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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

MEMORANDUM OPINION AND ORDER

This Memorandum Opinion and Order is issued pursuant to 50 U.S.C. § 1805c(b) & (c), which provide for the Foreign Intelligence Surveillance Court (FISC) to review, under a "clearly erroneous" standard, procedures adopted by the Attorney General and the Director of National Intelligence (DNI) under 50 U.S.C. § 1805b(a)(1). For the reasons stated herein, the Court finds that the procedures that have been submitted to the Court meet the applicable review for clear error with regard to the government's determinations that the collections appropriately concern persons reasonably believed to be outside of the United States.

I. *Procedural History*

On August 17, 2007, the government filed a set of procedures with this Court pursuant to 50 U.S.C. § 1805c(a). Those procedures pertain to a certification by the Attorney General and the Director of National Intelligence, styled DNI/AG 105B Certification 07-01, filed under seal on August 10, 2007, pursuant to § 1805b(c). Under that certification, and following those procedures ("*07-01 procedures*"), the National Security Agency (NSA) acquires foreign intelligence information regarding [redacted]

[redacted]

[redacted]

In an order dated October 11, 2007, the Court stated that it would consider these [redacted] procedures jointly for purposes of the Court's review pursuant to 50 U.S.C. § 1805c, and directed the government to address specific questions about these procedures identified in the Court's initial review. That order ("*October 11 Order*") is incorporated herein by reference and made a part of this Opinion and Order. See attached Tab A. The government timely submitted its response on October 26, 2007, see Government's Response to the Court's Order of October 11, 2007 ("*Gov't Response*"), which is incorporated herein by reference and made a part of this Opinion and Order, as the Court has relied on its contents. See attached Tab B.

On December 12, 2007, a hearing in this matter was conducted on the record. The transcript of that hearing ("*Trans.*") is incorporated herein by reference and made a part of this Opinion and Order, as the Court has relied on its contents. See attached Tab C.

II. Statutory Framework

In this matter, a judge of the FISC is for the first time exercising a responsibility assigned to it by the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (PAA). The PAA created a new framework, within the Foreign Intelligence Surveillance Act of 1978, codified as amended at 50 U.S.C. §§ 1801-1871 (FISA), under which the Executive Branch, pursuant to a "certification" by the Attorney General and the DNI, may conduct certain forms of foreign intelligence collection, and direct third parties to assist in such collection.

The PAA accomplished this in several steps. First, the PAA provided that FISA's definition of electronic surveillance, at 50 U.S.C. § 1801(f), shall not be "construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States." 50 U.S.C. § 1805a.[1]

[1] Prior to the PAA, the government had argued to the FISC that, in some contexts, surveillances of targets outside of the United States did constitute electronic surveillance as defined by FISA, such that the FISC had jurisdiction. The FISC judges concluded that they did have jurisdiction over certain types of such surveillances, [redacted] At the request of the government, FISC judges have entertained [redacted] applications for authority to conduct such surveillances. Since the enactment of the PAA, the government has opted, pursuant to the "transition procedures" of the PAA, to continue to submit applications to the FISC for authority to conduct such surveillances, "under the provisions of [FISA] as in effect" prior to the effective date of the PAA. PAA § 6(b).

Second, the PAA created a new "certification" mechanism.[2] Under this PAA mechanism, "the [DNI] and the Attorney General, may for periods of up to one year authorize the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States." 50 U.S.C. § 1805b(a). In order to grant such an authorization, the DNI and the Attorney General must make several specified determinations. Most pertinently, they must determine that

> (1) there are reasonable procedures in place for determining that the acquisition of foreign intelligence information . . . concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to review of the Court pursuant to [50 U.S.C. § 1805c; and]
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> (2) the acquisition does not constitute electronic surveillance . . . .

Id.[3] These determinations "shall be in the form of a written certification, under oath." § 1805b(a). The Attorney General and the DNI may direct a person to assist in acquisitions pursuant to such a certification. § 1805b(e).

Third, the PAA provides for judicial review of certain aspects of the certification process. The government is required to "transmit" to the FISC copies of each certification, § 1805b(a), and to

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[2] The pre-PAA version of FISA provided a means for the Attorney General to authorize some forms of electronic surveillance, without benefit of a court order, by making a different type of "certification." 50 U.S.C. § 1802(a). Section 1802(a), which the PAA did not alter, is available only in narrowly drawn circumstances – when the surveillance is "solely directed" at certain types of foreign powers (not including groups engaged in international terrorism) and "there is no substantial likelihood" that any U.S. person's communications will be acquired. § 1802(a)(1)(A) & (B). Although copies of such certifications are filed with the FISC under § 1802(a)(3), the FISC has no role in reviewing them.

[3] The other required elements of the certification involve assistance from a third party who has access to communications or communications equipment; the "significant purpose" of obtaining foreign intelligence information; and the adequacy of the minimization procedures to be followed. 50 U.S.C. § 1805b(a)(3), (a)(4) & (a)(5).

"submit" to the FISC "the procedures by which the Government determines that acquisitions conducted pursuant to [§ 1805b] do not constitute electronic surveillance." § 1805c(a). "No later than 180 days after the effective date" of the PAA, the FISC "shall assess the Government's determination under section 1805b(a)(1) that those procedures are reasonably designed to ensure that acquisitions conducted pursuant to section 1805b do not constitute electronic surveillance. The court's review shall be limited to whether the Government's determination is clearly erroneous." § 1805c(b).

> If the court concludes that the determination is not clearly erroneous, it shall enter an order approving the continued use of such procedures. If the court concludes that the determination is clearly erroneous, it shall issue an order directing the Government to submit new procedures within 30 days or cease any acquisitions under section 1805b of this title that are implicated by the court's order.

§ 1805c(c).[4]

Three points about the FISC's role under § 1805c bear emphasis.[5] First, the FISC is to apply a "clearly erroneous" standard of review. To apply this standard properly, the FISC looks to how a "clearly erroneous" standard of review is understood in other contexts.[6] When an appellate court is

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[4] The PAA also provides a role for the FISC regarding directives issued pursuant to § 1805b(e): under § 1805b(h), the recipient of such a directive may file a petition with the FISC challenging its legality; and under § 1805b(g), the government "may invoke the aid" of the FISC "to compel compliance" with a directive.

[5] In a separate, adversarial proceeding before another judge of this Court under § 1805b(g), the respondent has argued that the PAA is unconstitutional because it violates the Fourth Amendment and separation-of-powers principles. See Docket No. 105B(G) 07-01. In the instant, ex parte proceeding under § 1805c, the Court addresses only those issues commended to it by § 1805c, and does not reach those constitutional issues.

