

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

~~TOP SECRET//SI//ORCON//NOFORN~~

UNITED STATES  
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

[Redacted]

(b) (1)  
(b) (3)-50 USC 3024(i)

Washington, D.C.  
May 23, 2019  
11:30 a.m.

Docket No.

[Redacted]

TRANSCRIPT OF PROCEEDINGS  
HELD BEFORE THE HONORABLE CABRANES, TALLMAN, SENTELLE FOREIGN  
INTELLIGENCE SURVEILLANCE COURT OF REVIEW

APPEARANCES:

b6, 7C per NSD  
[Redacted]

DOJ/NSD  
DOJ/NSD/OI  
DOJ/NSD/OI

Jonathan Cedarbaum  
Amy Jeffress  
John Cella  
J. Bradford Wiegmann

Amici  
Amici  
Amici  
DOJ/NSD

(b) (3)-P.L. 86-36  
(b) (6)

[Redacted]

ODNI  
NSA

b3, 6 per CIA  
b6, 7C per FBI  
[Redacted]

~~TOP SECRET//SI//ORCON//NOFORN~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT STAFF: Karl Raney

COURT REPORTER: Janice E. Dickman, RMR, CRR, CRC  
Official Court Reporter  
U.S. Courthouse, Room 6523  
333 Constitution Avenue, NW  
Washington, DC 20001  
202-354-3267

Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided transcription. May 23, 2019.

(b) (1)  
(b) (3) - 50 USC 3024 (i)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

⋮

THE COURTROOM DEPUTY: The case before the Court is

[Redacted]

Would everyone please state your names for the record.

[Redacted] 6, 7C per NSD

[Redacted] 6, 7C per NSD

from the

Department of Justice.

[Redacted] 6, 7C per NSD

from the Department of

Justice.

[Redacted] b3, 6, per CIA

----- [Redacted]

National

Security Agency.

MR. WIEGMANN: Brad Wiegmann, Department of Justice.

[Redacted] 6, 7C per FBI

for the Federal Bureau of

Federal Investigation.

[Redacted] b6, 7C per FBI

FBI.

[Redacted] b6, 7C per FBI

FBI.

[Redacted] 6, 7C per FBI

FBI.

MR. CEDARBAUM: Jonathan Cedarbaum, from Wilmer, Hale, amicus curiae.

MS. JEFFRESS: Amy Jeffress from Arnold and Porter, also amicus curiae.

MR. CELLA: John Cella from Arnold and Porter, amicus.

THE COURTROOM DEPUTY: Thank you.

JUDGE CABRANES: Good morning. As you see, this is

(b) (3) - P.L. 86-36  
(b) (6)

1 an unusual invention, that we have our law clerks next to us,  
2 ready to whisper in our ear, if necessary. But we hope this  
3 will provide a sense of informality. But, nevertheless, hope  
4 you'll use the lectern.

5 Having said that, I -- these are important matters  
6 and to the extent that anyone who is arguing wishes to pause  
7 and consult with a colleague, you should not hesitate in the  
8 least. We want to make sure that you get it right and that we  
9 get it right. Thank you.

10 [REDACTED] Thank you, Your Honor, and good morning.  
11 May it please the Court. I'm [REDACTED] from the Department of  
12 Justice here for the United States.

13 If possible, Your Honor, I was hoping to reserve five  
14 minutes for rebuttal.

15 JUDGE CABRANES: Of course.

16 [REDACTED] Thank you. The Foreign Intelligence  
17 Surveillance Court was wrong to conclude that the FBI's  
18 querying and minimization procedures are deficient under FISA  
19 and the Fourth Amendment. Contrary to the Court's conclusion,  
20 the querying procedures are consistent with the recordkeeping  
21 provision added to FISA last year by Congress and now set forth  
22 in Subsection 702(f)(1)(B). And the FBI's minimization  
23 procedures are consistent both with FISA's definition of  
24 minimization procedures and with the Fourth Amendment.

25 Turning first to the recordkeeping provision. The

1 plain language of that provision, viewed in light of the  
2 relevant statutory context -- and if the Court elects to  
3 consider it, the legislative history -- makes clear that the  
4 provision is intended to codify an aspect of existing  
5 oversight-based practice, and that requires no change in the  
6 FBI's historical recordkeeping practices, including its  
7 practice of keeping records of all query terms used in 702  
8 context without distinguishing on the basis --

9 JUDGE SENTELLE: 702 requires a record of queries in  
10 the case of U.S. persons, does it not?

11 [REDACTED] 6, 7C per NSD Yes, sir.

12 JUDGE SENTELLE: How can it be a record of that fact  
13 if that fact does not appear in the document you're claiming is  
14 a record?

15 [REDACTED] b6, 7C per NSD Starting first with the plain language,  
16 Your Honor --

17 JUDGE SENTELLE: I'm talking about the plain  
18 language. When we say "record," how is it a record of that  
19 fact, or that piece of data, if it doesn't mention that fact or  
20 piece of data?

21 [REDACTED] 6, 7C per NSD Because what the language requires, Your  
22 Honor, is that whenever a query is run and that query involves  
23 the U.S. person query term, that the query term itself be  
24 recorded. And it is --

25 JUDGE SENTELLE: It also requires that every query

1 involving a U.S. person -- a record has to be made of that,  
2 does it not? Am I wrong about that?

3 [REDACTED] 6, 7C per NSD That's not how we read it. We think the  
4 literal language --

5 JUDGE SENTELLE: How do you read -- read it to me.

6 [REDACTED] 6, 7C per NSD Section 702 (f)(1)(B) requires procedures  
7 that ensure that a record is kept of each United States person  
8 query term that is --

9 JUDGE SENTELLE: Exactly. A record kept of each  
10 United States query term. Now how is there a record of that if  
11 it doesn't mention United States query?

12 [REDACTED] 6, 7C per NSD Again, it's just because the query term  
13 itself needs to be recorded and not the United States person  
14 status.

15 JUDGE SENTELLE: Why does the statute specifically  
16 single out that category of query and say you have to make a  
17 record of it, unless it means that you have to make a record of  
18 that fact?

19 [REDACTED] 6, 7C per NSD Your Honor, I think it's helpful to  
20 consider Congress's knowledge of the FBI's preexisting  
21 practices here. And Congress is aware --

22 JUDGE SENTELLE: I'm not sure that I see how that's  
23 relevant to the meaning of the words. The words mean the same  
24 thing now that they did then, or that they will when the people  
25 who, with the prior history of the FBI, did. What we need to

1 know is what that statute says. Because Congress meaningfully  
2 said, and I'm not -- I'm not understanding how Congress or why  
3 Congress would have used those terms, United States term unless  
4 they meant for a particular record to be kept.

5 [REDACTED] 6,7C per NSD Your Honor, again, the literal language  
6 requires that the query term be recorded, and it does -- it  
7 requires individual specific records. It requires a record of  
8 each United States person query term. It doesn't require a  
9 list or a compilation, it doesn't say --

10 JUDGE SENTELLE: No, it should be kept in a general  
11 list with a designation saying that this was a U.S. query term.  
12 But shouldn't there be something to comply with all the words  
13 of the statute and not just the word "query"?

14 [REDACTED] 6,7C per NSD I think we do comply with it, Your Honor,  
15 by treating all query terms effectively as if they're United  
16 States person query terms, which has been the FBI's practice,  
17 consistent with its mission, domestic-focused mission, all of  
18 the FBI's query-related practices, not just the recordkeeping;  
19 hold all query terms to the higher standard.

20 The standard, same standard applies substantively.  
21 The FBI requires that personnel -- and the other agencies do,  
22 too -- only run a query, whether or not the query involves a  
23 United States person query term, if the query is reasonably  
24 likely to return foreign intelligence information or evidence  
25 of a crime.

1 JUDGE TALLMAN: 6, 7C per NSD let me see if I can come at  
2 it from a different perspective. My understanding from the  
3 record is that the Bureau has a system deficiency in its  
4 current system that does not permit it to keep a record of all  
5 query terms that return information on U.S. persons. Am I  
6 misunderstanding the record?

7 6, 7C per NSD I think -- the systems would certainly  
8 have to be reconfigured and readjusted. And my colleagues can  
9 correct me if I'm wrong, but I believe that you're correct.  
10 The existing systems would have to be changed or replaced in  
11 order for the FBI to be able to record every instance.

12 JUDGE TALLMAN: Well, at least I think since 2016,  
13 when Director Comey acknowledged at a pen-and-pad briefing with  
14 the press, that there was a deficiency that was largely a  
15 system problem, isn't that what he was referencing?

16 6, 7C per NSD That may be part of it, Your Honor. I'm  
17 not intimately familiar with that comment. But, certainly, I  
18 mean, stepping back, it has been the Bureau's practice, going  
19 back years, to treat all query terms -- both for recordkeeping  
20 purposes and just for the purpose of running a query -- on the  
21 same basis. That's because the Bureau's mission is domestic.  
22 Many of the people that it's running queries about are in fact  
23 U.S. persons.

24 JUDGE TALLMAN: Are you taking the position that  
25 every query that is run is a query involving a United States



1 person?

2 [REDACTED] 6, 7C per NSD That's the effect of the FBI's practice.  
3 No, we know that some of them are not. But, the practice has  
4 long been to treat them all the same and to devote the FBI's  
5 resources to running queries and national security, sort of  
6 mission focus, rather than trying to -- because the standard  
7 doesn't depend in any way -- oversight doesn't depend in any  
8 way on U.S. person status.

9 JUDGE TALLMAN: I guess the problem I'm having is if  
10 there is a deficiency -- maybe it's a software problem, maybe  
11 it's an incompatible problem because you have [REDACTED] b1, 3 per FBI  
12 databases to query. I understand the practical problems of  
13 trying to run a search across all of these different databases,  
14 which were not designed and developed at the same time and may  
15 not play very well with one another. I get that. But I am  
16 concerned from an oversight standpoint, how is it that the IG  
17 or Congress or the NSD, [REDACTED] 6, 7C per NSD section, how are they  
18 able to perform effective oversight if they can't tell which  
19 searches were -- returned U.S. persons information?

