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



MEMORANDUM OPINION

These matters are before the Court on: (1) the Government's Ex Parte Submission of [REDACTED] and Related Procedures, Ex Parte Submission of Amended Minimization Procedures, and Request for an Order Approving [REDACTED] and Procedures, filed on [REDACTED] 2010 ([REDACTED] Submission") pursuant to 50 U.S.C. § 1881a(g); and (2) the Government's Ex Parte Submission of Amendment 1 to DNI/AG 702(g) [REDACTED] [REDACTED] and Ex Parte Submission of Amended Minimization Procedures, filed on [REDACTED] 2010 [REDACTED] Submission"). For the reasons stated below, the Court approves DNI/AG 702(g) [REDACTED] and the use of the targeting procedures and minimization procedures adopted by that [REDACTED]. The Court also approves the use

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of the minimization procedures adopted by amendment for DNI/AG 702(g) Certifications [REDACTED]

I. BACKGROUND

A. The Certifications and Amendments

The [REDACTED] Submission includes DNI/AG 702(g) [REDACTED] [REDACTED] which was executed by the Attorney General and the Director of National Intelligence (“DNI”). [REDACTED] filed by the government pursuant to Section 702 of the Foreign Intelligence Surveillance Act (“FISA” or the “Act”), 50 U.S.C. § 1881a. [REDACTED] certifications were submitted by the government and approved by the Court in [REDACTED] [REDACTED] (collectively, the “Prior 702 Dockets”).¹ Like the acquisitions approved by the Court in all of the Prior 702 Dockets, acquisitions under [REDACTED] are limited to “the targeting of non-United States persons reasonably believed to be located outside the United States.” [REDACTED]

More particularly, [REDACTED] the acquisition of foreign intelligence information [REDACTED]

[REDACTED] renews Attorney General and DNI authorization for acquisitions regarding [REDACTED] granted

¹ The Court’s Memorandum Opinions in the Prior 702 Dockets are incorporated by reference herein.

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by DNI/AG 702(g) [REDACTED] which was approved by the Court [REDACTED]

In addition to [REDACTED] the [REDACTED] Submission includes supporting affidavits by the Director of the National Security Agency (“NSA”), the Director of the Federal Bureau of Investigation (“FBI”), and the Director of the Central Intelligence Agency (“CIA”); two sets of targeting procedures, for use by the NSA and FBI respectively; and three sets of minimization procedures, for use by the NSA, FBI, and CIA, respectively.

As originally submitted [REDACTED] also included amendment [REDACTED] [REDACTED] that would allow information acquired under those prior certifications to be handled subject to the same NSA, FBI, and CIA minimization procedures that the government initially submitted for use under [REDACTED]. The effective date of those amendments, as well as of [REDACTED] was intended to be [REDACTED] 2010, or the date upon which the Court issued an order concerning the amendments of [REDACTED] [REDACTED] whichever was later. See [REDACTED]

Upon reviewing the [REDACTED] Submission, the Court ordered the government to file a memorandum of law that addressed two specific legal issues raised by the targeting and

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minimization procedures that had not previously been presented to the Court, as well as any other new issues raised by those procedures. Briefing Order issued on [REDACTED] 2010. In view of the 30-day period for the Court to consider the certifications and procedures under 50 U.S.C. § 1881a(i)(1)(B), the Court ordered the government to submit the memorandum no later than [REDACTED] 2010. *Id.* at 4. The government timely filed its Memorandum of Law on [REDACTED] 2010.

The Court then discussed the issues presented with representatives of the government on [REDACTED] 2010, at which time the Court identified certain concerns regarding the government's submissions. On [REDACTED], 2010, the Attorney General and the DNI executed two amendments regarding the [REDACTED] Submission, which were filed with the Court as part of the [REDACTED] Submission. These amendments have the effect of reverting to the use of targeting and minimization procedures previously approved by the Court in the context of prior certifications. See [REDACTED] Submission [REDACTED] at 3. The amendments are:

(1) Amendment 1 [REDACTED], which authorizes the use of the targeting and minimization procedures that were previously approved by the Court in [REDACTED] [REDACTED] instead of the targeting procedures and minimization procedures that were submitted as part of the [REDACTED] Submission.