[6] See Bradley v. United States, 410 U.S. 605, 609 (1973) (statute understood to use

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reviewing a district court's findings of fact, see Fed. R. Civ. Proc. 52(a), it finds clear error only when "left with a definite and firm conviction that a mistake has been committed." McAllister v. United States, 348 U.S. 19, 20 (1954) (internal quotations omitted). The review is not de novo, because the "clearly erroneous" standard "plainly does not entitle a reviewing court to reverse the finding . . . simply because it is convinced that it would have decided the case differently." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985). And the "clearly erroneous" standard of review applied by this Court under different provisions of FISA[7] "'is not, of course, comparable to a probable cause finding by the judge.'" In re Sealed Case, 310 F.3d 717, 739 (FISC Rev. 2002) (quoting H.R. Rep. No. 95-1283, pt. 1 at 80).

Second, the scope of the Court's review under § 1805c is narrow. Executive branch determinations under § 1805b(a)(4) & (a)(5) regarding the purpose of the acquisition and the adequacy of minimization procedures are not subject to review under § 1805c. Nor, under § 1805c, does the Court make any assessment of probable cause, as it does pursuant to §§ 1805(a)(3) and 1824(a)(3) before issuing orders authorizing electronic surveillance and physical search.

Third, the statute describes the subject matter of the Court's review under § 1805c using varying and ambiguous language. Section 1805b(a)(1) sets out the relevant executive branch

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[6](...continued)
"familiar legal expressions in their familiar legal sense") (internal quotations omitted).

[7] An application to the FISC for an order authorizing electronic surveillance or physical search must contain a certification from a designated senior executive branch official. See 50 U.S.C. § 1804(a)(7) (electronic surveillance) and § 1823(a)(7) (physical search). To grant such an application for a U.S. person target, the FISC judge must find that the certification is not clearly erroneous. See §§ 1805(a)(5) & § 1824(a)(5).

"determination" as follows: that "there are reasonable procedures in place for determining that the acquisition of foreign intelligence information under this section concerns persons reasonably believed to be located outside the United States." § 1805b(a)(1) (emphasis added).[8] However, § 1805c(b) states that the Court "shall assess the Government's determination under [§ 1805b(a)(1)] that those procedures are reasonably designed to ensure that acquisitions conducted pursuant to [§ 1805b] do not constitute electronic surveillance." § 1805c(b) (emphasis added). One provision focuses on the location of persons implicated by the acquisitions of foreign intelligence information, while the other provision focuses on whether the acquisitions constitute electronic surveillance.

This seeming disconnect between the language of § 1805b(a)(1) and § 1805c(b) is bridged in part by the PAA's amendment to the definition of "electronic surveillance" to exclude "surveillance directed at a person reasonably believed to be located outside of the United States." § 1805a (emphasis added). Section 1805a arguably harmonizes § 1805b(a)(1) and § 1805c(b), to the extent that the acquisition of foreign intelligence information concerning persons reasonably believed to be outside of the United States (per § 1805b(a)(1)), will often, and perhaps usually, be accomplished through surveillance directed at persons reasonably believed to be outside of the United States. In that event, such surveillance will not constitute "electronic surveillance" by virtue of § 1805a.[9] But

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[8] Section 1805b(a)(1) further provides that "such procedures will be subject to review of the Court pursuant to [§ 1805c]." Id.

[9] For ease of reference, this Memorandum Opinion uses the term "surveillance" to refer to the means of acquisition under the procedures in question. However, to be fully precise, the Court notes that some acquisitions of foreign intelligence information could involve means that do not fall within the definition of "electronic surveillance" at 50 U.S.C. § 1801(f) for reasons other than, or in addition to, their being directed at persons reasonably believed to be outside of the United States;
(continued...)

at first glance, at least, this harmonization is imperfect. For example, an acquisition of foreign intelligence information that concerns a person outside of the United States might not necessarily be understood to involve surveillance directed at a person outside of the United States. The concepts are related and overlapping, but not necessarily co-extensive under the terms of the statute.

Despite these interpretative difficulties, it seems clear that procedures will satisfy the relevant statutory requirements if they are reasonably designed to ensure both

(1) that such acquisitions do not constitute "electronic surveillance," because they are surveillance directed at persons reasonably believed to be outside of the United States, and

(2) that the acquisitions of foreign intelligence information concern persons reasonably believed to be outside of the United States.

Accordingly, the Court will review, under a "clearly erroneous" standard, whether the procedures satisfy each prong of this formulation. Where separate application of the two prongs may produce divergent results, the statutory language is further analyzed in the relevant factual context. See Parts III.B. and III.D infra. In this review, the Court will both examine the written procedures themselves, and consider and rely on information provided by the government in its October 26, 2007 response and at the December 12, 2007 hearing regarding the implementation of the procedures and the intended effect of certain of their provisions.

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[9](...continued)
for example, the means of acquisition could constitute a "physical search" as defined at 50 U.S.C. § 1821(5). But as long as the means of acquisition is directed at persons reasonably believed to be outside of the United States, NSA is not conducting "electronic surveillance," and the Court need not inquire into any additional reasons that might support this conclusion.

III. Consideration of the Procedures

A. Overview of Procedures

In most respects, the [redacted] procedures are quite similar. Because the procedures apply to the acquisition of foreign intelligence information about different entities, they include different descriptions of targets. There are other variations in wording, about which the Court inquired in its October 11 Order.[10] The government has clarified that these variations do not reflect "substantive differences" among the procedures, but rather result from drafting refinements that took place after the adoption of the [redacted] procedures. *Gov't Response* at 9. Thus, while the most recently filed procedures provide more technical detail on some points, the descriptions in all the procedures remain "accurate and current." Id. at 9-11. Accordingly, the procedures are discussed jointly herein.[11]

The procedures involve an assessment by NSA analysts, based on available information, that the user of a particular telephone number or electronic communications account/address/identifier ("e-mail account")[12] reasonably appears to be outside of the United States, before that telephone

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[10] *October 11 Order* at 3 n.1. These variations include: [redacted]

[11] There is one significant difference among them: only the [redacted] procedures include a type of "grandfathering" provision, which is discussed at Part III.C infra.

[12] The Court recognizes that many of these accounts/addresses/identifiers can be used for electronic communications other than e-mail, but will use the term "e-mail account" for ease of

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number or e-mail account is "tasked" for acquisition. [redacted] In making this assessment, NSA analysts examine "three categories of information, as appropriate under the circumstances." [redacted] First, they examine [redacted] Second, [redacted] Third, [redacted][13]

For each tasking, analysts are required to provide a "citation" to information or reporting on which they rely in making this assessment, and NSA personnel verify that an appropriate citation

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[12](...continued)
reference.