20 [REDACTED] 6, 7C per NSD It's an important distinction, Your Honor,  
21 between -- first of all, between running a query based on a  
22 U.S. person query term and a query that returns information  
23 probable concerning a U.S. person. It's not the case that  
24 every U.S. person query term, when run against Section 702,  
25 will return --

1 JUDGE TALLMAN: I understand that. But the problem  
2 that I'm trying to focus in on is the inability, given current  
3 system capabilities, in order to answer the question that the  
4 statute seems to command. And I read the statute the same way  
5 that Judge Sentelle reads it, that you need to develop a system  
6 whereby a record is kept of each United States person query  
7 term used for a query.

8 Is it your position that that language is ambiguous?  
9 Because if we conclude that the statutory command is clear, the  
10 Supreme Court has told us that's the end of our inquiry, we  
11 don't look at legislative history.

12 b6, 7C per NSD It's our view, Your Honor, in fact, that  
13 the statute, literal terms of the statute require only that the  
14 query term be recorded and that a couple pieces of context -- a  
15 couple important pieces of legislative context militate against  
16 reading it to require differentiation along the lines Your  
17 Honor suggested.

18 And those pieces of context include, number one,  
19 Section 603 of FISA, which requires the government generally to  
20 count and record each year the number of U.S. person query  
21 terms that are used in the 702 context. And since that  
22 provision was added to FISA in 2015, I believe, the FBI has  
23 been exempted. And when Congress reenacted this provision --  
24 or, enacted this recordkeeping provision, it in fact retained  
25 and expressly tweaked --

1 JUDGE TALLMAN: If they're exempted from reporting  
2 publicly, is it your position that the Bureau is also exempted  
3 from reporting to Congress or to the NSD or to the IG the true  
4 number of U.S. person query terms?

5 [6, 7C per NSD] Our position is that this provision  
6 doesn't require that. It doesn't discuss counting. It's  
7 intended to facilitate, in our view, oversight along the lines  
8 that oversight has been conducted by the FBI. There's no hint  
9 in the statute itself or in the legislative history -- again,  
10 if the Court chooses to look at it -- that Congress believes  
11 that the existing oversight process within the FBI for query  
12 terms was lacking.

13 JUDGE TALLMAN: They did require, the statute, did  
14 they not, that a report be made of any technical deficiencies  
15 that were located through oversight activities? So,  
16 presumably, so that those deficiencies could be corrected.

17 [6, 7C per NSD] Right. We think that provision, like the  
18 provision I just mentioned, militates against reading the  
19 provision to require differentiation because it shows, at a  
20 minimum, that Congress understood that the Bureau had  
21 difficulty in counting the records and --

22 JUDGE SENTELLE: Doesn't the first statute you  
23 referred to, thereby exempting the Bureau, indicate Congress  
24 said they would exempt the Bureau when they wanted the Bureau  
25 exempted? I think it militates against you, doesn't it? If

1 they wanted the Bureau exempted, they said so in the provision,  
2 they wanted them exempted. When they didn't, on this one, then  
3 they must not have wanted to exempt them.

4 [REDACTED] 6, 7C per NSD Well, no exemption is required here, Your  
5 Honor, because this statute doesn't actually say anything about  
6 counting or tallying queries.

7 JUDGE SENTELLE: It says: To record each U.S. person  
8 query, right?

9 [REDACTED] 6, 7C per NSD That is correct, Your Honor, but --

10 JUDGE SENTELLE: You read it to me a few moments ago.

11 [REDACTED] 6, 7C per NSD It's our view that it simply requires a  
12 recordation of the term itself and doesn't speak to what  
13 happens to the other query -- or, query terms that the Bureau  
14 uses.

15 JUDGE CABRANES: Let me approach it from still  
16 another perspective, but it's the same concern. We have been  
17 told that the FBI is in a singular position, as opposed to the  
18 other agencies. Maybe in a layman's way you can explain to me,  
19 to us, what the problem is. What is it that this decision, if  
20 fully implemented, the decision of the FISA Court is fully  
21 implemented, in what sense -- just exactly how does that pose a  
22 problem for you? And secondly, and relatedly, why does it pose  
23 no such problem for the other agencies?

24 [REDACTED] 6, 7C per NSD I think the difference is largely one of  
25 scale. Again, it has to do with the FBI's domestic focus. It

1 runs far more queries involving U.S. person query terms. Of  
2 course, we don't know the numbers, but we know overall, as the  
3 director's declaration notes, that [b3, 7E per FBI] queries each  
4 year in the aggregate are run, [b3, 7E per FBI] on average  
5 each day. Many of those are likely U.S. person query terms.

6 JUDGE CABRANES: How does that compare to other  
7 agencies? Just to give us a sense of the scale of all of this.

8 [6, 7C per NSD] By comparison, according to the director's  
9 declaration in the record, [b3, 7E per FBI]

10 [b3, 7E per FBI] [b3, 7E per FBI] [b1 and 3 per ODNI] [b1 and 3]

11 [b1 and 3 per ODNI] And so --

12 JUDGE CABRANES: In comparison with [b3, 7E per FBI] by the  
13 FBI?

14 [6, 7C per NSD] [b3, 7E per FBI] queries in total. I don't  
15 want to say necessarily [b3, 7E per FBI] U.S. persons -- it may be,  
16 but we don't know the exact numbers for sure from the FBI.

17 JUDGE SENTELLE: If you get the record of what  
18 Congress asked for, you would know, wouldn't you?

19 [6, 7C per NSD] Well, no, Your Honor. I think the  
20 director's declaration makes clear that in many cases -- again,  
21 these queries are run at various stages in the investigation,  
22 including early on -- agents won't and the analysts won't have  
23 full enough information to make an informed judgment about the  
24 U.S. person status. And even if they've got information  
25 available --

1 JUDGE SENTELLE: If you know it to be a U.S. person  
2 term, that's not a problem. If you don't know, then it's still  
3 not a problem because you really don't have to make that record  
4 then.

5 [REDACTED] 6, 7C per NSD Sure. But that goes to what it means to  
6 know it. And for some, sure, you may already have enough  
7 information that you know for sure. But for many, you just may  
8 not know -- all you might have is a particular phone number or  
9 email address and you may not know much more about that person.

10 JUDGE SENTELLE: Then you wouldn't have to keep that  
11 record because it wouldn't be a record of a U.S. person term.  
12 I mean, it might turn out to be, but at the time you made the  
13 query it wouldn't be a query of a U.S. person term, would it?

14 [REDACTED] 6, 7C per NSD I guess, I note that the statute doesn't  
15 say known, you are presumed U.S. person query term. It says  
16 U.S. person query term.

17 And getting back to Your Honor's question about the  
18 problem with this, current oversight, as Congress was aware,  
19 for the FBI, again, doesn't distinguish on the basis between --  
20 all queries are subject to review on the same basis. And it is  
21 in fact the case that many non-U.S. person query terms in fact  
22 return information of or concerning U.S. persons. And you can  
23 easily envision a number of scenarios when that happens.

24 So it's clearly not the case that Congress wanted to  
25 focus oversight solely on U.S. person query terms. It's just

1 hard to see what Congress would have in mind. We believe this  
2 is just intended to codify the existing practice.

3 JUDGE CABRANES: Let me go back again to the apparent  
4 difficulties that the FBI would face in adopting this  
5 procedure. That's certainly your point, right? That it  
6 would -- it would create difficulties of some kind.

7 **6, 7C per NSD** That's part of our point, although that's  
8 secondary to what we just believe the statute says and what it  
9 requires.

10 JUDGE CABRANES: We're beyond that. We want to know  
11 what the problem is. What is the big deal? There has to be a  
12 big deal which has brought you here. That is that the FBI  
13 faces some obstacle or burden in adopting a procedure analogous  
14 to or similar to those of the other agencies. And I understand  
15 the question of volume, but explain to us why it is so  
16 difficult to keep even just a -- what one might regard as a  
17 nominal check -- a checklist, so that every time you make  
18 such -- since you're willing to hold all queries to the same  
19 high standard, why not simply have something available which  
20 would -- which would cover both U.S. persons and non-U.S.  
21 persons? But you would have a list.

22 **6, 7C per NSD** The problem, Your Honor, is that that  
23 would really serve no purpose, other than fulfilling the one  
24 reading of the statute.

25 JUDGE CABRANES: Yes.

1 [REDACTED] 6, 7C per NSD Without aid oversight --

2 JUDGE CABRANES: Hold on a second. That's right. It  
3 would have that function. Why -- assume for the argument only,  
4 the hypothetical, that you are required to keep some such  
5 record or that we would agree with the FISA Court that such a  
6 record be maintained; what, again, is the big deal about it?  
7 Why can't it be done with relatively modest checklist-type  
8 records?

9 [REDACTED] 6, 7C per NSD Because, Your Honor, it adds to a number,  
10 a high number. This is a very complex program with many, many  
11 requirements. And so it's easy to look at any one new  
12 requirement that's imposed and say, well, that one is not a big  
13 deal. But in the aggregate these requirements kind of stack up  
14 and there's obviously a balance that needs to be struck.  
15 And --

16 JUDGE CABRANES: But for this particular requirement.

17 [REDACTED] 6, 7C per NSD Would distract as -- Oh, I'm sorry, Your  
18 Honor.

19 JUDGE CABRANES: Go on.

20 [REDACTED] 6, 7C per NSD As the director's declaration states --  
21 and I can't say it better than the director did -- that the  
22 risk and the concern here is this will try to decide and  
23 determine U.S. person status. In many cases -- not in every  
24 case, in some cases it will be straightforward, but in many  
25 cases will result in agents and analysts having to divert their



1 attention and their resources away from the mission for the  
2 purpose of making what --

3 JUDGE CABRANES: Their attention would be diverted  
4 for the purpose of differentiating between non-U.S. persons and  
5 U.S. persons, right?