(2) Amendment 2 [REDACTED] which provides that information acquired under those certifications will be handled subject to the minimization procedures that were previously approved by the Court in [REDACTED] [REDACTED] This amendment thereby supersedes

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Amendment 1 [REDACTED] under which the government would have applied the minimization procedures included in the [REDACTED] Submission.

Both of these amendments become effective on [REDACTED] 2010, or on the date that the Court issues an order concerning the amendments, whichever is later. [REDACTED] Submission, [REDACTED] at 4.

II. REVIEW [REDACTED]

The Court must review a certification submitted pursuant to Section 702 of FISA “to determine whether [it] contains all the required elements.” 50 U.S.C. § 1881a(i)(2)(A). The Court’s examination of [REDACTED] Submission, confirms that:

(1) [REDACTED] been made under oath by the Attorney General and the DNI, as required by 50 U.S.C. § 1881a(g)(1)(A), see [REDACTED] Submission, [REDACTED] at 5-6; [REDACTED] Submission, [REDACTED] at 5-6;

(2) [REDACTED] each of the attestations required by 50 U.S.C. § 1881a(g)(2)(A), see [REDACTED] Submission [REDACTED] at 1-2 [REDACTED] Submission [REDACTED] at 1-3;

(3) as required by 50 U.S.C. § 1881a(g)(2)(B), [REDACTED] accompanied by the applicable targeting procedures² and minimization procedures;³

² See [REDACTED] Submission, NSA Targeting Procedures and FBI Targeting Procedures.

³ See [REDACTED] Submission, NSA Minimization Procedures, FBI Minimization Procedures, (continued...)

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

(5) [redacted] an effective date for the authorization in compliance with 50 U.S.C. § 1881a(g)(2)(D), see [redacted] Submission [redacted] at 4.⁵

The Court therefore finds that [redacted] all the required elements. 50 U.S.C. § 1881a(i)(2)(A).

III. REVIEW OF THE AMENDMENTS TO [redacted]

Regarding Amendment 2 [redacted] under the judicial review procedures that apply to amendments by virtue of § 1881a(i)(1)(C), the Court must review each of the amended certifications “to determine whether the certification contains all the required elements.” 50 U.S.C. § 1881a(i)(2)(A). The Court has previously determined that Certifications

[redacted] as amended by Amendment 1 thereto, contained all the required elements. See [redacted]

³(...continued)
and CIA Minimization Procedures.

⁴ See [redacted] Submission, Affidavit of Gen. Keith B. Alexander, U.S. Army, Director, NSA (attached [redacted] at Tab 1); Affidavit of Robert S. Mueller, III, Director, FBI (attached [redacted] at Tab 2); Affidavit of Leon E. Panetta, Director, CIA (attached [redacted] at Tab 3).

⁵ The statement described in 50 U.S.C. § 1881a(g)(2)(E) is not required in this case because there has been no “exigent circumstances” determination under Section 1881a(c)(2).

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September 4, 2008 Memorandum Opinion at 6-7; [REDACTED]

[REDACTED] Like the prior certifications, Amendment 2 to DNI/AG 702(g) Certifications [REDACTED] was executed under oath by the Attorney General and the DNI, as required by 50 U.S.C. § 1881a(g)(1)(A), and submitted to the Court within the time allowed under 50 U.S.C. § 1881a(i)(1)(C).⁶ See [REDACTED] Submission [REDACTED] at 5-6. Pursuant to Section 1881a(g)(2)(A)(ii), the latest amendment includes the attestations of the Attorney General and the DNI that the accompanying NSA, FBI, and CIA minimization procedures meet the statutory definition of minimization procedures and have been approved by this Court in prior dockets. *Id.* at 3. The latest amendment also includes an effective date that complies with 50 U.S.C. § 1881a(g)(2)(D) and § 1881a(i)(1). All other aspects of Certifications [REDACTED] – including the further attestations made therein in accordance with § 1881a(g)(2)(A), the targeting procedures submitted therewith in accordance with § 1881a(g)(2)(B),⁷ and the affidavits executed in support thereof in accordance with § 1881a(g)(2)(C) – are unaltered by the latest amendment.

