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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: (b)(6)

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.

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02:05:41PM 18
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02:05:51PM 21
02:05:58PM 22
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MS. JEFFRESS: Your Honor, Amy Jeffress,
FISC Amicus.

THE COURT: All right. Thank you.

Any potential fact witnesses you may have here if
I have questions to ask, potentially, the FBI?

MR. EVANS: Your Honor, at this time we do have
several representatives from the FBI in the room with us.
We had not been anticipating, necessarily, presenting a fact
witness, but depending on whether the Court had relevant
questions, that's something that we can --

THE COURT: If I develop questions that you don't
answer and you want to turn to someone else to answer them,
then we'll have them sworn at that time. We'll hold off
until then.

All right. Well, I think that we will begin with
the Amicus and her report, and Ms. Jeffress, you'll want to
cover the other areas as well, but I'm obviously interested
in what you have developed as an issue in this FBI
minimization procedures and their appropriateness or not as
it affects the collection and dissemination of matters
related to crime and your position in that matter. So if
you can take the podium, please.

MS. JEFFRESS: Yes, good afternoon.

THE COURT: Thank you for your work on this
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
0 :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 1:38PM 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
Q 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
02:38:29PM 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
0 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 (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
0 :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)

03:03:09PM 21

03:03:12PM 22

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

03:06:53PM 1 the certifications in the near future to look forward on
0 :58PM 2 these matters. So we'll take a look at it, and let you all
03:07:01PM 3 know. Thank you again.

03:07:03PM 4 (Whereupon the hearing was
5 concluded at 3:07 p.m.)

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9 CERTIFICATE OF OFFICIAL COURT REPORTER

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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
CLERK

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."

~~SECRET//NOFORN~~

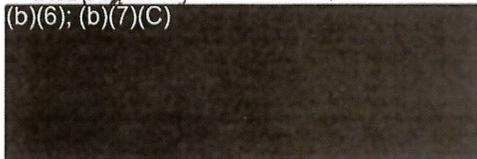
~~Classified by: Matthew G. Olsen, Deputy Assistant
Attorney General, NSD, DOJ
Reason: 1.4 (c)
Declassify on: 6 August 2033~~

~~SECRET//NOFORN~~

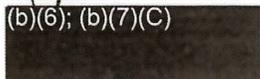
These guidelines have been adopted by the Attorney General, in consultation with the Director of National Intelligence, pursuant to subsection 702(f)(1) of the Act. (U)

Respectfully submitted,

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



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



National Security Division
United States Department of Justice

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