6 [REDACTED] 6, 7C per NSD Yes, sir.

7 THE COURT: But if the standard that you suggested is  
8 a uniform standard, maybe that's not such a big deal, maybe  
9 it's just -- maybe you're checking every one. Or is that  
10 appropriate?

11 [REDACTED] 6, 7C per NSD That's effectively what the FBI does,  
12 because it keeps a record of every single query. And that's --  
13 we believe that the Congress was not intending to change  
14 exiting practice.

15 There's one other piece of statutory context that I  
16 wanted to mention here, and that's section (f)(2), which is  
17 also 702.2 (sic), which was also added by the Reauthorization  
18 Act last year. That provision, which requires for the first  
19 time the FBI to obtain a FISC order on a probable cause showing  
20 whenever FBI personnel want to review the contents returned in  
21 response to a U.S. person query that's run for purposes of  
22 retrieving evidence of the crime unrelated to law enforcement,  
23 there Congress very clearly --

24 JUDGE CABRANES: Crime unrelated to law enforcement.

25 [REDACTED] 6, 7C per NSD I'm sorry, unrelated to foreign

1 intelligence information. I misspoke, sir. There Congress  
2 spoke clearly -- not that there's a clear statement rule, but  
3 by comparison, Congress's very detailed provision unmistakably  
4 changed an element of the FBI's querying and related practice.  
5 It mandated a change.

6 Now the government -- and it doesn't come up very  
7 often, but Congress, nevertheless, spoke very clearly in  
8 changing what was required in that context. By contrast, the  
9 language of (f)(1)(B) respectfully, we believe, is flexible  
10 enough to accommodate both the preexisting practices of the FBI  
11 and the distinct practices of the other agencies. And that's  
12 an area where one would have expected Congress to have spoken  
13 even clearly since, unlike the scenario in (f)(2), which maybe  
14 comes up once or twice or three times a year, recordkeeping  
15 requirements apply thousands of times every day. And we  
16 shouldn't lightly presume, in the absence of any indication  
17 that Congress thought that there was a problem, that this  
18 provision was intended to work a change. It's really a  
19 solution in search of a problem.

20 If I could -- I'm not sure, Karl, how much time I  
21 have left.

22 MR. RAINEY: You're fine. You have five minutes and  
23 then you have your rebuttal five minutes.

24 6.7C per NSD Unless there are further questions, can I  
25 move on to the second issue?

1 JUDGE TALLMAN: I do have one off-the-record  
2 question, and you may have to confer with 6.7C per FBI and his  
3 staff. If the Bureau has known since 2016 there was a  
4 technical system problem, what steps have been taken in the  
5 last three years to correct it?

6 6.7C per NSD If I could answer that on rebuttal, Your  
7 Honor. But I'm not sure it has to do with, kind of, the  
8 specific -- I'll answer it on rebuttal, but --

9 JUDGE CABRANES: Answer it now. It's not that  
10 urgent --

11 6.7C per NSD The reason why the FBI chooses to apply  
12 the same standard to all queries, U.S. person queries, or using  
13 U.S. persons terms or non-U.S. person query terms, there's not  
14 a deficiency, that's just --

15 JUDGE TALLMAN: The deficiency, as I understood it  
16 from the director's prior remarks publicly, was the inability  
17 to say conclusively, with regard to a specific inquiry, that  
18 this involves a U.S. person. Isn't that the problem? And so  
19 then the -- if that's the case, then what steps are being  
20 taken -- to reprogram computers or buy new systems -- in order  
21 to get a better handle on how many U.S. persons --

22 6.7C per NSD I'm actually not sure that the Bureau or  
23 the government has seen this as a problem. Again, it's always  
24 been the practice of the Bureau to apply the same standard  
25 across the board. And so there's just been no purpose

1 in tracking --

2 JUDGE TALLMAN: When the head of the agency says  
3 there's a system problem, I mean, that seems to me to be an  
4 admission that we got a problem.

5 [REDACTED] 6, 7C per NSD Let me get the context on that, Your  
6 Honor. I apologize, I'm just not familiar with the context of  
7 that statement, and I'm sure my colleagues would be able to  
8 help me with it.

9 JUDGE CABRANES: While you're up now, perhaps you  
10 could turn to the letter of March 6, 2019, as you addressed it  
11 to Miss Hall as the Clerk of Court. And in that letter you  
12 draw our attention to the opening --

13 [REDACTED] 6, 7C per NSD Oh, this is the new one -- yes, sir.

14 JUDGE CABRANES: You draw our attention to your  
15 opening brief at page 57, et seq., concerning the revised FBI  
16 querying procedures regarding categorical batch queries.

17 [REDACTED] 6, 7C per NSD Yes, sir.

18 JUDGE CABRANES: Which you say, quote, which  
19 represent the greatest compliance risk identified by the FISC,  
20 right?

21 [REDACTED] 6, 7C per NSD That was our reading of the FISC opinion,  
22 yes.

23 JUDGE CABRANES: FISC. Okay. So you bring to our  
24 attention that you have a revised FBI query procedure which can  
25 improve your compliance in this respect. Would you describe

1        what that revised FBI querying procedure is? To put it another  
2        way, how is it different from the unrevised FBI querying  
3        procedure?

4        [REDACTED] 6, 7C per NSD        So, Your Honor, if you take a look at the  
5        FBI's querying procedures, and in particular, page 235 of the  
6        appendix.

7                JUDGE CABRANES: Bear with us a moment.

8        [REDACTED] 6, 7C per NSD        Sure.

9                JUDGE CABRANES: Don't worry about your time, you'll  
10        be all right, I assure you.

11        [REDACTED] 6, 7C per NSD        On page 235, Your Honor, paragraph 3, at  
12        the top of that page is a new provision that didn't -- that  
13        appeared for the first time in this set of procedures. This  
14        is -- by revised, we're referring to changes from the initial  
15        set of procedures that the FISC reviewed in read-copy form and  
16        orally told the government it had issues with.

17                JUDGE CABRANES: Now, this has to do with getting the  
18        advice of counsel at some stage, right?

19        [REDACTED] 6, 7C per NSD        Yes, sir.

20                JUDGE CABRANES: All right. So why don't you go on  
21        and explain this to us a little bit.

22        [REDACTED] 6, 7C per NSD        So this was aimed at -- and again, it's  
23        not -- it's not a provision that's meant to apply with ironclad  
24        precision; it's meant to channel many of these large-scale  
25        queries through an attorney approval process in order to at

1       least, when contents are to be reviewed, in order to make sure  
2       the standards are being appropriately applied.

3               It was rolled out in connection with training and  
4       additional guidance on both the application of the query  
5       standard in general and its application in the context of these  
6       large scale queries. Both of those had been, obviously, issues  
7       that the FISC had expressed serious concern about. So this  
8       provision, together with the revised guidance, was an effort to  
9       add an extra layer of protection for many, but not all, of  
10      these large scale queries.

11             JUDGE CABRANES: In your view, this revised procedure  
12      adequately addresses the FISC Court's concern with regard to  
13      categorical batch queries?

14             6.7C per NSD   By itself? We don't rely on it by itself.  
15      It is part of the remedy that we have adopted, which also  
16      includes training, again, on application of the query standard  
17      itself. As we note in our brief, oversight review of the  
18      incidents that the FISC -- many of the incidents the FISC  
19      itself and some others revealed that some FBI personnel were  
20      under the impression that the query standard could be applied  
21      as long as they had a purpose of acquiring foreign intelligence  
22      information.

23             JUDGE CABRANES: You've suggested in this letter and  
24      in your remarks just now that these revised querying procedures  
25      effectively respond to the FISC Court's decision to a very

1 large extent, right?

2 [REDACTED] 6,7C per NSD That is part of our answer. And we also  
3 rely largely on the fact that in our -- with respect -- in our  
4 view, the FISC failed to pay adequate heed to the rest of the  
5 procedures. These provisions, both the query standard and this  
6 categorical batch query provision, are only one part of a  
7 multilayered framework of protections.

8 JUDGE CABRANES: Forget your objections to the FISC  
9 Court's decision. Just assume for the sake of discussion that  
10 the FISC Court's decision is the law and you are meant to apply  
11 it. You're saying in this correspondence that your response is  
12 a revised querying procedure regarding batch queries and that  
13 that response has accomplished what?

14 Again, don't fight with the hypothetical, just tell  
15 us how it solves -- how it solves, or largely solves the  
16 problem identified by the FISC Court.

17 [REDACTED] 6,7C per NSD It's really the second piece of what I  
18 would call a three-part remedial plan that was adopted. The  
19 first was training on the core -- as the FISC noted and as we  
20 reported, there appeared to be some fundamental  
21 misunderstanding about the query standard itself across the  
22 board. So the way to fix that was to issue new guidance, which  
23 was done; to clarify what the reasonable likelihood standard  
24 means, both in the context of your run-of-the-mill individual  
25 queries and in the context of this these batch queries; to note

1 the other restrictions on these batch queries, and then to  
2 clarify, on the face of the querying procedures -- I may be on  
3 the same page we referred to -- actually, the page before --

4 Anyway, the query standard was clarified to make it  
5 crystal clear that all queries need to be reasonably likely to  
6 retrieve foreign intelligence information. Guidance, more  
7 importantly, for your line personnel -- because they're not  
8 holding these procedures when they're doing it, they're relying  
9 on guidance and training -- also included clarified and, kind  
10 of, elaborated discussion of the query procedure and how it's  
11 supposed to apply.

12 The categorical batch query thing was a piece added,  
13 kind of on top of that, just to give an extra layer of  
14 protection, again, for some of these larger scale queries, to  
15 require an attorney become involved, at least in some of the  
16 cases. It's not meant to apply in every single case and  
17 it's --

18 JUDGE CABRANES: But your letter indicates that this  
19 modification of the procedures represent or address the  
20 greatest compliance risk identified by the FISC, right?