Accordingly, the Court finds that Certifications [REDACTED] each contain all the required elements. 50 U.S.C. § 1881a(i)(2)(A).

⁶ Amendment 2 was approved by the Attorney General and DNI on [REDACTED] 2010, and submitted to the Court on [REDACTED] 2010.

⁷ [REDACTED]

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IV. REVIEW OF THE TARGETING AND MINIMIZATION PROCEDURES

The Court is required to review the targeting and minimization procedures to determine whether they are consistent with the requirements of 50 U.S.C. § 1881a(d)(1) and (e)(1). See 50 U.S.C. § 1881a(i)(2)(B) and (C); see also 50 U.S.C. § 1881a(i)(1)(C) (providing that amended procedures must be reviewed under the same standard). Section 1881a(d)(1) provides that the targeting procedures must be “reasonably designed” to “ensure that any acquisition authorized under [the certification] is limited to targeting persons reasonably believed to be located outside the United States” and to “prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States.” Section 1881a(e)(1) requires that the minimization procedures “meet the definition of minimization procedures under section 1801(h) or 1821(4) of [the Act]” In addition, the Court must determine whether the targeting and minimization procedures are consistent with the requirements of the Fourth Amendment. 50 U.S.C. § 1881a(i)(3)(A).

The government represents that the targeting and minimization procedures filed in the [REDACTED] Submission are identical to the corresponding procedures that were submitted to the Court in [REDACTED] 1. See [REDACTED] Submission, [REDACTED] at 3; [REDACTED] at 1-2. The Court has reviewed each of these sets of procedures and confirmed that is the case. In fact, the documents submitted are copies of the procedures that were initially filed on [REDACTED] 2009, [REDACTED]

[REDACTED] The Court

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found [REDACTED] that the targeting and minimization procedures were consistent with the requirements of 50 U.S.C. § 1881a(d)-(e) and with the Fourth Amendment. [REDACTED]

When considering these targeting and minimization procedures [REDACTED] the Court found that implicit in the requirement that the government must maintain procedures that satisfy the statutory standards is a requirement that it must comply with those procedures. [REDACTED] at 11. Consequently, the Court examined important non-compliance incidents that had arisen during the previous year. *Id.* at 11-22. Specifically, the Court considered two particular deficiencies in NSA's implementation of the targeting and minimization procedures: NSA's failure to effectively purge from its databases § 1881a information that was required to be purged under the minimization procedures, and NSA's substantial backlog in conducting post-targeting review of selectors for which NSA had indications that the selector may have been used from within the United States. *Id.* at 13-22. After reviewing the enhanced measures that the government adopted to remedy these problems and to ensure prospective compliance with the applicable procedures, the Court found that those measures adequately addressed NSA's purging and post-targeting review problems and provided a basis for again finding that the targeting and minimization procedures were consistent with the requirements of 50 U.S.C. § 1881a(d)-(e) and with the Fourth Amendment. Since the Court

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entered its [REDACTED] the government has reported that it continues to use its “Master Purge List” to locate, identify, and purge information improperly retained in NSA databases, and has adopted additional measures to ensure that such information is not retained in the future. See Letters from [REDACTED] Office of Intelligence, U.S. Department of Justice [REDACTED]

The government has recently reported a separate post-tasking review problem, in which NSA did not provide to Department of Justice (DOJ) oversight personnel the documentation for [REDACTED] decisions to task selectors. See Letter from Kevin J. O’Connor, Office of Intelligence, U.S. Department of Justice, [REDACTED] at 2. These [REDACTED] decisions were each followed within 24 hours by a countermanding decision to de-task the selector, such that NSA’s [REDACTED] process to identify new tasking decisions failed to identify them as actions to report to DOJ. *Id.* Given the rapid de-tasking of these selectors, the government suggests that it is “unlikely . . . that earlier review . . . would have prevented any compliance incidents.” *Id.* That assessment discounts the possibility that such review may have identified lapses in training or implementation of the targeting procedures, the redress of which could have avoided similar problems in the future. Nevertheless, taking into account the small number of cases for which this problem has been identified relative to the total number of tasking decisions,⁸ the limited duration of any improper taskings among these [REDACTED] cases, and the

8 [REDACTED]

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government's report that NSA's [REDACTED] process for identifying new taskings has been improved, see [REDACTED] the Court concludes that this most recent disclosure does not undermine the basis for prior approval of the targeting and minimization procedures.

