

Wikimedia Foundation v. NSA
No. 15-cv-0062-TSE (D. Md.)

Plaintiff's Exhibit 22

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**GOVERNMENT'S RESPONSE TO THE
COURT'S BRIEFING ORDER OF MAY 9, 2011**

1. The government's May 2 Letter can be read to take the position that [REDACTED] [REDACTED] are communications authorized for collection under the Section 702 Certifications that have previously been approved by the Court. ~~(TS//SI//NF)~~

a. For how long has NSA been acquiring [REDACTED] through its upstream collection? ~~(TS//SI//NF)~~

Under the Section 702 Certifications, NSA acquires, *inter alia*, "Internet communications." *E.g.*, DNI/AG 702(g) Certification [REDACTED] Affidavit of General Keith B. Alexander, Director, National Security Agency (NSA), filed Apr. 20, 2011, at ¶ 4. As described by General Alexander, Internet communications "include, but are not limited to, [REDACTED]"

E.g., id. ~~(TS//SI//NF)~~

In the context of NSA's upstream collection techniques, NSA acquires Internet communications in the form of "transactions," which in this filing refers to a complement of "packets" traversing the Internet that together may be understood by a device on the Internet and, where applicable, rendered in an intelligible form to the user of that device.¹ A "transaction" might contain information or data representing either a discrete communication (e.g., an e-mail message), or multiple discrete communications [REDACTED]. As further described in the response to question 2 below, whenever a tasked selector is present within a transaction, NSA's "upstream" Internet collection techniques are designed to identify and acquire that transaction. ~~(TS//SI//NF)~~

¹ While the terms "Internet communication" and "transmission" have been used to describe the types of communications NSA acquires, NSA believes that, in the context of upstream collection, "transaction" is the more precise term from a technical perspective, because "transmission" could be understood to mean all data being exchanged on the Internet within a specific time period by a specific device, and an "Internet communication" may actually contain multiple logically separate communications between or among persons. ~~(TS//SI//NF)~~

The transactions discussed herein -- whether they contain single or multiple discrete communications having a commonality of a single user -- should not be confused with the two [REDACTED] compliance incidents initially reported to the Court on April 19, 2011, and further discussed below in the Government's response to question 6, which involved the [REDACTED] unrelated communications [REDACTED]. ~~(TS//SI//NF)~~

~~Derived From: NSA/CSSM 1-52~~

~~Dated: 20070108~~

~~Declassify On: 20360501~~

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At the time of acquisition, NSA's upstream Internet collection devices are, with limited exceptions further described below, not presently capable of distinguishing transactions containing only a single discrete communication to, from, or about a tasked selector from transactions containing multiple discrete communications, not all of which may be to, from, or about a tasked selector.² Thus, in order to acquire transactions containing one or more communications to, from, or about a tasked selector, it has been necessary for NSA to employ these same upstream Internet collection techniques throughout the entire timeframe of all certifications authorized under Section 702 of the Foreign Intelligence Surveillance Act of 1978, as amended (hereinafter "FISA" or "the Act"), and the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (Aug. 5, 2007) (hereinafter "PAA"). It was also necessary for NSA to employ these upstream collection techniques to implement the electronic surveillance authorized in *In re*

[REDACTED] Docket No. [REDACTED] and *In re* [REDACTED]

Docket No. [REDACTED] (TS//SI//NF)

b. According to the May 2 Letter, [REDACTED] may include the full content of email messages that are not to, from or about the user of a targeted selector. They also may include discrete communications as to which all communicants are within the United States. Please explain how the acquisition of such transmissions: (TS//SI//NF)

i. comports with the government's representations to the Court regarding the scope of upstream collection under Section 702 and the approvals granted by the Court in reliance upon those representations in Dockets 702(i) 08-01, [REDACTED] (see, e.g., Docket No. 702(i)-08-01, Aug. 27, 2008 Hearing Transcript at 19-26, 40-41 and Sept. 4, 2008 Memorandum Opinion at 15-20, 38); (TS//SI//NF)

The Government has concluded, after a careful review of the record, that its prior representations to the Court regarding the steps NSA must take in order to acquire single, discrete communications to, from, or about a tasked selector did not fully explain all of the means by which such communications are acquired through NSA's upstream collection techniques. The Government will attempt through this filing to provide the Court with a more thorough explanation of this technically complex collection. This notwithstanding, the Government respectfully submits that for the reasons set forth in its responses to questions 2.ii.,

² Specifically, as is discussed in the Government's response to questions 2(c) and (d) of the Court's briefing order, NSA does have the ability to identify and acquire discrete communications to, from, or about a tasked selector in certain cases [REDACTED]

[REDACTED] (TS//SI//NF)

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2.iii., and 5 below, NSA's prior and ongoing acquisition of information utilizing its upstream collection techniques is consistent with the Court's prior orders, meets the requirements of Section 702, and is consistent with the Fourth Amendment. ~~(TS//SI//NF)~~

b. According to the May 2 Letter, [REDACTED] may include the full content of email messages that are not to, from or about the user of a targeted selector. They also may include discrete communications as to which all communicants are within the United States. Please explain how the acquisition of such transmissions: ~~(TS//SI//NF)~~

ii. meets the requirements of Section 702, including, but not limited to, the requirement that targeting procedures must be reasonably designed to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States"; and, ~~(TS//SI//NF)~~

NSA'S TARGETING PROCEDURES ARE REASONABLY DESIGNED TO PREVENT THE INTENTIONAL ACQUISITION OF COMMUNICATIONS AS TO WHICH THE SENDER AND ALL INTENDED RECIPIENTS ARE KNOWN AT THE TIME OF ACQUISITION TO BE LOCATED IN THE UNITED STATES. (S)

Under Section 702, the Government targets "persons reasonably believed to be located outside the United States to acquire foreign intelligence information." 50 U.S.C. § 1881a(a). The Government determines whether the targeting of a person is consistent with Section 702 by applying Court-approved targeting procedures. 50 U.S.C. § 1881a(d). These targeting procedures must be "reasonably designed to (A) ensure that any acquisition authorized under subsection [702(a)] is limited to targeting persons reasonably believed to be located outside the United States; and (B) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States." 50 U.S.C. § 1881a(d)(1). (U)

A. The User of a Tasked Selector is the Person Being Targeted by all Acquisitions by NSA's Upstream Collection, Including Transactions That Contain Multiple Discrete Communications. ~~(TS//SI//NF)~~

As previously explained to the Court, the Government "targets" a person by tasking for collection a "selector" (e.g., an e-mail account) believed to be used by that person. *See, e.g., In re DNI/AG Certification* [REDACTED] Docket No. 702(i)-08-01, Mem. Op. at 8 (USFISC Sept. 4, 2008) (hereinafter "[REDACTED] Mem. Op."). NSA acquires foreign intelligence information through the tasking of selectors by collecting communications to or from a selector used by a targeted person (hereinafter "to/from communications") and by collecting communications that refer to or are about a selector used by a targeted person (hereinafter "abouts communications"). *Id.*

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In both of these types of acquisition, the person being "targeted" is the user of the tasked selector, who, by operation of the targeting procedures, is a non-United States person reasonably believed to be located outside the United States. Specifically, "the persons targeted by acquisition of to/from communications are the users of the tasked selectors," because "their communications are intentionally selected for acquisition." ██████████ Mem. Op. at 15. Similarly, the person being targeted by acquisition of abouts communications is also the user of the tasked selector, "because the government's purpose in acquiring abouts communications is to obtain information about that user." *Id.* at 18 (citation omitted). ~~(TS//SI//NF)~~

This remains true for all acquisitions conducted by NSA's upstream collection -- including transactions containing several discrete communications, only one of which may be to, from, or about the user of a tasked selector. As discussed above, the fact that there also may be communications to, from, or about persons other than the target in the transaction does not mean that those persons are also being targeted by the acquisition. The sole reason a transaction is selected for acquisition is that it contains the presence of a tasked selector used by a person who has been subjected to NSA's targeting procedures.³ Indeed, at the time a transaction is acquired, NSA cannot always know whether the transaction includes other data or information representing communications that are not to, from, or about the target, let alone always have knowledge of the parties to those communications. *Cf.* ██████████ Mem. Op. at 18-19 (noting that with respect to abouts communications, "the government may have no knowledge of [the parties to a communication] prior to acquisition"). It therefore cannot be said that the acquisition of a transaction containing multiple discrete communications results in the intentional targeting of any of the parties to those communications other than the user of the tasked selector. *Cf. United States v. Bin Laden*, 126 F. Supp. 2d 264, 281 (S.D.N.Y. 2000), *aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157 (2d Cir. 2008), *cert. denied sub nom. El-Hage v. United States*, 130 S.Ct. 1050 (2010) (acknowledging that in light of *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), and Title III "incidental interception" case law, overseas surveillance of a United States person terrorism suspect would have posed no Fourth Amendment problem "if the Government had not been aware of [his] identity or of his complicity in the [terrorism] enterprise"). ~~(TS//SI//OC,NF)~~

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B. NSA's Targeting Procedures are Reasonably Designed to Prevent the Intentional Acquisition of Communications as to Which the Sender and All Intended Recipients Are Known at the Time of Acquisition to be in the United States (S)

In conducting acquisitions targeting the user of a tasked selector, the Government "may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States." 50 U.S.C. § 1881a(b)(4). As noted above, the targeting procedures must be reasonably designed to prevent such intentional acquisitions. With respect to to/from communications, "because a user of a tasked selector is a party to every to/from communication acquired by NSA, a reasonable belief that the users of tasked selectors are outside the United States will ensure that NSA does not intentionally acquire any to/from communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States." [REDACTED] Mem. Op. at 15 (citation omitted). With respect to upstream collection that may contain abouts communications, NSA's targeting procedures provide that:

[REDACTED]

E.g., Amendment 1 to DNI/AG 702(g) Certification [REDACTED] Docket No. 702(i)-[REDACTED] Ex. A, filed Aug. 12, 2010, at 1-2 (hereinafter "NSA Targeting Procedures"). Although these provisions on their face suggest separate technical means might apply only to the "abouts" aspect of NSA's upstream collection, in practice these provisions currently apply to any Internet transaction collected upstream. (TS//SI//OC,NF)

The Government has previously represented that "the operation of the IP address filters or [REDACTED] prevents the intentional acquisition of communications about the target as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States." *In re DNI/AG 702(g) Certification* [REDACTED] Docket No. 702(i)-08-01, Government's Preliminary Response to Questions Posed by the Court, filed Aug. 26, 2008, at 3. The Government also has represented that these IP filters "have been effective in limiting the collection to communications with at least one communicant located outside the United States."

