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UNITED STATES

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

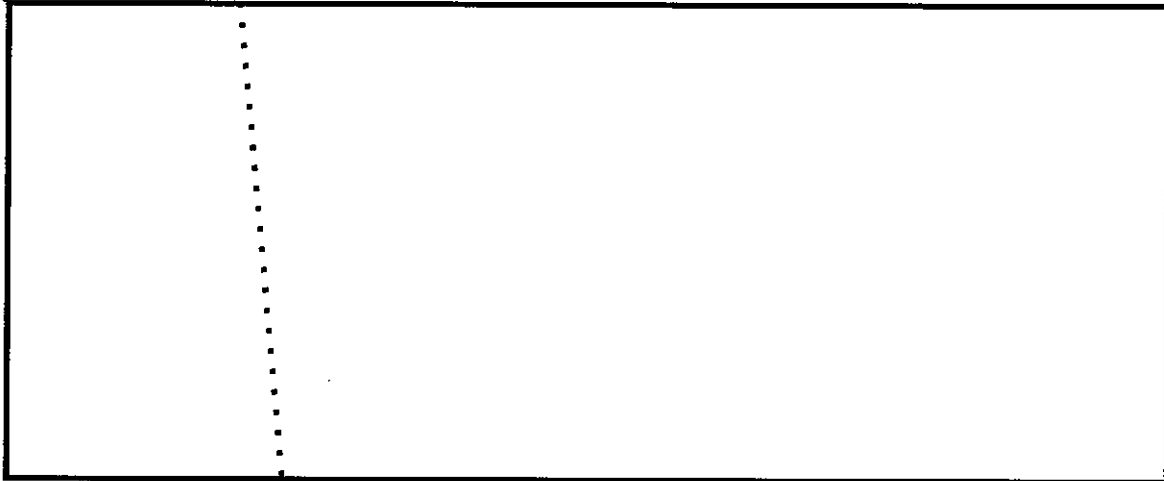
FOREIGN INTELLIGENCE SURVEILLANCE COURT

2018 MAR 26 AM 11:40


LEEANN FLYNN HALL
CLERK OF COURT

WASHINGTON, D.C.

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(U) GOVERNMENT'S RESPONSE TO THE COURT'S ORDER OF MARCH 20, 2018

~~(S//NF)~~ The United States respectfully submits this response as required by the Order of the Foreign Intelligence Surveillance Court (FISC or Court) issued on March 20, 2018, in the above-captioned docket numbers (hereinafter "the March 20 Order"). That Order directs the government to file a written submission explaining whether an extension of the time limit for the Court to complete its review of and issue orders concerning proposed  (hereinafter "the 2018 Certifications"), and the accompanying targeting, minimization, and querying

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procedures, with the assistance of amicus curiae would be consistent with national security. As discussed below, the government respectfully submits that if the Court were to appoint an amicus curiae to assist the Court in its consideration of the 2018 Certifications, an extension of the Court's 30-day deadline to conduct its review would be consistent with national security.

(U) Procedural Background

~~(S//NF)~~ In mid-February 2018, the government submitted to the Court in draft form certain documents associated with the proposed 2018 Certifications. Included among these documents were draft targeting procedures to be used by the National Security Agency (NSA) and Federal Bureau of Investigation (FBI), draft minimization procedures to be used by the NSA, FBI, Central Intelligence Agency (CIA), and National Counterterrorism Center (NCTC), and draft querying procedures to be used by the NSA, FBI, CIA, and NCTC under the 2018 Certifications. The proposed 2018

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Certifications would reauthorize

[REDACTED]

[REDACTED]

"the 2016 Certifications"), which currently expire

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~~(S//NF)~~ On or before March 27, 2018, the government intends to file with the Court the 2018 Certifications; targeting, minimization, and querying procedures; and a memorandum addressing changes to those procedures as compared to those submitted with the 2016 Certifications. In accordance with 50 U.S.C. § 1881a(j)(1)(B) and (3), the

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Court is required to conduct its review and issue an order and written statement of the reasons for the order within 30 days after section 702(h) certifications are submitted to the Court in final form. This deadline, however, may be extended "as necessary for good cause in a manner consistent with national security." 50 U.S.C. § 1881a(k)(2).

~~(S//NF)~~ The USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, enacted on June 2, 2015 (USA FREEDOM Act), that amended 50 U.S.C. § 1803 created a framework for the participation of amicus curiae in proceedings before the Court. Specifically, the USA FREEDOM Act requires that, consistent with statutory requirements that the Court "act expeditiously or within a stated time," the Court "shall appoint" a designated amicus curiae to assist in considering "any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such an appointment is not appropriate." 50 U.S.C. § 1803(j)(2)(A). In addition, the Court "may appoint an individual or organization to serve as amicus curiae . . . in any instance as such court deems appropriate." *Id.* § 1803(j)(2)(B).

~~(S//NF)~~ The March 20 Order stated that the Court is considering appointment of an amicus curiae for its review of the 2018 Certifications and stated that "[w]ithout an extension of time under section 702(k)(2), however, it would be difficult, to say the least, for an amicus to provide meaningful assistance." March 20 Order at 3. The March 20 Order further directs that the government submit a written response by March 26, 2018,

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explaining "whether an extension of time – and, if so, what length an extension of time – for the Court to review the 2018 Certifications and procedures would be consistent with national security, taking into account that once the 2018 Certifications are filed with the Court, the 2016 Certifications and procedures would remain in effect for the duration of an extended review period pursuant to section 702(j)(5)(B)." *Id.* at 3.