The Court therefore finds that the targeting and minimization procedures included in the [REDACTED] 2010 submission are consistent with the requirements of 50 U.S.C. § 1881a(d)-(e) and with the Fourth Amendment, for the reasons set forth in Judge McLaughlin's Memorandum Opinion [REDACTED]. See [REDACTED]. It is clear, however, that NSA's efforts to comply with the terms of FISA authorizations, under Section 1881a⁹ and otherwise,¹⁰ remain a work in progress, and the Court will continue to monitor the state of compliance, both as part of its oversight function regarding prior approvals, see 50 U.S.C. § 1803(i), and insofar as it may bear on requests for future authorizations.

V. CONCLUSION

For the foregoing reasons, the Court finds, in the language of 50 U.S.C. § 1881a(i)(3)(A), that [REDACTED] submitted in the above-captioned dockets "in accordance

⁹ In addition to the incidents described herein, see, e.g., 90-day Report Concerning Compliance Matters Under Section 702 of FISA, [REDACTED]

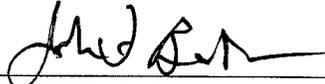
¹⁰ See, e.g., Docket No. PR/TT [REDACTED] Memorandum Opinion issued on [REDACTED] at 9- [REDACTED] (continuous non-compliance from 2004 to 2009 with pen register/trap-and-trace orders issued under 50 U.S.C. § 1842); [REDACTED] Compliance Notices filed on [REDACTED] (non-compliance with orders issued under 50 U.S.C. § 1805, resulting in unauthorized electronic surveillance of [REDACTED] for periods ranging from one to three years).

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with [Section 1881a(g)] contain[] all the required elements and that the targeting and minimization procedures adopted in accordance with [Section 1881a(d)-(e)] are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States.” Orders approving DNI/AG 702(g) [REDACTED] [REDACTED] which authorize the use of the minimization procedures approved herein, are being entered contemporaneously herewith.

ENTERED this [REDACTED] 2010, in [REDACTED] [REDACTED].



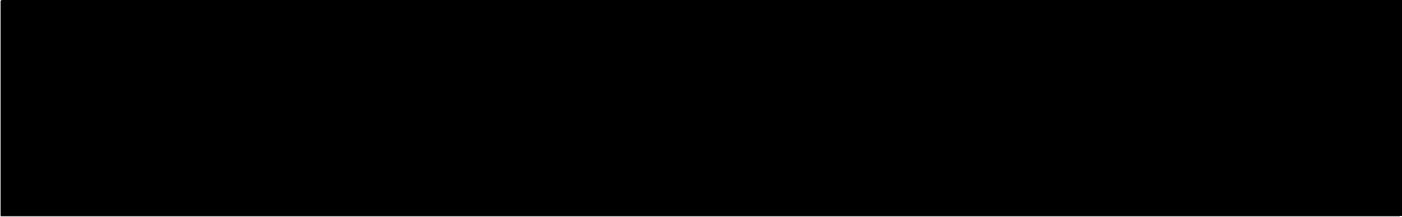
JOHN D. BATES
Judge, United States Foreign
Intelligence Surveillance Court

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1. [REDACTED] Deputy Clerk,
FISC, certify that this document
is a true and correct copy of
the original [REDACTED]
June 13, 20 [REDACTED]
[REDACTED] exempt
under
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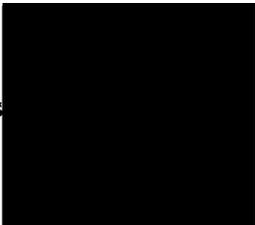


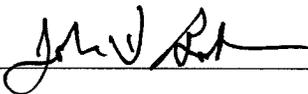
ORDER

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

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

ENTERED this [redacted] 2010.





JOHN D. BATES
Judge, United States Foreign
Intelligence Surveillance Court

I, [redacted] Deputy Clerk,
FISC, certify that this document
is a true and correct copy of
the original. [redacted]
June 13, 20 [redacted]

exempt
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