⁴ This provision has remained identical throughout every set of NSA's Section 702 targeting procedures approved for use by the Court, and is also the same in the proposed targeting procedures submitted with DNI/AG 702(g) Certification [REDACTED] (S//OC,NF)

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Id. at 4. Except in one circumstance previously reported to the Court,⁵ the Government is not aware of a case where an about collection resulted in the acquisition of a communication where both ends were inside the United States. NSA therefore continues to believe that these prior representations remain accurate. Accordingly, for the reasons described below, the Government respectfully submits that NSA's targeting procedures are reasonably designed to prevent, in the context of NSA's upstream collection, "the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States," including Internet communications [REDACTED] that have not been previously described to the Court. 50 U.S.C. § 1881a(d)(1)(B). ~~(TS//SI//OC,NF)~~

1. How NSA's IP Filters Work (S)

NSA acquires Internet communications by collecting the individual packets of data that make up those communications. [REDACTED]

[REDACTED]

~~(TS//SI//OC,NF)~~

[REDACTED]

5 [REDACTED]

~~(TS//SI//NF)~~

6 [REDACTED]

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[REDACTED]

(TS//SI//OC,NF)

[REDACTED]

Additionally, at the time of acquisition, NSA's upstream Internet collection devices are, with limited exceptions further described below, not presently capable of distinguishing transactions containing only a single discrete communication to, from or about a targeted selector from transactions containing multiple discrete communications.⁷ Accordingly, NSA cannot prevent the acquisition of, or even mark for separate treatment, those types of transactions that may feature multiple discrete communications [REDACTED]. (TS//SI//OC,NF)

[REDACTED]

⁷ See Government's response to questions 2(c) and (d) *infra*. (U)

[REDACTED]

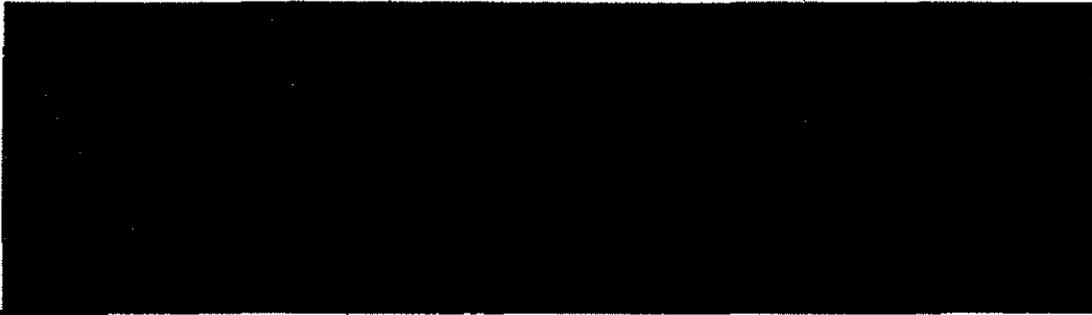
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Except for the one instance noted above concerning an error by an electronic communication service provider, NSA is not aware of any instance in which its upstream collection on [redacted] or are subject to an IP filter nevertheless resulted in the acquisition of a communication as to which the sender and all intended recipients were known at the time of acquisition to be located in the United States.¹¹ This includes those situations in which NSA might collect unrelated communications when acquiring Internet communications that include multiple, discrete communications. ~~(TS//SI//NF)~~



~~(TS//SI//OC,NF)~~



~~(TS//SI//OC,NF)~~

¹¹ It is noteworthy that the provider error that resulted in the acquisition of domestic communications was first identified not by the provider, but by an NSA analyst who recognized a domestic communication in NSA's repositories, realized that such a domestic communication should not have been acquired, and properly reported the communication through NSA channels. NSA investigated this matter and found that domestic communications had been acquired not due to any theoretical limitations in its IP filter technology, but instead because [redacted]. The domestic overcollection caused by this incident represented a very small portion of NSA's collection during the time period of the overcollection, and an even smaller portion of NSA's collection since the initiation of its Section 702 acquisitions, but the error was still discovered and remedied. It is therefore particularly noteworthy that no NSA analyst has otherwise yet discovered a wholly domestic communication in NSA's repositories collected through NSA's upstream collection systems.

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In May 2011, NSA conducted two tests of its Section 702 upstream collection in order to determine the likelihood of collecting an Internet transaction between a user in the United States and [REDACTED]. The first test included [REDACTED]

The second test included [REDACTED]

~~(TS//SI//NF)~~

The first test sample included no records where both the sender and receiver IP addresses were in the United States [REDACTED]

[REDACTED] NSA analysis further revealed that only [REDACTED] of the more than [REDACTED] (0.028%) had characteristics consistent with a person in the United States accessing a [REDACTED]

For the second dataset, NSA analysis discovered that only [REDACTED] out of more than [REDACTED] total records (0.0016%) included a non-targeted user likely accessing the Internet from an IP address in the United States. [REDACTED]

[REDACTED] NSA assesses, based on analysis of the underlying data, that this activity in fact was [REDACTED] copies of the same Internet transaction, [REDACTED]. There is no indication that NSA collected any wholly domestic communications through its acquisition of this transaction.

~~(TS//SI//NF)~~

In sum, the Government submits that the two test samples discussed above, coupled with the fact that, except as noted above, no NSA analyst has yet discovered in NSA's repositories a wholly domestic communication collected through NSA's upstream collection systems, strongly suggests that NSA's acquisition of transactions or single Internet communications between users in the United States and [REDACTED] currently occurs only in a very small percentage of cases. Even those rare cases, moreover, won't necessarily involve a user in the United States receiving from the [REDACTED] a transaction containing a communication from a person known at the time of acquisition to be located in the United States.¹² ~~(TS//SI//NF)~~

¹² Additionally, as discussed elsewhere herein, even if the sender is located in the United States, the communication likely will not contain any reliable information that would enable NSA to determine at the time of acquisition the sender's location. ~~(TS//SI//OC,NF)~~

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2. The [REDACTED] Means by Which NSA Prevents the Intentional Acquisition of Communications as to Which the Sender and All Intended Recipients Are Known to be Located In the United States at the Time of Acquisition Are Reasonable (S)

This Court has found that NSA's targeting procedures are reasonably designed to prevent the intentional acquisition of communications in which the sender and all intended recipients are known at the time of acquisition to be located in the United States. In approving DNI/AG 702(g) Certification [REDACTED], with respect to NSA's upstream collection of "abouts" communications, in particular, the Court noted that NSA "relies on [REDACTED] means of ensuring that at least one party to the communication is located outside the United States." [REDACTED] Mem. Op. at 19. As described above, those [REDACTED] means are NSA's use of "an Internet Protocol filter to ensure that the person from whom it seeks to obtain foreign intelligence information is located overseas" and NSA's [REDACTED] NSA

Targeting Procedures at 1-2; see also [REDACTED] Mem. Op. at 19. Relying on the Government's representations that these [REDACTED] means had prevented the acquisition of wholly domestic communications under the PAA, and recognizing that it is "theoretically possible that a wholly domestic communication could be acquired as a result of the [REDACTED]" the Court found that these [REDACTED] means were "reasonably designed to prevent the intentional acquisition of communications as to which all parties are in the United States." [REDACTED] Mem. Op. at 20 & n.17. The Government respectfully submits that there is no aspect of NSA's upstream collection, as further described herein, that would prevent the Court from continuing to find that NSA's targeting procedures are reasonably designed to prevent the intentional acquisition of communications as to which the sender and all intended recipients are known at the time of acquisition to be in the United States.

~~(TS//SI//OC,NF)~~

Two aspects of NSA's upstream collection activity that have not been specifically addressed by the Court are discussed herein: first, the fact that NSA acquires some communications [REDACTED]

and second, the fact that NSA could acquire [REDACTED] -- whether retrieving a single, discrete communication, or a transaction containing several discrete communications -- possibly resulting in the acquisition of wholly domestic communications. ~~(TS//SI//OC,NF)~~

a. Acquisition of Communications that [REDACTED]

(S)

First, [REDACTED]

-- NSA's targeting procedures are reasonably designed to prevent the intentional acquisition of communications as to which the sender and all intended recipients are known at the time of acquisition to be located in the United

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States.

