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UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT

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IN RE:

Washington, D.C.  
October 20, 2015  
2:01 p.m.



TRANSCRIPT OF PROCEEDINGS  
HELD BEFORE THE HONORABLE THOMAS F. HOGAN  
FOREIGN INTELLIGENCE SURVEILLANCE COURT

APPEARANCES:

FOR THE DEPARTMENT OF JUSTICE:

(b)(6); (b)(7)(C)  
STUART J. EVANS, ESQ.

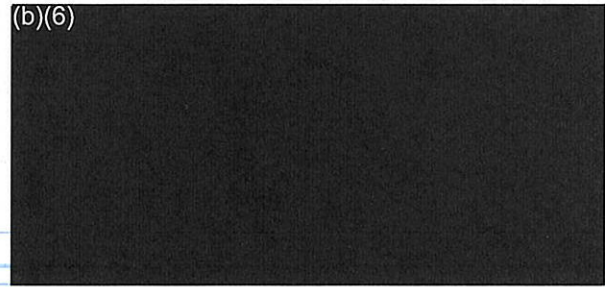
FOR THE AMICUS CURIAE:

AMY JEFFRESS, ESQ.

COURT STAFF:

(b)(6); (b)(7)(C)

Court Reporter:



Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

## P R O C E E D I N G S

0 :41PM 2 THE COURT: All right. Good afternoon. We're  
02:01:43PM 3 here on the matter that we had appointed Amicus counsel to  
02:01:48PM 4 look into under the new statute. I want to introduce you to  
02:01:54PM 5 Judge James Parker Jones from the Western District of  
02:01:57PM 6 Virginia, one of our newer FISA judges, who is just  
02:02:02PM 7 attending this ceremony with me and who will probably be  
02:02:05PM 8 kicking me under the table telling me how to behave here.

02:02:08PM 9 This matter before the Court is, as I've said on  
02:02:13PM 10 the report, materials received entitled "The Briefs of  
02:02:23PM 11 Amicus Curiae" from the Amicus we appointed here, Ms. Amy  
02:02:25PM 12 Jeffress, whom the Court acknowledges for her excellent work  
02:02:30PM 13 in a very tight time frame in this matter and appreciates  
02:02:34PM 14 the work that she's given to the Court, and to all of us,  
02:02:37PM 15 for this report.

02:02:42PM 16 What I want to start with is a couple of things.  
02:02:44PM 17 One is, I'd like to have introduced the parties who are  
02:02:47PM 18 going to be arguing for the Court for the record. And  
02:02:50PM 19 Ms. Jeffress is one, and we've got about 18 others so I'll  
02:02:54PM 20 assume we'll reduce that to one or two on the government's  
02:02:57PM 21 side, and we won't hear from everybody. But also, after  
02:03:00PM 22 that, anyone who may be intending to be a fact witness, if  
02:03:04PM 23 there's questions I want to ask and develop, if they would  
02:03:07PM 24 introduce themselves, if there's any officials here from the  
02:03:13PM 25 relevant agencies. I think the Court -- counsel for the

02:03:20PM 1 Court have at least advised the Court -- the government that  
02:03:24PM 2 my interest, and I believe to -- first of all, my interest  
02:03:30PM 3 really is to the issues she's raised as to the inquiry into  
02:03:34PM 4 the 702 materials by the FBI on evidence of crimes.

02:03:41PM 5 The second inquiry that she had -- the first was  
02:03:43PM 6 as to the aspects that we found were appropriate under the  
02:03:52PM 7 new law, I'd call it, The Freedom Act, and some minimization  
02:03:59PM 8 procedures adopted by the CIA, NSA, and then the FBI; and  
02:04:07PM 9 it's the FBI we're concerned mostly about. And the second  
02:04:10PM 10 issue was the retention of materials for litigation  
02:04:13PM 11 purposes, which I think the Amicus has covered as well.

02:04:18PM 12 And if the government wants to be heard on any of  
02:04:20PM 13 those others, they can be, but my interest really is in the  
02:04:23PM 14 FBI's minimization procedures and the use of inquiries by  
02:04:29PM 15 the FBI into potential criminal activity in the 702  
02:04:39PM 16 collections.

02:04:40PM 17 So, with that, if we can have the parties who are  
02:04:42PM 18 going to argue introduce themselves first; and then, if  
02:04:45PM 19 there are any identified fact witnesses, we can have them  
02:04:48PM 20 introduced as well.

02:04:49PM 21 (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) from the Department of  
02:04:52PM 22 Justice.

02:04:53PM 23 MR. EVANS: Stuart Evans, also from the Department  
02:04:55PM 24 of Justice, Your Honor.

02:04:55PM 25 THE COURT: All right. And Ms. Jeffress.

02:04:58PM 1 MS. JEFFRESS: Your Honor, Amy Jeffress,  
02:05:02PM 2 FISC Amicus.

02:05:03PM 3 THE COURT: All right. Thank you.

02:05:04PM 4 Any potential fact witnesses you may have here if  
02:05:06PM 5 I have questions to ask, potentially, the FBI?

02:05:10PM 6 MR. EVANS: Your Honor, at this time we do have  
02:05:11PM 7 several representatives from the FBI in the room with us.  
02:05:14PM 8 We had not been anticipating, necessarily, presenting a fact  
02:05:17PM 9 witness, but depending on whether the Court had relevant  
02:05:19PM 10 questions, that's something that we can --

02:05:20PM 11 THE COURT: If I develop questions that you don't  
02:05:22PM 12 answer and you want to turn to someone else to answer them,  
02:05:25PM 13 then we'll have them sworn at that time. We'll hold off  
02:05:27PM 14 until then.

02:05:28PM 15 All right. Well, I think that we will begin with  
02:05:30PM 16 the Amicus and her report, and Ms. Jeffress, you'll want to  
02:05:37PM 17 cover the other areas as well, but I'm obviously interested  
02:05:41PM 18 in what you have developed as an issue in this FBI  
02:05:44PM 19 minimization procedures and their appropriateness or not as  
02:05:48PM 20 it affects the collection and dissemination of matters  
02:05:51PM 21 related to crime and your position in that matter. So if  
02:05:58PM 22 you can take the podium, please.

02:06:01PM 23 MS. JEFFRESS: Yes, good afternoon.

02:06:02PM 24 THE COURT: Thank you for your work on this  
02:06:04PM 25 matter.

02:06:04PM 1 MS. JEFFRESS: Thank you, Your Honor. And thank  
02:06:05PM 2 you for appointing me to serve in this role.

02:06:07PM 3 Before I begin, I wanted to add one point to what  
02:06:11PM 4 I set forth in my brief about my understanding of my role as  
02:06:15PM 5 Amicus. One interpretation of the Amicus provision of the  
02:06:19PM 6 statute would be that my job is to present all legal  
02:06:22PM 7 arguments that advance the protection of individual privacy  
02:06:25PM 8 and civil liberties interests.

02:06:28PM 9 Many advocacy groups and academic experts  
02:06:31PM 10 presented these arguments to the Privacy and Civil Liberties  
02:06:34PM 11 Oversight Board in much greater detail than I have set forth  
02:06:37PM 12 in my brief. I did not think that the time allowed for my  
02:06:41PM 13 participation permitted me to serve that role, as a privacy  
02:06:45PM 14 and civil liberties advocate, broadly speaking. Rather, my  
02:06:49PM 15 understanding of the role that I was asked to and was able  
02:06:52PM 16 to fill, given the time constraints and my own abilities as  
02:06:55PM 17 advisor to the Court, was really to evaluate the program and  
02:06:58PM 18 to determine whether there were any aspects of the  
02:07:00PM 19 certifications and the procedures submitted to the Court  
02:07:03PM 20 that did not comply with the statutory and constitutional  
02:07:07PM 21 requirements, as I viewed it, with respect to the two  
02:07:10PM 22 specific issues that the Court noted in the order.

02:07:13PM 23 So I reviewed the program with that goal in mind  
02:07:17PM 24 and found that I thought that the FBI's minimization  
02:07:21PM 25 procedures are not consistent with the purpose of Section

02:07:24PM 1 702 or the Fourth Amendment because specifically they do not  
02:07:27PM 2 provide sufficient safeguards of the U.S. person information  
02:07:32PM 3 that is incidentally collected in the 702 -- Section 702  
02:07:36PM 4 program.

02:07:38PM 5 To start with, Your Honor, I would first address  
02:07:41PM 6 the issue of whether querying warrants a separate Fourth  
02:07:46PM 7 Amendment analysis at all.

02:07:47PM 8 THE COURT: Yes, exactly.

02:07:50PM 9 MS. JEFFRESS: You could argue that a query is not  
02:07:52PM 10 a search under the Fourth Amendment; that it is --

02:07:55PM 11 THE COURT: Well, if the original materials are  
02:07:58PM 12 appropriately collected, which they are, I assume, if they  
02:08:03PM 13 permitted them, how is looking at the materials a new  
02:08:06PM 14 search?

02:08:06PM 15 MS. JEFFRESS: Right. It's not a new search so  
02:08:10PM 16 much as it is a separate action that I think does warrant  
02:08:14PM 17 Fourth Amendment scrutiny and needs to be treated as a  
02:08:16PM 18 separate action subject to the Fourth Amendment  
02:08:19PM 19 reasonableness test, and I think that that is appropriate,  
02:08:24PM 20 and I'd also note that the Private and Civil Liberties  
02:08:28PM 21 Oversight Board thought so as well. If you look at their  
02:08:31PM 22 report on Pages 95 and 96, they talk about how -- and I'll  
02:08:39PM 23 just quote -- concerns about post-collection practices such  
02:08:42PM 24 as the use of queries to search for the communications of  
02:08:46PM 25 specific U.S. persons cannot be dismissed on the basis that

02:08:50PM 1 the communications were, quote, lawfully collected, unquote.  
02:08:54PM 2 That's the end of that quote.

02:08:55PM 3 The report, though, goes on to say that the Court  
02:08:58PM 4 must consider whether the procedures that govern the  
02:09:01PM 5 acquisition, use, dissemination and retention of U.S.  
02:09:04PM 6 persons -- and then I'll quote again -- quote, appropriately  
02:09:08PM 7 balance the government's valid interests with the privacy of  
02:09:11PM 8 U.S. persons, end quote. And I think that that querying  
02:09:14PM 9 process, too, is subject to a totality of the circumstances  
02:09:18PM 10 test to determine whether it's reasonable under the Fourth  
02:09:23PM 11 Amendment.

02:09:23PM 12 THE COURT: Well, if your bottom line conclusion  
02:09:27PM 13 is that if the minimization procedures are sufficient and  
02:09:33PM 14 consistent with the reasonableness requirement of the Fourth  
02:09:36PM 15 Amendment, that wouldn't solve your problem.

02:09:39PM 16 MS. JEFFRESS: That's correct. That's correct.

02:09:40PM 17 And with respect to the NSA's procedures and the  
02:09:43PM 18 CIA's procedures, I thought that they did. I thought that  
02:09:48PM 19 the requirements that may have been followed before the  
02:09:51PM 20 recent changes to the minimization procedures, but that it  
02:09:54PM 21 is now very clear, requiring that each U.S. person query be  
02:09:59PM 22 supported by a statement of facts that explains why the  
02:10:03PM 23 information is being sought and why it's relevant to foreign  
02:10:06PM 24 intelligence, or why it's expected to produce foreign  
02:10:10PM 25 intelligence information, I thought, justified the query in

02:10:14PM 1 a way that the FBI's procedures don't because they allow for  
02:10:19PM 2 really virtually unrestricted querying of the Section 702  
02:10:23PM 3 data in a way that NSA and CIA have restrained it through  
02:10:28PM 4 their procedures.

02:10:31PM 5 I would just also note that the PCLOB report, on  
02:10:36PM 6 Page 96, notes that given the low standards for collection  
02:10:41PM 7 of information under Section 702, quote, The standards for  
02:10:45PM 8 querying the collected data to find the communications of  
02:10:48PM 9 specific U.S. persons may need to be more rigorous than  
02:10:52PM 10 where higher standards are required at the collection stage,  
02:10:55PM 11 unquote. And that's what distinguishes, in my view, Section  
02:11:00PM 12 702 from the information collected pursuant to traditional  
02:11:03PM 13 FISA applications or in other databases that are collected  
02:11:07PM 14 under more traditional criminal procedure methods.