21 6, 7C per NSD Yes.

22 JUDGE CABRANES: So, I know this is a very rough  
23 estimate, but if all of the risks are 100 percent, what  
24 percentage of that 100 percent would you imagine or guess  
25 involves categorical batch queries? Any general sense of the



1 proportion of the problem?

2 [REDACTED] 6, 7C per NSD I would hesitate to put a number on it. I  
3 can tell you that individual queries are far more common than  
4 categorical queries.

5 JUDGE CABRANES: The reason I ask, of course, is that  
6 your letter itself says it represents the greatest compliance  
7 risk identified by the FISC. I'm simply asking to what extent  
8 is that accurate?

9 [REDACTED] 6, 7C per NSD Right. And what we mean by that, just  
10 because of the large number of query terms involved, the risk  
11 that one mistake can result in a greater intrusion, assuming  
12 that results are returned, those results involve U.S. person,  
13 information concerning U.S. persons, and FBI personnel actually  
14 review the results.

15 Of course, I note that in the first instance that's  
16 cited in the letter, and the first incident that's described in  
17 the Court's opinion, which involved [REDACTED] 3, 7E per FBI query terms,  
18 there are instances when either no query results are returned,  
19 or if they are returned, they're never looked at by a person.  
20 And it's our view that, just to be clear, not every categorical  
21 batch query or every improper query, on an individual basis,  
22 results in a meaningful intrusion for that reason.

23 JUDGE TALLMAN: So are these queries essentially  
24 machine analytic queries, as opposed to a human analyst making  
25 an individual query of an individual data source?

1 [REDACTED] 6, 7C per NSD My understanding is they're all human --  
2 they're judgments by an individual analyst, and they can [REDACTED] 3, 7E per  
3 [REDACTED] 3, 7E per FBI run these larger scale queries, which are called  
4 categorical queries, and when they only have one crosscut  
5 justification for such a query, that's a categorical batch.  
6 But it's done manually.

7 JUDGE TALLMAN: I assume that the analyst or the  
8 agent inputs various search terms, but then runs, let's say, a  
9 string of search terms across multiple systems. Is that what  
10 you mean by a categorical batch query?

11 [REDACTED] 6, 7C per NSD The categorical batch query -- [REDACTED] 3, 7E per FBI  
12 [REDACTED] 3, 7E per FBI is used to run these large-scale  
13 queries. And my understanding, my layman's understanding of  
14 how that works is that [REDACTED]  
15 [REDACTED] 3, 7E per FBI  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED] 3, 7E per FBI But still a human being has to  
19 make the judgment that the query standard is met, or in the  
20 case of a categorical batch query, that the standard is met and  
21 that the additional parameters, overbreadth, etcetera, are  
22 complied with.

23 JUDGE CABRANES: I understand you're not -- you don't  
24 view yourself as an expert on these things, so you can imagine  
25 how we feel. But let me just -- maybe you can just describe

1       how this provision to which you've drawn our attention on  
2       querying procedures, which at pages 234 and 235 of the  
3       appendix, just give us an example how it would work. Because  
4       now we've introduced lawyers, you've introduced them in the  
5       battlefield and now we've introduced them here. Somehow  
6       there's going to be a reference to a lawyer. Just walk us  
7       through what such a -- what such a moment in the life of an FBI  
8       agent or a team would look like under these provisions.

9       [REDACTED] 6, 7C per NSD

9       [REDACTED] So for a categorical query in particular  
10      or for --

11                JUDGE CABRANES: For the -- yes, for the kind of  
12      revised FBI querying procedures regarding categorical batch  
13      queries to which you refer in your opening brief at page 57 and  
14      which have -- and to which you've directed us to these two  
15      provisions in the appendix.

16      [REDACTED] 6, 7C per NSD

16      [REDACTED] So, I'll try to use the same example that  
17      we used with the FISC, which is: Suppose the FBI agent gets  
18      reporting, and it's reliable reporting -- we don't have to  
19      worry about lies, it's reliable reporting -- [REDACTED]

20      [REDACTED] 3, 7E per FBI  
21      [REDACTED]  
22      [REDACTED]  
23      [REDACTED]  
24      [REDACTED]  
25      [REDACTED]

1 JUDGE CABRANES: That's all the agent knows.

2 [REDACTED] 6, 7C per NSD That's all the agent knows.

3 JUDGE CABRANES: Somewhere in this large group of  
4 people there's somebody who's doing something nefarious.

5 [REDACTED] 6, 7C per NSD [REDACTED] 3, 7E per FBI [REDACTED]

6 [REDACTED]

7 [REDACTED] 3, 7E per FBI  
8 [REDACTED] 3, 7E per FBI  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]

12 [REDACTED] they would pick up the phone  
13 and call their field counsel, or headquarters, whichever -- and  
14 get this -- get a lawyer in the cyber law branch or the chief  
15 division counsel's office, and they would say, hey, I'm  
16 planning to run this query and here's the basis.

17 And I believe how it works is they would explain in  
18 that email why they believe that the standard is met. And they  
19 would either get approval --

20 JUDGE CABRANES: And that approval would be oral?

21 [REDACTED] 6, 7C per NSD I know there's writing. I don't know  
22 whether the writing has to be both ways. But, it's my  
23 understanding that this is done in writing and -- am I correct  
24 about that?

25 [REDACTED] 6, 7C per NSD Documented.

(b) (1)  
(b) (3) - 50 USC 3024 (i)

1 [REDACTED] 6, 7C per NSD Has to be documented. So the approval --  
2 JUDGE CABRANES: Bear with me one second.  
3 [REDACTED] 6, 7C per NSD Sure.  
4 JUDGE CABRANES: FBI personnel --  
5 [REDACTED] 6, 7C per NSD Yes --  
6 JUDGE CABRANES: Excuse me. FBI personnel would  
7 obtain approval from an attorney from either the chief division  
8 counsel's office or national security and cyber law branch. So  
9 this putative agent is scrambling, [REDACTED] 3, 7E per FBI  
10 [REDACTED] 3, 7E per FBI and he now seeks to obtain approval from an  
11 attorney, right?  
12 [REDACTED] 6, 7C per NSD Yes.  
13 JUDGE CABRANES: And that's probably going to be done  
14 by email or some such?  
15 [REDACTED] 6, 7C per NSD It could be done by email.  
16 JUDGE CABRANES: Or by voice?  
17 [REDACTED] 6, 7C per NSD It could be done by voice.  
18 JUDGE CABRANES: How is the approval then recorded,  
19 if at all?  
20 [REDACTED] 6, 7C per NSD Well, the next sentence says: Approvals  
21 to review the content returned by such query. So this would  
22 happen after -- I'm sorry. I've misspoken. The person could  
23 run the query without any attorney approval. It's the review  
24 of the contents that triggers the written -- or, the approval  
25 requirement. And before reviewing the contents of

1       communications returned by that query there would have to be an  
2       approval, and that approval would include a written  
3       justification for the queries, the name of the approving  
4       official, and the duration of the approval.

5               JUDGE CABRANES: Okay. That's --

6               6, 7C per NSD       Again -- oh, I'm sorry.

7               JUDGE CABRANES: And again, how much of the total --  
8       we don't really know how much -- although you do describe it as  
9       the greatest compliance risk identified by the FISC, we don't  
10      quite know what the proportion is to -- if we think of the  
11      whole universe of risks?

12              6, 7C per NSD       Right. And I apologize if that language  
13      was somewhat inartful, but it was just meant to communicate  
14      that as a category, when you're dealing with one query and one  
15      decision that involves many terms, it stands to reason there's  
16      just a greater risk. So results can have a -- a bad query can  
17      have a greater impact on privacy.

18              But, again, I just want to emphasize, I would  
19      encourage the Court to consider these procedures, including  
20      these remedial measures which we adopted in good faith. And we  
21      have every interest in addressing problems like this that arise  
22      and that are crosscutting issues. We want to address them, and  
23      we believe we have adopted a solution that is reasonably  
24      designed to improve things, particularly when it's viewed in  
25      light of all the other protections that are in place.

1           Again, the results of any one of these queries can  
2           only be reviewed, like any other FISA, on reliable information  
3           by people with a legitimate work-related reason, who have been  
4           appropriately trained, and only for the limited purpose, in the  
5           first instance, of determining whether it constitutes or  
6           reasonably appears to be foreign intelligence information to be  
7           necessary to understand foreign intelligence information or  
8           evidence of a crime. If that standard isn't met, no further  
9           analytic or investigative use can be made of the information.

10           There are even tighter restrictions on the  
11           dissemination of information. It has to at least meet that  
12           standard. And then depending on the kind of information  
13           involved, the purpose of the dissemination and the identity of  
14           the recipient, there are even tighter controls.

15           So the point is, Your Honor, that while we take these  
16           incidents very seriously and we believe we've undertaken  
17           remedial measures that are likely to reduce the likelihood of  
18           errors going forward, there are backstops in place that we  
19           believe, despite the errors, make the procedures that we  
20           submitted reasonable on their face. They strike the  
21           appropriate balance both required under the minimization  
22           definition and the Fourth Amendment, between U.S. person's  
23           privacy on the one hand and the government's interest in  
24           obtaining, producing and disseminating foreign intelligence  
25           information on the other.

1           JUDGE CABRANES: And I know that -- I'll just have  
2 one final question. We're happy to see counsel here from the  
3 various other agencies of the intelligence community. And I  
4 guess we have to assume or we should assume that the interest  
5 asserted in behalf of the FBI are the interests that are shared  
6 by the other agencies; that is, they would like you to be able  
7 to continue whatever it is you're doing.

8           **6, 7C per NSD** If you're asking, Your Honor, whether the  
9 other agencies support the FBI's position, I presume so. I  
10 haven't explicitly asked them. They're interested, obviously,  
11 because they're here.