(U) Response

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~~(S//NF)~~ This Court has recognized that "[t]he government's national security interest in conducting acquisitions pursuant to Section 702 'is of the highest order of magnitude.'" [REDACTED]

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. As noted by the Court, however, were the Court to issue orders under 50 U.S.C. § 1881a(k)(2) extending the time limits for its review of the certifications so that the Court could appoint amicus curiae, the authorizations in the 2016 Certifications that are being reauthorized would, by

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operation of 50 U.S.C. § 1881a(j)(5)(B), continue despite their expiration dates.¹ The government respectfully submits that this result would be consistent with national security because it would allow the government's acquisition of vitally important foreign intelligence information under the 2016 Certifications to continue pending the completion of the Court's review of the 2018 Certifications.

~~(S//NF)~~ As will be described in the memorandum submitted in support of the 2018 Certifications, which the government intends to file with the Court on or before March 27, 2018, the 2018 Certifications and attached targeting procedures do not expand the government's targeting authority as compared with what is already authorized by the 2016 Certifications. Therefore, the government assesses that a reasonable delay in the approval and implementation of the 2018 Certifications would be consistent with national security.²

¹~~(S//NF)~~ The government's intended filing of the 2018 Certifications on or before March 27, 2018, will comport with 50 U.S.C. § 1881a(j)(5)(A), which requires that if the government seeks to reauthorize an authorization issued under 50 U.S.C. § 1881a(a), the government must, to the extent practicable, submit to the Court a new certification executed under 50 U.S.C. § 1881a(h), with supporting documents, at least 30 days before the expiration of the certification being reauthorized. If a new certification is filed in accordance with 50 U.S.C. § 1881a(j)(5)(A), 50 U.S.C. § 1881a(j)(5)(B) provides that the existing certification being reauthorized shall remain in effect, notwithstanding its expiration date, until the Court issues an order under 50 U.S.C. § 1881a(j)(3) with respect to the new certification.

²~~(S//NF)~~ The government notes that under different circumstances, such as the submission of a new, additional certification or an important change to the targeting, minimization, or querying procedures that provides the government with expanded authorities, an extension may not be consistent with national security.

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~~(S//NF)~~ In 2011, this Court, first at the government's request and then *sua sponte*, ultimately extended its time period for review pursuant to the provision currently codified at 50 U.S.C. § 1881a(k)(2) for a total of approximately 153 days. This extension was accomplished [REDACTED]

[REDACTED] Additionally, in 2015, in order to permit participation of an amicus curiae, the Court extended its time period for review of [REDACTED] [REDACTED] for 90 days.⁶ In each of these cases, the Court considered all relevant circumstances, including appropriate durations based upon the complexity of the issues and posture of its review, before issuing each order. Consistent with this past practice and based upon its understanding of current circumstances, the government assesses that an extension of 90 days with respect to the 2018 Certifications would be consistent with national security. The government respectfully submits that in determining whether a further extension would be consistent with national security, all relevant

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³ (S) [REDACTED]

⁴ (S) [REDACTED]

⁵ (S) [REDACTED]

⁶ (S) [REDACTED]

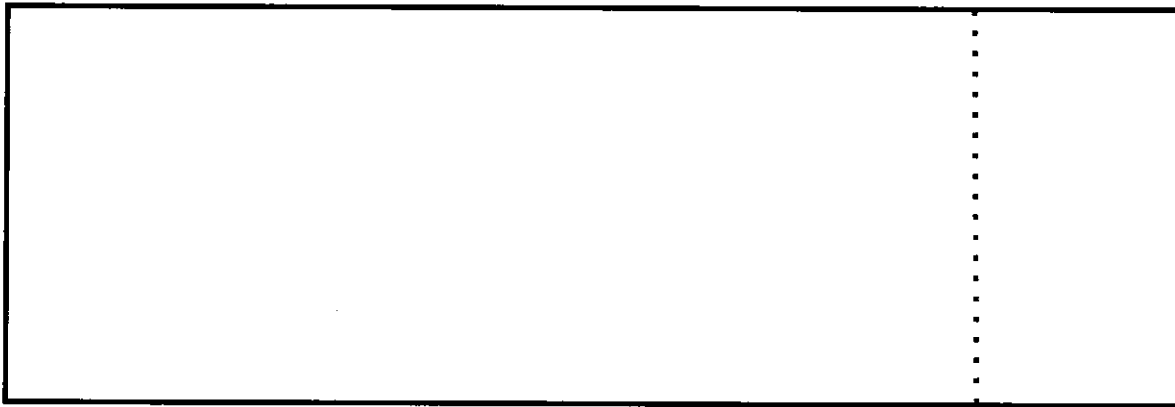
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circumstances, including complexity of the issues, posture of the Court's review and length of any additional proposed extension would need to be assessed at that time.⁷

~~(S//NF)~~ Should the Court choose to extend the time limits for its review of the 2018 Certifications, pursuant to 50 U.S.C. § 1881a(k)(2), the government would request, consistent with prior practice, that the Court issue a Notice of Extension



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⁷ ~~(S//NF)~~ Although the government assesses that an extension would be consistent with national security, the government notes that extensions are not without costs.



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(U) Conclusion

~~(S//OC/NF)~~ For the foregoing reasons, the government respectfully submits that should the Court issue orders under 50 U.S.C. § 1881a(k)(2) extending the time limit for the Court to complete its review of, and issue orders under 50 U.S.C. § 1881a(j)(3) concerning, the proposed 2018 Certifications, such an extension would be consistent with national security. Additionally, the government respectfully requests that the Court issue a Notice of Extension consistent with any such orders.

Respectfully submitted,

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By:

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Office of Intelligence
National Security Division
U.S. Department of Justice

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