02:11:14PM 15 And then, Your Honor, the government may have  
02:11:16PM 16 arguments on that point that I would want to respond to, but  
02:11:19PM 17 I thought, for the interest of just introducing my position,  
02:11:21PM 18 I would move to the second step in my analysis, which is  
02:11:26PM 19 that the current procedures do not meet the Fourth Amendment  
02:11:28PM 20 reasonableness test, and, as I've already said, I think that  
02:11:32PM 21 the NSA and CIA do have sufficient protections in requiring  
02:11:36PM 22 a written statement that reflects that each specific query  
02:11:40PM 23 is designed to produce foreign intelligence information, and  
02:11:44PM 24 that really justifies the intrusion on U.S. person  
02:11:48PM 25 information that the queries implicate.



02:11:50PM 1 The FBI minimization procedures, though, do not.  
02:11:54PM 2 They allow the information to be queried for any legitimate  
02:11:58PM 3 law enforcement purpose, and I find two problems with that.  
02:12:01PM 4 One is that there need be no connection to foreign  
02:12:05PM 5 intelligence or national security, and that is the purpose  
02:12:08PM 6 of the collection, of course, and so they're overstepping,  
02:12:12PM 7 really, the purpose for which the information is collected.  
02:12:15PM 8 THE COURT: Well, if you look at the -- it is  
02:12:25PM 9 somewhat anomalous, but it is in the statute. I mean, 702,  
02:12:28PM 10 the authorization, the original authorization, it talks  
02:12:31PM 11 about targeting persons reasonably believed to be located  
02:12:34PM 12 outside the United States to acquire foreign intelligence  
02:12:37PM 13 information. That's the purpose of it. But then you go  
02:12:39PM 14 back to the minimization procedures. It's under (h) and, I  
02:12:45PM 15 guess, in 1801(h), "'Minimization procedures', with respect  
02:12:49PM 16 to electronic surveillance, means," and then it talks about  
02:12:52PM 17 (1), specific procedures, which I'm sure you're familiar  
02:12:56PM 18 with, having been at Justice and all, and the Attorney  
02:12:58PM 19 General's adopted these; (2), the procedures that require  
02:13:01PM 20 and what to do about it; and then (3) says, "notwithstanding  
02:13:04PM 21 paragraphs (1) and (2), procedures that allow for the  
02:13:07PM 22 retention and dissemination of information that is evidence  
02:13:09PM 23 of a crime which has been or is being or is about to be  
02:13:13PM 24 committed and that is to be retained or disseminated for law  
02:13:17PM 25 enforcement purposes."

02:13:18PM 1 So the statute recognizes another purpose, does it  
0 :22PM 2 not, of this collection of the foreign intelligence  
02:13:27PM 3 information as a subsidiary of that or subset that there may  
02:13:30PM 4 be evidence of a crime that's collected as well, which is  
02:13:33PM 5 approved to be distributed under the statute?

02:13:35PM 6 MS. JEFFRESS: That's correct, Your Honor, and I  
02:13:36PM 7 would note that you're correct that it also specifies any  
02:13:39PM 8 crime. So it doesn't just restrict that to --

02:13:42PM 9 THE COURT: Right, as long as it's a serious crime  
02:13:44PM 10 or a kidnapping or some type that people talk about.

02:13:48PM 11 MS. JEFFRESS: No, no, and I think that that is an  
02:13:49PM 12 important point to note. And it explains why the government  
02:13:52PM 13 is permitted to retain and disseminate evidence of a crime,  
02:13:56PM 14 and that's that, you know, when the government collects it  
02:14:00PM 15 pursuant to these lawful authorities, if there is evidence  
02:14:02PM 16 of a crime, it would be somewhat counterintuitive for the  
02:14:05PM 17 government not to be able to use that and to act on it.

02:14:08PM 18 But I think that the use -- the querying process  
02:14:11PM 19 is different because there is no finding that this  
02:14:15PM 20 incidental collection is such evidence, and that takes me to  
02:14:21PM 21 the second point that I wanted to make about the FBI's  
02:14:24PM 22 minimization procedures, which is that there are -- there is  
02:14:27PM 23 no limitation on what type of matter can be the subject of a  
02:14:33PM 24 query. So an assessment can be the subject of a query, and  
02:14:39PM 25 assessments can be initiated for virtually any reason. I'm

02:14:44PM 1 sure there are limits on improper reasons, you know, racial  
02:14:48PM 2 discrimination and things like that, and that's out of  
02:14:50PM 3 bounds, of course, but really there is no threshold that  
02:14:54PM 4 needs to be met.

02:14:55PM 5 And for an assessment, I would note that there are  
02:14:58PM 6 restrictions even on the use of grand jury subpoenas for  
02:15:00PM 7 assessments. So grand jury subpoenas can only be issued to  
02:15:04PM 8 request subscriber information for telephone numbers or  
02:15:07PM 9 email addresses, and so they're really viewed as considered  
02:15:13PM 10 the very lowest of the purpose for which you would need a  
02:15:18PM 11 query.

02:15:19PM 12 And I think that that opens up the Section 702  
02:15:22PM 13 database to a really very wide-ranging, really virtually  
02:15:26PM 14 unrestricted use by the FBI that I think should be cabined  
02:15:31PM 15 in order to meet the Fourth Amendment reasonableness test.

02:15:35PM 16 I found that that unrestricted querying just is  
02:15:38PM 17 inconsistent with the language and the analysis in the FISA  
02:15:44PM 18 Court of Reviews case *In Re: Sealed Case*, which stated  
02:15:48PM 19 plainly that the FISA process cannot be used as a device to  
02:15:51PM 20 investigate wholly unrelated crimes, and I think that that's  
02:15:54PM 21 what this querying process allows the FBI to do without any  
02:15:58PM 22 restriction of the querying process.

02:16:04PM 23 THE COURT: That's Judge Silberman, 736 of his  
02:16:09PM 24 opinion, you're talking about. He says, for example, a  
02:16:12PM 25 group of international terrorists engaged in bank

02:16:15PM 1 robberies -- which is something I'm going to raise in a  
02:16:18PM 2 minute -- in order to finance or manufacture a bomb, the  
02:16:18PM 3 evidence of bank robbery should be treated just as evidence  
02:16:21PM 4 of a terrorist act itself, but the FISA process cannot be  
02:16:25PM 5 used as a device to investigate wholly unrelated ordinary  
02:16:28PM 6 crimes.

02:16:29PM 7 MS. JEFFRESS: That's what I thought was the  
02:16:31PM 8 language that made me -- gave me pause about what the FBI is  
02:16:35PM 9 doing with the Section 702 database here because that's  
02:16:40PM 10 exactly what it seems these minimization procedures permit.

02:16:48PM 11 THE COURT: That case, in essence, approved the  
02:16:50PM 12 practice of retaining and disseminating information about  
02:16:54PM 13 possible crimes --

02:16:55PM 14 MS. JEFFRESS: It does.

02:16:56PM 15 THE COURT: -- under proper controls.

02:16:58PM 16 MS. JEFFRESS: Right. And there's a very careful  
02:16:59PM 17 balancing in the opinion of the purpose -- the national --  
02:17:05PM 18 the foreign intelligence purpose of the statute and the need  
02:17:09PM 19 to preserve and use evidence in a crime, but I thought it  
02:17:12PM 20 was a very careful analysis.

02:17:15PM 21 And on Page 735, there's also some language that  
02:17:20PM 22 I thought was instructive where the Court wrote, "The  
02:17:24PM 23 addition of the word 'significant' to [the section at issue]  
02:17:29PM 24 imposed a requirement that the government have a measurable  
02:17:32PM 25 foreign intelligence purpose other than just criminal

02:17:34PM 1 prosecution of even foreign intelligence crimes." So the  
0 17:38PM 2 Court was grappling with what purpose the statute required,  
02:17:46PM 3 and I think came to a conclusion that's instructive in this  
02:17:50PM 4 context.

02:17:53PM 5 The last point that I would make, Your Honor, and  
02:17:56PM 6 then I'm happy to answer specific questions from the Court,  
02:17:59PM 7 but I thought that the government actually appeared to  
02:18:02PM 8 recognize the need for limits in one regard with respect to  
02:18:07PM 9 the changes that have been made to the NSA and CIA  
02:18:10PM 10 minimization procedures, but also even in the government's  
02:18:14PM 11 brief on Page 14, the government says, "Given that FBI is a  
02:18:20PM 12 law enforcement agency as well as a member of the  
02:18:22PM 13 intelligence community, the ability to query for evidence of  
02:18:26PM 14 a crime using U.S. person identifiers can help the FBI  
02:18:30PM 15 pursue important leads regarding criminal activity."

02:18:33PM 16 And I think that's good language, "important  
02:18:37PM 17 leads." They clearly want to be able to use it for examples  
02:18:41PM 18 that they cited: espionage, cyber crimes, terrorism, and,  
02:18:46PM 19 you know, they said perhaps to help locate a kidnapper. And  
02:18:49PM 20 I think that that -- that may be justifiable, but there's no  
02:18:54PM 21 restriction in the minimization procedures that restrict it  
02:18:57PM 22 even to important leads or important crimes. They can use  
02:19:00PM 23 it for any purpose, and I just found that to be beyond --

02:19:04PM 24 THE COURT: Is it your impression, from what  
02:19:06PM 25 you've been able to read in the PCLOB report, that an agent

02:19:15PM 1 or analyst who is conducting the assessment of a nonsecurity  
02:19:18PM 2 crime would get generally responsive results against the  
02:19:23PM 3 queries in the 702-acquired data, and I'm referring, not to  
02:19:30PM 4 mislead you, that the PCLOB reports says, and notably, the  
02:19:35PM 5 FBI says they don't get that.

02:19:37PM 6 MS. JEFFRESS: I saw that, and I don't know what  
02:19:39PM 7 to make of it because it's anecdotal, and they didn't have  
02:19:42PM 8 much support for it, but I take it that that is true, and  
02:19:46PM 9 maybe you can find out more. But I don't know that that  
02:19:48PM 10 is -- that that answers the question because going forward  
02:19:53PM 11 it may be that it does draw responsive data or it may prove  
02:19:58PM 12 the point, Your Honor, that maybe they don't need to be  
02:20:00PM 13 querying the Section 702 database in cases that are not  
02:20:04PM 14 national-security related.

02:20:06PM 15 THE COURT: All right. If the relevant  
02:20:16PM 16 minimization procedures were modified, as you suggested to  
02:20:22PM 17 us in the beginning, assuming incorporating executive branch  
02:20:25PM 18 policies that limit this to national security, provided  
02:20:33PM 19 these inquiries are serious crimes and that -- and to be  
02:20:41PM 20 used as evidence in serious criminal cases, I mean, would  
02:20:46PM 21 the modification be sufficient to satisfy, you think, the  
02:20:51PM 22 concerns you have about violating the Fourth Amendment?

02:20:53PM 23 MS. JEFFRESS: Your Honor, I didn't make a  
02:20:55PM 24 specific recommendation for what -- how the FBI should meet  
02:20:59PM 25 this.

02:21:00PM 1 THE COURT: Did you talk about maybe they should  
02:21:02PM 2 record or have a written inquiry each time they want to do  
02:21:05PM 3 this? Every officer in the FBI would have to sit and write  
02:21:09PM 4 a justification up when he wants to send an inquiry in.

02:21:13PM 5 MS. JEFFRESS: That is one option, Your Honor, and  
02:21:14PM 6 the option that you just mentioned a moment ago in terms of  
02:21:17PM 7 limiting the types of matters that can be the subject of a  
02:21:20PM 8 query would be another; or perhaps you'd have both, given  
02:21:25PM 9 the sensitivity of the incidentally collected information.

02:21:30PM 10 But I would note that the FBI's general counsel,  
02:21:34PM 11 James Baker, testified three times that I'm aware of,  
02:21:38PM 12 possibly more than that, before the Privacy and Civil  
02:21:41PM 13 Liberties Oversight Board. He's one of the most  
02:21:43PM 14 authoritative experts on the program, and I think that he  
02:21:46PM 15 would certainly be highly capable of designing minimization  
02:21:51PM 16 procedures that would provide appropriate restrictions but  
02:21:54PM 17 also allow the FBI to use the information for purposes that  
02:21:57PM 18 are really justified and necessary to protect national  
02:22:00PM 19 security.