[REDACTED]

~~(TS//SI//OC,NF)~~

b. **Theoretical Acquisition of Wholly Domestic Communications Through**

[REDACTED]

~~(TS//SI//NF)~~

With respect to the above-discussed theoretical cases in which NSA could acquire a [REDACTED] NSA's targeting procedures also are reasonably designed to prevent the intentional acquisition of communications as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States. As discussed above, NSA assesses that [REDACTED]

[REDACTED] only in a minute percentage of cases. Yet even in those rare cases, there would be no way for NSA to know at the time of acquisition that the sender and intended recipient are located in the United States. [REDACTED]

[REDACTED] NSA cannot at that point know the location of the intended recipient, who has yet to receive the message. Likewise, [REDACTED]

[REDACTED] it is highly unlikely that the communication would contain information useful in determining the sender's true location.¹³ In any event, it is currently not possible for NSA's IP filters to [REDACTED]

[REDACTED] Because NSA's filters will be looking at the best available information, [REDACTED] it cannot be said that the sender and all intended recipients of those communications are known at the time of acquisition to be located in the United States. Similarly, in the case of NSA's [REDACTED]

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[REDACTED]

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Accordingly, NSA has designed its systems so that it should never intentionally acquire a communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States. To the extent that NSA does unintentionally acquire such communications, NSA must treat those communications in accordance with its minimization procedures -- just as it must for other types of communications that it is prohibited from intentionally collecting under subsection 702(b), but nevertheless sometimes does unintentionally acquire, such as communications acquired from a target while that target is located inside the United States. ~~(TS//SI//OC,NF)~~

c. Conclusion (U)

Although for different reasons than those discussed above, the Court has recognized that it is "theoretically possible that a wholly domestic communication could be acquired" through NSA's upstream collection of "abouts" communications. ~~Mem. Op. at 20 n.17.~~ For the reasons outlined above, the Government respectfully submits that, despite the theoretical scenarios under which NSA could acquire communications through its upstream collection as to which the sender and all intended recipients are located in the United States, NSA's targeting procedures are reasonably designed to prevent such acquisitions where the location of the sender and all intended recipients is known at the time of acquisition. ~~(TS//SI//OC,NF)~~

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- b. According to the May 2 Letter, [REDACTED] may include the full content of email messages that are not to, from or about the user of a targeted selector. They also may include discrete communications as to which all communicants are within the United States. Please explain how the acquisition of such transmissions: ~~(TS//SI//NF)~~
- iii. is consistent with the Fourth Amendment. ~~(TS//SI//NF)~~

NSA's ACQUISITION OF TRANSACTIONS CONTAINING MULTIPLE DISCRETE COMMUNICATIONS IS CONSISTENT WITH THE FOURTH AMENDMENT.
~~(TS//SI//NF)~~

Section 702 requires the Attorney General (AG) and the Director of National Intelligence (DNI) to execute a certification attesting, among other things, that the targeting and minimization procedures are consistent with the requirements of the Fourth Amendment. 50 U.S.C. § 1881a(g)(2)(A)(iv). In reviewing a certification, Section 702 in turn requires the Court to enter an order approving the certification and the use of the targeting and minimization procedures if the Court finds, among other things, that those procedures are consistent with the requirements of the Fourth Amendment. *Id.* § 1881a(i)(3)(A). The issue for the Court in light of the above-described nature and scope of NSA's upstream collection is whether, in light of a governmental interest "of the highest order of magnitude," NSA's targeting and minimization procedures sufficiently protect the individual privacy interests of United States persons whose communications are inadvertently acquired. *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1012 (Foreign Int. Surv. Ct. Rev. 2008) (hereinafter "*In re Directives*"). ~~(TS//SI//NF)~~

The Fourth Amendment protects the right "to be secure . . . against unreasonable searches and seizures" and directs that "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. As demonstrated below, the Fourth Amendment requires no warrant here, and the upstream collection conducted by NSA is a reasonable exercise of governmental power that satisfies the Fourth Amendment. ~~(TS//SI//NF)~~

A. The Warrant Requirement Does Not Apply to NSA's Acquisition of Transactions Containing Multiple Discrete Communications. ~~(TS//SI//NF)~~

The Supreme Court has recognized exceptions to the Fourth Amendment's warrant requirement "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (internal quotations omitted); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (quoting *Griffin*). The Foreign Intelligence Surveillance Court of Review, in upholding the Government's implementation of the PAA, held that a foreign intelligence exception exists "when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably

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believed to be located outside the United States." *In re Directives*, 551 F.3d at 1012. See also *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Int. Surv. Ct. Rev. 2002) ("[A]ll the . . . courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information."). ~~(TS//SI//NF)~~

In approving a previous Section 702 certification, this Court has found that Section 702 acquisitions "fall within the exception recognized by the Court of Review" in that they "target persons reasonably believed to be located outside the United States who will have been assessed by NSA to possess and/or to be likely to communicate foreign intelligence information concerning a foreign power authorized for acquisition under the Certification" and are "conducted for national security purposes." ~~██████████~~ Mem. Op. at 35 (citations omitted). Specifically, this Court recognized that the Court of Review's rationale for applying a foreign intelligence exception "appl[ies] with equal force" to Section 702 acquisitions, in that the Government's purpose in conducting Section 702 acquisitions goes well beyond a normal law enforcement objective and involves "the acquisition from overseas foreign agents of foreign intelligence to help protect national security," a circumstance ~~in which the government's interest is particularly intense.~~ *Id.* at 35-36 (quoting *In re Directives*, 551 F.3d at 1011). In addition, this Court, noting the likely volume of Section 702 acquisitions and the fact that those acquisitions involve targets who are attempting to conceal their communications, found that "[s]ubjecting ~~██████████~~ number of targets to a warrant process inevitably would result in delays and, at least occasionally, in failures to obtain perishable foreign intelligence information, to the detriment of national security." ~~██████████~~ Mem. Op. at 36; see also *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) ("attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy" such that "[a] warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, [and] in some cases delay executive response to foreign intelligence threats..."). The Court's previous finding that the foreign intelligence exception applies to Section 702 acquisitions remains equally applicable here. ~~(TS//SI//NF)~~

B. NSA's Acquisition of Transactions Containing Multiple Discrete Communications is Reasonable Under the Fourth Amendment. ~~(TS//SI//NF)~~

Where, as here, the foreign intelligence exception applies, "governmental action intruding on individual privacy interests must comport with the Fourth Amendment's reasonableness requirement." *In re Directives*, 551 F.3d at 1012. In evaluating the reasonableness of the Government's action, a court must consider the totality of the circumstances, see *United States v. Knights*, 534 U.S. 112, 118 (2001), taking into account "the nature of the government intrusion and how the intrusion is implemented." *In re Directives*, 551 F.3d at 1012 (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) and *United States v. Place*, 462 U.S. 696, 703 (1983)). In balancing these interests, the Court of Review has observed that "[t]he more important the government's interest, the greater the intrusion that may be constitutionally tolerated." *In re Directives*, 551 F.3d at 1012 (citing *Michigan v. Summers*, 452 U.S. 692, 701-05 (1981)). "If the protections that are in place for individual privacy interests are sufficient in light of the governmental interests at stake, the constitutional scales will tilt in favor of upholding the government's actions." *Id.* ~~(TS//SI//NF)~~

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1. NSA's Acquisition of Transactions Containing Multiple Discrete Communications Implicates Fourth Amendment-Protected Interests.

~~(TS//SI//NF)~~

Although targeting under Section 702 is limited to non-United States persons reasonably believed to be located outside the United States, who are not entitled to protection under the Fourth Amendment, *see, e.g.*, ██████████ Mem. Op. at 37, this Court has recognized that conducting acquisitions under Section 702 creates a "real and non-trivial likelihood of intrusion on Fourth Amendment-protected interests" of United States persons or persons located in the United States who, for example, communicate directly with a Section 702 target, *id.* at 38.¹⁴ In particular, as described herein, NSA's upstream collection may incidentally acquire information concerning United States persons within transactions containing multiple discrete communications, only one of which is to, from, or about a person targeted under Section 702. ~~(TS//SI//NF)~~

2. The Government's Interest in the Foreign Intelligence Information Contained in All Transactions, Including Those Containing Multiple Discrete Communications, is Paramount. ~~(TS//SI//NF)~~

On the other side of the ledger, it is axiomatic that the Government's interest in obtaining foreign intelligence information to protect the Nation's security and conduct its foreign affairs is paramount. *See, e.g., Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[I]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." (citations omitted)). Equally indisputable is the Government's interest in conducting acquisitions of foreign intelligence information¹⁵ under Section 702 of the Act. *See* ██████████ Mem. Op. at 37

¹⁴ Although the scope of Fourth Amendment protection for e-mail is not settled, the Government has argued before this Court that United States persons have a reasonable expectation of privacy in the content of such electronic communications. *See, e.g., United States of America's Supplemental Brief on the Fourth Amendment*, Docket No. 105B(g) 07-01, filed Feb. 15, 2008, at 1. The Government likewise assumes for purposes of this filing that the collection of ██████████ implicates privacy interests protected by the Fourth Amendment. ~~(TS//SI//NF)~~

¹⁵ "Foreign intelligence information" is defined as:

- (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against --
 - (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
 - (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or
 - (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
- (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to --
 - (A) the national defense or the security of the United States; or
 - (B) the conduct of the foreign affairs of the United States.

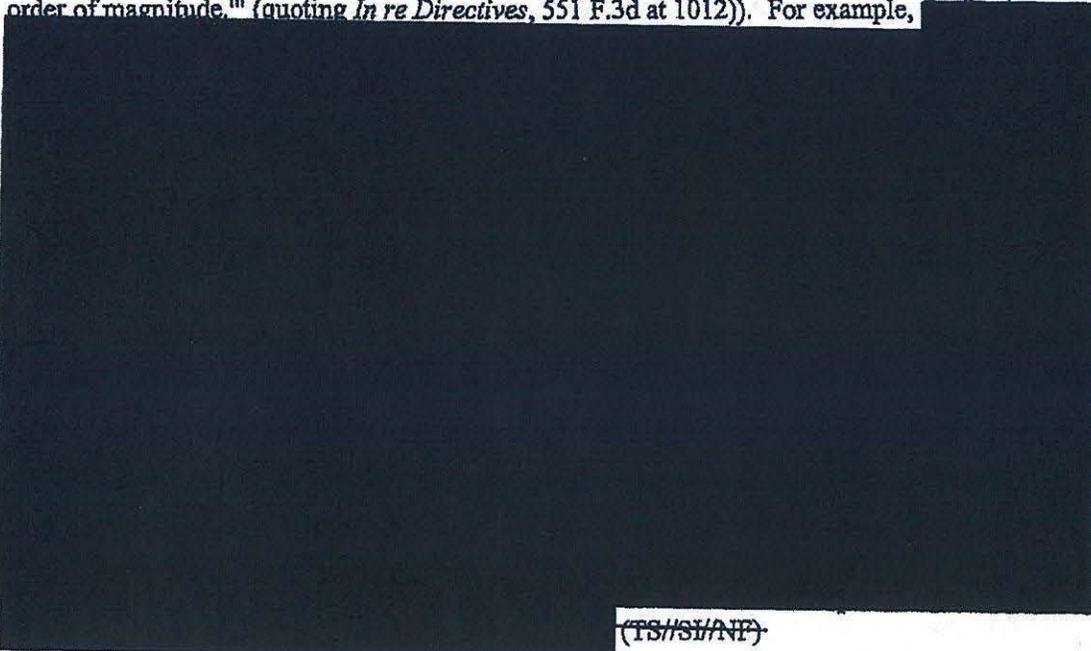
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("The government's national security interest in conducting these acquisitions 'is of the highest order of magnitude.'" (quoting *In re Directives*, 551 F.3d at 1012)). For example,



