted] Submission at 13), the Court recognized in the course of its Fourth Amendment balancing in the 2008 Dockets that the "potential for error" – e.g., the inadvertent collection of non-targeted communications of domestic communicants – was "'not a sufficient reason to invalidate the surveillances.'" Docket Number 702(i)-08-01, Opinion at 38 n.

45 (quoting In re Directives, Opinion at 28). Here, however, the Court is faced not with the mere potential for error, but with actual errors. Moreover, those errors have resulted in the improper acquisition by NSA of [redacted] of non-targeted emails, at least some of which likely were communications of U.S. persons or persons located inside the United States. See Docket Number 702(i)–08-01, Opinion at 38. Such significant intrusions must be accorded more relative weight in the Fourth Amendment balancing because the overcollected communications have no connection to any properly targeted facility and, therefore, do not serve the governmental interest underlying foreign intelligence gathering under the FAA.

Nevertheless, although NSA's overcollection problems alter the Fourth Amendment analysis, they do not, considering the totality of the circumstances, ultimately tip the scales toward prospective invalidation of the procedures under review in the above-captioned docket. As discussed above (see pages 21-22, supra), the government has, since identifying the first overcollection incidents at issue here, taken substantial steps toward preventing [redacted], quickly identifying [redacted] and promptly purging [redacted] The Court is satisfied that those remedial and preventative measures, taken together with the protections that were relied upon by the Court in approving the corresponding procedures in the 2008 Dockets and that have been carried forward here, are adequate to protect the Fourth Amendment interests at stake.[20]

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[20] In light of the remedial and preventative measures adopted by the government in response to the overcollection incidents described above, the Court is satisfied that it need not take additional corrective action in the 2008 Dockets at the present time. The Court expects that the government (continued...)

E. Other Compliance Incidents

In addition to the overcollection incidents [redacted] government has identified a number of other compliance incidents of a different nature involving intelligence gathering under Section 702. In several instances, for example, U.S. person selectors subject to collection under 50 U.S.C. § 1805 (electronic surveillance) and/or 50 U.S.C. § 1824 (physical search), or an order authorizing acquisitions targeting a person overseas under 50 U.S.C. § 1881c, have been erroneously targeted under Section 702. See [redacted] Submission at 8 n. 14; [redacted] 2009 Notice of Compliance Incident [redacted] 2009 Letter [redacted] Moreover, there have been several situations in which the government has, as the result of typographical errors, mistakenly tasked selectors under Section 702. See [redacted] Submission at 8 n. 14. In other instances, the government has failed to de-task accounts before the known arrival of the target in the United States, see id., or apparently failed to detect the presence of a target in the United States as a result of temporary [redacted] factors, see [redacted] Submission at 27. Along the same lines, the government recently reported that in several other cases, NSA incorrectly [redacted] indicating that targets might have roamed into the United States as "false positives," only to later find out that the targets were in fact in the country. See Government's Second Supplemental Response to the Court's Order of [redacted] 2009 at 3-

[20](...continued)
will, in accordance with Rule 10(c), promptly notify the Court of any future compliance issues involving foreign intelligence collection conducted pursuant to the FAA Certifications.

6; see also id. at 7 (discussing corrective measures adopted by NSA).

The Court has considered these incidents, many of which are more fully described in the DOJ Semiannual Report and in the March 2009 Semiannual Assessment of Compliance with the FISA Amendments Act, Submitted by the Attorney General and the Director of National Intelligence, both of which are on file with the Court. In light of the steps taken by the government to address these incidents and prevent similar occurrences, the Court is satisfied that they likewise do not preclude a finding that the targeting and minimization procedures submitted in the above-captioned docket satisfy the requirements of the FAA and the Fourth Amendment.

IV. CONCLUSION

For the foregoing reasons, the Court finds, in the language of 50 U.S.C. § 1881a(i)(3)(A), that [redacted] submitted in the above-captioned docket "in accordance with [Section 1881a(g)] [redacted] all the required elements and that the targeting and minimization procedures adopted in accordance with [Section 1881a(d)-(e)] are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States." A separate order approving [redacted] and the use of the procedures pursuant to Section 1881a(i)(3)(A) is being entered contemporaneously herewith.

ENTERED this 7th day of April 2009 [redacted]

Mary A. McLaughlin

MARY A. McLAUGHLIN
Judge, United States Foreign
Intelligence Surveillance Court

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

ORDER

For the reasons stated in the Memorandum Opinion issued contemporaneously herewith, and in reliance on the entire record in this matter, the Court finds, in the language of 50 U.S.C. § 1881a(i)(3)(A), that the above-captioned [redacted] submitted in accordance with [50 U.S.C. § 1881a(g)] [redacted] all the required elements and that the targeting and minimization procedures adopted in accordance with [50 U.S.C. § 1881a(d)-(e)] are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States."

Accordingly, it is hereby ORDERED, pursuant to 50 U.S.C. § 1881a(i)(3)(A), that [redacted] the use of such procedures are approved.

ENTERED this 1st day of April 2009, at 8:10AM Eastern Time.

MARY A. McLAUGHLIN
Judge, United States Foreign
Intelligence Surveillance Court

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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

ORDER

For the reasons stated in the Memorandum Opinion issued contemporaneously herewith, and in reliance on the entire record in this matter, the Court finds, in the language of 50 U.S.C. § 1881a(i)(3)(A), that the above-captioned [redacted] submitted in accordance with [50 U.S.C. § 1881a(g)] [redacted] all the required elements and that the targeting and minimization procedures adopted in accordance with [50 U.S.C. § 1881a(d)-(e)] are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States."

Accordingly, it is hereby ORDERED, pursuant to 50 U.S.C. § 1881a(i)(3)(A), that [redacted] and the use of such procedures are approved.

ENTERED this 1st day of April 2009, at 8:10AM Eastern Time.

Mary A. McLaughlin

MARY A. McLAUGHLIN
Judge, United States Foreign
Intelligence Surveillance Court

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