02:22:04PM 20 But I would note both of those options are ones  
02:22:09PM 21 that I think probably would satisfy the Fourth Amendment  
02:22:12PM 22 reasonableness test but are not present in the current  
02:22:15PM 23 procedures.

02:22:16PM 24 THE COURT: One of the things that was pointed out  
02:22:18PM 25 in PCLOB, and some of the government's materials as well, is

02:22:21PM 1 that this set of data is commingled with other data the FBI  
02:22:27PM 2 has normally in their files and that it's essentially a  
02:22:31PM 3 practical impossibility to distinguish between the two.  
02:22:38PM 4 Would your requirement sort of be putting more emphasis on  
02:22:45PM 5 the minimization procedures or making them more restrictive  
02:22:48PM 6 and require them somehow to separate those out?

02:22:53PM 7 The government can answer in a minute as to that.  
02:22:56PM 8 But would that be necessary, you think, to have a separate  
02:22:59PM 9 data bank?

02:23:01PM 10 MS. JEFFRESS: That, again, is why I didn't delve  
02:23:03PM 11 into the specifics of what I think would be required. I  
02:23:05PM 12 think separating it, if that's not possible, then perhaps  
02:23:08PM 13 they need a justification and a set of requirements  
02:23:13PM 14 surrounding the use of the querying in the entire database,  
02:23:16PM 15 and that may be more practical.

02:23:19PM 16 THE COURT: I'll ask the government. I think it's  
02:23:21PM 17 flagged somehow that it's NSA material anyway within the  
02:23:24PM 18 same data bank. It is flagged because they do have some  
02:23:27PM 19 procedures about that.

02:23:29PM 20 All right. Let me just switch with you for a  
02:23:35PM 21 minute. On the retention -- the second prong of your  
02:23:37PM 22 assignment that you've accepted from us was a retention for  
02:23:42PM 23 litigation purposes beyond the normal purging time frames.  
02:23:47PM 24 Even though there's an exception to the minimization  
02:23:51PM 25 procedures that we've adapted and that are normally



02:23:55PM 1 required, you had felt that that was a justifiable  
0 :59PM 2 exception?

02:23:59PM 3 MS. JEFFRESS: I did, Your Honor. I just couldn't  
02:24:02PM 4 see how the government would handle those competing  
02:24:05PM 5 directives other than they have. It seems to me that the  
02:24:08PM 6 government's made a real effort to comply with the  
02:24:12PM 7 destruction requirements, but in the face of court orders,  
02:24:16PM 8 where information is specifically designated as being  
02:24:20PM 9 necessary for specific cases, I think that those specific  
02:24:24PM 10 cases are good cause to maintain the information despite the  
02:24:30PM 11 otherwise applicable destruction requirements.

02:24:33PM 12 So especially after having read the reports that  
02:24:37PM 13 the government files annually with the Court, which your  
02:24:40PM 14 order from 2014 required them to file, I thought that the  
02:24:46PM 15 material that was being preserved was limited in nature. It  
02:24:51PM 16 was specifically preserved for purposes of, you know, a  
02:24:56PM 17 relatively small number of cases, and I just don't know how  
02:24:59PM 18 else the government would accommodate the needs in those  
02:25:02PM 19 cases, which seemed to me to be wholly legitimate and  
02:25:05PM 20 specific. Where, of course, the destruction policies in the  
02:25:10PM 21 minimization requirements are important, and they're  
02:25:14PM 22 important in the Court's analysis of the program overall,  
02:25:17PM 23 they're also general in nature in that they're, you know,  
02:25:21PM 24 age-off requirements that apply to the entire body of data  
02:25:24PM 25 and not to specific elements of it apart from that material

02:25:30PM 1 that is required to be destroyed because it's inadvertently  
02:25:34PM 2 collected and really shouldn't have been collected, but  
02:25:36PM 3 collected basically because of errors.

02:25:38PM 4 So I thought that the government had handled that  
02:25:40PM 5 appropriately, Your Honor, and, with the Court's oversight,  
02:25:43PM 6 I don't have any concerns about that aspect of the  
02:25:45PM 7 procedures.

02:25:47PM 8 THE COURT: All right. Anything else you want to  
02:25:51PM 9 address the Court about on these issues at this time?

02:25:53PM 10 MS. JEFFRESS: No. Do I come back or...?

02:25:56PM 11 THE COURT: You'll get a chance to come back.

02:25:58PM 12 MS. JEFFRESS: Thank you, Your Honor.

02:26:01PM 13 THE COURT: Thank you, Ms. Jeffress.

02:26:02PM 14 (b)(6); (b)(7)(C) I'll hear from you at this time on  
02:26:05PM 15 behalf of the government. And you can focus, I think,  
02:26:13PM 16 your argument principally on the issues we've discussed with  
02:26:18PM 17 Ms. Jeffress and explain why this querying of the U.S.  
02:26:27PM 18 person information should be subject to Fourth Amendment  
02:26:29PM 19 search review or what is reasonable looking at this that can  
02:26:37PM 20 be done with proper minimization procedures to make sure  
02:26:46PM 21 that this is being appropriately done under the law.

02:26:50PM 22 (b)(6); (b)(7)(C) Thank you, Your Honor. And the  
02:26:52PM 23 government appreciates your careful consideration of these  
02:26:54PM 24 issues. We appreciate the views of Amicus and the ability  
02:26:57PM 25 to address them in this hearing.

02:26:59PM 1 To begin with, to start with the Fourth Amendment  
0 :02PM 2 issue that you addressed, we would agree with your earlier  
02:27:06PM 3 comments that the querying of this information after it's  
02:27:12PM 4 been lawfully acquired is not a separate Fourth Amendment  
02:27:15PM 5 event. It is not a separate search, and Amicus did not cite  
02:27:19PM 6 case law that suggests that it would be. It's certainly the  
02:27:22PM 7 case that the program as a whole must comply with the Fourth  
02:27:26PM 8 Amendment and must be reasonable under the Fourth Amendment.

02:27:28PM 9 THE COURT: Well, let me ask you about that.  
02:27:32PM 10 Suppose a local agent in the field office runs across  
02:27:41PM 11 somebody's name and, without any basis to think that he did  
02:27:46PM 12 anything wrong, he starts making an inquiry into the  
02:27:49PM 13 database of the FBI and gets a hit that there are some 702  
02:27:55PM 14 evidence or materials that he can't see so he asks someone  
02:28:00PM 15 who has a FISA clearance to go ahead and make the inquiry,  
02:28:09PM 16 and they bring back something like a credit card fraud or  
02:28:11PM 17 something, and that has nothing to do, that he can tell,  
02:28:13PM 18 with any foreign intelligence issues. I mean, aren't there  
02:28:18PM 19 some protections that should apply there?

02:28:20PM 20 (b)(6); (b)(7)(C) So I want to be very clear on that  
02:28:22PM 21 point. The FBI can only conduct a query for an authorized  
02:28:27PM 22 purpose. Now, that authorized purpose for FBI is different  
02:28:31PM 23 than NSA and CIA, but it must be an authorized purpose.  
02:28:34PM 24 They cannot go in and query because they come across someone  
02:28:37PM 25 who, as you point out, hasn't done anything wrong. That is

02:28:40PM 1 already prohibited by the minimization procedures.

02:28:42PM 2 The authorized purpose that the FBI had is either  
02:28:46PM 3 for queries that are reasonably designed to return foreign  
02:28:50PM 4 intelligence information or reasonably designed to return  
02:28:52PM 5 evidence of a crime. Those two purposes, as Your Honor  
02:28:56PM 6 points out, come directly from the definition of  
02:28:58PM 7 minimization procedures in the statute.

02:29:00PM 8 They are also the joint purposes of the FBI  
02:29:04PM 9 itself. It is a dual law enforcement and intelligence  
02:29:07PM 10 agency, and certainly one of the things that we've learned  
02:29:11PM 11 in the last 15 years is that we can't make artificial  
02:29:15PM 12 distinctions between these two roles of law enforcement and  
02:29:19PM 13 intelligence, and so perhaps hypothetical examples do help.

02:29:23PM 14 You can have instances, for example, where the FBI  
02:29:26PM 15 is investigating a crime. Let's take a minor crime as  
02:29:33PM 16 opposed to the more major ones. Let's take a minor crime  
02:29:36PM 17 like something like cigarette smuggling, a federal offense,  
02:29:39PM 18 or money laundering. The FBI queries in these federated  
02:29:43PM 19 systems. They query not just the 702 information but other  
02:29:47PM 20 information that they obtain from intelligence and law  
02:29:49PM 21 enforcement, from their foreign partners. Query across.

02:29:54PM 22 When they conduct that query, they're not looking  
02:29:57PM 23 at that time for foreign intelligence information. They're  
02:30:00PM 24 looking for evidence of that crime, but to the degree  
02:30:03PM 25 something then pings in the 702 and connects a dot that they

02:30:06PM 1 didn't know was there -- so they find, yes, my cigarette-  
02:30:10PM 2 smuggler actually is speaking with [REDACTED]  
02:30:15PM 3 individuals -- that investigation has now taken a very  
02:30:18PM 4 different turn. Now we have a national security element to  
02:30:18PM 5 that investigation.

02:30:23PM 6 But when that query was conducted, the government  
02:30:25PM 7 didn't know that. We can only connect the dots by looking  
02:30:29PM 8 at the information. When we ran that query, we were doing  
02:30:30PM 9 so because we were looking for evidence of a crime across  
02:30:32PM 10 all of our systems.

02:30:34PM 11 Those federated queries are something that come  
02:30:37PM 12 from a number of experiences the government's had and a  
02:30:41PM 13 number of the commission reports. So going back to the 9/11  
02:30:44PM 14 Commission, that Commission was quite critical of the  
02:30:48PM 15 government saying that one of the weaknesses that enabled  
02:30:50PM 16 the 9/11 attacks to occur was the government's failure to  
02:30:54PM 17 make use of information already in its repositories. There  
02:30:54PM 18 were three hijackers, the Commission found, that we couldn't  
02:30:59PM 19 identify and didn't because we didn't look at all the  
02:31:01PM 20 information that we already had.

02:31:02PM 21 To use an example more recent and even more on  
02:31:05PM 22 point, the Webster Commission's report on the Fort Hood  
02:31:09PM 23 attack criticized the government's queries of information in  
02:31:12PM 24 its possession. The people doing the assessment of Nidal  
02:31:17PM 25 Hasan did not identify several messages between Anwar Aulaqi

02:31:21PM 1 and Nidal Hasan, and the commission deemed it essential that  
02:31:24PM 2 the FBI possess the ability to search all of its  
02:31:29PM 3 repositories and to do so without balkanizing those data  
02:31:32PM 4 sources.

02:31:33PM 5 And so these systems that do these federated  
02:31:36PM 6 queries that allow us to, yes, to query the 702 information,  
02:31:38PM 7 but all of these sources are in direct response to those  
02:31:40PM 8 findings, and they're in direct response to our efforts over  
02:31:46PM 9 the last 15 years to bring down this artificial wall between  
02:31:49PM 10 the law enforcement mission of the FBI and its national  
02:31:50PM 11 security intelligence mission.

02:31:52PM 12 THE COURT: As I asked the Amicus, the PCLOB said  
02:32:00PM 13 that anecdotally the FBI has advised the board that it is  
02:32:02PM 14 extremely unlikely an agent or analyst who is conducting an  
02:32:06PM 15 assessment of a non-national security crime will get a  
02:32:08PM 16 response or result from the query against 702-acquired data,  
02:32:12PM 17 and I know Rachel Brand and her counterparts say it never  
02:32:18PM 18 happens, according to her.

02:32:20PM 19 Do you know anything about that?

02:32:21PM 20 (b)(6); (b)(7)(C) So we would say at the very least it  
02:32:23PM 21 would be extremely rare, and we believe that's one of the  
02:32:25PM 22 many reasons why the privacy impact of these queries would  
02:32:28PM 23 be quite low.