12           JUDGE CABRANES: No one has suggested to you from any  
13 of the other parts of the intelligence community that there are  
14 ways in which you can solve your problem without the -- the  
15 concerns that you state? I understand that they have many  
16 fewer queries and all of that, but I just want to make sure  
17 that we're speaking with the executive -- the intelligence  
18 community is speaking with one voice.

19           **6, 7C per NSD** The executive branch is speaking with one  
20 voice here, sir.

21           JUDGE TALLMAN: Chief, can I ask one more?

22           JUDGE CABRANES: Sure.

23           JUDGE TALLMAN: Now that you've had some more time  
24 since implementing the revised procedure, since September of  
25 2018, can you assure us that the instances of noncompliance



1 have decreased significantly?

2 6, 7C per NSD It's too soon to tell, Your Honor. We're  
3 just now getting to the point where oversight reviews are  
4 actually kind of tapping in a meaningful way into the period  
5 after the new procedures and the training and remedial measures  
6 that they rolled out. So, but the FISC will, you know,  
7 obviously -- including the incidents we reported in our letter,  
8 the FISC will, at the time of the next renewal, have all of  
9 these things on hand to be able to make that assessment.

10 We're, obviously, hopeful that things will improve.  
11 I can say that there have been past experience here of -- there  
12 was another issue, for example -- sometimes these things get  
13 worse once a problem is identified and people are focusing on  
14 it; more instances are identified because it's an area of  
15 focus. I'm not saying that's happened here, but it wouldn't be  
16 surprising.

17 There was another incident involving  
18 attorney-client -- misapplication of certain attorney-client  
19 related provisions in the past. When the problem was  
20 identified and investigated, we ended up reporting more  
21 compliance incidents, which were historical in nature, before  
22 we eventually saw improvement.

23 So we are hopeful that things will improve here. And  
24 I would just say that it's unrealistic to think that the error  
25 rate is ever going to go to zero, but we're hopeful to have

1 meaningful improvement. I would note that the FISC has  
2 approved similar procedures year after year after year here.  
3 And it's our assessment that though the compliance record here  
4 is a bit different, the same result is warranted and we're  
5 confident that the measures we've taken, when considered in  
6 conjunction with the procedures, render the whole thing  
7 reasonable.

8 JUDGE CABRANES: Thanks very much.

9 Mr. Cedarbaum.

10 MR. CEDARBAUM: Good morning. And may it please the  
11 Court. Jonathan Cedarbaum, amicus curae.

12 I will address the U.S. person query recordkeeping  
13 requirement. And my colleague, Ms. Jeffress, will address the  
14 querying procedures and their consistency with the statutory  
15 requirements and the Fourth Amendment.

16 The FISC carefully considered the text, the context,  
17 the legislative history, and the purpose of the recordkeeping  
18 requirement and we urge you to affirm its conclusion that the  
19 recordkeeping requirement cannot be satisfied unless the FBI  
20 identifies, in its record of query terms, which terms it knows  
21 to be U.S. person query terms.

22 I would like to offer three central reasons why we  
23 believe that this conclusion was correct. And I hope, in  
24 walking through those reasons, I may also try to respond to  
25 some of the arguments made by my friend <sup>6, 7C per</sup> NSD and some of

1 the questions that the judges posed to 6, 7C per NSD

2 Let me begin with text. I think, as Judge Sentelle  
3 and Judge Tallman both very forcefully urged, our view is the  
4 FISC was correct, that the plain wording of the term -- of the  
5 requirement requires that some indication be given in the  
6 record kept whether it is a U.S. person query term or not.

7 By contrast, the government's position, as my friend  
8 6, 7C per NSD candidly acknowledged, would effectively read the  
9 recordkeeping requirement out of the statute. As 6, 7C per NSD  
10 acknowledged, the government's position is no change is  
11 required in the government's practice. And our view is  
12 Congress did not insert a new requirement into Section 702 with  
13 respect to the preservation of certain kinds of records as an  
14 empty gesture. And so we think -- we urge you to -- we think  
15 the text supports the FISC's conclusion that Congress was  
16 requiring, intending to require all the agencies to include in  
17 their records query terms an indication of which were the U.S.  
18 person query terms.

19 JUDGE TALLMAN: Mr. Cedarbaum, Director Wray  
20 suggests, at pages 12 to 13 of his declaration, a scenario in  
21 which an inquiry is made using a selector, such as a phone  
22 number or email address for which no name can be ascribed. Is  
23 it your view that the statute requires identification of this  
24 query as a U.S. person search when no name is known at the time  
25 a search is made?

1 MR. CEDARBAUM: Our understanding, Your Honor, is  
2 that, as Judge Sentelle, I believe, suggested, that in imposing  
3 this recordkeeping requirement, Congress was not asking the FBI  
4 to do the impossible. It was asking the FBI to record those  
5 query terms that it knew were U.S. person query terms.

6 JUDGE TALLMAN: So the answer to my question is no,  
7 there is no requirement if, at the time the search is made, we  
8 can't tell whether a U.S. person is implicated or not?

9 MR. CEDARBAUM: Whether the identifier is a U.S.  
10 person -- yes. My answer to you is yes, Your Honor. And I  
11 derive that understanding both from the statute and from the  
12 FBI's own existing querying procedures. The statute -- the  
13 provision in the statute --

14 JUDGE SENTELLE: I want the answer. He's asking if  
15 they do not know whether it is a U.S. term or not, do they have  
16 to record that?

17 MR. CEDARBAUM: And my answer, consistent with what I  
18 thought you said before, Judge Sentelle, is our understanding,  
19 like yours, is if they do not know --

20 JUDGE SENTELLE: You answered the word no.

21 MR. CEDARBAUM: Sir, no. The answer is no, they do  
22 not.

23 JUDGE SENTELLE: You do not.

24 MR. CEDARBAUM: No, they do not. Sorry for that.  
25 Sorry for the long-winded response. And I was just --

1           JUDGE CABRANES: And that takes care of a very large  
2 number of such queries, right?

3           MR. CEDARBAUM: I don't know, Your Honor, because we  
4 don't know what the universes are. But the reason I gave the  
5 response I did to Judge Tallman and Judge Sentelle, consistent  
6 with Judge Sentelle's earlier statement, comes from -- partly  
7 from the statute and partly from the FBI's existing querying  
8 procedures.

9           JUDGE CABRANES: But with respect to so-called  
10 categorical batch queries, which may be quite common, I take  
11 your answer to Judge Sentelle to be that in such situations,  
12 including the one, for example, 6, 7C per NSD gave us as an  
13 anecdote, that no such effort has to be made to record the --  
14 whether the individual members of the batch are or are not U.S.  
15 persons?

16           MR. CEDARBAUM: It would depend, Your Honor, on  
17 whether the query term used was known at the time of the query  
18 to be a U.S. person identifier. I don't know how batch queries  
19 are generated, so I don't know whether, in every instance, a  
20 batch query would necessarily have the uncertainty you're  
21 suggesting, where the FBI would not be able to know always with  
22 batch queries whether a U.S. person query term was being used.  
23 I think it might vary depending on the size of the batch and  
24 the nature of the query terms used.

25           But in -- I would just -- I would just note, just to

1 go back to the earlier discussion about how the FBI can go  
2 about identifying the ones that it should record, I wanted to  
3 draw the Court's attention to the FBI's own querying procedures  
4 again. And particularly, to a set of presumptions that the FBI  
5 sets out in those procedures that appear in the appendix at  
6 page 234. And you'll see, if you look at those presumptions,  
7 they set out four criteria that are designed to speed the FBI's  
8 initial determination of whether a query term is -- or, could  
9 be used to speed the FBI's determination of whether a query  
10 term is a U.S. person query term. And so if you look at  
11 appendix page 234, you'll see, under Section B, presumptions  
12 for purposes of these procedures, and then there's 1, 2, 3, 4.  
13 So a person -- and the following guidelines apply in  
14 determining whether a person whose status is unknown is a  
15 United States person, and then it gives guidelines --

16 JUDGE CABRANES: Those presumptions, I suppose, in  
17 your view are very helpful and should make it much easier?

18 MR. CEDARBAUM: Yes. I think -- our view is that  
19 those presumptions are one indication that some of the burden  
20 concerns that you raised, Your Honor, and that some of your  
21 colleagues raised could be solved by the FBI, in responding to  
22 Congress's command -- that Congress recognized that the FBI  
23 would have to figure out how to put this requirement into  
24 practice in a sensible way. Congress recognized that in  
25 establishing the components of the inspector general report,

1       which it required to be submitted a year after the new query  
2       procedures went into place.

3               If you look in section 112, at (b)(2), it recognizes  
4       and identifies one of the issues for the inspector general to  
5       address, the handling by the FBI of individuals whose  
6       citizenship status is unknown at the time of the query. So  
7       Congress recognized it's not always going to be black and  
8       white, there are going to be uncertain cases. And in (b)(8)(B)  
9       Congress required that the inspector general's report should  
10      also address the total number of such queries U.S. persons --  
11      sorry, total number of queries that use known United States  
12      person identifiers. There is that word "known" that Judge  
13      Sentelle mentioned before.

14               JUDGE CABRANES: Where, exactly?

15               MR. CEDARBAUM: That is in Section 112 of the  
16      reauthorization act, which, unfortunately, is the part that was  
17      not codified.

18               JUDGE CABRANES: I'm looking at appendix page 234.

19               MR. CEDARBAUM: Sorry. Yes, 234 is the presumption  
20      from the querying procedure. Now I'm referring to provisions  
21      in the FISA Reauthorization Act itself.

22               JUDGE CABRANES: You're very familiar, I know, with  
23      law enforcement generally. And this may be beyond the purview  
24      of -- or, expectations of an amicus, but put yourself in the  
25      position, if you would, for our benefit, of 6,7C per  
NSD and his

1 colleagues, or his clients: How would you make their life  
2 easier, or how would you actually do this? Can you give us a  
3 timeline or a description of the simplest possible -- Occam's  
4 Rule, the simplest possible way the FBI can be in compliance  
5 with the FISC order? How would do you it? What's your advice  
6 to them? As opposed to objecting to how they're doing, tell us  
7 how you would do it.