[13] [redacted]

entry is made before a tasking is approved. [redacted]

[redacted]

After a telephone number or e-mail account has been tasked, NSA will routinely take specified steps designed to assess whether the user remains outside of the United States. [redacted]

[redacted]

In the event that information is "acquired by directing surveillance at a person not reasonably believed to be outside the United States in a manner that constitutes electronic surveillance, as defined under the FISA, [such information] shall be purged from NSA databases." [redacted] If the user of a tasked facility had been reasonably believed to be outside of the United States at the time of tasking, but later was determined to be within the United States, NSA will "[t]erminate the acquisition from that person without delay and determine whether to seek authorization to conduct electronic surveillance under applicable provisions of FISA." [redacted]

[redacted]

The procedures also include oversight and compliance measures, including reviews, at intervals no greater than 60 days, by personnel from the Department of Justice and the Office of the DNI. [redacted] Twelve of these reviews had been conducted as of the hearing on December 12: [redacted] These reviews involve examination of the "citations" recorded by the NSA analysts in support of their pre-tasking assessment that the user of the facility is outside of the United States, and, where the significance of the citation is not apparent on its face, of the supporting materials referenced in the citations. Id. at 5, 10-11. The documentation for [redacted] taskings has been reviewed in this manner, id. at 5-6, and these reviews have found that "a strong majority" of taskings were properly documented by referencing materials that supported the analysts' determination that the user of the tasked facility was outside of the United States. Id. at 12. Most of the problems identified have concerned adequacy of documentation, id. at 6-8, 12, and training and technical improvements have been made in response to them. Id. at 10, 34-35. As to the actual location of the users of the tasked facilities, it appears that, in approximately [redacted] cases, the user of a tasked facility may have been within the United States. While examination of these cases by the government is not complete, the government expects that at least some of them may have involved a user reasonably believed to have been outside the United States at the time of tasking who, based upon later-obtained information, was subsequently determined to be within the United States. Id. at 13-14.

B. Analysis of Procedures as Applied to Communications to or from Tasked Facilities

For the most part, NSA surveillance under the PAA acquires telephone communications that are placed to or from tasked telephone numbers, and electronic communications that are sent to or from tasked e-mail accounts.[14] In order to apply the two-pronged formulation stated on page 8 supra, it is necessary to determine at which persons this form of NSA surveillance is "directed," and which persons the resulting acquisitions of foreign intelligence information "concern."

Under the first prong, which corresponds to the language of § 1805a, it is natural to think of the users of the tasked facilities as the persons at whom surveillance is "directed." A user of a tasked facility is a party to every communication acquired by this form of surveillance. It is true that other persons are subjected to the surveillance when they communicate with the users of the tasked facilities. But NSA is not targeting the communications of those other persons for general acquisition; rather, those persons come within the scope of the surveillance only when they are communicating with the users of the tasked facilities.[15] In the plain meaning of the term, this form of surveillance is "directed" at the users of the tasked facilities, and not at other persons.[16]

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[14] NSA also acquires another category of electronic communications, which is discussed in Part III.D infra.

[15] United States persons whose communications are acquired will be afforded the protection of FISA minimization procedures. See 50 U.S.C. § 1801(h) (defining "minimization procedures") and § 1805b(a)(5) (requiring Attorney General and DNI to determine that the minimization procedures to be used with respect to PAA acquisitions meet the definition at § 1801(h)).

[16] This conclusion comports with the prevalent understanding, under a different provision of FISA, of the "facility" at which surveillance is "directed." The FISC has issued [redacted] orders authorizing the acquisition of communications to and from specified telephone numbers and e-mail accounts, and those orders identify such telephone numbers and e-mail accounts as the "facilities" at

(continued...)

Under the second prong, which corresponds to the language of § 1805b(a)(1), the acquisitions of foreign intelligence information resulting from this form of surveillance clearly "concern" the users of the tasked facilities, who are parties to each acquired communication. It could be argued that these acquisitions also "concern" persons who communicate with the users of the tasked facilities, and even third parties who are mentioned in such communications. However, there are sound reasons for concluding that the second prong is still satisfied. Section 1805b(a)(1), by its terms, does not require that the acquisition of foreign intelligence information exclusively concern persons reasonably believed to be outside of the United States. Moreover, so stringent a reading would put § 1805b(a)(1) at odds with § 1805a, which focuses on the location of persons at whom the surveillance is "directed," not at the broader class of persons whose communications or information are acquired by the surveillance. Therefore, § 1805b(a)(1) should be interpreted in a manner that harmonizes its requirements with those of §§ 1805a and 1805c(b). See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (court must interpret statute "as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole") (internal quotations and citations omitted).[17] This may be done by interpreting § 1805b(a)(1) to permit procedures reasonably designed to ensure that each acquisition "concerns" a person reasonably believed to be outside of the United States, even if the acquisition also may

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[16](...continued)
which this form of "electronic surveillance is directed" for purposes of 50 U.S.C. § 1805(a)(3)(B).

[17] The government implicitly adopts a similar interpretative approach. See *Gov't Response* at 1("[T]he government has filed [redacted] procedures used to determine that certain acquisitions of foreign intelligence information concern persons reasonably believed to be located outside of the United States and, therefore, do not constitute electronic surveillance.") (emphasis added).

"concern" another person who is in the United States. The Court adopts this interpretation in its review of whether the procedures are clearly erroneous.

Thus, for the form of NSA surveillance that acquires communications that are to or from the tasked facilities, both prongs of the two-part formulation stated on page 8 supra will be satisfied if the procedures are reasonably designed to ensure that the users of the tasked facilities are reasonably believed to be outside of the United States.

The Court finds, under the applicable "clearly erroneous" standard, that the procedures as generally summarized in Part III.A. supra are reasonably designed to ensure that the users of tasked facilities are reasonably believed to be located outside of the United States. While the procedures leave it to the discretion of NSA analysts exactly which steps are appropriate to take prior to tasking a particular phone number or e-mail account, analysts are required to make a record of the basis for their assessment that the user is outside of the United States. After tasking, there are additional steps – some of which are taken as frequently as [redacted] – to verify that this assessment remains valid. The results of the reviews conducted by the Department of Justice and the Office of the DNI, as described at the hearing in this matter, support this finding. The Court anticipates that continuation of thorough reviews by the Department of Justice and the Office of the DNI will aid in the timely identification and resolution of future problems that may arise.

However, certain provisions of the procedures require further analysis, as discussed below.