02:32:29PM 24 It's not surprising that it would be quite rare.  
02:32:31PM 25 We are talking about a targeted program. Targets for 702

02:32:37PM 1 collection have to be non-U.S. persons outside the United  
02:32:41PM 2 States who the government reasonably believes possess or can  
02:32:45PM 3 communicate foreign intelligence information. It's a big  
02:32:47PM 4 program, but as the Court recognizes, it's a targeted  
02:32:48PM 5 program. This is not bulk surveillance.

02:32:48PM 6 I know in the Amicus brief there's a footnote  
02:32:51PM 7 about the government conducting surveillance of entire  
02:32:53PM 8 geographic regions. That is not this program. This program  
02:32:56PM 9 is targeted on people outside of the United States, and the  
02:33:00PM 10 likelihood that in any given query information about a U.S.  
02:33:04PM 11 person is going to be returned is quite low. However, if it  
02:33:08PM 12 happens, when it happens, it can be quite significant. It  
02:33:11PM 13 can connect that dot that we were not aware of before.

02:33:17PM 14 THE COURT: Is there any requirement in the  
02:33:18PM 15 minimization procedures that's been suggested by the  
02:33:20PM 16 government now that the FBI personnel be required to record  
02:33:25PM 17 the purpose of the query? Is there a written statement made  
02:33:29PM 18 or anything?

02:33:30PM 19 (b)(6); (b)(7)(C) So that is something that the  
02:33:31PM 20 government has taken a look at in the past. We believe that  
02:33:35PM 21 the procedures, as they are, are sufficient, both as a  
02:33:38PM 22 statutory and constitutional matter. We don't believe that  
02:33:40PM 23 a difference in documentation -- and let's be clear, what  
02:33:43PM 24 we're talking about is a difference in documentation. FBI  
02:33:46PM 25 does have to document some aspects of their query, as do NSA

02:33:50PM 1 and CIA. The particulars of that documentation vary, but  
02:33:53PM 2 there is a documentation of parts of it throughout, and I  
02:33:55PM 3 can explain that in more detail.

02:33:57PM 4 THE COURT: What's the rationale for the  
02:33:59PM 5 difference in the CIA/NSA minimization procedures and the  
02:34:03PM 6 FBI minimization procedures?

02:34:06PM 7 (b)(6); (b)(7)(C) So it goes fundamentally to the  
02:34:08PM 8 different missions of those organizations. The NSA and the  
02:34:10PM 9 CIA have a -- are foreign-focused intelligence  
02:34:15PM 10 organizations. They have little need usually to query U.S.  
02:34:20PM 11 persons. It happens much more rarely, and they don't have  
02:34:22PM 12 that law enforcement mission that the FBI has.

02:34:26PM 13 FBI has all of those things. FBI had also -- as I  
02:34:30PM 14 mentioned in the commission report, has a duty to do these  
02:34:34PM 15 federated queries across these systems, so they're  
02:34:36PM 16 conducting queries on a much more regular basis. But the  
02:34:40PM 17 fact that there isn't a documentation requirement with  
02:34:42PM 18 respect to the justification doesn't mean that the queries  
02:34:44PM 19 don't have to be documented.

02:34:46PM 20 So what is required of the FBI is that every  
02:34:48PM 21 query is recorded. Those query terms are recorded; what the  
02:34:52PM 22 agent -- which agent did the query is recorded; whether the  
02:34:55PM 23 information has been exported to another system is recorded.

02:34:58PM 24 And what the National Security does with those  
02:35:00PM 25 records for the FBI is we go out to about 30 field offices a



02:35:05PM 1 year, and we sit down with the agents and analysts, and we  
02:35:08PM 2 make them justify the queries; take a sample, and make them  
02:35:11PM 3 justify those queries. And what we've found is that they  
02:35:14PM 4 can. The agents and the analysts, they understand the rules  
02:35:17PM 5 because they have to have a justification. They can't, to  
02:35:19PM 6 use your first example, query someone just because they come  
02:35:23PM 7 across them, and they've done nothing wrong. They know they  
02:35:26PM 8 have to have a justification, and they've given them to us.

02:35:29PM 9 We've done some effective oversight of that.  
02:35:31PM 10 We've found no systemic problems. We've found FBI agents  
02:35:34PM 11 and analysts understand the rules. We've found a few  
02:35:35PM 12 isolated incidents, but those incidents have been things  
02:35:39PM 13 like an individual querying their own name for work flow  
02:35:42PM 14 purposes.

02:35:42PM 15 THE COURT: In your example you gave, for  
02:35:44PM 16 instance, of cigarette-smuggling which turns out to be  
02:35:48PM 17 potentially related to national security matters, is the  
02:35:50PM 18 experience such now you think the FBI queries of 702 data  
02:35:57PM 19 can be limited to national-security-related crimes? I mean,  
02:36:03PM 20 do you have a database where you can recognize crimes  
02:36:06PM 21 generally associated with national security?

02:36:08PM 22 (b)(6); (b)(7)(C) I think limiting the queries to  
02:36:10PM 23 national security crimes is going to cause us to miss  
02:36:13PM 24 connecting some of the dots or something we do not realize  
02:36:15PM 25 is a national security event before we conduct the query

02:36:18PM 1 and, in fact, has national security implications.

02:36:20PM 2 So to take another example, for example, for cyber  
02:36:24PM 3 security. FBI could be investigating a spear phishing  
02:36:27PM 4 attempt, a criminal attempt to access a computer. They have  
02:36:32PM 5 no indication that there's any sort of foreign connection.  
02:36:35PM 6 They run a query like this in those federated systems, and  
02:36:38PM 7 they find out -- they did not know before, but they find out  
02:36:41PM 8 that, you know, we have [REDACTED]  
02:36:44PM 9 [REDACTED] cyber hackers who have been using this account. They  
02:36:47PM 10 just didn't know that.

02:36:48PM 11 So if we limit what those queries can have, we're  
02:36:51PM 12 going to miss those instances where we're going to make that  
02:36:53PM 13 connection. As I said, those connections are going to be  
02:36:56PM 14 rare, but very important when we find them.

02:36:59PM 15 THE COURT: Again, on the numbers, is there any  
02:37:07PM 16 FBI information available as to the actual numbers of  
02:37:12PM 17 queries that come up with hits that 702 evidence is  
02:37:17PM 18 available about a crime? And maybe it happens a hundred  
02:37:21PM 19 times a month, or is it once a year? I don't know.

02:37:23PM 20 [REDACTED] So we don't have -- we,  
02:37:25PM 21 unfortunately, do not have specific information about when  
02:37:28PM 22 evidence of a crime is returned from one of those queries.  
02:37:30PM 23 What I can say, Your Honor, is that in no instance to date  
02:37:34PM 24 has the government used, in a criminal trial or in a  
02:37:38PM 25 non-national security matter, 702-obtained information.

02:37:44PM 1 THE COURT: So I understand the program -- I want  
0 7:48PM 2 to make sure I understand it. The 702 data that is mixed in  
02:37:52PM 3 with the other information you have is still segregated in a  
02:37:56PM 4 sense that when a query is made it hits a 702 data. That  
02:38:00PM 5 comes back that way. I mean --

02:38:03PM 6 (b)(6); (b)(7)(C) Certainly, Your Honor. It's  
02:38:05PM 7 identified as FISA information, and this can occur in one of  
02:38:08PM 8 two different ways in this federated system.

02:38:11PM 9 If the agent has a subject matter reason to have  
02:38:16PM 10 access to FISA information and has the full training in the  
02:38:20PM 11 FISA minimization procedures, when they run a query like  
02:38:23PM 12 this, they will return the results, and it will be clear to  
02:38:26PM 13 them that this is FISA information and, in fact, as they  
0 8:29PM 14 look at it, 702 information.

02:38:29PM 15 If the agent does not -- is a criminal agent  
02:38:32PM 16 working mostly those cigarette cases, they would not have  
02:38:35PM 17 access to FISA information in the course of their normal  
02:38:38PM 18 duties. They would not have the FISA training. When they  
02:38:41PM 19 run that same query, they would -- the content would not be  
02:38:44PM 20 returned to them. Metadata would not be returned to them.  
02:38:46PM 21 The only thing that would be returned to them was an  
02:38:48PM 22 indication that there is some information available in this  
02:38:51PM 23 database that contains FISA.

02:38:53PM 24 And what the procedures before you do is they  
02:38:57PM 25 require that individual to go to someone who does have the

02:39:00PM 1 training and the minimization procedures. They have access  
02:39:04PM 2 to the data to rerun the query. And there is a new  
02:39:07PM 3 requirement, a new restriction, that has not been in the  
02:39:10PM 4 procedures before that also requires supervisory approval  
02:39:14PM 5 both from the criminal agent's supervisor and the national  
02:39:17PM 6 security agent's supervisor before that second query is run  
02:39:21PM 7 to ensure that it's appropriate, to ensure -- to use your  
02:39:24PM 8 first example again -- they are not running queries for  
02:39:27PM 9 someone for whom they have no reason to.

02:39:28PM 10 THE COURT: Again about whether you can ask  
02:39:31PM 11 questions whether they be related to national- or foreign-  
02:39:33PM 12 intelligence-related crimes was Judge Silberman's expression  
02:39:38PM 13 that the Amicus pointed out where he talks about  
02:39:43PM 14 international terrorists engaged in bank robbery that's  
02:39:46PM 15 obviously to finance or manufacture a bomb. The evidence of  
02:39:49PM 16 bank robbery is treated just like a terrorist act itself.  
02:39:53PM 17 I'm not going to get into that.

02:39:55PM 18 So he concludes, then, but the FISA process cannot  
02:39:57PM 19 be used as a device to investigate wholly unrelated ordinary  
02:40:01PM 20 crime.

02:40:02PM 21 (b)(6); (b)(7)(C) : So I think unfortunately the quote  
02:40:05PM 22 the Amicus identified really turns the actual holding of *In*  
02:40:12PM 23 *Re: Sealed Case* on its head. So *In Re: Sealed Case* was a  
02:40:16PM 24 case about the initial targeting of an individual, getting  
02:40:18PM 25 that authorization from the FISA court in order to -- and it

02:40:20PM 1 was saying that we could not get a FISA for purely criminal  
02:40:23PM 2 reasons. But the holding of that case was that not even  
02:40:28PM 3 constitutionally a primary purpose of the government, but  
02:40:31PM 4 only a significant purpose of the government needed to be to  
02:40:34PM 5 obtain foreign intelligence information.

02:40:36PM 6 And Amicus's brief repeatedly refers to the  
02:40:39PM 7 purpose, the purpose. The purpose is an even stronger  
02:40:43PM 8 standard than a primary purpose, which has been rejected by  
02:40:48PM 9 *In Re: Sealed Case* and has been rejected by Congress in the  
02:40:49PM 10 Patriot Act. It must be that it's a significant purpose,  
02:40:52PM 11 and in 702 we have that purpose because when we're acquiring  
02:40:55PM 12 the information, we are acquiring information only because  
02:40:58PM 13 we've assessed that the target of that collection, in  
02:41:01PM 14 addition to being a non-U.S. person who we believe to be  
02:41:04PM 15 outside the United States, either possesses or is  
02:41:08PM 16 communicating foreign intelligence information.

02:41:10PM 17 THE COURT: PCLOB says at one point -- and really  
02:41:13PM 18 I'd like the opportunity to question what the PCLOB has  
02:41:16PM 19 said. But the PCLOB said at one point, at Page 161 there's  
02:41:21PM 20 a statement -- I made a note -- that it received -- the FBI  
02:41:26PM 21 receives only, quote, a small portion of the 702 collection.

02:41:30PM 22 Do you know what that is, or --

02:41:31PM 23 (b)(6); (b)(7)(C) Yes, I do, Your Honor. Thank you.

02:41:32PM 24 That's actually a point I was hoping to return to.

02:41:35PM 25 (b)(1); (b)(3); (b)(7)(E)

02:41:39PM 1  
 0 :43PM 2  
 02:41:46PM 3  
 02:41:49PM 4  
 02:41:54PM 5  
 02:41:57PM 6  
 02:42:03PM 7  
 02:42:06PM 8  
 02:42:09PM 9  
 02:42:13PM 10  
 02:42:17PM 11  
 02:42:19PM 12  
 02:42:22PM 13  
 02:42:26PM 14  
 02:42:30PM 15  
 02:42:34PM 16  
 02:42:35PM 17  
 02:42:41PM 18  
 02:42:44PM 19  
 02:42:47PM 20  
 02:42:51PM 21  
 02:42:58PM 22  
 02:43:02PM 23  
 02:43:02PM 24  
 02:43:07PM 25

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

Not surprisingly, the individuals that the FBI is identifying are related to the things that FBI investigates. They are the CT cases. They are the cyber cases, weapons of mass destruction. Those are cases that they have already opened.