The Supreme Court has indicated that in addition to examining the governmental interest at stake, some consideration of the efficacy of the search being implemented -- that is, some measure of fit between the search and the desired objective -- is also relevant to the reasonableness analysis. See, e.g., *Knights*, 534 U.S. at 119 (noting that the reasonableness of a search "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which [the search] is needed for the promotion of legitimate governmental interests." (internal quotation marks omitted)); see also *Board of Educ. v. Earls*, 536 U.S. 822, 834 (2002) ("Finally, this Court must consider the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them.")). Here, NSA's acquisition of transactions through upstream collection is an essential and irreplaceable means of acquiring valuable foreign intelligence information that promotes the paramount governmental interest of protecting the Nation and conducting its foreign affairs.

~~(TS//SI//NF)~~

The AG and DNI have attested that a significant purpose of all acquisitions under Section 702, which includes those conducted by NSA's upstream collection, is to obtain foreign intelligence information. These acquisitions are conducted in accordance with FISC-approved targeting procedures reasonably designed to ensure that the acquisitions are directed "toward communications that are likely to yield the foreign intelligence information sought, and thereby

50 U.S.C. § 1801(e). (U)

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afford a degree of particularity that is reasonable under the Fourth Amendment." [REDACTED] Mem. Op. at 39-40 (footnote omitted). Indeed, certain of the valuable foreign intelligence information NSA seeks to acquire through upstream collection of transactions simply cannot be acquired by any other means. (TS//SI//NF)

Specifically, as this Court has recognized, NSA's upstream collection "is particularly important because it is *uniquely capable* of acquiring certain types of targeted communications containing valuable foreign intelligence information," such as [REDACTED]

[REDACTED]
Such foreign intelligence information is particularly useful, for example, [REDACTED]

¹⁶ In

¹⁶ More specifically, during the course of the Court's consideration of DNI/AG-702(g) Certification [REDACTED] the Government explained the unique value of NSA's [REDACTED]

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addition, NSA's upstream collection enables NSA to acquire foreign intelligence information from [REDACTED]

[REDACTED] All of these types of communications are intercepted in transactions acquired through NSA's upstream collection. Valuable foreign intelligence information such as this simply cannot be obtained by means other than the acquisition of transactions through NSA's upstream collection. ~~(TS//SI//NF)~~

3. The Acquisition of Foreign Intelligence Information Contained in Transactions is Conducted Using the Least Intrusive Means Available.
~~(TS//SI//NF)~~

The fact that NSA's upstream collection acquires transactions that may contain several discrete communications, only one of which is to, from, or about a tasked selector, does not render NSA's upstream collection unreasonable. *See In re Directives*, 551 F.3d at 1015 ("It is settled beyond peradventure that incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful.") (citations omitted); *see also United States v. Bin Laden*, 126 F. Supp. 2d 264, 280 (S.D.N.Y. 2000) ("[I]ncidental interception of a person's conversations during an otherwise lawful [Title III] surveillance is not violative of the Fourth Amendment."); *cf. Scott v. United States*, 436 U.S. 128, 140 (1978) (recognizing that "there are surely cases, such as the one at bar [involving a Title III wiretap], where the percentage of nonpertinent calls is relatively high and yet their interception was still reasonable"). Indeed, the Supreme Court has repeatedly rejected suggestions that reasonableness requires "the least intrusive search practicable." *City of Ontario v. Quon*, 130 S. Ct. 2619, 2632 (2010) (quotation marks omitted); *see, e.g., Earls*, 536 U.S. at 837 ("[T]his Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." (internal quotation marks omitted)); *Vernonia*, 515 U.S. at 663 ("We have repeatedly refused to declare

[REDACTED]

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such information will be handled in accordance with strict minimization procedures, as discussed in more detail below. ~~(TS//SI//NF)~~

4. United States Person Information Acquired Incidentally Through NSA's Acquisition of Transactions Containing Multiple Discrete Communications is Protected by NSA's Section 702 Minimization Procedures. ~~(TS//SI//NF)~~

As discussed above, the fact that NSA's upstream collection may result in the incidental acquisition of communications of United States persons cannot, by itself, render the overall collection unreasonable. Instead, courts have repeatedly found support for the constitutionality of foreign intelligence activities resulting in the incidental acquisition of United States person information in the existence and application of robust minimization procedures. See, e.g., *In re Directives*, 551 F.3d at 1015 (recognizing that minimization procedures are a "means of reducing the impact of incidental intrusions into the privacy of non-targeted United States persons");

~~Mem. Op. at 40 (concluding that minimization procedures meeting the definition in 50 U.S.C. § 1801(h)(1) "constitute a safeguard against improper use of information about United States persons that is inadvertently or incidentally acquired, and therefore contribute to the Court's overall assessment that the targeting and minimization procedures are consistent with the Fourth Amendment").~~ As explained below, NSA's current Section 702 minimization procedures, which this Court previously has found to satisfy the definition of minimization procedures in 50 U.S.C. § 1801(h)(1),¹⁸ adequately protect the privacy interests of United States persons whose communications may be incidentally acquired through NSA's upstream collection and thus contribute significantly to the overall reasonableness of that collection. ~~(TS//SI//NF)~~

At the outset, it is worth noting that NSA's acquisition of Internet transactions containing multiple discrete communications does not necessarily increase the risk that NSA will incidentally acquire United States person information. For example, as discussed above, the ~~means by which NSA ensures it does not intentionally acquire wholly domestic communications limits the acquisition of certain transactions such as~~ to persons located outside the United States, who reasonably can be presumed to be non-United States persons. Thus, to the extent that the ~~of those non-United States persons contain communications that are not to, from, or about a targeted selector, those communications are unlikely to be United States person communications.~~ See *In re Directives*, Docket No. 105B(g):07-01, Mem. Op. at 87 (recognizing that "the vast majority of persons who are located overseas are non United States persons and that most of their communications are with other, non-United States persons, who are located overseas") (footnote omitted). For this same reason, the risk that United States person information would be obtained through the acquisition of a ~~is no greater than in the acquisition of a~~

¹⁸ 50 U.S.C. § 1801(h)(1) defines "minimization procedures" as "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, 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." (U)

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~~(TS//SI//NF)~~

a. Acquisition (U)

As discussed above, with limited exceptions,¹⁹ it is technologically infeasible for NSA's upstream collection to acquire only the discrete communication to, from, or about a tasked selector that may be contained in a transaction containing multiple discrete communications. That does not mean, however, that the minimization procedures governing NSA's upstream collection do not adequately minimize the acquisition of any United States person information that may be contained in those transactions. Specifically, minimization procedures must be reasonably designed to minimize the acquisition 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)(1). As discussed above, the *only* way to obtain the foreign intelligence information contained within a discrete communication is to acquire the entire transaction in which it is contained. Thus, to the extent that United States person information may be contained within other discrete communications not to, from, or about the target in that transaction, the acquisition of such United States person information would be "consistent with the need of the United States to obtain . . . foreign intelligence information." ~~(TS//SI//NF)~~

Congress has recognized that "in many cases it may not be possible for technical reasons to avoid acquiring all information" when conducting foreign intelligence surveillance. H.R. Rep. No. 95-1283, pt. 1, at 55 (1978); *see also id.* at 56 ("It may not be possible or reasonable to avoid acquiring all conversations."); *cf. Scott*, 436 U.S. at 140 (recognizing that Title III "does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations"). Rather, in situations where, as here, it is technologically infeasible to avoid incidentally acquiring communications that are not to, from, or about the target, "the reasonable design of the [minimization] procedures must emphasize the minimization of retention and dissemination." H.R. Rep. No. 95-1283, pt. 1, at 55. ~~(TS//SI//NF)~~

b. Retention (U)

In addition, for reasons discussed more fully below, nothing in the statutory definition of minimization procedures obligates NSA to immediately destroy any United States person information in a communication that is not to, from, or about a tasked selector within a transaction acquired by NSA's upstream collection. ~~(TS//SI//NF)~~

¹⁹ See *supra* footnote 6. (U)

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First, Congress intended that the obligation to destroy non-pertinent information would attach only if the destruction of such information is feasible. *See* H.R. Rep. No. 95-1283, pt. 1, at 56 ("By minimizing retention, the committee intends that information acquired, which is not necessary for obtaining[,] producing, or disseminating foreign intelligence information, be destroyed *where feasible*." (emphasis added)). That is because Congress recognized that in some cases, the pertinent and non-pertinent information may be co-mingled in such a way as to make it technologically infeasible to segregate the pertinent information from the non-pertinent information and then destroy the latter. *See id.* ("The committee recognizes that it may not be feasible to cut and paste files or erase part of tapes where some information is relevant and some is not."). ~~(TS//SI//NF)~~

A transaction containing several communications, only one of which contains the tasked selector, is to NSA's systems ~~technologically indistinguishable from a transaction containing a single message to, from, or about a tasked selector~~. That is true both for NSA's collection systems and for the NSA systems that process and then route Section 702-acquired information to NSA's corporate stores. Thus, unlike other instances where it is technologically possible for certain kinds of communications to be recognized, segregated, and prevented from being routed to NSA's corporate stores, the transaction as a whole, including all of the discrete communications that may be included within it, is forwarded to NSA corporate stores, where it is available to NSA analysts. ~~(TS//SI//NF)~~