C. "Grandfathering" of Previously Tasked Facilities

The 07-01 procedures for acquisitions regarding [redacted] exempt from certain

requirements telephone numbers and e-mail accounts that had been "properly tasked for collection" under FISC orders in docket numbers [redacted] *07-01 procedures* at 1 n.1. [redacted] The government explains that tasking under these dockets "means that NSA reasonably believed that the facilities were being used outside the United States and that NSA had discovered no information indicating that the facilities were being used in the United States." *Gov't Response* at 4. NSA's prior determination that these users "were reasonably believed to be located outside the United States" was "based on the same categories of information (i.e., [redacted]) described in the 07-01 procedures." Id. at 3. However, in implementing those prior authorities, NSA did not have formalized processes for verification, documentation, and systematic re-checking of a target's location. Id. at 4.

Such previously tasked phone numbers and e-mail accounts are exempt from pre-tasking requirements under the 07-01 procedures, but "are subjected to the same post-tasking procedures designed to verify that their location is outside of the United States and to notify NSA of any changes to their location as are other facilities." Id. As noted above, these post-tasking procedures include [redacted] On this understanding, the Court finds that the exemption of these facilities from pre-tasking requirements does not alter its

general conclusion that the procedures satisfy the applicable review for clear error with regard to acquisition of communications to or from tasked telephone numbers and e-mail accounts.

D. Acquisition of "About" Communications

In addition to acquiring communications that are to or from a tasked facility, NSA also acquires electronic communications that are "about," i.e., contain a reference to, a tasked e-mail account.[18] (There is no comparable acquisition of phone communications.) Because these "about"

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[18] These "about" communications consist of the following [redacted] categories (for ease of reference, the e-mail account tasked for acquisition is given the name "tasked@email.com"):

[redacted]

See *Gov't Response* at 7 (referencing description at pages 12-14 of the Primary Order issued on [redacted]

(continued...)

communications will not necessarily be to or from the user of a tasked e-mail account, it is necessary to analyze them separately under the two-pronged formulation previously discussed on page 8 supra. Under that formulation, the relevant statutory requirements will be met if the procedures are reasonably designed to ensure both (1) that the acquisitions do not constitute "electronic surveillance," because they are surveillance directed at persons reasonably believed to be outside of the United States, and (2) that the acquisitions of foreign intelligence information concern persons reasonably believed to be outside of the United States.

In each case, the user of the tasked e-mail account will have already been determined by NSA, in accordance with the procedures (to include the "grandfathering" provision in the 07-01 procedures), to reasonably appear to be outside of the United States. In addition, "NSA will either

[redacted][19] For these reasons, the Court accepts, for purposes of its "clearly erroneous" review, that for each "about" communication that is acquired, there is reason to believe: (a) that the user of the tasked e-mail

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[18](...continued)

[redacted]

[19] In the event that NSA determines that an "about" communication was acquired where all parties to the communication were within the United States, NSA would purge information about the communication from its databases. *Trans.* at 47–48.

account, the name of which is referenced in the acquired communication, is outside of the United States; and (b) that at least one party to the acquired communication is outside of the United States. From these two conclusions, it follows that "about" communications satisfy the second prong of the above-described formulation because there is reason to believe that the acquired communications "concern" persons reasonably believed to be outside of the United States.

This is true for two reasons. First, there is reason to believe that such communications concern the users of the tasked e-mail accounts that are referenced in the communications, and those users are reasonably believed to be outside of the United States. Second, there is reason to believe that at least one party to an acquired communication is outside of the United States, such that the communication will "concern" that party also. In addition to these persons reasonably believed to be outside of the United States, the acquired communications might also "concern" other persons, including some persons in the United States. This fact, however, is not fatal to the procedures, because an acquisition may properly concern a person in the United States, provided that it also concerns one or more persons reasonably believed to be outside of the United States, under the interpretation adopted by the Court to harmonize § 1805b(a)(1) with §§ 1805a and 1805c(b). See Part III.B, supra. Accordingly, the Court finds, under the applicable "clearly erroneous" standard, that the second prong of this formulation, relating to the requirements of § 1805b(a)(1), is satisfied.

Under the first prong of the formulation, the analysis is not as simple, because it less clear at whom this form of surveillance is "directed." In one sense, NSA directs the surveillance by tasking particular e-mail accounts for acquisition, and as a result of that tasking only communications that are to, from or "about" a tasked e-mail account are acquired. From this perspective, the users of the

tasked e-mail accounts, who by virtue of the procedures are reasonably believed to be outside of the United States, could be regarded as the persons at whom the surveillance is directed. All the acquired communications relate in some fashion to the tasked e-mail accounts, and all persons other than the users of the tasked accounts have their communications acquired only to the extent that they communicate with, or "about," a tasked e-mail account. In less technical terms, NSA is trying to obtain information primarily about the users of the tasked e-mail accounts, and about other persons only insofar as their communications relate to those accounts.

However, there is another sense in which NSA could be said to "direct" this form of surveillance. NSA takes steps to ensure, [redacted] that each communication acquired has at least one party outside of the United States. In this sense, NSA's surveillance can be said to be directed at parties outside of the United States who send or receive communications that contain a reference to the tasked e-mail account. The government appears to adhere to this understanding. See [redacted] ("NSA will direct [this form of] surveillance at a party to the communication reasonably believed to be outside the United States."); *Gov't Response* at 7 ("The person from whom NSA seeks to acquire communications in such cases is the party to the communication who is reasonably believed to be located outside of the United States.")

There is a third possibility: that the surveillance is instead or also directed at those persons inside the United States who send or receive communications that contain a reference to the tasked e-mail account, the user of which is reasonably believed to be outside of the United States. But against this view, it could be argued that NSA is not affirmatively directing the surveillance at these

persons, either individually (e.g., by tasking e-mail accounts used by them) or collectively (e.g., by conducting the surveillance in a manner to ensure that at least one party to the communication is inside the United States).

Under the terms of §§ 1805a and 1805c(b), it is difficult to ascertain the class of persons at whom this form of surveillance is "directed." However, the Court recognizes that, under the "clearly erroneous" standard of review applicable under § 1805c(b), the government's determination regarding the procedures should be overturned only where there is "a definite and firm conviction that a mistake has been committed." McAllister, 348 U.S. at 20. The Court is also mindful, as stated in Part III.B above, that where possible it should harmonize the requirements of §§ 1805a and 1805c(b) with those of § 1805b(a)(1). See Food & Drug Admin., 529 U.S. at 133. Having determined that the procedures satisfy the second prong of the formulation stated on page 8 supra, which follows the language of § 1805b(a)(1), the Court should adopt a reasonable interpretation of §§ 1805a and 1805c(b) that permits a finding that the first prong is satisfied, even if the statutory language is open to other reasonable interpretations.