THE COURT: But when an FBI analyst has supposedly been tasked to email accounts, and he's reviewing all the emails, and he has a task because you were talking about weapons of mass destruction or something, but in there he finds ordinary credit card fraud, would that change the analysis of whether he could then use that and proceed with an investigation? It wasn't what he was looking for. Do you know anything about that?

(b)(6); (b)(7)(C)

It was not originally what they were

02:43:08PM 1 looking for, but FISA -- and this is not just the 702 --  
02:43:12PM 2 FISA from the beginning, from 1978, has recognized that the  
02:43:15PM 3 FBI might come across evidence of a crime in the course of  
02:43:18PM 4 doing their investigation.

02:43:19PM 5 Now, I would say, as I said earlier, the  
02:43:23PM 6 government has not used 702-obtained information in a non-  
02:43:26PM 7 national security crime to date. This is an instance where,  
02:43:30PM 8 and sort of interestingly, the interest of defendants and  
02:43:33PM 9 the interest of the intelligence community happen to align,  
02:43:36PM 10 right?

02:43:36PM 11 The intelligence community -- this is -- puts a  
02:43:40PM 12 great deal of importance on this program. They're not going  
02:43:43PM 13 to risk their sources and methods for this important program  
02:43:46PM 14 on an ordinary crime, and that's where the use policy that  
02:43:51PM 15 the government announced earlier this year stems from, is  
02:43:54PM 16 the fact that the information is not going to be used in an  
02:43:59PM 17 ordinary crime because we're not just going to risk our  
02:44:01PM 18 sources and methods in those instances.

02:44:13PM 19 THE COURT: Is there any reason why the  
02:44:19PM 20 minimization procedures could not incorporate some  
02:44:25PM 21 restrictions to limit the searches to, as I said, certain  
02:44:35PM 22 crimes related to national security?

02:44:40PM 23 I'm not sure where -- the Amicus has argued in her  
02:44:48PM 24 brief, and she can raise this again, but that it's -- there  
02:44:55PM 25 are certainly possibilities, if not probabilities, that

02:44:58PM 1 there will be incidental collection. I mean, we're talking  
02:45:02PM 2 [REDACTED] of bits of information, collection of  
02:45:08PM 3 American conversations or whatever with others abroad, et  
02:45:11PM 4 cetera, or emails, et cetera, that are totally innocent, and  
02:45:15PM 5 it seems to me that the minimization procedures in effect  
02:45:20PM 6 now would allow the FBI to make inquiries that would then go  
02:45:24PM 7 into this information to see what might be there that would  
02:45:28PM 8 return anything about a crime because they had some --  
02:45:31PM 9 you're saying some investigation open about somebody. But I  
02:45:35PM 10 don't know how you limit that appropriately to satisfy the  
02:45:39PM 11 requirements in the statute. There has to be reasonableness  
02:45:43PM 12 under the Constitution for this search or this inquiry, at  
02:45:46PM 13 least, to be made of this information. I'm struggling with  
02:45:51PM 14 that a little bit.

02:45:52PM 15 (b)(6); (b)(7)(C) : I think, from a statutory  
02:45:54PM 16 perspective, as you mentioned earlier, the statute doesn't  
02:45:57PM 17 distinguish between crimes. It just says evidence of a  
02:46:00PM 18 crime.

02:46:00PM 19 With respect to reasonableness, the government  
02:46:04PM 20 would really assert that when the Court looks at these  
02:46:09PM 21 procedures, they need to look at the sum of these procedures  
02:46:11PM 22 as opposed to isolating aspects of them. It starts with a  
02:46:14PM 23 targeting and a limited collection aperture of the targeting  
02:46:18PM 24 in the first place and for those purposes. That doesn't  
02:46:21PM 25 mean we will not receive some incidental U.S. person



02:46:25PM 1 information. That's probably only where it starts.

02:46:27PM 2 You also have the access controls that are  
02:46:30PM 3 limiting this information to individuals who are working on  
02:46:33PM 4 these national security issues. You have the controls on  
02:46:37PM 5 retention, you know, the controls on dissemination. You  
02:46:41PM 6 have the controls of attorney-client communications. You  
02:46:43PM 7 have the controls on querying that can only be done for an  
02:46:47PM 8 authorized purpose.

02:46:47PM 9 All of these privacy controls are an integrated  
02:46:50PM 10 approach to protect Americans' civil liberties and privacy,  
02:46:54PM 11 and that whole of all of those protections, we have found,  
02:47:00PM 12 does a very good job of ensuring that no one is rifling  
02:47:04PM 13 through these communications.

02:47:07PM 14 THE COURT: Do we have numbers or ballpark figures  
02:47:10PM 15 as to the number of inquiries made by the FBI? Not just for  
02:47:14PM 16 crime, but just the numbers made to the 702 collection of  
02:47:18PM 17 materials on a yearly basis?

02:47:21PM 18 (b)(6); (b)(7)(C) So we don't have specific numbers.  
02:47:23PM 19 It's a substantial number of queries, particularly because  
02:47:27PM 20 of these federated systems. They don't break down by U.S.  
02:47:31PM 21 person or non-U.S. person. A query is a query. But it is a  
02:47:36PM 22 routine and encouraged practice for the FBI to conduct  
02:47:39PM 23 queries at the beginning of an assessment.

02:47:41PM 24 This is the way that the FBI, looking at its  
02:47:44PM 25 lawfully acquired information, makes its initial

02:47:46PM 1 determinations about whether further investigation, which  
02:47:50PM 2 often involves further more privacy invasive steps, is  
02:47:52PM 3 warranted or not. They conduct these queries, and then,  
02:47:56PM 4 based on the results, either have confidence, no, there's  
02:47:59PM 5 nothing here, and stop, or there is some additional  
02:48:02PM 6 information that we need to investigate.

02:48:05PM 7 THE COURT: What problems would arise if the  
02:48:10PM 8 Amicus's suggestion of modifying the minimization procedures  
02:48:15PM 9 to be more precise and tightly controlled, although it may  
02:48:21PM 10 be a written authorization, et cetera, would arise to the  
02:48:25PM 11 FBI by having to do that?

02:48:27PM 12 (b)(6); (b)(7)(C) So maybe to start with that written  
02:48:28PM 13 justification requirement. Because these systems are  
02:48:33PM 14 queried on such a routine basis, these federated systems in  
02:48:37PM 15 some ways are FBI's Google of its lawfully acquired  
02:48:42PM 16 information. They are quite routine. They must have that  
02:48:46PM 17 justification before they query, but they're quite routine  
02:48:50PM 18 queries.

02:48:50PM 19 And so the implications here -- there are  
02:48:54PM 20 technical issues we would have to work out. But far more  
02:49:10PM 21 concerning to us than the technical issues are the practical  
02:49:12PM 22 ones. If we require our agents to write a full  
02:49:16PM 23 justification every time -- think about if you wrote a full  
02:49:19PM 24 justification every time you used Google. Among other  
02:49:22PM 25 things, you would use Google a lot less. Well, one of the

02:49:26PM 1 things that we learned from these commission reports is  
02:49:28PM 2 that's not what we want. We want the FBI to look and  
02:49:31PM 3 connect the dots in its lawfully acquired information.

02:49:34PM 4 So there's a practical limitation that's going to  
02:49:37PM 5 just cause the FBI to use these tools that we've spent a  
02:49:41PM 6 good deal of time and learned some very hard lessons in  
02:49:44PM 7 order to have to build; and in addition to that -- I'm  
02:49:49PM 8 sorry, I'm losing my place here for a moment. In addition  
02:49:52PM 9 to that, once you have that requirement, that bureaucratic  
02:49:56PM 10 requirement, the FBI really has two choices. Either you're  
02:50:00PM 11 going to have agents use the system less, or  
02:50:03PM 12 alternatively -- and the FBI, when it was examining this  
02:50:06PM 13 very kind of requirement said, well, one of the things we  
02:50:09PM 14 might have to do is then pull the 702 information out. Pull  
02:50:12PM 15 it out of the federated system. Balkanize the data again.

02:50:15PM 16 THE COURT: That was my next question.

02:50:17PM 17 (b)(6); (b)(7)(C) Unlearn that lesson and have it in a  
02:50:19PM 18 separate repository. And if we have it in that separate  
02:50:24PM 19 repository, again, we're going to miss our dots because we  
02:50:26PM 20 now have to query multiple systems. It's that querying of  
02:50:26PM 21 multiple systems that has gotten us, as the government,  
02:50:32PM 22 again and again and again. We finally, I think, have  
02:50:33PM 23 learned our lesson. We don't want to unlearn it.

02:50:39PM 24 THE COURT: All right. Do you have any other  
02:50:41PM 25 issues you wanted to address in this matter?

02:50:44PM 1 (b)(6); (b)(7)(C) Your Honor, if you have no further  
0 :45PM 2 questions.

02:50:47PM 3 THE COURT: Anything else?

02:50:48PM 4 All right. Thank you, (b)(6); (b)(7)(C) I appreciate  
02:50:51PM 5 it.

02:50:51PM 6 (b)(6); (b)(7)(C) Thank you, Your Honor.

02:50:52PM 7 THE COURT: We'll get Ms. Jeffress up and get a  
02:50:57PM 8 chance for her last word here.

02:50:58PM 9 MS. JEFFRESS: Thank you, Your Honor. I'd like  
02:51:00PM 10 to first go back to the question that the Court asked  
02:51:03PM 11 (b)(6); (b)(7)(C)

02:51:05PM 12 THE COURT: Can you lower the mic a second. I  
02:51:08PM 13 can't see. That's why.

02:51:10PM 14 MS. JEFFRESS: There you go. Better?

02:51:11PM 15 THE COURT: Thank you.

02:51:11PM 16 MS. JEFFRESS: I wanted to go back to the question  
02:51:13PM 17 the Court asked with respect to the rationale for the  
02:51:16PM 18 difference between FBI's procedures and NSA's and CIA's, and  
02:51:22PM 19 that's, in fact, the subject that (b)(6); (b)(7)(C) was just  
02:51:24PM 20 talking about, that it would be more difficult to adopt  
02:51:28PM 21 those -- to adopt similar procedures because the FBI's  
02:51:31PM 22 queries are so frequent. I don't think that that is  
02:51:37PM 23 necessarily an answer that justifies not complying with the  
02:51:43PM 24 Fourth Amendment. It doesn't seem to me to be too  
02:51:46PM 25 unreasonable to require.

02:51:48PM 1 As (b)(6); (b)(7)(C) explained, the queries are already  
02:51:50PM 2 recorded, and when the Department of Justice goes to field  
02:51:55PM 3 offices to do oversight, they require the agents to explain  
02:51:59PM 4 them, and they have, in fact, found, which is good to know,  
02:52:03PM 5 that the agents can explain them. I don't think it's a real  
02:52:06PM 6 imposition to have the agents have to put that explanation  
02:52:09PM 7 in writing before they conduct the query, and I think it is  
02:52:12PM 8 a step that perhaps may mean that they don't always do it in  
02:52:16PM 9 the cases where now they do always do it, but perhaps that  
02:52:19PM 10 means because now they are doing it in cases where there  
02:52:22PM 11 really isn't a real obvious need to be doing it, assessments  
02:52:28PM 12 that aren't sufficiently important, and other circumstances.

02:52:32PM 13 So I don't think it's an unreasonable requirement,  
02:52:34PM 14 and I don't think that it would rebuild the wall or render  
02:52:38PM 15 the government unable to connect the dots. If the matter is  
02:52:41PM 16 important enough where the dots are important and could be  
02:52:44PM 17 connected, I think that the FBI will do it.