8 MR. CEDARBAUM: Well, Your Honor, I have had the  
9 privilege, earlier in my career, to advise folks in 6, 7C per NSD  
10 position. But I think the best course in this scenario -- and  
11 I think Congress envisioned this in the Reauthorization Act --  
12 is for the FBI to work perhaps with its colleagues in NSD, the  
13 National Security Division, and taking into account things like  
14 the provisions I've highlighted in Section 112 of the  
15 Reauthorization Act and the presumptions that they have created  
16 in their own querying procedures, to develop the way forward  
17 that you're suggesting, and that for the inspector general, as  
18 Congress required, to come back a year later and for the  
19 inspector general to weigh in on the strength and weaknesses of  
20 the approach they have adopted.

21 JUDGE CABRANES: Well, that's all very complicated  
22 and very interesting, but tell me in the most mechanical,  
23 pedestrian, low-level way that you are empowered to do this.  
24 How -- don't -- I don't want you to tell me who should be  
25 consulted, to whom is this being sent; just how would you do



1 it? And what would be the -- how would you do it in a way that  
2 addresses the concerns of the director of the FBI and 6, 7C per NSD

3 MR. CEDARBAUM: Well, I would do it --

4 JUDGE CABRANES: It could be very simple, right? It  
5 could be a checklist.

6 MR. CEDARBAUM: Exactly. I think -- I was about to  
7 say, Your Honor, you took the words right out of my mouth. As  
8 you suggested before, I think -- again, I'm not as familiar as  
9 my colleagues with how querying works today --

10 JUDGE CABRANES: I'm listening.

11 MR. CEDARBAUM: -- but if there are a number of  
12 things an agent has to do before entering a query, this would  
13 add one item on that checklist.

14 JUDGE CABRANES: As far as you know, is there a  
15 checklist, in any event?

16 MR. CEDARBAUM: I don't know.

17 JUDGE CABRANES: We don't know. They'll tell us  
18 later. But there could be a checklist. It could be  
19 bureaucratically and physically very simple, is that what  
20 you're saying?

21 MR. CEDARBAUM: Yes, I think it is -- it could be  
22 bureaucratically and operationally -- I don't know whether it  
23 would be simple, but I think it would be directly accomplished.

24 JUDGE CABRANES: And could be done quickly.

25 MR. CEDARBAUM: That is -- that is my understanding

1 from things like the querying presumptions we already have in  
2 front of us.

3 JUDGE TALLMAN: Mr. Cedarbaum, you referred us to  
4 Section 112, and I read that language to the effect that the IG  
5 is to produce a report to include, and I quote, any  
6 impediments, including operational, technical, or policy  
7 impediments, for the FBI to count the total number of such  
8 queries that use known United States person identifiers.

9 . Doesn't that language reflect congressional  
10 understanding that the FBI does not presently have the  
11 capability to capture all U.S. person inquiry?

12 MR. CEDARBAUM: No, not in our view, Your Honor, and  
13 not in the FISC's view, as it pointed out. Our understanding,  
14 like the FISC's understanding, is that Congress was  
15 recognizing, as I think the Court is suggesting, that there  
16 will be some challenges for the FBI to overcome in order to  
17 comply with Congress's new directive.

18 So as my colleague 6, 7C per NSD said, this is not their  
19 current practice, they're going to have to change things. And  
20 as they try to figure out how to do it, there may be  
21 difficulties. I think if Congress had thought that they were  
22 not requiring them to achieve this end, I don't think they  
23 would have had an IG go and study the difficulties along the  
24 way. Why would they impose it, if they thought it couldn't be  
25 done?

1                   JUDGE TALLMAN: I guess the problem I'm having with  
2                   the FISC reasoning and with your argument which embraces it, is  
3                   if Congress understood that there is an existing problem in the  
4                   Bureau's ability to compile answers to the questions that we're  
5                   asking you about, how many of these queries are actually being  
6                   conducted, and in the same 2017 Reauthorization Act that  
7                   contains the language requiring reports or records to be kept  
8                   of such queries, this language suggests pretty strongly, to me,  
9                   that Congress recognizes there is an existing problem today,  
10                  but we need to get a better arm around what the problem is.  
11                  What are the operational, technical, or policy impediments to  
12                  meeting the requirement in the statute that a record of all  
13                  U.S. person inquiries be kept?

14                  MR. CEDARBAUM: Right. I guess, like the FISC, we  
15                  don't see it that way, Your Honor, because I guess, in part, I  
16                  don't see it as a black and white situation that is either the  
17                  FBI can do it or the FBI is utterly incapable of doing it. I  
18                  think what Congress recognized is that the FBI is -- or, should  
19                  be capable of doing it, but the FBI has told Congress it will  
20                  be a challenge. And so Congress is saying, well, we want you  
21                  to do it, but we want the inspector general to come -- and we  
22                  gather, from what you're telling us, that will create some  
23                  challenges in your carrying out our command. But the inspector  
24                  general will come back in a year and let us know whether the  
25                  difficulties you claim you're having in achieving this

1 requirement that we want fulfilled are, you know, legitimate or  
2 not.

3 You know, why -- normally inspector general comes in  
4 to assess, among other things, whether the performance of the  
5 agency is failing in certain ways or succeeding. And so an IG  
6 study of this very issue of what the difficulties are is a  
7 check on the FBI saying, Sorry, we're throwing up our hands; we  
8 can't do it at all. Congress is saying --

9 JUDGE TALLMAN: I'm not hearing them say that. What  
10 I'm hearing them say is right now we are -- if I can use a  
11 terrible legal term -- commingling the record. Somewhere in  
12 there is a number, less than 100 percent of all U.S. person  
13 query terms, we just can't quantify currently with our  
14 capabilities today what that number is. And yet the question  
15 that we're wrestling with is what do we do in the interim?  
16 Because I've got a declaration from the director of the FBI  
17 that says if we have to comply with the FISC order, it will, A,  
18 substantially impair our mission to protect the national  
19 security of the country, and, B, divert substantial resources  
20 to trying to figure out whether or not a particular query  
21 involves a U.S. person term, when what we want those agents and  
22 analysts to be doing is trying to figure out when the next 9-11  
23 attack is going to occur. That's a pretty weighty concern.

24 MR. CEDARBAUM: We certainly agree with you, Your  
25 Honor, that is a very weighty concern. And, of course, we also

1 take very seriously the concerns expressed in Director Wray's  
2 declaration. But as I was trying to suggest by pointing the  
3 Court to things like the existing presumptions in the querying  
4 procedures, our understanding is that what Congress is calling  
5 for may not be as burdensome as the FBI and Director Wray are  
6 suggesting, and that there are some, if you will, shortcuts  
7 that could be adopted that would be responsive to Congress's  
8 command and that would not lead to the substantial diversion  
9 that Director Wray is raising concerns about.

10 You know, it is the case, if you look, for example,  
11 at the querying procedures of the FBI and compare them to the  
12 targeting procedures of the FBI, or the other agencies, and you  
13 can find the -- the targeting procedures -- excuse me. Are --

14 JUDGE TALLMAN: We've got them.

15 MR. CEDARBAUM: Yes. What I just want to get at is  
16 if you look at the targeting procedures -- which also involve  
17 at the outset an effort to identify whether a target is a U.S.  
18 person or not -- you'll see there a very different set of steps  
19 or directions than you see in the querying procedures. The  
20 targeting procedures, in all facts and circumstances, do  
21 research, check it out, look at the facts from every corner,  
22 put it altogether. I'm paraphrasing. And at least to me, to  
23 us, that sounds more like the kind of potential diversion of  
24 resources that Director Wray is talking about.

25 Whereas, if you look over in the world of querying

1 and you take the approach Judge Sentelle was suggesting, that  
2 if you're uncertain you talk it out, what you're looking for is  
3 known at the time of the query, and you look at the  
4 presumptions that the FBI has established for the querying,  
5 which gives a series of shortcuts for a first-cut  
6 determination, the burden should be much less.

7 JUDGE TALLMAN: So how would --

8 MR. CEDARBAUM: And I think Judge Wray's (sic)  
9 declaration actually makes reference to the targeting  
10 procedures at some point. And I think the querying procedures,  
11 I would hope at least, offer a more efficient way to get to  
12 what Congress wanted.

13 JUDGE TALLMAN: So how would the presumption help us  
14 with [REDACTED] 6, 7C per NSD hypothetical of querying the [REDACTED] 3, 7E per FBI

15 [REDACTED] 3, 7E per FBI

16 [REDACTED] 3, 7E per FBI

17 [REDACTED] How is the  
18 Bureau going to be able to apply those presumptions to help  
19 narrow the focus of the query so that we're not trampling on  
20 privacy issues of U.S. persons?

21 MR. CEDARBAUM: Well, I think to look at the  
22 presumptions for a moment, the first presumption in the list is  
23 that a person known to be located in the United States will be  
24 treated as a United States person, unless the person is, you  
25 know, affirmatively identified as not. I would think that, for  
example, if in the case of [REDACTED] 3, 7E per FBI located in the

1 United States, all those persons are, therefore, working in the  
2 United States and located in the United States, presumption  
3 number one might get a quick initial answer, even though, yes,  
4 it is the case that the presumptions will be, in some cases,  
5 under- or overinclusive. It's only a rough cut.

6 JUDGE TALLMAN: But if that were true, then the  
7 Bureau couldn't run the search, could they? If the presumption  
8 is that 3, 7E per FBI are U.S. persons in  
9 applying the presumption.

10 MR. CEDARBAUM: Sir, I should make clear, what we're  
11 talking about with respect to the current requirement -- and my  
12 colleague, 6, 7C per NSD drew this distinction as well -- is the  
13 query term used. So, this is not targeting -- the target --  
14 and you should correct me if I go astray -- but the target of  
15 702 must be people reasonably believed to be outside the United  
16 States. But what we're talking about here is the querying of  
17 702 information that has already been collected.