Accordingly, in reviewing these procedures, the Court adopts the interpretation that, under §§ 1805a and 1805c(b), this form of surveillance is "directed" (i) at the users of the tasked e-mail accounts (each of whom, by implementation of the procedures, is reasonably believed to be outside of the United States); (ii) at those parties to the acquired communications who, by virtue of [redacted] are reasonably believed to be outside of the United States; or (iii) at both these classes of persons. Because there is reason to believe that both classes of persons are outside of the United States, the Court finds, under the

"clearly erroneous" standard applicable under § 1805c, that the first prong of the formulation stated on page 8 supra is satisfied. The Court expresses no opinion on whether such a finding could be made for procedures that did not provide reason to believe that both the user of the tasked e-mail accounts and at least one party to the acquired communications are outside of the United States.

E. Emergency Departure Provision

The procedures state:

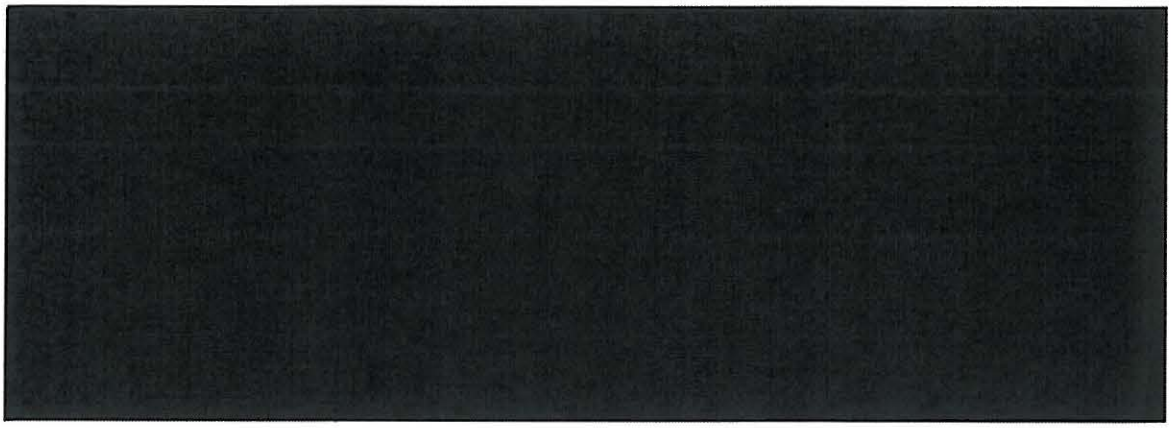
> If, in order to protect against an immediate threat to the national security, the NSA determines that it must take action in apparent departure from these procedures and that it is not feasible to obtain a timely modification of these procedures from the Attorney General and Director of National Intelligence, NSA may take such action and shall report that activity promptly to [the Department of Justice and the Office of the DNI].

[redacted]

As of the hearing on December 12, this departure provision had not been invoked. *Trans.* at 28. By the terms of this provision, any requirement of the procedures could be the subject of a "departure."[20] However, the government has explained that it anticipates that an emergency departure might be invoked in one of three contexts:

[redacted]

[20] Even in emergency circumstances, though, NSA "would continue to adhere to the statutory limitation that it could only direct surveillance at a target reasonably believed to be located outside of the United States." *Gov't Response* at 2.



The government intends that NSA's prompt notification of the activity conducted pursuant to an emergency departure would be in writing (either initially or following an oral notification), such that the propriety of such activity could be assessed in future reviews. Id. at 40. The departure from the procedures would be only as broad as necessary to respond to the immediate threat to national security, id. at 33-34, and would terminate once the immediate threat had receded. Id. at 36-37. If the government concluded that a broader or longer-lasting modification of the procedures was appropriate, it would revise the procedures accordingly and submit the revision to the FISC for review under § 1805c. Id. at 56-57.

The Court recognizes that it is difficult to anticipate in advance what steps would be most efficacious in responding to an emergency. The government has determined that a delegation to NSA of authority to depart from the procedures temporarily, when necessary to respond to an immediate threat to national security, and only when modification by the Attorney General and the DNI cannot be timely obtained, is a reasonable means of responding to emergencies. NSA is required to report such activity promptly to the Attorney General and the DNI, who may then take appropriate action if they do not believe that the departure is justified. Based on the government's

explanation of the intended functioning of the emergency departure provision, the Court finds, in reliance on the government's explanation, that this provision does not alter its general conclusion that the procedures satisfy the applicable review for clear error.

IV. Conclusion

For the reasons stated herein, the Court finds, in the language of 50 U.S.C. § 1805c(b) and consistent with the Court's interpretation of that provision in view of 50 U.S.C. §§ 1805b(a)(1) and 1805a, that the Government's determination under 50 U.S.C. § 1805b(a)(1) that the [redacted] procedures "are reasonably designed to ensure that acquisitions conducted pursuant to [§ 1805b] do not constitute electronic surveillance" is not "clearly erroneous." Accordingly, pursuant to § 1805c(c), it is hereby ORDERED that the continued use of such procedures is approved.

ENTERED this 15th day of January, 2008, regarding [redacted]

COLLEEN KOLLAR-KOTELLY
Judge, United States Foreign
Intelligence Surveillance Court

~~TOP SECRET//COMINT//ORCON,NOFORN//X1~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

[redacted]

ORDER

On August 17, 2007, the government filed a set of procedures with this Court pursuant to 50 U.S.C. § 1805C. Those procedures pertain to a certification by the Attorney General and the Director of National Intelligence, styled DNI/AG 105B Certification 07-01, filed under seal on August 10, 2007, pursuant to § 1805B(c). Under that certification, and following those procedures ("07-01 procedures"), the National Security Agency (NSA) acquires foreign intelligence information regarding [redacted]

[redacted]

These submissions provide the first occasion for Court review of such procedures under 50 U.S.C. § 1805C(b). Under that provision, the Court "shall assess the Government's determination . . . that [such] procedures are reasonably designed to ensure that acquisitions conducted pursuant to section 1805B do not constitute electronic surveillance. The court's review shall be limited to whether the Government's determination is clearly erroneous." Evidently, it is the government's view that acquisitions under the above-referenced procedures will not constitute electronic surveillance because they will be "directed at a person reasonably believed to be located outside of the United States," and therefore will be excluded from the definition of electronic surveillance by § 1805A.

Because [redacted] procedures are similar in many respects, the Court intends to consider all [redacted] procedures jointly for purposes of review under § 1805C(b).