02:52:49PM 18 I also wanted to explain the point that I made  
02:52:55PM 19 about the scope of the incidental collection. I did not  
02:52:59PM 20 mean, in my Footnote 7, to endorse what the ACLU statement  
02:53:03PM 21 said about the program, and I actually don't think that  
02:53:06PM 22 statement is accurate. What I was really trying to do is to  
02:53:09PM 23 say, "Here's the extreme end of this criticism."

02:53:11PM 24 But I do stand by the text that I wrote with  
02:53:14PM 25 respect to how often Americans' communications could be

02:53:19PM 1 intercepted incidentally because the targets are so wide,  
02:53:24PM 2 and (b)(6); (b)(7)(C) actually did explain that to some extent;  
02:53:27PM 3 that the FBI only receives a certain portion of the Section  
02:53:31PM 4 702 information, which is helpful. But the entire body of  
02:53:34PM 5 it really does likely intercept lots of information of, you  
02:53:41PM 6 know, Americans who are communicating with friends overseas  
02:53:43PM 7 who, as I pointed out, [REDACTED]

02:53:48PM 8 [REDACTED]  
02:53:50PM 9 So I thought that the scope was really very --  
02:53:53PM 10 potentially very broad, although I didn't take the same view  
02:53:56PM 11 that the ACLU took of that.

02:53:58PM 12 And, Your Honor, you mentioned that your concern  
02:54:01PM 13 is with, you know, obtaining information about credit card  
02:54:04PM 14 fraud and the like, and I think that they're -- that's one  
02:54:07PM 15 issue, but there is a potentially greater issue with just  
02:54:10PM 16 the intrusiveness of having the innocent communications  
02:54:14PM 17 reviewed. And there are lots of private communications that  
02:54:16PM 18 take place over email that people who are -- whose  
02:54:20PM 19 communications are incidentally collected would not want to  
02:54:22PM 20 be reviewed for any purpose, and so I think there should be  
02:54:26PM 21 stricter limitations for that reason.

02:54:28PM 22 I wanted to also respond to the comment about my  
02:54:33PM 23 turning the logic of *In Re: Sealed Case* on its head. And I  
02:54:39PM 24 understand [REDACTED] (b)(6); (b)(7)(C) point, but I don't think that I did  
02:54:42PM 25 that because the analysis in that case was really whether --

02:54:46PM 1 it was balancing the prosecution being -- prosecution of  
02:54:51PM 2 national security crimes for the most part being a purpose  
02:54:55PM 3 of the collection versus just a collection of foreign  
02:54:57PM 4 intelligence information. So it really didn't go into the  
02:55:00PM 5 sort of issues surrounding the prosecution of unrelated  
02:55:04PM 6 crimes, which is my central concern here.

02:55:11PM 7 And I think -- let me just check my notes for one  
02:55:15PM 8 thing, Your Honor.

02:55:24PM 9 Finally, I think that the query, as (b)(6); (b)(7)(C)  
02:55:28PM 10 pointed out, if it is reasonably designed to return foreign  
02:55:30PM 11 intelligence information or evidence of a crime, that can be  
02:55:33PM 12 explained in a statement that is a relatively minimal  
02:55:38PM 13 imposition on the FBI.

02:55:39PM 14 I would just conclude by saying that I don't think  
02:55:43PM 15 that the FBI will voluntarily set limits on its querying  
02:55:47PM 16 procedures because law enforcement agencies tend not to take  
02:55:50PM 17 steps to restrict or limit what they can do, for obvious  
02:55:53PM 18 reasons, and that's, you know, giving them the full benefit  
02:55:57PM 19 that they're very-well-intentioned and they want to do their  
02:55:59PM 20 job as best they possibly can. But the incentive is that if  
02:56:04PM 21 you give them a program or a database or any other power,  
02:56:07PM 22 they will use it to the fullest possible extent, and I think  
02:56:12PM 23 that in this case the procedures could be tighter and more  
02:56:15PM 24 restrictive, and should be, in order to comply with the  
02:56:18PM 25 Fourth Amendment.

02:56:18PM 1 THE COURT: Thank you very much, Ms. Jeffress.

02:56:21PM 2 I'm going to see if counsel for the Court has any  
02:56:25PM 3 particular question they wanted to raise.

02:56:29PM 4 (b)(6) Your Honor, can I ask one question?

02:56:32PM 5 (b)(6); (b)(7)(C) can I --

02:56:34PM 6 THE COURT: You can sit down.

02:56:35PM 7 (b)(6) -- ask you one follow-up question on  
02:56:41PM 8 something?

02:56:41PM 9 So just following up on the statement that the  
02:56:43PM 10 judge mentioned, the anecdotal statement, and this other  
02:56:47PM 11 statement in the PCLOB report, I think it's in the separate  
02:56:53PM 12 Brand and Cook part of the report: "We are unaware of any  
02:56:56PM 13 instance," this says, "in which a database query in an  
02:56:59PM 14 investigation of a nonforeign intelligence crime resulted in  
02:57:03PM 15 a hit on Section 702 information and much less a situation  
02:57:07PM 16 in which such information was used to further such an  
02:57:10PM 17 investigation of prosecution."

02:57:12PM 18 I think you made the point, you know, that that  
02:57:14PM 19 undercuts the notion of this being overly intrusive, but at  
02:57:19PM 20 the same time doesn't it undermine the -- I mean, how do you  
02:57:23PM 21 reconcile that with the national security purpose of the  
02:57:26PM 22 collection as a whole?

02:57:28PM 23 You gave a bank robbery example, or I think it  
02:57:31PM 24 was -- I can't remember exactly what it was, but --

02:57:34PM 25 THE COURT: Cigarettes.



02:57:35PM 1 (b)(6) Cigarette smugglers. Are there any  
02:57:38PM 2 examples where queries unrelated to foreign intelligence on  
02:57:43PM 3 the front end resulted in the acquisition of information  
02:57:49PM 4 relating to foreign intelligence? And if the answer is no,  
02:57:52PM 5 then how does this process really serve the overall national  
02:57:57PM 6 security purpose of Section 702?

02:58:00PM 7 (b)(6); (b)(7)(C) So to answer your question, I don't  
02:58:03PM 8 have a smoking gun example for you, and I think that's for a  
02:58:07PM 9 couple of reasons. One is because, again, the collection  
02:58:10PM 10 that is being acquired is of the non-U.S. persons outside  
02:58:13PM 11 the United States. We would expect queries -- particularly  
02:58:16PM 12 queries not for foreign intelligence information, but  
02:58:19PM 13 instead for evidence of crime -- to very rarely respond to  
02:58:22PM 14 anything.

02:58:22PM 15 And for a second reason, which is it is --  
02:58:26PM 16 querying is one tool in FBI's toolbox, and to discern that  
02:58:31PM 17 any individual query was the thing that broke open the case  
02:58:34PM 18 is often a very difficult thing to do.

02:58:37PM 19 That said, what we have found, again, just  
02:58:43PM 20 returning to those -- returning to the commission reports of  
02:58:50PM 21 the past, is that we do not want to limit our ability to  
02:58:53PM 22 connect the dots. We don't know beforehand, before we do  
02:58:57PM 23 the query, whether the information is going to be responsive  
02:59:00PM 24 and is going to lead to that national security angle.

02:59:05PM 25 And we have appropriate controls. We limit the

02:59:08PM 1 access. We limit the retention. We can limit the  
02:59:10PM 2 dissemination, and we have our policy on use. We have a  
02:59:14PM 3 variety of limitations designed, particularly designed to  
02:59:18PM 4 protect the privacy and civil liberties of individuals, but  
02:59:22PM 5 what we don't want to do is to balkanize our data to then  
02:59:28PM 6 limit our ability to find that dot that is out there in the  
02:59:31PM 7 case where it is, in fact, important. It is -- and I think  
02:59:34PM 8 this is something that we also saw in the PCLOB report.

02:59:38PM 9 It wasn't that the PCLOB report thought there were  
02:59:40PM 10 no concerns. Where they ultimately came out on this was  
02:59:43PM 11 where are the proper places to put those protections, and we  
02:59:46PM 12 believe the proper places are to limit those queries to  
02:59:50PM 13 foreign intelligence information or evidence of a crime, to  
02:59:53PM 14 limit that access, to limit the targeting to foreign  
02:59:56PM 15 intelligence information, to limit the retention and  
02:59:59PM 16 dissemination, to limit their use.

03:00:02PM 17 We've imposed all of those, but what we don't  
03:00:06PM 18 believe we should do is limit our ability to find the dots  
03:00:08PM 19 where we weren't expecting to find them.

03:00:13PM 20 (b)(6) Thank you, Your Honor.

03:00:18PM 21 (b)(6) I guess what I want to ask about is  
03:00:21PM 22 federated queries, which it sounds like is the principal  
03:00:25PM 23 means by which FBI personnel queried the 702 data. Is that  
03:00:31PM 24 correct?

03:00:31PM 25 (b)(6); (b)(7)(C) It is one of the means. So the FBI

03:00:34PM 1 has both a repository of information that includes FISA and  
03:00:38PM 2 some other information, for example, like national security  
03:00:41PM 3 letter information that it queries, but it also has the  
03:00:45PM 4 system -- I believe it's DIVS -- that allows these federated  
03:00:50PM 5 queries of not just the FISA information but, for example,  
03:00:53PM 6 CBP records, foreign intelligence reports, FBI's own case  
03:00:57PM 7 files. It is really those federated queries where those  
03:01:04PM 8 come into play.

03:01:04PM 9 (b)(6) So let's talk about a federated  
03:01:08PM 10 query on DIVS then.

03:01:13PM 11 (b)(6); (b)(7)(C) Sure.

03:01:14PM 12 (b)(6) If it's one query that reaches into  
03:01:16PM 13 multiple data sets including the 702 data, is it the same  
03:01:22PM 14 standard for queries across all those different data sets?

03:01:25PM 15 (b)(6); (b)(7)(C) It is now. So because the FISA  
03:01:30PM 16 information is one of the repositories that is queried, what  
03:01:34PM 17 you, in effect, have had is that the FISA rules now apply to  
03:01:38PM 18 all of these data sets when you conduct that query. If I  
03:01:42PM 19 conduct a query, and I have authorization to get 702  
03:01:44PM 20 information as a result of that query, then my query needs  
03:01:48PM 21 to meet the FISA standard regardless of the fact that it  
03:01:52PM 22 might not ping any of the -- bring back any of the 702  
03:01:55PM 23 information regardless of the fact that I was actually  
03:01:57PM 24 intending, thinking, oh, I'm looking for those CBP records  
03:02:01PM 25 or something else.

03:02:02PM 1 So what we have already done, because of the FISA  
03:02:04PM 2 information that's in there, is to make sure that we have  
03:02:07PM 3 this more restrictive regime.

03:02:09PM 4 (b)(6) And that's true even for FBI  
03:02:13PM 5 personnel who haven't been trained on the 702 data and so  
03:02:16PM 6 wouldn't have direct return but rather the sort of mediated  
03:02:20PM 7 process with supervisory approval that you described before?

03:02:25PM 8 (b)(6); (b)(7)(C) So for FBI personnel for whom the  
03:02:27PM 9 data would not return content or metadata, for those  
03:02:32PM 10 individuals their queries would not necessarily need to meet  
03:02:37PM 11 the standard because one of the things that is in this  
03:02:40PM 12 repository are internal FBI records when someone has done  
03:02:44PM 13 like a temporary duty assignment, but they would, at most,  
03:02:47PM 14 get back a response saying there is positive foreign  
03:02:50PM 15 intelligence -- there is a positive hit in this repository  
03:02:55PM 16 that contains FISA and some other information.

03:02:57PM 17 And they would stop there unless they were  
03:02:59PM 18 conducting a foreign intelligence or evidence-of-a-crime-  
03:03:02PM 19 type query, and, in that case, they would have to go to a

03:03:06PM 20 (b)(1); (b)(3); (b)(7)(E)

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03:03:17PM 23 (b)(6) But in any scenario, a query that  
03:03:24PM 24 reaches into the 702 data is subject to the reasonably  
03:03:30PM 25 designed to return foreign intelligence information or

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evidence of a crime.

(b)(6); (b)(7)(C) If content or metadata can be returned to the person conducting the query, then it has to meet that standard each and every time.

(b)(6) Okay. And if it were withheld from (b)(1); (b)(3); (b)(7)(E)

(b)(6); (b)(7)(C) Yes.