The transaction is likewise not divisible into the discrete communications within it even once it resides in an NSA corporate store. That is because NSA assesses that it is not technologically feasible to extract, post-acquisition, only the discrete communication that is to, from, or about a tasked selector within a transaction without destabilizing -- and potentially rendering unusable -- some or all of the collected transaction, including the single, discrete communication which is to, from or about the tasked selector. Thus, an NSA analyst cannot, for example, simply cut out any pertinent part of the transaction (i.e., the discrete communication that contains the tasked selector), paste it into a new record, and then discard the remainder. In this way, the transactions at issue here are a present-day version of the very same problem that Congress recognized over thirty years earlier -- i.e., that in some cases, "it might not be feasible to cut and paste files . . . where some information is relevant and some is not." H.R. Rep No. 95-1283, pt.1, at 56. Given that Congress recognized it might be necessary to retain all acquired information regardless of its pertinence because destruction of the non-pertinent information may not be feasible, minimization procedures that permit the retention of transactions in their entireties because their further divisibility is infeasible (if not technologically impossible) are consistent with the statutory requirement that such procedures minimize the retention of United States person information. ~~(TS//SI//NF)~~

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ii. **Retention of United States Person Information Can Be Effectively Minimized Through Restrictions on its Retrieval** ~~(TS//SI//NF)~~

Second, although it is not required that all non-pertinent United States person information be destroyed, NSA's retention of non-pertinent information concerning innocent United States persons is not without bounds. FISA's legislative history suggests that the retention of such information could still be effectively minimized through means other than destruction. *See* H.R. Rep. No. 95-1283, pt. 1, at 56 ("There are a number of means and techniques which the minimization procedures may require to achieve the purposes set out in the definition."). Of particular relevance here, Congress recognized that minimizing the retention of such information can be accomplished by making the information "not retrievable by the name of the innocent person" through the application of "rigorous and strict controls." *Id.* at 58-59. Those "rigorous and strict controls," however, need only be applied to the retention of United States person information "for purposes other than counterintelligence or counterterrorism." *Id.* That is because Congress intended that "a significant degree of latitude be given in counterintelligence and counterterrorism cases with respect to the retention of information." *Id.* at 59. ~~(TS//SI//NF)~~

NSA's current Section 702 minimization procedures flatly prohibit the use of United States person names or identifiers to retrieve any Section 702-acquired communications in NSA systems. *See, e.g.,* Amendment 1 to DNI/AG 702(g) Certification [REDACTED] Ex. B, filed [REDACTED] 2010, § 3(b)(5) (hereinafter "NSA Section 702 minimization procedures"). This "rigorous and strict control[]" applies even to United States person information that relates to counterintelligence or counterterrorism, despite Congress's stated intent that agencies should have "a significant degree of latitude . . . with respect to the retention of [such] information." H.R. Rep. No. 95-1283, pt. 1, at 59; *see id.* at 58-59 (recognizing that "for an extended period it may be necessary to have information concerning [the] acquaintances [of a hypothetical FISA target] retrievable" for analytic purposes, even though "[a]mong his contacts and acquaintances . . . there are likely to be a large number of innocent persons"). NSA's current Section 702 minimization procedures thus require the retention of information concerning United States persons (innocent or otherwise) to be minimized to a significantly greater degree than is necessary for those procedures to be reasonable. ~~(TS//SI//NF)~~

Of course, the Government seeks the Court's approval of revised NSA Section 702 minimization procedures that would enable NSA analysts to use United States person identifiers as selection terms if those selection terms are reasonably likely to return foreign intelligence information. *E.g.,* DNI/AG 702(g) Certification [REDACTED] Ex. B, filed Apr. 20, 2011, § 3(b)(5). Under these revised NSA Section 702 minimization procedures, the use of such selection terms must be approved in accordance with NSA procedures. *Id.* The Government is still in the process of developing the NSA procedures governing the use of United States person identifiers as selection terms. Until those procedures are completed, NSA analysts will not begin using United States person identifiers as selection terms. The Government will ensure that these NSA procedures contain "rigorous and strict controls" on the retrieval of United States person information consistent with statutory requirements and Congressional intent. H.R. Rep. No. 95-1283, pt. 1, at 59. ~~(TS//SI//NF)~~

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c. Dissemination (U)

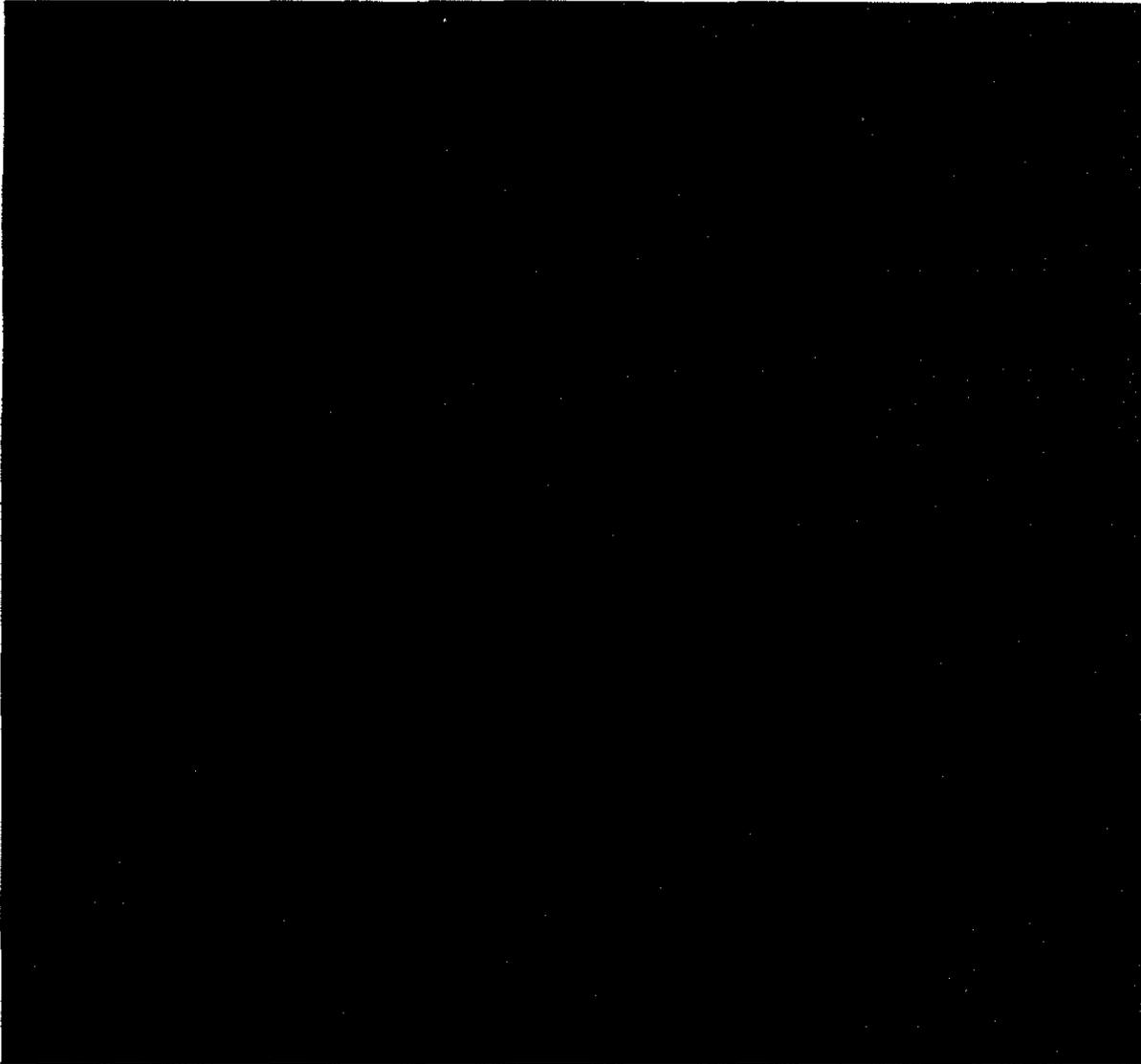
As discussed above, the NSA current Section 702 minimization procedures prohibit the use of United States person identifiers to retrieve any Section 702-acquired communications in NSA systems. Accordingly, the only way incidentally acquired United States person information currently will be reviewed by an NSA analyst is if that information appears in a communication that the analyst has retrieved using a permissible query term -- i.e., one that is reasonably likely to return information about non-United States person foreign intelligence targets. See NSA Section 702 minimization procedures, § 3(b)(5). Any identifiable United States person information contained in a communication retrieved in this manner would be subject to the dissemination restrictions in the NSA Section 702 minimization procedures, which operate to ensure that any dissemination of United States person information is consistent with the Act. These restrictions apply regardless of whether the United States person information is contained in a discrete communication that is to, from, or about a tasked selector. Moreover, the same dissemination restrictions will continue to apply to any United States person information retrieved through the use of a United States person identifier as a selection term in accordance with NSA's revised 702 minimization procedures. Indeed, given the small probability that an incidentally acquired communication of a United States person that is not to, from, or about a tasked selector would contain foreign intelligence information or evidence of a crime, it is highly unlikely that NSA would disseminate any information from that incidentally acquired communication, let alone information concerning the United States person. (TS//SI//NF)