~~TOP SECRET//COMINT//ORCON,NOFORN//X1~~

In furtherance of that consideration, it is hereby ORDERED as follows:

1. The government shall file supplemental briefing and information on the following questions, which the Court has identified as the principal issues for purposes of its review of these procedures under § 1805C(b):

(a) Under what circumstances is it envisioned that, under Part IV. of all [redacted] procedures, an "immediate threat to the national security" would require departure from the procedures? What provisions of the procedures would have to be disregarded in such circumstances in order to respond to such a threat? Is a delegation to NSA of authority to decide when it is justified to "depart" from these procedures consistent with statutory requirements?

(b) Footnote 1, page 1, of the 07-01 procedures appears to exempt from those procedures facilities "properly tasked for collection" under certain prior authorities from the 07-01 procedures. To what extent did that prior tasking involve a determination of the user's location under procedures comparable to those now before the Court? Are such facilities permanently exempted from all requirements of the 07-01 procedures? Or, for example, are they exempted from requirements for the initiation of collection, but are subject to post-initiation procedures (see subparagraph (c) below) designed to verify that the user of a facility is still outside of the United States?

(c) The procedures state that NSA will "routinely" undertake certain activities that together will constitute an "analysis designed to detect those occasions when a person who when targeted was reasonably believed to be located overseas has since entered the United States." [redacted]

(i) At what time intervals will each of the various steps be taken?

(ii) It appears that NSA may continue to regard a facility – [redacted] – as being used by a person outside of the United States, even after it becomes aware of indications that it may be used by someone in the United States. To what extent do these procedures embody a presumption that a user who is initially assessed to be outside of the United States remains outside of the United States, even if there are later indications to the contrary? If there is such a presumption, why is it reasonable?

(d) The procedures describe circumstances "where NSA seeks to acquire communications about the target," but "not to or from the target." [redacted] Does this acquisition involve the interception of one or more types of "about communications," as described at pages 12-14 of the Primary Order issued on May 31, 2007, in Docket No. [redacted]? Who is the "person from whom [NSA] seeks to obtain

foreign intelligence information" in this context? [redacted] May NSA acquire such communications, as long as it is reasonably believed that at least one party (sender or recipient) to the communication is outside of the United States? Or should the location of the sender be determinative?

(e) The procedures state that "information acquired by directing surveillance at a person not reasonably believed to be outside of the United States in a manner that constitutes electronic surveillance . . . shall be purged from NSA databases." [redacted] Does this mean that all records or copies of such information, in any form, shall be destroyed?

2. Some of the differences between the [redacted] procedures require no explanation (for example, [redacted] However, there are other differences in wording, the effect of which is uncertain.[1] To the extent that these differences in wording are intended to reflect a substantive difference in how the procedures are implemented, the government is directed to explain in its submission the differences in implementation and reasons therefor. To the extent that these differences in wording are not intended to reflect a substantive difference, but rather, e.g., reflect drafting refinements that took place after the submission of the 07-01 procedures, the government's submission shall so state, and shall include revised versions of the procedures to the extent necessary to make each set of procedures fully accurate and current.

3. The government shall make its submission, in conformance with paragraphs 1. and 2. above, on or before October 26, 2007.

SO ORDERED this 11th day of October, 2007, regarding [redacted]

Colleen Kollar-Kotelly

COLLEEN KOLLAR-KOTELLY
Judge, United States Foreign
Intelligence Surveillance Court

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[1] [redacted]

~~TOP SECRET//COMINT//ORCON,NOFORN//MR~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

GOVERNMENT'S RESPONSE TO
THE COURT'S ORDER OF OCTOBER 11, 2007

The United States of America, through the undersigned Department of Justice attorney, respectfully submits this response to the questions the Court posed in its Order dated October 11, 2007, in the above-captioned matter. ~~(S)~~

Pursuant to 50 U.S.C. § 1805C, the Government has filed [redacted] procedures used to determine that certain acquisitions of foreign intelligence information concern persons reasonably believed to be located outside of the United States and, therefore, do not constitute electronic surveillance. See 50 U.S.C. § 1805A ("Nothing in the definition of electronic surveillance under section 101(f) shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States.") These [redacted] procedures correspond to [redacted] certifications – captioned [redacted] respectively – authorizing the National Security Agency (NSA) to acquire foreign

~~TOP SECRET//COMINT//ORCON,NOFORN//MR~~

Classified by: Margaret A. Skelly-Nolen, Acting Counsel for Intelligence Policy, NSD, DOJ
Reason: 1.4(c)
Declassify on: 26 October 2032

intelligence information regarding various targets. In accordance with 50 U.S.C. § 1805C(b), the Court "shall assess the Government's determination . . . that [such] procedures are reasonably designed to ensure that acquisitions conducted pursuant to section 105B do not constitute electronic surveillance." This review is limited to whether the Government's determination is "clearly erroneous." Id. The following responses to the Court's questions are based primarily on information provided by NSA. ~~(S)~~

Question 1(a) Under what circumstances is it envisioned that, under Part IV of all [redacted] procedures, an "immediate threat to the national security" would require departure from the procedures? What provisions of the procedures would have to be disregarded in such circumstances in order to respond to such a threat? Is a delegation to NSA of authority to decide when it is justified to "depart" from these procedures consistent with statutory requirements? ~~(TS//SI//OC,NF)~~

Answer 1(a) Part IV of each set of procedures was inserted to allow for an emergency situation in which the Government must acquire foreign intelligence information on an emergency basis in order to protect against an immediate threat to the national security, but is unable to comply with the procedures at the time of the acquisition. For example, due to an emergency situation, the NSA analyst requesting that a facility be tasked may not [redacted] due to the emergency situation and the need for immediate collection of information. Under such circumstances, the Government would continue to adhere to the statutory limitation that it could only direct surveillance at a target reasonably believed to be located outside of the United States. ~~(TS//SI//OC,NF)~~

The Government believes this provision is consistent with statutory requirements because, as noted above, the Government will adhere to the statutory limitation in the Protect America Act of 2007 (PAA) in any case in which it departs from the procedures to protect against an immediate threat. Further, Part IV of the procedures requires that action under this provision only be taken in the event that obtaining a timely modification of the procedures from the Director of National Intelligence (DNI) and the Attorney General (AG) is not feasible. In addition, Part IV of the procedures requires prompt notification of NSA's departure from the procedures to the representatives of the DNI and AG. Accordingly, to the extent NSA has been delegated the authority to decide if a departure from the procedures is necessary, there will be an opportunity for the DNI and AG to review any such decision by NSA.