(b)(6) But they ultimately only get it if it meets that standard after people look at it; is that right?

(b)(6); (b)(7)(C) Correct.

Just one small clarification on that when it talks (b)(1); (b)(3); (b)(7)(E)

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

If the answer is no, it ends there. That information goes nowhere. It doesn't go into FBI's case files. It doesn't go for permanent retention. It isn't disseminated.

If the answer is yes, and it is foreign intelligence information or evidence of a crime, it is covered by the minimization procedures and used appropriately.

(b)(6) Thank you.

One more question. Should it be understood that it's not sufficient for -- in order to run a query that touches on the 702 data, for it to relate to the subject of an assessment or any other type of open FBI investigation, it has to be reasonably designed to return evidence of a crime or foreign intelligence information? So it may be necessary, but it's not sufficient that it relates to an open assessment or other --

(b)(6); (b)(7)(C) Correct.

(b)(6) -- category of case.

(b)(6); (b)(7)(C) Every query that returns content or metadata has to be for an authorized purpose. That authorized purpose has to be that the query is reasonably

03:05:40PM 1 designed to return foreign intelligence information or  
03:05:44PM 2 evidence of a crime. That is true for every query that  
03:05:46PM 3 returns content or metadata.

03:05:48PM 4 (b)(6) Thank you.

03:05:49PM 5 THE COURT: All right. Thank you very much,

03:05:50PM 6 (b)(6); (b)(7)(C) I appreciate your work on that.

03:05:52PM 7 (b)(6); (b)(7)(C) Thank you, Your Honor.

03:05:53PM 8 THE COURT: Anything else?

03:05:56PM 9 MS. JEFFRESS: No, Your Honor. I think the  
03:05:57PM 10 government may want another word. No?

03:06:01PM 11 MR. EVANS: One moment, Your Honor, if you would.

03:06:01PM 12 THE COURT: Sure.

03:06:01PM 13 (Pause)

03:06:16PM 14 MR. EVANS: Your Honor, nothing further. Thank  
03:06:17PM 15 you.

03:06:17PM 16 THE COURT: All right. Thank you.

03:06:19PM 17 I want to thank you again, all the counsel here,  
03:06:21PM 18 for their work on the matter and the agents, but  
03:06:23PM 19 particularly Ms. Amy Jeffress, who dedicated, I know,  
03:06:31PM 20 weekends and nights to prepare and to study and understand,  
03:06:36PM 21 in a short period of time, this rather difficult and complex  
03:06:40PM 22 area and has given an excellent report of great assistance  
03:06:44PM 23 to the Court, and that's why we have an Amicus. So I  
03:06:47PM 24 appreciate that very much.

03:06:49PM 25 We are going to look at this. We have to consider

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the certifications in the near future to look forward on these matters. So we'll take a look at it, and let you all know. Thank you again.

(Whereupon the hearing was concluded at 3:07 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, (b)(6) RDR, CRR, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 29th day of October, 2015.

(b)(6)



~~SECRET//NOFORN~~

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

2008 AUG 19 PM 3:24  
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IN RE ATTORNEY GENERAL GUIDELINES  
ADOPTED PURSUANT TO 50 U.S.C. § 1881a(f)(1).  
(U)

UNDER SEAL

Docket No: [REDACTED]

GOVERNMENT'S EX PARTE SUBMISSION OF ATTORNEY GENERAL  
GUIDELINES (U)

In accordance with subsection 702(f)(2)(C) of the Foreign Intelligence  
Surveillance Act of 1978, as amended ("the Act"), the United States of America, by and  
through the undersigned Department of Justice attorney, hereby submits ex parte the  
attached "Attorney General's Guidelines for the Acquisition of Foreign Intelligence  
Information Pursuant to the Foreign Intelligence Surveillance Act of 1978, as Amended."

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~~Classified by: Matthew G. Olsen, Deputy Assistant  
Attorney General, NSD, DOJ  
Reason: 1.4 (c)  
Declassify on: 6 August 2033~~

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These guidelines have been adopted by the Attorney General, in consultation with the Director of National Intelligence, pursuant to subsection 702(f)(1) of the Act. (U)

Respectfully submitted,

(b)(6); (b)(7)(C)



(b)(6); (b)(7)(C)



National Security Division  
United States Department of Justice

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**THE ATTORNEY GENERAL'S GUIDELINES FOR THE ACQUISITION OF  
FOREIGN INTELLIGENCE INFORMATION PURSUANT TO THE FOREIGN  
INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED**

INTRODUCTION (U)

These guidelines have been adopted by the Attorney General, in consultation with the Director of National Intelligence, pursuant to subsection 702(f)(1) of the Foreign Intelligence Surveillance Act of 1978, as amended ("the Act"). They govern the implementation of acquisitions of foreign intelligence information under the Act. (U)

ACQUISITIONS UNDER SUBSECTION 702(a) OF THE ACT (U)

All acquisitions conducted under subsection 702(a) of the Act shall be conducted in compliance with the following limitations:

- 1) **An acquisition authorized under subsection 702(a) of the Act may not intentionally target any person known at the time of acquisition to be located in the United States.** The targeting of a person under subsection 702(a) may be done only in accordance with targeting procedures that have been adopted by the Attorney General in consultation with the Director of National Intelligence and that are reasonably designed to ensure that only persons reasonably believed to be located outside the United States are targeted. Any targeting procedures adopted by the Attorney General in consultation with the Director of National Intelligence also shall include measures for detecting those occasions when a person who when targeted was reasonably believed to be located overseas has since entered the United States. Such targeting procedures also shall require that when such an

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Classified by: The Attorney General  
Reason: 1.4(c)  
Declassify on: 1 August 2033

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when such an occasion is detected, all acquisition from the targeted person shall be terminated without delay. ~~(S)~~

- 2) **An acquisition authorized under subsection 702(a) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States.** A non-United States person reasonably believed to be located outside the United States may not be targeted under subsection 702(a) unless a significant purpose of the targeting is to acquire foreign intelligence information that such person possesses, is reasonably expected to receive, and/or is likely to communicate. ~~(S)~~

If, at any time an agency targets a person, it has as its purpose for targeting that person the targeting of a particular, known person reasonably believed to be in the United States, it must follow the prescribed procedures under the Foreign Intelligence Surveillance Act and other governing authorities that apply for targeting persons inside the U.S. ~~(S)~~

- 3) **An acquisition authorized under subsection 702(a) may not intentionally target a United States person reasonably believed to be located outside the United States.** Any targeting procedures adopted by the Attorney General, in consultation with the Director of National Intelligence, shall include a requirement that, in targeting a person reasonably believed to be located outside the United States, due diligence is exercised to inform the reasonable belief that the target of the acquisition is not a United States person. [REDACTED]
- [REDACTED]

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~~(S)~~

If, at any time an agency targets a person, it is intentionally targeting a United States person reasonably believed to be outside the United States, it must follow the prescribed procedures under the Foreign Intelligence Surveillance Act and other governing authorities that apply for targeting U.S. persons abroad. ~~(S)~~

- 4) **An acquisition authorized under subsection 702(a) 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.** Any targeting procedures adopted by the Attorney General in consultation with the Director of National Intelligence shall include measures for detecting those occasions when a person who when targeted was reasonably believed to be located overseas has since entered the United States. Such targeting procedures also shall require that when such an occasion is detected, all acquisition from the targeted person shall be terminated without delay. ~~(S)~~
- 5) **An acquisition authorized under subsection 702(a) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.** Any communication to, from, or concerning a United States person that is incidentally acquired under subsection 702(a) of the Act shall be processed in accordance with minimization procedures which meet the definition of minimization procedures in subsections 101(h) and 301(4) of the Act and

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which have been adopted by the Attorney General, in consultation with the Director of National Intelligence, pursuant to subsection 702(e) of the Act. (U)

Any acquisition of foreign intelligence information under subsection 702(a) that does not comply with each of these limitations is prohibited. Furthermore, an acquisition authorized under subsection 702(a) shall be conducted only in accordance with:

- 1) targeting and minimization procedures adopted by the Attorney General, in consultation with the Director of National Intelligence, pursuant to subsections 702(d) and (e) of the Act; and
- 2) upon submission of a certification in accordance with subsection 702(g) of the Act, such certification. (U)

*Specific guidance regarding targeting.* Intelligence agencies may not designate a nominal non-U.S. person foreign target when the actual target is a U.S. communicant with whom that foreign target is known to be in contact.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ~~(S//NF)~~

- 1) [REDACTED]

~~(S//NF)~~

- 2) [REDACTED]

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[REDACTED]  
~~(S//NF)~~

3) [REDACTED]  
~~(S//NF)~~

4) [REDACTED]  
~~(S//NF)~~

ACQUISITIONS FOR WHICH AN APPLICATION FOR A COURT ORDER UNDER THE ACT MUST BE FILED (U)

Any time an element of the Intelligence Community seeks to acquire foreign intelligence information by conducting electronic surveillance, pen register or trap and trace surveillance, or physical search, as defined in the Act, of any person known at the time of acquisition to be located in the United States, an application for a court order under the Act must be filed. Prior to the making of such application, the Attorney General may authorize emergency collection as provided in the Act. (U)

Any time an element of the Intelligence Community seeks to acquire foreign intelligence information by intentionally targeting a United States person reasonably believed to be located outside the United States, and such acquisition is conducted within the United States and constitutes electronic surveillance or the acquisition of [REDACTED] [REDACTED] an application for a court order under the Act must be filed and authority to do so must be obtained from the Attorney General pursuant to Section 2.5 of Executive Order

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12333. Prior to the making of such application, the Attorney General may authorize emergency acquisition as provided in the Act. (U)

Any time an element of the Intelligence Community seeks to acquire foreign intelligence information by intentionally targeting a United States person reasonably believed to be located outside the United States under circumstances in which the targeted United States person has a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes, and such acquisition is conducted outside the United States, an application for a court order under the Act must be filed and authority to do so must be obtained from the Attorney General pursuant to Section 2.5 of Executive Order 12333. Prior to the making of such application, the Attorney General may authorize emergency acquisition as provided in the Act. (U)

AUG 5 2008

Date



Michael B. Mukasey  
Attorney General of the United States

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# Emergency USP Content Queries within FAA 702 PRISM and Telephony Content Collection

## External Oversight Process Description

**Oversight Activity Name:** Emergency USP Queries within FAA 702 PRISM and Telephony Content Collection

**Document Classification:** TOP SECRET//COMINT//NOFORN

### 1. Oversight Purpose

The information described below will provide reasonable assurance<sup>1</sup> to DoJ and ODNI that in the event of a national security emergency (e.g., a threat scenario) any USP identifiers used to query FAA 702 PRISM and telephony content collection will be reasonably likely to return foreign intelligence information. The oversight process described below has been reviewed by NSA Leadership, and NSA can reasonably implement it.

### 2. External Oversight Process

**Emergency Scenario:** NSA OGC and SID/SV will approve any United States person identifiers used to query the FAA 702 PRISM and telephony content collection. NSA will maintain a specific record of the following information and provide DoJ and ODNI such information for oversight purposes as soon as practicable after approval:

- a. Approved identifiers and the realm for each identifier;
- b. The United States person, if known, who uses the identifier; and
- c. The foreign intelligence information reasonably likely to be obtained by running a query with the identifier, stated as:
  - *A short description of the user of the identifier and/or the foreign intelligence information that could be obtained from a query, as well as the basis for this belief; it will not include attachments or supporting analytic assessment documentation.*

Example information:

Identifier	Realm	US Person Name	Foreign Intelligence
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

<sup>1</sup> "Reasonable assurance" is a term of art commonly used in the auditing and compliance context that serves as an acknowledgment that it is not possible to assert with absolute certainty that an event will or will not occur. In the context of oversight activity, the term indicates that oversight personnel will have access to persuasive evidence that will allow them to reach conclusions about whether the underlying activity conforms to a specified compliance standard.

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# USP Queries within FAA 702 PRISM and Telephony Content Collection

## External Oversight Process Description

**Oversight Activity Name:** USP Queries of FAA 702 PRISM and Telephony Content Collection

**Document Classification:** TOP SECRET//COMINT//NOFORN

### 1. Oversight Purpose

The information described below will provide reasonable assurance<sup>1</sup> to DoJ and ODNI that any USP identifiers used to query FAA 702 PRISM and telephony content collection will be reasonably likely to return foreign intelligence information. The oversight process described below has been reviewed by NSA Leadership, and NSA can reasonably implement it.