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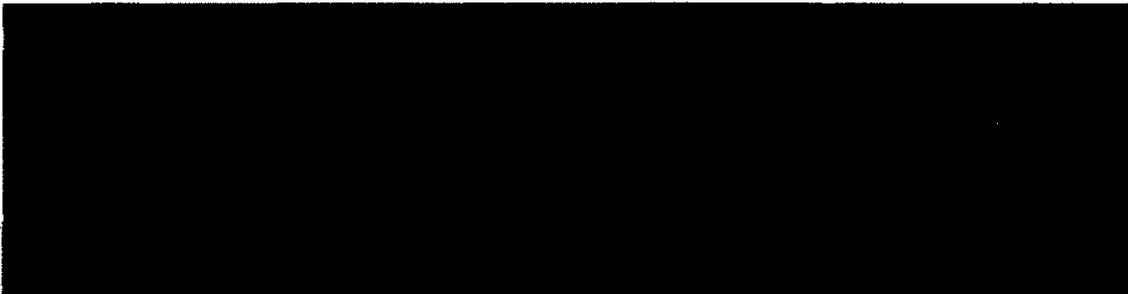
²² See footnote 22 below. (S)

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c. The May 2 Letter states that NSA is not presently capable of "separating out individual pieces of information" contained within [REDACTED] May 2 Letter at 3. Please explain why and state whether it would be feasible for NSA to implement such capability, either at the time of acquisition or thereafter. ~~(TS//SI//NF)~~

d. Can [REDACTED] be identified as distinct from other, discrete communications between users, either at the time of acquisition or thereafter? If so, can NSA filter its Section 702 collection on this basis? ~~(TS//SI//NF)~~



Except as described above, at the time of acquisition, NSA is not presently capable of separating out transactions that contain multiple electronic communications into logical constituent parts without destabilizing -- and potentially rendering unusable -- some or all of the entire collected transaction, including any particular communication therein which is in-fact to, from, or about the tasked selector. Each electronic communication service provider develops protocols that perform the services being provided in a manner designed to be economical in speed, size, and other factors that the provider considers important. [REDACTED]

²⁵ An NSA analyst would, however, be able to copy a portion of the rendered view of a transaction contained in a NSA corporate store and then paste it into a new record on a different system, such as an analytic store. Even so, the original transaction from which that copy was made would be retained in the corporate store in its original state, which cannot be altered for the reasons discussed below. ~~(TS//SI//NF)~~

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Each of the major providers change protocols often to suit their own business purposes, and it is therefore generally not possible for NSA to isolate or separate out individual pieces of information contained within single transactions at the time of NSA acquisition. Any protocol in use today could easily be changed by the provider tomorrow [REDACTED]

[REDACTED]

In short, except in cases involving [REDACTED] described above, at the time of acquisition it is not technologically feasible for NSA to extract any particular communication that is to, from, or about a tasked selector within a transaction containing multiple discrete communications. (TS//SI//NF)

For the same reasons that protocol volatility and myriad user settings prevent the extraction of only discrete communications at the point of acquisition, it is not technologically feasible to extract, post-acquisition, only the specific communication(s) to, from, or about a tasked selector within a transaction without destabilizing -- and potentially rendering unusable -- some or all of the collected transaction, including any particular communication therein which is to, from, or about the tasked selector. Thus, an NSA analyst cannot, for example, simply cut out the discrete communication that contains the tasked selector, paste it into a new record, and then discard the remainder. (TS//SI//NF)

3. The May 2 Letter notes that NSA uses Internet Protocol (IP) filtering and [REDACTED] to prevent the intentional acquisition of communications as to which the sender and all known recipients are inside the United States. May 2 Letter at 3. (TS//SI//NF)

a. Please describe how NSA applies IP filtering in the context of [REDACTED] (TS//SI//NF)

i. [REDACTED] (TS//SI//NF)

ii. [REDACTED] (TS//SI//NF)

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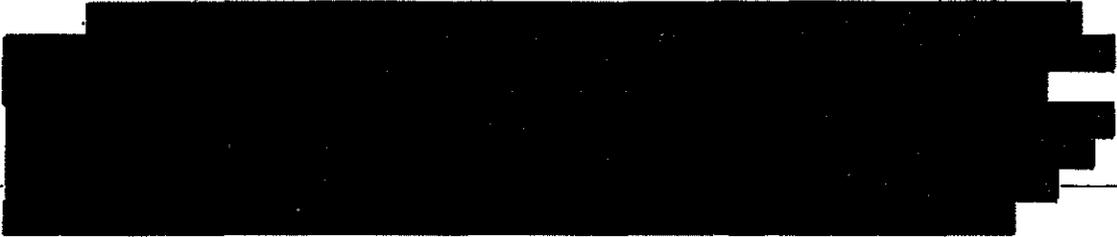
NSA acquires Internet communications by collecting the individual packets of data that make up those communications. As required by NSA's targeting procedures, all Internet communications data packets that may contain abouts information that NSA intercepts through its Section 702 upstream collection must either pass through an "Internet Protocol filter to ensure that the person from whom it seeks to obtain foreign intelligence information is located overseas." or



~~(TS//SI//OC,NF)~~



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[REDACTED] Accordingly, NSA cannot prevent the acquisition of, or even mark for separate treatment, those types of transactions that may feature multiple discrete communications [REDACTED] (TS//SI//OC,NF)

- b. In the collection of "to/from" communications, are the communicants always the individual users of particular facilities [REDACTED], or does NSA sometimes consider [REDACTED] Please explain. (TS//SI//NF)

In the collection of "to/from" communications, NSA considers the communicants as being the individual users of particular selectors. More particularly, NSA considers those individual users to be the senders and intended recipients of "to/from" communications. Conversely, NSA does not consider [REDACTED] (TS//SI//NF)

- 4. How, in terms of numbers and volume, does NSA's collection of [REDACTED] under Section 702 compare with the collection of discrete Internet communications (such as e-mail messages) between or among individual users? (TS//SI//NF)

As a result of the present technological limitations [REDACTED] NSA cannot precisely measure the number of transactions that might contain information or data representing several discrete communications [REDACTED] for purposes of comparing that figure with transactions containing a single, discrete communication [REDACTED] without manually examining each transaction that NSA has acquired. However, in an attempt to provide an estimate of the volume of such collection at the Court's request, NSA performed a series of queries into the SIGINT Collection Source System of Record that holds the relevant transactions in question. [REDACTED]

Results were sampled manually to confirm collection of [REDACTED] Results were reviewed for three randomly selected days in April, averaged to produce an estimated figure of collection of [REDACTED] for the month of April. This figure was then compared to the total take of Section 702 upstream collection of web activity for the month. From this sample, NSA estimates that approximately 9% of the monthly Section 702 upstream collection of [REDACTED]²⁶ It is important

²⁶ NSA notes that it is likely that this 9% figure includes [REDACTED] of the user of the targeted selector him/herself. (TS//SI//NF)

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to note that this was a manually intensive and imprecise means to quantify the volume of [REDACTED] collection and should not be interpreted to suggest that any technological method of pre-filtering can be applied to the collection before it is available to the analyst. ~~(TS//SI//NF)~~

5. Given that some of the information acquired through upstream collection is likely to constitute "electronic surveillance" as defined in 50 U.S.C. § 1801(f)(2) that has not been approved by this Court, how does the continued acquisition of, or the further use or dissemination of, such information comport with the restrictions of 50 U.S.C. § 1809(a)(1) and (a)(2)? ~~(TS//SI//NF)~~
- I. **THE CONTINUED ACQUISITION, USE, AND DISSEMINATION OF INFORMATION ACQUIRED THROUGH UPSTREAM COLLECTION DOES NOT VIOLATE 50 U.S.C. § 1809.** ~~(TS//SI//NF)~~

A. Introduction (U)

Section 702 of FISA, as codified at 50 U.S.C. § 1881a, provides that "[n]otwithstanding any other provision of law," upon the issuance of an appropriate Order from the Court, the Attorney General (AG) and the Director of National Intelligence (DNI) may jointly authorize the targeting of non-United States persons reasonably believed to be located outside the United States to acquire foreign intelligence information as long as certain conditions set out in subsection 702(b) are met. The joint authorizations of the AG and the DNI authorized NSA's upstream acquisition of communications that are to, from, or about a tasked selector. The Court, in turn, approved the implementing certifications as well as the use of proffered targeting and minimization procedures. Accordingly, because the acquisition of communications to, from, or about a tasked selector was authorized by the AG and DNI, and the Court approved the certifications and procedures used to implement those authorizations, NSA's acquisition of such communications upstream does not constitute unauthorized electronic surveillance and, therefore, does not violate the terms of 50 U.S.C. § 1809. ~~(TS//SI//NF)~~

As noted above, the Government readily acknowledges that it did not fully describe to the Court that the upstream collection technique would result in NSA acquiring [REDACTED] types of Internet transactions that could include multiple individual, discrete communications [REDACTED]. As discussed below, however, this omission does not invalidate the AG and DNI's prior authorizations. Nor does it mean that the incidental acquisition of communications that are not to, from, or about a tasked selector as a consequence of obtaining communications that are to or from a tasked selector or contain reference to a tasked selector, exceeds the scope of those authorizations. For the same reasons, the Government respectfully suggests that the Orders of

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this Court upon which those authorizations rely likewise remain valid. Thus, Section 1809 is not implicated by NSA's upstream collection activities under Section 702. ~~(TS//SI//NF)~~

B. Statutory Framework (U)

i. Section 1809 (U)

Under Subsection 1809(a), a person is guilty of a criminal offense if he or she "intentionally (1) engages in electronic surveillance under color of law, except as authorized by this Act . . . ; or (2) disclose[s] or uses 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 this Act."²⁷ (U)

For purposes of Section 1809 the issue is whether the Government's prior failure to fully explain to the Court the steps NSA must take in order acquire communications to, from, or about a tasked selector, and certain technical limitations regarding the IP address filtering it applies, means that the acquisition of such communications was not authorized by the DNI and AG, and inconsistent with Court approval of the targeting and minimization procedures. ~~(TS//SI//NF)~~

ii. Section 702 Collection Authorizations ~~(S)~~

Pursuant to 50 U.S.C. § 1881a(a), "notwithstanding any other provision of law," the AG and the DNI may jointly authorize for a period of up to one year the targeting of non-United States persons reasonably believed to be located outside the United States to acquire foreign intelligence information, subject to targeting and minimization procedures approved by this Court, and certain limitations set out in §1881a(b). Authorizations are premised on certifications to the Court, in which the AG and DNI attest to the fact that, among other things, the targeting and minimization procedures comply with certain statutory requirements and the Fourth