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

Question 1(b) Footnote 1, page 1, of the 07-01 procedures appears to exempt from those procedures facilities "properly tasked for collection" under certain prior authorities from the 07-01 procedures. To what extent did that prior tasking involve a determination of the user's location under procedures comparable to those now before the Court? Are such facilities permanently exempted from all requirements of the 07-01 procedures? Or, for example, are they exempted from requirements for the initiation of collection, but are subject to post-initiation procedures (see subparagraph (c) below) designed to verify that the user of a facility is still outside of the United States? ~~(TS//SI//OC,NF)~~

Answer 1(b) NSA determined that the users of facilities tasked for collection under docket numbers [redacted] and [redacted] were reasonably believed to be located outside the United States based on the same categories of information (i.e., [redacted] described in the 07-01 procedures. However, at the time the foreignness

[1] In docket number [redacted] telephone numbers and e-mail accounts tasked for collection were referred to as "selectors" rather than facilities. For ease of reference, telephone numbers and e-mail accounts tasked for collection under [redacted] are referred to herein as "facilities." ~~(TS//SI//OC,NF)~~

determination was made for each of those facilities tasked for collection under docket numbers [redacted] and [redacted] every database that is mentioned in the 07-01 procedures did not necessarily exist, or contain the same types of information. The fact that each of the facilities was presented to the Court in docket numbers [redacted] and [redacted] means that NSA reasonably believed that the facilities were being used outside the United States and that NSA had discovered no information indicating that the facilities were being used in the United States. However, NSA did not have in place, prior to the PAA, the formalized and repeatable pre-tasking procedures it has in place now with respect to such determinations. Most significantly, NSA had no requirement that such determinations be documented or that the information which formed the basis for the determinations be maintained at NSA in a way that could be retrieved and provided to those conducting oversight. Nor did NSA have any systematic post-tasking procedures to ensure that NSA became aware of any discrepancies between NSA's pre-tasking foreignness determination for a target and the target's actual location. ~~(TS//SI//OC,NF)~~

Facilities that had been tasked for collection under docket numbers [redacted] and [redacted] and are now tasked under the PAA are not permanently exempted from all requirements of the 07-01 procedures. Specifically, facilities initially tasked pursuant to footnote 1 of the 07-01 procedures are subjected to the same post-tasking procedures designed to verify that their location is outside of the United States and to notify NSA of any changes to their location as are other facilities. ~~(TS//SI//OC,NF)~~

Question 1(c) The procedures state that NSA will "routinely" undertake certain activities that together will constitute an "analysis designed to detect those occasions when a person who when targeted was reasonably believed to be located overseas has since entered the United States." [redacted] ~~(TS//SI//OC,NF)~~

Question 1(c)(i) At what time intervals will each of the various steps be taken? ~~(TS//SI//OC,NF)~~

Answer 1(c)(i) Electronic communications accounts/addresses/identifiers tasked pursuant to the procedures are all checked against the [redacted] database (as described in the procedures, [redacted] in order to try to detect whether a tasked electronic communications account/address/identifier has been used from a location inside the United States. The results of these checks are reviewed [redacted] ~~(TS//SI//OC,NF)~~

Telephone selectors are likewise processed [redacted] and the results are reviewed [redacted] for the purpose of attempting to verify the user's location.

[redacted]

[redacted]

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

[redacted]

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

Question 1(c)(ii) It appears that NSA may continue to regard a facility - [redacted] as being used by a person outside of the United States, even after it becomes aware of indications that it may be used by someone in the United States. To what extent do these procedures embody a presumption that a user who is initially assessed to be outside of the United States remains outside of the United States, even if there are later indications to the contrary? If there is such a presumption, why is it reasonable? ~~(TS//SI//OC,NF)~~

Answer 1(c)(ii) Once NSA determines that the user of a facility is reasonably believed to be outside the United States, it will presume that the user remains outside the United States, unless it becomes aware of indications to the contrary. The post-tasking procedures contained in Part I of the procedures, and also described in response to the Court's question 1(c)(i), are designed to alert NSA to any indications that the user is no longer outside the United States. However, there are cases in which information NSA receives may indicate a user is in the United States, but NSA may still reasonably believe, based on analysis of additional information in NSA's possession, that the user is located outside of the United States. For example, [redacted]

[redacted]

[redacted]

Question 1(d) The procedures describe circumstances "where NSA seeks to acquire communications about the target," but "not to or from the target." [redacted] Does this acquisition involve the interception of one or more types of "about communications," as described at pages 12-14 of the Primary Order issued on May 31, 2007, in Docket No. [redacted] Who is the "person from whom [NSA] seeks to obtain foreign intelligence information" in this context? [redacted] May NSA acquire such communications, as long as it is reasonably believed that at least one party (sender or recipient) to the communication is outside of the United States? Or should the location of the sender be determinative? ~~(TS//SI//OC,NF)~~

Answer 1(d) The acquisition "where NSA seeks to acquire communications about the target," but "not to or from the target" involves the interception of "about" communications as described at pages 12-14 of the Primary Order issued on May 31, 2007, in Docket No. [redacted] ~~(TS//SI//OC,NF)~~

The person from whom NSA seeks to acquire communications in such cases is the party to the communication who is reasonably believed to be located outside the United States. NSA may acquire such communications as long as it reasonably believes at least one party (sender or recipient) is outside of the United States, and the location of the sender of the communication should not be determinative. As noted in the procedures, in those cases where NSA seeks to acquire communications about the target that are not to or from the target, NSA will [redacted] in order to ensure that

the person from whom it seeks to obtain foreign intelligence information is located outside of the United States. ~~(TS//SI//OC,NF)~~

Question 1(e) The procedures state that "information acquired by directing surveillance at a person not reasonably believed to be outside of the United States in a manner that constitutes electronic surveillance…shall be purged from NSA databases." [redacted] Does this mean that all records or copies of such information, in any form, shall be destroyed? ~~(TS//SI//OC,NF)~~

Answer (1)(e) In the event NSA determined that it had "information acquired by directing surveillance at a person not reasonably believed to be outside of the United States in a manner that constitutes electronic surveillance," NSA would purge the information from its databases and take steps designed to ensure that all other records or copies of such information, in any form, were destroyed. Data collected by NSA under PAA authority is precisely labeled and controlled, and it is stored in a limited number of known, established electronic repositories. If required to purge the data, NSA analysts would provide the system administrators of these repositories with the precise identifying information for the data to be purged in order to pinpoint the specific data that resulted from the inappropriate collection, and would continue to follow up until the purge was completed. ~~(TS//SI//OC,NF)~~

In addition, NSA would determine whether anything from this collection had been disseminated and would take steps to delete intelligence reports from NSA databases, subsequently issuing a report cancellation notice to all customers who would have received the original report, requesting that they delete it from their own holdings. NSA analysts are trained and tested on the handling requirements for data collected pursuant to the PAA, including the conditions under which the data must be purged, and the requirement to destroy any hard copies that they have retained. NSA relies on