### 2. Proposed External Oversight Process

The external oversight requirements of USP queries within FAA 702 PRISM and telephony content collection will depend on the nature of the USP identifier used to query. Three categories of identifiers and their respective oversight processes are described below.

**2.1 Identifiers Managed by Existing Oversight Processes.** All United States person identifiers authorized for electronic surveillance [REDACTED] FISA Court Order or RAS-approved under NSA's bulk metadata authorities are approved to query the FAA 702 PRISM and telephony content collection because these identifiers have already been reviewed and assessed to be associated with a foreign power, and hence any query with those identifiers is reasonably likely to return foreign intelligence information.

Approval to query each identifier under section 2.1 will cease upon the expiration or termination of the underlying FISA court authority or RAS approval, whichever is applicable to the approved identifier.

- a. [REDACTED] NSA will use these lists as its record for United States person identifiers authorized for electronic surveillance [REDACTED] FISA Court Order; these lists will be available to DoJ and ODNI upon request.
- b. NSA currently maintains records of all RAS-approved identifiers. This list will be made available to DoJ and ODNI upon request.

**2.2 Identifiers Managed by NSA's Targeting Systems and Associated with 704/705b Targets, US Persons Held Captive, or Emergency Collection.** Any United States person identifiers used by approved 704/705b targets that are managed by NSA's

<sup>1</sup> "Reasonable assurance" is a term of art commonly used in the auditing and compliance context that serves as an acknowledgment that it is not possible to assert with absolute certainty that an event will or will not occur. In the context of oversight activity, the term indicates that oversight personnel will have access to persuasive evidence that will allow them to reach conclusions about whether the underlying activity conforms to a specified compliance standard.





**2.3 All Other US Person Identifiers:** For any United States person identifiers approved to query the FAA 702 PRISM and telephony content collection not identified in sections 2.1 and 2.2 above, NSA will maintain a specific record of the following information and provide DoJ and ODNI such information for oversight purposes at the existing 60-day review:

- a. Approved identifiers, the realm for each identifier, and the duration of the approval<sup>2</sup>;
- b. The United States person, if known, who uses the identifier; and
- c. The foreign intelligence information reasonably likely to be obtained by running a query with the identifier, stated as:
  - *A short description of the user of the identifier and/or the foreign intelligence information that could be obtained from a query, as well as the basis for this belief; it will not include attachments or supporting analytic assessment documentation.*

*Example information:*

Identifier	Realm	US Person Name	Foreign Intelligence	Duration
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

<sup>2</sup> Upon approval of each identifier under section 2.3, the approving official will specify the duration of the approval. The process for managing approvals and durations will be developed as described in Section 3.3.

[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
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### 3. NSA Resources Required to Implement:

#### Phase I

3.1 (b)(1); (b)(3); (b)(5) [Redacted]

3.2 (b)(1); (b)(3); (b)(5) [Redacted]

#### Phase II

3.3 (b)(1); (b)(3); (b)(5) [Redacted]

#### Phase III

3.4 (b)(1); (b)(3); (b)(5) [Redacted]

### Technical Implementation

3.5 NSA's technical implementation will allow analysts to define the appropriate parameters to query FAA 702 PRISM and telephony content collection with USP identifiers and not query FAA 702 Upstream collection.

## Training

- 3.6 Additionally, for all phases of implementation, a USP Query of 702 PRISM and Telephony Content Collection training package will need to be developed and implemented for both NSA auditors and analysts. This training will cover the information analysts need to document in order to have USP identifiers approved to query FAA 702 PRISM and telephony content collection. (Note: This may be done via email and/or in-person sessions until such information can be included in standard formal training documentation.)

## 4. Additional Comments:

- 4.1 Upon request, NSA will make available to DoJ and ODNI any query logs of USP queries of FAA 702 PRISM and telephony content collection that are generated by systems used to query FAA 702 PRISM and telephony content collection.
- 4.2 It is important to note that a query of the 702 PRISM and telephony content collection may be comprised of several terms, [REDACTED] these combined terms are utilized to narrow the query results, and minimize the return of irrelevant data. Analysts are already instructed as part of their USSID SP0018 training to make their queries as focused as possible, and NSA auditors are trained to look out for and question analysts regarding overly broad queries. If a USP identifier is included as part of a broader query involving multiple terms, that identifier will still be included in the oversight process described above.
- 4.3 In general, NSA will be deemed to have met its obligation to support oversight of USP queries of FAA 702 PRISM and telephony content collection under Section 2 above by providing the information described in that section, and will not generally be expected to provide additional supporting documentation or references to specific traffic or reporting. Further, for queries in accordance with sections 2.2.c and 2.3.c above, NSA expects the information descriptions to remain generally consistent with the examples above. Importantly, for queries in accordance with section 2.2, NSA does not intend to require regular updates to the date of the information referenced (e.g., SIGINT collection from October 2011).
- 4.4 **USP Queries of FAA 702 Metadata.** Oversight of queries of metadata derived from FAA 702 PRISM and telephony collection containing USP identifiers will be handled in accordance with separate procedures. Those queries will not be handled in accordance with these procedures.



**U.S. Department of Justice**

National Security Division

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Washington, D.C. 20530

To: Litigation Section, Office of Intelligence

From: Stuart J. Evans  
Deputy Assistant Attorney General for Intelligence

Re: Restriction Regarding the Use of FISA Section 702 Information in Criminal Proceedings Against United States Persons

This memorandum serves to document a policy restriction imposed on authorizations of the use of information acquired from Section 702 of the Foreign Intelligence Surveillance Act (FISA) against United States persons in criminal proceedings.

For background, in January 2014, in response to a recommendation from the President's Review Group on Intelligence and Communication Technologies, the President directed the Attorney General and Director of National Intelligence to place additional restrictions on the government's ability to use in criminal cases communications between Americans and foreign citizens incidentally collected under Section 702. The Department of Justice and the Intelligence Community, in consultation with the Administration, subsequently adopted a policy restriction, which was announced in the Intelligence Community's Signals Intelligence Reform 2015 Anniversary Report, published on February 3, 2015. While this restriction was formalized in February 2015, it is also fully consistent with the Department's past practice regarding authorizations for the use of Section 702 acquired information.

Specifically, in addition to any other limitations imposed by applicable law, including FISA, any communication to or from, or information about, a U.S. person acquired under Section 702 of FISA shall not be introduced as evidence against that U.S. person in any criminal proceeding except:

- (1) with the prior approval of the Attorney General, and
- (2) in
  - (A) criminal proceedings related to national security (such as terrorism, proliferation, espionage, or cybersecurity), or
  - (B) other prosecutions of crimes involving
    - (i) death;

- (ii) kidnapping;
- (iii) substantial bodily harm;
- (iv) conduct that constitutes a criminal offense that is a specified offense against a minor as defined in 42 U.S.C. § 16911;
- (v) incapacitation or destruction of critical infrastructure as defined in 42 U.S.C. § 5195c(e);
- (vi) cybersecurity;
- (vii) transnational crime; or
- (viii) human trafficking.

Requests for authority to use Section 702 acquisitions in criminal proceedings against United States persons must comply with the above restriction. Prior to recommending that the Attorney General, as defined by FISA, authorize such use, Office of Intelligence personnel will ensure that the requested use and the recommended authorization complies with the above policy. This policy will remain in effect unless modified in the future by the Attorney General and Director of National Intelligence.

This policy is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

Cc: Deputy Assistant Attorneys General, National Security Division  
Chief, Counterterrorism Section  
Chief, Counterintelligence and Export Control Section



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# USP Queries of Communications Metadata Derived from FAA 702 (b)(3) and Telephony Collection

## External Oversight Process Description

*(Note: Documented herein is the purpose, process, and implementation details associated with an NSA SIGINT activity that requires external oversight. The formal articulation of these oversight aspects, when combined with the process of coordinating these activities with our overseers will ensure clear understanding between NSA and our overseers regarding oversight expectations. This process will also serve to document NSA's effort and resource allocation required to support the oversight.)*

**Oversight Activity Name:** USP Queries of Communications Metadata derived from FAA 702 (b)(3) and Telephony Collection

**Document Classification:** TOP SECRET//COMINT//NOFORN

### 1. Oversight Purpose

The information described below will provide reasonable assurance<sup>1</sup> to DoJ and ODNI that any query of communications metadata derived from FAA 702 (b)(3) and telephony collection starting with USP identifiers will be reasonably likely to return foreign intelligence information. The oversight process described below has been reviewed by NSA Leadership, and NSA can reasonably implement it.

### 2. Proposed External Oversight Process

**2.1 US Person Identifiers:** For any query of communications metadata<sup>2</sup> derived from the FAA 702 (b)(3) and telephony collection starting with a United States person identifier<sup>3</sup>, NSA will maintain a specific record identifying each United States person query, which will include the following information and provide DoJ and ODNI access to such information for oversight purposes at the existing 60-day review:

- a. The query; and
- b. The foreign intelligence (FI) justification for the query;
  - i. Each initial (seed) query will require the analyst to enter an FI justification. The FI justification will apply to all traffic analysis performed as a result of

<sup>1</sup> "Reasonable assurance" is a term of art commonly used in the auditing and compliance context that serves as an acknowledgment that it is not possible to assert with absolute certainty that an event will or will not occur. In the context of oversight activity, the term indicates that oversight personnel will have access to persuasive evidence that will allow them to reach conclusions about whether the underlying activity conforms to a specified compliance standard.

<sup>2</sup> For the purpose of these procedures, "communications metadata" is the same as the description of "metadata" provided in the response to question 9 within the Government's Responses to FISC Questions re: Amended 2011 Section 702 Certifications, filed on November 15, 2011, pages 3-8.

<sup>3</sup> NSA will rely on an algorithm and/or a business rule to identify queries of communications metadata derived from the FAA 702 (b)(3) and telephony collection that start with a United States person identifier. Neither method will identify those queries that start with a United States person identifier with 100 percent accuracy.

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the seed query, to include the identification and analysis of direct and indirect contacts of the initial (seed) query.

- ii. Recording FI justifications is intended to assist NSA/CSS analysts in memorializing the purpose of their metadata analysis activities. The FI justification documents the analytic knowledge linking the selector to a foreign target or foreign intelligence purpose. The FI justification is a memory aid in the event that the analytic process is questioned long after the fact. The justification preserves the rationale behind the query. FI justifications are subject to review (spot check).

### 3. NSA Resources Required to Implement:

#### Technical Implementation

- 3.1 NSA's technical implementation will ensure that USP metadata queries of FAA 702 collection will only run against communications metadata derived from FAA 702 (b)(3) and telephony collection. NSA's Technical Directorate (TD) continues work to implement this requirement.

#### Training

- 3.2 Training sufficient to grant analyst access to systems that support the Supplemental Procedures Concerning Communications Metadata Analysis (SPCMA) will be sufficient to start a query of communications metadata derived from FAA 702 (b)(3) and telephony collection with a United States person identifier.

### 4. Additional Comments:

4.1 (b)(1); (b)(3)

- 4.2 Analysts are not required to check any specific database or seek any internal approvals prior to executing a query against metadata derived from FAA 702 (b)(3) or telephony collection. Further, NSA analysts are not required to attach supporting documentation to the FI justification or reference specific traffic or reporting.
- 4.3 These procedures describe the external oversight of USP queries of communications metadata derived from FAA 702 (b)(3) and telephony collection. Nothing in these procedures is intended to alter or modify the underlying minimization procedures NSA personnel apply to the analysis of communications metadata derived from FAA 702 (b)(3) and telephony collection. Substantively, the analysis of FAA 702 (b)(3) and telephony communications metadata does not differ in any material respect from the analysis of metadata governed by the SPCMA procedures that the Secretary of Defense and Attorney General approved in late 2007. Maintaining consistency between the analysis of FAA 702 (b)(3) and telephony metadata and the analysis of metadata governed by the SPCMA process creates a more uniform rule-set for analysts to follow which allows analysts to execute the mission more efficiently and helps prevent compliance incidents.

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