18 JUDGE TALLMAN: Right. But we're trying to figure  
19 out who the mole is.

20 MR. CEDARBAUM: But I'm saying there's no prohibition  
21 on the use of U.S. person query terms, that was all I was  
22 saying.

23 JUDGE TALLMAN: Okay. All right.

24 MR. CEDARBAUM: Just because they're located here and  
25 that is the presumption, that that is not a bar to the query

1 term.

2 JUDGE TALLMAN: Assuming that the search reveals raw  
3 FISA information with regard to one or more employees, then  
4 they would have to comply, would they not, with the statute and  
5 go to the FISC and get an order before they could look at what  
6 was returned? Because the presumption is that these are all  
7 U.S. persons.

8 MR. CEDARBAUM: I want to just refresh my memory of  
9 the exact language of the (f)(2) order requirement which --  
10 sorry.

11 6, 7C per NSD Foreign intelligence -- evidence of a  
12 crime query is that, in practical terms, it would trigger that.  
13 Evidence of a crime unrelated to foreign intelligence.

14 MR. CEDARBAUM: Thank you. My colleague is helping  
15 me.

16 6, 7C per NSD It wouldn't apply in that scenario.

17 JUDGE TALLMAN: Okay. Thank you.

18 MR. CEDARBAUM: Thank you. I was going to turn the  
19 podium over to my colleague, if I may. Thank you.

20 MS. JEFFRESS: Just one moment.

21 JUDGE CABRANES: Go ahead.

22 MS. JEFFRESS: May it please the Court. Amy Jeffress  
23 here to address the second question on behalf of the amici.

24 I wanted to just follow up before I address the issue  
25 that I'm here to discuss, mainly on, Judge Cabranes, your



1 question about what's the very most basic way that we can ask  
2 the FBI to comply with the recordkeeping requirements. And I  
3 wanted to draw your attention to footnote 9 of the government's  
4 reply brief, which is on page 18, where the government explains  
5 that FBI personnel keep chronological logs of their queries.  
6 And it would be very simple, in those logs, to have a simple  
7 checklist: U.S. person, non-U.S. person, or unknown. And then  
8 all they need to do is check one of those boxes, and then that  
9 would go a long way towards complying with the requirement that  
10 Congress has imposed.

11 And then in the same vein, what I'm here to talk  
12 about is the part of the FISC's order that requires the FBI to  
13 maintain a record of -- a written justification for any time  
14 that the FBI seeks to review information returned as a result  
15 of a query. And that could also be just another box in this  
16 chronological log.

17 JUDGE SENTELLE: What is the statutory foundation for  
18 the Court's order on that subject?

19 MS. JEFFRESS: Excellent question, Your Honor. So  
20 the Reauthorization Act --

21 JUDGE SENTELLE: I thought it was pretty good.

22 MS. JEFFRESS: The Reauthorization Act listed three  
23 requirements in Section 101. So the very first section of the  
24 act itself relating to querying procedures. So, number one, it  
25 requires the attorney general and the DNI to adopt querying

1 procedures for the Section 702 programs that are consistent  
2 with the Fourth Amendment.

3 Number two, it requires a record of each U.S. person  
4 query, as Mr. Cedarbaum has just explained.

5 Number three, it requires that the querying  
6 procedures be subject to judicial review. So that --

7 JUDGE SENTELLE: Read me the language about judicial  
8 review.

9 MS. JEFFRESS: It's -- I think it's very -- quite  
10 basic, Your Honor. It's section 101(f)(1)(C), judicial review:  
11 The procedures adopted in accordance with subparagraph (a)  
12 shall be subject to judicial review pursuant to subsection (j).  
13 And so in keeping with that, the government has presented its  
14 certifications. And Judge Boasberg, on the FISC, took this  
15 responsibility very seriously; scheduled briefings, you know  
16 the record, consulted with the advisors and had several  
17 hearings on the subject, and concluded that the querying  
18 procedures were reasonable, except in one respect. And that is  
19 that there was no system for the FBI to record a written  
20 justification for its queries or for reviewing the contents  
21 returned of U.S. person queries.

22 So that places the FBI out of step with all of the  
23 other agencies which, of course, have a written justification  
24 requirement. And the FISC determined that without this  
25 requirement the FBI's querying system is unreasonable.

1           Now, I come from private practice where a good bit of  
2 my work is advising companies on how to comply with U.S. laws  
3 in conducting their business. And one of those laws is the  
4 Foreign Corrupt Practices Act. So if I go into a company and  
5 say, you know, you need to show me how it is that you're making  
6 sure that you're not making payments to foreign officials that  
7 violate this Act. And the company says to me, well, we have a  
8 system where our people are trained on the requirements of the  
9 FCPA and they know what are permissible bases for payments and  
10 what are not, and they comply with the law. And I'll say,  
11 that's great. And then they'll say, well, so we've made these  
12 number of payments, say it's ten payments, and the people who  
13 made them made them from entirely proper purposes. And I'll  
14 say that's great, show me the documentation of that.

15           And so if they don't have documentation, if they tell  
16 me that, well, we don't really require them to document it,  
17 they just know the law and they know when they make proper  
18 payments and when they don't. I can't go in and tell that  
19 company that that's a perfectly acceptable system because it's  
20 not, and I don't think the Department of Justice would accept  
21 that as a compliance system on behalf of any U.S. company. The  
22 Department of Justice would require the company to have a  
23 system where they document the basis for the payments. And so  
24 that's just an example of how documentation is really crucial  
25 to any compliance program.

1           So the government does say that in their experience  
2           the FBI agents seem to remember the reasons for queries, even  
3           when they're asked years later. And they've included the  
4           footnote that I just referenced to say that there are in fact  
5           chronological logs of queries and so when they go back and look  
6           at those logs, they can remember the purpose. But that memory  
7           is really not a good basis for a compliance program. No other  
8           compliance program that I'm familiar with relies on human  
9           memory to support the justification for what that person has  
10          done.

11           And so, we're just saying that the Court's order that  
12          the FBI had a written justification is essential to ensure that  
13          the FBI is adequately following the rules. And it's a very  
14          modest step that the Court required, that we think does not  
15          impose a burden on the FBI, that Director Wray or anyone else  
16          has explained would interfere with the FBI's ability to engage  
17          in the important work that it does.

18           JUDGE CABRANES: So how do you explain -- I guess  
19          this is a question that requires you read other people's minds  
20          or motivations, and I want to avoid that. But maybe there's  
21          some way you can describe to us why you think the FBI is so  
22          resistant to what appears to be a relatively simple compliance  
23          mechanism that you've drawn to our attention in this footnote.  
24          What's going on?

25           MS. JEFFRESS: You're correct, Your Honor, that I

1 can't read their minds. But I was in government for 20 years  
2 and I worked with many FBI agents and I know that they're very  
3 diligent and they want to be able to get the information that  
4 they seek. And so when an agent has a case, they want to be  
5 able to run the information that they have through the systems  
6 and get the results. And a burden, even a very minimal one,  
7 that requires them to record a written justification is just  
8 going to make it that much more burdensome for them to do their  
9 job.

10 So while I sympathize with that, I think it's  
11 essential because this is very sensitive data. And the  
12 compliance incidents that the government has reported to the  
13 Court, very diligently and commendably, they show that FBI  
14 agents don't seem to appreciate the sensitivity of the data  
15 that they're running these queries through.

16 JUDGE SENTELLE: I'm sorry. I'll preface what I'm  
17 about to say, we can't bring anything in here that has  
18 electronics in it. My hearing aids have bluetooth in them, so  
19 I can't bring them in. I'm not hearing as well as I usually  
20 do, so if you could repeat what you just said. Try not to drop  
21 your voice. I'm having a little bit of difficulty hearing.

22 MS. JEFFRESS: Sorry, Your Honor. I think I'm too  
23 far from the microphone, too. I apologize. I hope the court  
24 reporter can hear. I feel like I'm yelling.

25 So, the FBI agents, in my experience, just want to

1 get the job done, and so any small impediment to their being  
2 able to run information through the system, to them, is one  
3 that they would rather not face. So, it's a fairly minimal  
4 step, but it is one that would make it just that much harder  
5 because they have to take the time to record the justification  
6 before they review the contents of the query that they've --  
7 that they've run through the system.

8 So I don't think it's much of an impediment, but I  
9 understand that that's the reason why FBI agents are likely to  
10 resist it.

11 JUDGE TALLMAN: And do you agree, then, with the  
12 question that I asked Mr. Cedarbaum, that if they don't know at  
13 the time that they've run the selector they're using a phone  
14 number or an email address, then they don't have to keep a  
15 record of the justification for running the search?

16 MS. JEFFRESS: We would -- no, we would say that when  
17 they return information, it's very likely -- well, if it's not  
18 a U.S. person query, do you have to have the written  
19 justification?

20 JUDGE TALLMAN: That's what the director is concerned  
21 about, is the amount of time and effort that agents are going  
22 to be diverted to doing in order to try and figure out: Is  
23 this a U.S. person telephone number? Is this a U.S. person  
24 email address? And as I'm sure you know from your prior  
25 experience with the government, that's not always an easy

1 question to answer in short order.

2 MS. JEFFRESS: Absolutely right, Judge Tallman. So  
3 Director Wray's declaration, though, is mostly focused on this  
4 problem of trying to sort through what is a U.S. person query  
5 and what is not. And I think we've actually overcome that by  
6 allowing the FBI to have this, sort of, three-box system; U.S.  
7 person query, non-U.S. person query, we don't know. And I  
8 would say that they need to have a written justification --

9 JUDGE CABRANES: And applying the presumptions that  
10 Mr. Cedarbaum brought to our attention.

11 MS. JEFFRESS: Correct. Correct. So to go to  
12 another issue relating to your questions earlier, Judge  
13 Cabranes, on whether the categorical batch query guidelines  
14 that the government has adopted resolve the problem. We, as  
15 amici, do not see all of the compliance reports, but we've seen  
16 enough to see that while some of the more serious compliance  
17 problems are with categorical batch queries, there are also  
18 equally serious compliance problems with queries that would not  
19 be characterized as categorical batch queries.