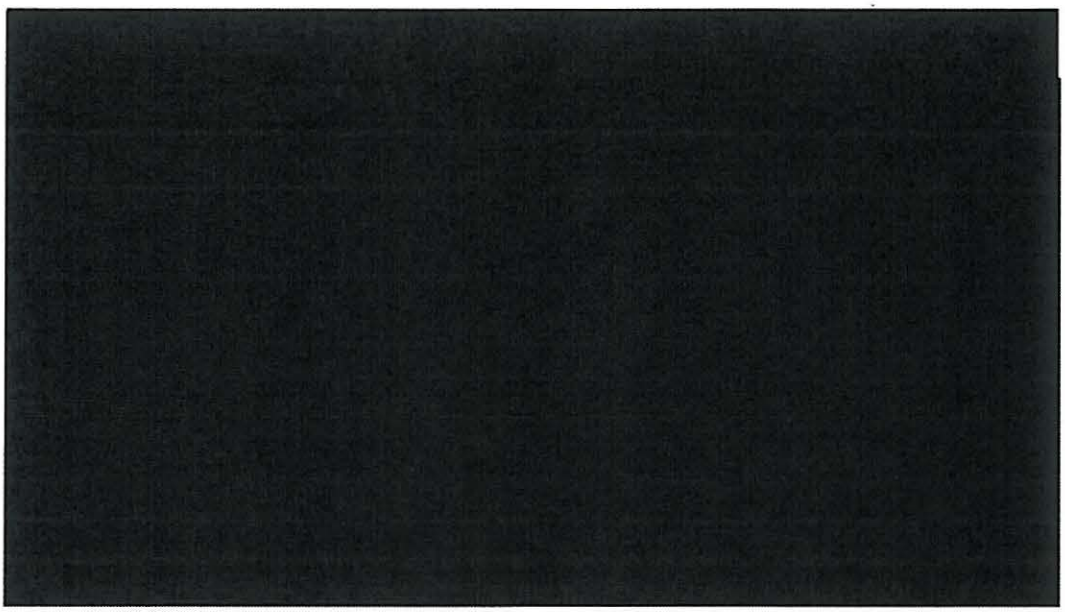
local managers, intelligence oversight officers, and the analysts who discover the problem selectors to ensure, to the extent possible, that these hard copies are destroyed. ~~(TS//SI//OC,NF)~~

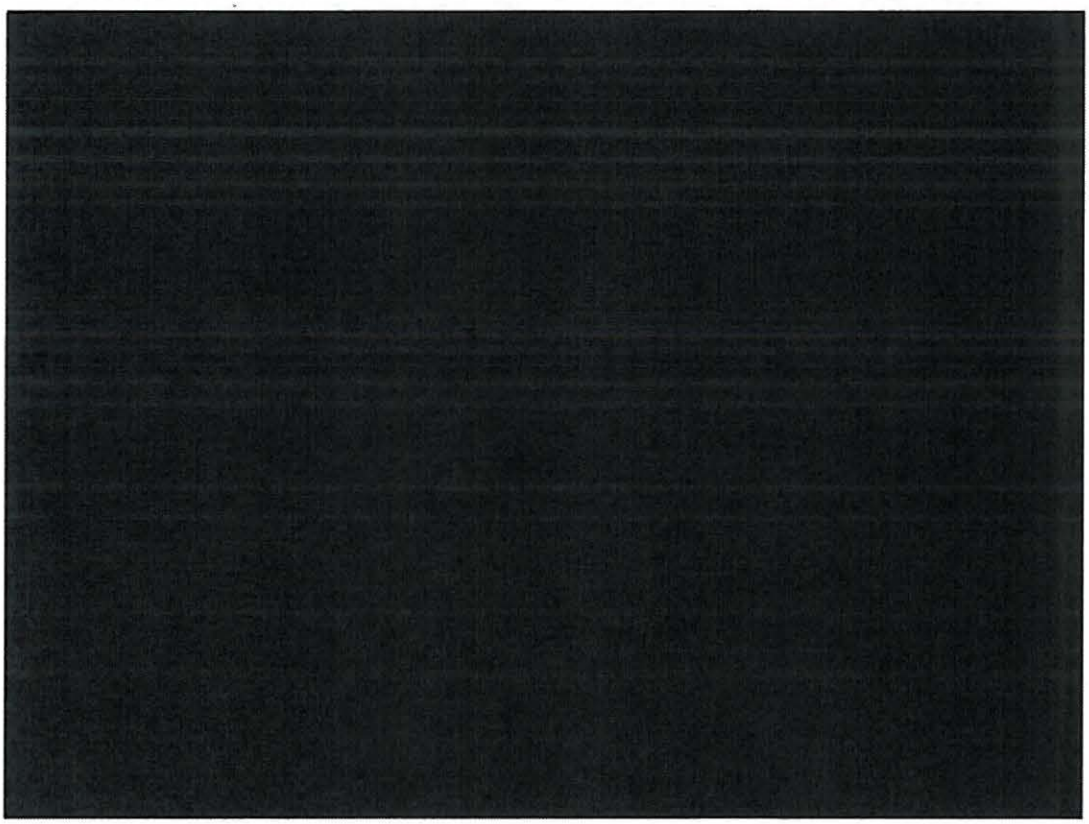
Question 2 Some of the differences between the [redacted] procedures require no explanation (for example, [redacted] However, there are other differences in wording, the effect of which is uncertain.[2] To the extent that these differences in wording are intended to reflect a substantive difference in how the procedures are implemented, the government is directed to explain in its submission the differences in implementation and reasons therefor. To the extent that these differences in wording are not intended to reflect a substantive difference, but rather, e.g., reflect drafting refinements that took place after the submission of the 07-01 procedures, the government's submission shall so state, and shall include revised versions of the procedures to the extent necessary to make each set of procedures fully accurate and current. ~~(TS//SI//OC,NF)~~

Answer 2 No substantive differences were intended among the procedures. The differences identified by the Court reflect subtle refinements that took place as the procedures for each certification were drafted and finalized. [redacted]

[redacted]

[2] [redacted]





As explained above, none of the differences in wording identified by the Court resulted from changes that were made to correct an inaccuracy or to make current

information that had become outdated. Therefore, the Government has not provided revised versions of the procedures because the procedures presented to the Court, as approved by the DNI and the AG, are accurate and current, notwithstanding these minor differences. ~~(TS//SI//OC,NF)~~

Respectfully submitted,

MATTHEW G. OLSEN
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[redacted]
Associate Counsel

[redacted]
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National Security Division
U.S. Department of Justice