²⁷ This Court has previously noted that the legislative history of this provision focuses on a predecessor bill that was substantially different from the provision subsequently enacted and codified. See [REDACTED] Mem. Op. at 6-7 (Dec. 10, 2010). Yet, both the predecessor bill and the codified provision use the word intentionally, which has been described as "carefully chosen" and intended to limit criminal culpability to those who act with a "conscious objective or desire" to commit a violation. See H.R. Rep. No. 95-1283, pt.1, at 97 (1978) ("The word 'intentionally' was carefully chosen. It is intended to reflect the most strict standard for criminal culpability. . . . The Government would have to prove beyond a reasonable doubt both that the conduct engaged in was in fact a violation, and that it was engaged in with a conscious objective or desire to commit a violation."). Based upon discussions between responsible NSA officials and the Department of Justice (DOJ) and the Office of the Director of National Intelligence (ODNI) and DOJ and ODNI's review of documents related to this matter, DOJ and ONDNI have not found any indication that there was a conscious objective or desire to violate the authorizations here. ~~(TS//SI//NF)~~

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Amendment. 50 U.S.C. § 1881a(g)(2). Authorizations become effective “upon the issuance of an order [of this Court]” approving the certification and the use of the targeting and minimization procedures as consistent with the statute and the Fourth Amendment. *Id.* §§ 1881a(a) (AG and DNI authorizations go into effect upon “issuance of an order”); 1881a(i)(2)-(3) (laying out scope of FISC review).²⁸ ~~(TS//SI//NF)~~

Thus, if an acquisition is authorized by the AG and DNI, and the certification and targeting and minimization procedures which implement that authorization are approved by the Court, and the authorization remains valid, then the acquisition does not constitute unauthorized electronic surveillance under 50 U.S.C. § 1801(f)(2) and is not a violation of 50 U.S.C. § 1809. ~~(TS//SI//NF)~~

C. At a Minimum, the Upstream Acquisition of Single, Discrete Communications To, From, or About a Tasked Selector Was Authorized by the AG and the DNI

~~(TS//SI//NF)~~

The relevant AG and DNI authorizations and the targeting procedures the AG approved explicitly permit the acquisition of Internet communications that are to, from, or about a tasked selector. *See, e.g.*, NSA Targeting Procedures at 1 (describing the safeguards used in the acquisition of “about” as compared with “to/from” communications). In addition, the accompanying Affidavits of the Director of NSA described upstream collection in a paragraph detailing the various methods of obtaining such acquisitions. *See, e.g.*, DNI/AG 702(g) Certification [REDACTED] Affidavit of General Keith B. Alexander, Director, NSA, filed July 16, 2010, ¶ 4. Thus, it is clear that the authorizations permit – at a minimum – the upstream acquisition of single, discrete communications to, from, or about a tasked selector. ~~(TS//SI//NF)~~

As described in detail in response to questions 2 and 3 above, due to certain technological limitations, in general the only way NSA can currently acquire as part of its upstream collection single, discrete communications to, from, or about a tasked selector [REDACTED] is by obtaining the Internet transactions of which those communications are a part. An Internet transaction can include either a single, discrete communication to, from, or about a tasked

²⁸ For reauthorizations, the AG and the DNI submit, to the extent possible, a certification to the FISC laying out, among other things, the targeting and minimization procedures adopted at least 30 days prior to the expiration of the prior authorization. The prior authorization remains in effect, notwithstanding the otherwise applicable expiration date, pending the FISC's issuance of an order with respect to the certification for reauthorization. 50 U.S.C. § 1881a(i)(5). The scope of the court's review is the same for reauthorizations as it is for initial authorizations. *Id.* § 1881a(i)(5)(B). (U)

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selector [REDACTED], or several discrete communications, only one of which may be to, from, or about a tasked selector [REDACTED] ~~(TS//SI//NF)~~

Where an Internet transaction includes multiple communications, not all of which are to, from, or about a tasked selector, it currently may not be technologically feasible for NSA to separate out, at the time of acquisition or thereafter, the discrete electronic communications within that transaction that are to, from, or about a tasked selector. Indeed, at the time of acquisition, NSA's upstream Internet collection devices are, with limited exception, not capable of distinguishing or further separating discrete electronic communications [REDACTED] within a single Internet transaction. Thus, in some cases, NSA can collect communications to, from, or about a tasked selector, as authorized by the certification, only by obtaining the Internet transaction of which those communications may be just a part.

~~(TS//SI//NF)~~

In this respect, the upstream acquisition of Internet transactions which contain multiple, discrete communications not all of which are (and, in some instances, only one of which is) to, from or about a tasked selector is akin to the Government's seizure of a book or intact file that contains a single page or document that a search warrant authorizes the government to seize. In *United States v. Wuagneux*, 683 F.2d 1343, for example, the Eleventh Circuit rejected appellants' argument that a search was unreasonable because the agents seized an entire file, book, or binder if they identified a single document within the file, book, or binder as being within the authorization of the warrant. As the court explained, "a search may be as extensive as reasonably required to locate items described in the warrant." *Id.* at 1352. It was therefore "reasonable for the agents to remove intact files, books and folders when a particular document within the file was identified as falling within the scope of the warrant." *Id.* at 1353. *See also United States v. Rogers*, 521 F.3d 5, 10 (1st Cir. 2008) (concluding that a videotape is a "plausible repository of a photo" and that therefore a warrant authorizing seizure of "photos" allowed the seizure and review of two videotapes); *United States v. Christine*, 687 F.2d 749, 760 (3d Cir. 1982) (*en banc*) (emphasizing that "no tenet of the Fourth Amendment prohibits a search merely because it cannot be performed with surgical precision. Nor does the Fourth Amendment prohibit seizure of an item, such as a single ledger, merely because it happens to contain other information not covered by the scope of the warrant."); *United States v. Beusch*, 596 F.2d 871, 876-77 (9th Cir. 1979) (rejecting argument that "pages in a single volume of written material must be separated by searchers so that only those pages which actually contain the evidence may be seized"). ~~(TS//SI//NF)~~

That the certifications by the AG and DNI did not specifically describe this aspect of NSA's upstream collection does not mean that collection was unauthorized by the AG and DNI. Again, case law involving the reasonableness of searches conducted pursuant to criminal search warrants is instructive on this point. For example, in *Dalia v. United States*, 441 U.S. 238, 259 (1979), the Supreme Court recognized that "[o]ften in executing a warrant the police may find it

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necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant." *Id.* at 257. See *United States v. Grubbs*, 547 U.S. 90, 98 (2006) ("Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the [requirements set forth in the text], search warrants also must include a specification of the precise manner in which they are to be executed.") (quoting *Dalia*, 441 U.S. 238, 257 (1979)). This is especially true where, as in *Dalia*, "[t]here is no indication that [the] intrusion went beyond what was necessary" to effectuate the search authorized. *Dalia*, 441 U.S. at 258 n. 20. ~~(TS//SI//NF)~~

Like the seizure of an entire book or file simply because it contained a single page or document within the scope of the warrant, NSA only acquires an Internet transaction containing several discrete communications if at least one of those communications within the transaction is to, from, or about a tasked selector. Moreover, unlike the agents in *Wuagneux*, who presumably could have opted to seize only the responsive pages out of the books and files searched, except in limited circumstances, NSA has no choice but to acquire the whole Internet transaction in order to acquire the to, from, or about communication the DNI and AG authorized NSA to collect. NSA only acquires an Internet transaction if *in fact* it contains at least one communication to, from, or about a tasked selector. NSA's acquisition of Internet transactions containing several discrete communications, only one of which is to, from, or about a tasked selector, is therefore "as extensive as reasonably required to locate the items described" in the DNI and AG's authorization, and thus cannot be said to exceed the scope of that authorization. ~~(TS//SI//NF)~~

Moreover, as described in response to questions 1(b)(ii) and (iii), the Government has concluded that such collection fully complies with the statutory requirements and the Fourth Amendment. Having now considered the additional information that is being presented to this Court, the AG and DNI have confirmed that their prior authorizations remain valid. Accordingly, Government personnel who rely on those authorizations to engage in ongoing acquisition are not engaging in unauthorized electronic surveillance, much less doing so "intentionally." ~~(TS//SI//NF)~~

D. The Court Approved the Certifications and Targeting and Minimization Procedures Used to Implement the Authorizations of the AG and DNI ~~(TS//SI//NF)~~

A second issue concerns whether this Court's orders cover the full scope of the authorizations, and, if not, whether that affects the validity of the AG and DNI authorizations. Like the AG and DNI authorizations, in approving the applicable certifications and the use of the proffered targeting and minimization procedures this Court's Opinions and Orders clearly contemplated and approved some upstream collection of communications to, from, or about a target. See, e.g., [REDACTED] Mem. Op. at 15-17 (describing acquisition of communications to, from,

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and about a target).²⁹ Thus, for the reasons described above, the acquisition of Internet transactions that include at least one communication to, from, or about a target falls within the scope of the Court's Orders – even if additional communications are also incidentally acquired due to limits in technology. ~~(TS//SI//NF)~~

The fact that the Government did not fully explain to the Court all of the means by which such communications are acquired through NSA's upstream collection techniques does not mean that such acquisitions are beyond the scope of the Court's approval, just as in the criminal context a search does not exceed the scope of a warrant because the Government did not explain to the issuing court all of the possible means of execution, even when they are known beforehand and could possibly implicate privacy rights. See *Dalia*, 441 U.S. at 257 n.19 (noting that "[n]othing in the decisions of this Court . . . indicates that officers requesting a warrant should be constitutionally required to set forth the anticipated means for execution even in those cases where they know beforehand that [an additional intrusion such as] unannounced or forced entry likely will be necessary."). In addition, as discussed herein, the incidental acquisitions do not go beyond what is reasonably necessary to acquire the foreign intelligence information contained in a communication to, from, or about a targeted selector within a transaction. See *id.* at 258 n. 20. ~~(TS//SI//NF)~~

In any event, the Government believes that the additional information should not alter the Court's ultimate conclusion that the targeting and minimization procedures previously approved are consistent with the statutory requirements, including all the requirements of § 1881a(b), and the Fourth Amendment, and the Court's orders therefore remain valid. Cf. *Franks v. Delaware*, 438 U.S. 154 (1978) (establishing that a search warrant is valid unless it was obtained as the result of a knowing and intentional false statement or reckless disregard for the truth and the remaining content is insufficient to establish the requisite probable cause needed to obtain the warrant). ~~(TS//SI//NF)~~

Pursuant to § 1881a, the Court reviews the following issues: (i) whether the AG and DNI certifications contain all the required elements; (ii) whether the targeting procedures are consistent with the requirements of § 1881a(d)(1); (iii) whether the minimization procedures are consistent with § 1881a(i)(e)(1); and (iv) whether the targeting and minimization procedures are consistent with the requirements of the Fourth Amendment. 50 U.S.C. § 1881a(i)(2), (3). See also *id.* § 1881a(i)(5)(B) (specifying that reauthorizations are to be reviewed under the same

²⁹ Each of the relevant 2010 FISC Orders is based on the "reasons stated in the Memorandum Opinion issued contemporaneously herewith." These Opinions, in turn, rely on the analysis conducted by the Court in Dockets [REDACTED], which incorporate and rely on the analysis of earlier FISC Opinions, including Docket 702(i)-08-01. ~~(TS//SI//NF)~~

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standards). The Government believes that the Court's ultimate conclusions with respect to each of these issues should not change based on the additional information provided. ~~(TS//SI//NF)~~

First, there is no suggestion that the prior certifications failed to contain all the required elements. ~~(TS//SI//NF)~~

Second, while the Government acknowledges that it did not fully explain to the Court the steps NSA must take in order to implement its Section 702 upstream Internet collection techniques, and certain technical limitations regarding its IP address filtering, the Court did approve the DNI/AG certifications and the use of targeting and minimization procedures which authorized the acquisition of communications to, from, or about tasked selectors. As discussed above and in response to questions 1(b)(ii) (iii) and 3, Internet transactions are collected because they contain at least one discrete communication to, from, or about a tasked selector. Each tasked selector has undergone review, prior to tasking, designed to ensure that the user is a non-United States person reasonably believe to be located outside the United States. Moreover, with respect to "abouts" communications, for the reasons discussed in the response to question 1(b)(ii), NSA's targeting procedures are reasonably designed to prevent the intentional acquisition of any communications as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States.³⁰ Thus, NSA is targeting persons reasonably believed to be outside the United States and is not intentionally acquiring communications in which both the sender and all intended recipients are known at the time of acquisition to be in the United States. ~~(TS//SI//NF)~~

Third, as described throughout, in many cases, it is not technologically feasible for NSA to acquire only Internet transactions that contain a single, discrete communication to, from, or about a tasked selector that may be contained in an Internet communication containing multiple discrete [REDACTED] communications. As discussed in detail in response to questions 1(b)(ii) and (iii), this does not mean that NSA's procedures do not adequately minimize the acquisition of any U.S. person information that may be contained within those transmissions. Rather, the minimization procedures fully comport with all statutory requirements. ~~(TS//SI//NF)~~

³⁰ As the Court is aware, § 1881a(b)(4) provides that an acquisition authorized under section 702, "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 . . ." Although this prohibition could be read at first glance to be absolute, another provision of Section 702 indicates otherwise. Specifically, § 1881a(d)(1)(B) provides that the targeting procedures that the AG, in consultation with the DNI, must adopt in connection with an acquisition authorized under section 702 need only be "reasonably designed 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." (U)

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Finally, as described in response to question 1(b)(iii), the targeting and minimization procedures fully comply with the Fourth Amendment. ~~(TS//SI//NF)~~

Thus, the additional information the Government has provided concerning details of its upstream collection does not – in the Government’s view – undercut the validity of the targeting or minimization procedures. ~~(TS//SI//NF)~~

E. Compliance with the Authorizations: Use and Disclosure ~~(TS//SI//NF)~~

As described above, § 1809(a)(2) criminalizes the intentional use and disclosure of electronic surveillance, “knowing or having reason to know that the information was obtained through electronic surveillance not authorized by this Act.” Having concluded that the upstream collection conducted by NSA falls within the scope of the relevant authorizations, the Government respectfully submits that the continued use and disclosure of such information is likewise valid, so long as the minimization procedures approved by the Court (and discussed in detail in response to questions 1(b)(ii) and (iii)) are followed.³¹ ~~(TS//SI//NF)~~

6. Please provide an update regarding the [REDACTED] over collection incidents described in the government’s letter to the Court dated April 19, 2011.

The April 19, 2011, notice to the Court described two overcollection incidents involving entirely unrelated communications that had been [REDACTED]. The notice also advised that as part of its continued investigation into these incidents, NSA would examine other systems to determine whether similar [REDACTED] issues occurred in those systems. ~~(TS//SI//NF)~~

The first incident described in the April 19 notice involved [REDACTED]. Each [REDACTED] contained at least one communication to, from, or about a Section 702-tasked selector, but also [REDACTED] unrelated communications. This overcollection started [REDACTED].

³¹ Although this analysis has focused on acquisitions conducted pursuant to the 2010 Section 1881a Authorizations, the Government believes that, for all of the reasons discussed herein, the upstream collection conducted pursuant to previous certifications authorized under Section 1881a of the Foreign Intelligence Surveillance Act of 1978, as amended, the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (Aug. 5, 2007), [REDACTED]

[REDACTED] falls within the scope of the relevant authorizations and Orders of this Court.

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[REDACTED] ~~(TS//SI//NF)~~

[REDACTED]

All such communications will be processed in accordance with NSA's minimization procedures.³² The Government will advise the Court of the final disposition of these communications.

[REDACTED] ~~(TS//SI//NF)~~

The second-described [REDACTED] incident involved overcollection [REDACTED]. As described in the April 19 notice, on March 28, 2011, NSA discovered a [REDACTED] of Section 702-acquired communications that had not been properly [REDACTED]

In contrast to the communications overcollected between [REDACTED] discussed above, the [REDACTED] acquired as a result of the [REDACTED] overcollection incident involved fewer communications [REDACTED]

³² In particular, section 3(b)(1) of NSA's Section 702 Minimization Procedures state:

Personnel will exercise reasonable judgment in determining whether information acquired must be minimized and will destroy inadvertently acquired communications of or concerning a United States person at the earliest practicable point in the processing cycle at which such communication can be identified either: as clearly not relevant to the authorized purpose of the acquisition (e.g., the communication does not contain foreign intelligence information); or, as not containing evidence of a crime which may be disseminated under these procedures. Such inadvertently acquired communications of or concerning a United States person may be retained no longer than five years in any event. The communications that may be retained include electronic communications acquired because of limitations on NSA's ability to filter communications.

(Emphasis added). ~~(S//SI)~~

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As in the [REDACTED] incident, each [REDACTED] contains at least one communication that is to, from, or about a Section 702-task selector. (TS//SI//NF)

As of April 11, 2011, NSA began to sequester in its Collection Stores all communications involving the affected [REDACTED]

[REDACTED]. NSA was deliberately overinclusive in adding objects to the [REDACTED]; while some of these objects include [REDACTED] other objects consist of only one communication to, from, or about a Section 702-task selector.

~~(TS//SI//NF)~~

Since the filing of the April 19 notice, NSA has continued to evaluate collection from [REDACTED] and has observed no evidence of [REDACTED] issues other than the above-described issues [REDACTED]

~~(TS//SI//NF)~~

NSA has identified no reporting based upon overcollected communications and is currently exploring options to automate ways to accelerate identification of [REDACTED]

[REDACTED] NSA anticipates that it will be able to reach a decision by June 30, 2011, on whether this approach is effective. ~~(TS//SI//NF)~~

~~(TS//SI//NF)~~

The April 19 notice also advised the Court that NSA would "examine [REDACTED] and other upstream collection systems to ensure that similar [REDACTED] problems are not occurring in those systems." NSA now reports that unlike the most recent [REDACTED]

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these other systems were designed [REDACTED] ³³ [REDACTED]
[REDACTED]
[REDACTED] (~~TS//SI//NF~~)

7. Are there any other issues of additional information that should be brought to the Court's attention while it is considering the certifications and amendments filed in the above-captioned dockets?

At this time, the Department of Justice (DOJ) and Office of the Director of National Intelligence (ODNI) are currently investigating certain possible incidents of non-compliance about which the Department of Justice intends to file preliminary notices in accordance with the rule of this Court. These incidents do not relate to any of the matters discussed in this filing and, based on the information currently available to DOJ and ODNI, the Government does not believe that the nature of these incidents is sufficiently serious such that they would bear on the Court's consideration of the certifications and amendments filed in the above-captioned dockets.

(~~S//OC,NF~~)

³³ As discussed in response to question 2(c) and (d), NSA has the ability to separate out individual pieces of information in certain cases [REDACTED] In the course of the investigation into the most recent [REDACTED] incident, NSA additionally identified [REDACTED]

[REDACTED] Though testing demonstrated the possibility that incompletely processed communications could have been forwarded through the SIGINT system, NSA has identified no actual overcollection that occurred as a result. NSA is currently in the process of developing a software fix designed to properly process such communications under the limited circumstances in which overcollections could occur. Until such a fix can be tested and deployed, NSA will continue to monitor [REDACTED] and other upstream Section 702 collection systems [REDACTED]

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