20 So one of the compliance reports that's in the  
21 appendix, at page 561, relates to an incident [REDACTED]

22 [REDACTED] 1, 3, 7E per FBI [REDACTED]

23 [REDACTED] That, obviously, struck a nerve with us. [REDACTED] 1, 3, 7E per FBI

24 [REDACTED] 1, 3, 7E per FBI [REDACTED]

25 [REDACTED]

1



2

3

4

5

6

7

8

9

10

11

12

So, the government admits that this was not reasonably likely to return, you know, foreign intelligence or evidence of a crime, so it was a mistake. Well, that kind of query, in our view, the agent might not take that next step to review information produced in response to that query, if the agent had to take the time to write down the justification, or record the justification for reviewing that information, they might then realize, oh, I am supposed to record this justification, and that's because this is highly sensitive information, and you know what? I'm not sure I have the basis that is required under the law.

13

14

15

16

17

18

19

20

21

22

23

Now, the government says that the written justification requirement would not necessarily prevent improper queries. But we don't believe that that comports with common sense. We think that everyone knows that when you have to take the time to write something down, you have to think about it a little more sharply and a little more focused than you do when you just have a reason in your mind. And I think that that's, in all of our experience, something that is just human nature. When you have to articulate the basis or the reason for doing something, you're going to think about it differently.

24

25

And so we think that this requirement would in fact deter improper queries, and would make the system and the FBI



1 overall more compliant with the law.

2 And, Your Honor, I don't know if there are any  
3 further questions on this topic, but I know my colleague and I  
4 have taken more than our time. I just -- if I could, would  
5 close by saying that the whole purpose of the amicus program is  
6 to ensure that privacy interests and civil liberties interests  
7 are adequately protected. And as you know, the Section 702  
8 program is one in which U.S. person interests are directly and  
9 significantly implicated, and we think that the querying  
10 process needs this modest modification in order to comply with  
11 the Fourth Amendment and the statutory requirements. That has  
12 been our job, it's been an honor to serve in this role, and we  
13 would urge you to affirm the FISC's ruling on these important  
14 issues.

15 JUDGE TALLMAN: Counsel, before you sit down -- and I  
16 know my colleagues and I all appreciate the good work you've  
17 done on this case -- but I'm curious as to Section  
18 1873(d)(2)(A) which establishes an exception to the DNI's  
19 mandatory reporting requirement of U.S. person search terms and  
20 queries in subsection (d), and it states that those provisions  
21 that we've been talking about shall not apply to information or  
22 records held by or queries conducted by the Federal Bureau of  
23 Investigation. If we have the FISC decision, doesn't that  
24 render this language completely surplusage?

25 MS. JEFFRESS: I think that's my colleague's

1 question.

2 JUDGE TALLMAN: I don't care who answers it. I would  
3 like an answer to it.

4 MR. CEDARBAUM: Sure. If I'm understanding the  
5 question correctly, Your Honor, I believe Judge Sentelle  
6 offered the answer that I would give as well, which is that, I  
7 believe, that is about public reporting. And so, even though  
8 the FBI may not have to do this reporting in public, by  
9 retaining the records required to be retained by the  
10 recordkeeping requirement, it would be collecting important  
11 information for oversight carried out by the FISC and by  
12 Congress.

13 JUDGE TALLMAN: Okay. Thank you.

14 JUDGE SENTELLE: Can I ask one more question before  
15 you all get completely comfortable? Query has been conducted,  
16 the first instance -- I'm sorry, we've gotten by the first  
17 step, you've got the information, now the query out of that, is  
18 that a second search or is that not? I think I've made myself  
19 clear on what I'm asking you.

20 MS. JEFFRESS: You did, Your Honor. And the FISC  
21 found that that is not a second search, but it is an event that  
22 is taking place that is, nonetheless, subject to Fourth  
23 Amendment scrutiny.

24 JUDGE SENTELLE: That's my question, is if it's not a  
25 second search, is it subject to Fourth Amendment standards?

1 MS. JEFFRESS: Our position is that the querying  
2 procedures must comply with the Fourth Amendment, and it's a  
3 totality -- or, a meaningful review of those querying  
4 procedures in the context of the entire collection process, and  
5 the Court does need to look at whether the procedures are  
6 reasonable. Even if that querying is not a search, it must be  
7 done in a manner that comports with the Fourth Amendment.

8 JUDGE SENTELLE: I realize that we're not bound by  
9 dissents on the Supreme Court, but Justice Alito, in *Carpenter*,  
10 raises a very real question of whether something in a digital  
11 information analysis or obtained is a search. This seems to be  
12 one step beyond what they had in the data collection in  
13 *Carpenter*. I'm curious, are you saying you agree it's not a  
14 search, but you're saying it's subject to Fourth Amendment  
15 anyway?

16 MS. JEFFRESS: Correct, Your Honor. We think it's an  
17 event that should be subject to the requirements of the Fourth  
18 Amendment. And we do believe that *Carpenter* -- and I  
19 understand Justice Alito was in dissent there, but we do  
20 believe that *Carpenter* changed the law in this regard in  
21 extending Fourth Amendment protections to, in essence, a sort  
22 of querying-like process where the cell site location  
23 information had been lawfully collected by the service provider  
24 in that case, but when the government went to obtain that cell  
25 site location information for Mr. Carpenter, that search would

1 now be a search that required a warrant.

2 JUDGE SENTELLE: That was a search. That was in the  
3 first instance, like when you first get the information in this  
4 context. Was there a query after that gathering, in the  
5 *Carpenter* facts, to which the Fourth Amendment applied  
6 independently, or before *Carpenter* are we just speaking of the  
7 first obtaining of that evidence from the provider?

8 MS. JEFFRESS: Well, so *Carpenter* found that the -- I  
9 would view it as querying, if you will, when the government  
10 goes and gets from the provider the information for  
11 Mr. Carpenter. The government is, in effect, querying the cell  
12 site location information that the provider has collected  
13 en masse, that's how I would draw --

14 JUDGE SENTELLE: You would say the content query, in  
15 this context, that becomes a search? Or are you saying it's  
16 subject to Fourth Amendment, even though it's not a search?

17 MS. JEFFRESS: I would say it's type of a search.  
18 And so I would say *Carpenter* makes it more of a search. The  
19 court below found it was not a separate search and that's been  
20 the law to date. But it does implicate the Fourth Amendment,  
21 in our view. And we took the position below that it should be  
22 considered a search, and that was not --

23 JUDGE TALLMAN: How do you respond to the language in  
24 the majority opinion that concludes, at page 2220, 138 Supreme  
25 Court, "Our decision today is a narrow one. Our opinion does

1 not consider other collection techniques involving foreign  
2 affairs or national security."

3 MS. JEFFRESS: The government cites that provision to  
4 say that *Carpenter*, in effect, shouldn't apply here. And I  
5 don't think that that's the right way to read that.

6 JUDGE TALLMAN: Is that what the Court is saying --

7 MS. JEFFRESS: Not really --

8 JUDGE TALLMAN: -- we're not addressing the question  
9 that -- you want us to extend *Carpenter* and the Court is saying  
10 we're not doing it in *Carpenter*. So if they don't want to do  
11 it, how can we?

12 MS. JEFFRESS: If you read that language, the Court  
13 in *Carpenter* just said we're not considering national security  
14 and foreign intelligence collection. The Court doesn't say  
15 this decision does not apply to national security.

16 JUDGE TALLMAN: So we have free rein to go -- boldly  
17 go where the Supreme Court --

18 MS. JEFFRESS: That's your job, yes.

19 JUDGE TALLMAN: Okay. I understand your position.

20 MS. JEFFRESS: Thank you.

21 JUDGE CABRANES: Thank you.

22 6, 7C per NSD Thank you. I'll try to be brief. But in  
23 response in your question, Judge Tallman, I am told that  
24 there's no technical system problem with recording U.S. person  
25 status, that the problem is the operational problem identified

1 in the director's declaration. I think I described that and  
2 it's available in the record.

3 So essentially, it's a concern about diversion of  
4 resources away from the mission of detecting threats and  
5 disrupting threats for something that doesn't serve any  
6 purpose, would not be an oversight, wouldn't -- any application  
7 of the query standard, which applies on the same basis  
8 regardless, and which isn't required, certainly, for counting  
9 that ends up being reported publicly in any fashion.

10 JUDGE CABRANES: Now, Miss Jeffress had brought to  
11 our attention this footnote 9. It's your brief.

12 [REDACTED] 6, 7C per NSD Our reply brief, yes, sir.

13 JUDGE CABRANES: Page 18. This seems to be a  
14 footnote pregnant with something significant. Why can't you  
15 adopt the learning, such as it is, of your own footnote 9 and  
16 have a checklist which, in some sense, would take time -- would  
17 take some time, but not a lot of time to check the appropriate  
18 box. And, of course, that checklist might also include a  
19 possible restatement of relevant presumptions. Why isn't that  
20 really a very modest, uncomplicated way of complying with the  
21 FISC Court's order?

22 [REDACTED] 6, 7C per NSD Well, I'm not sure, Your Honor, if you're  
23 speaking about the front end requirement, the statutory  
24 requirement that the Court read into Section (f)(1)(B) which  
25 applies before queries are run, U.S. persons -- or, when

1 queries are run, U.S. person status has to be -- or, the  
2 written justification requirement that amici proposed and FISC  
3 endorsed but did not require us to adopt, which involves making  
4 certain written justifications for queries before reviewing the  
5 content, but not before running the query. So --

6 JUDGE CABRANES: Take your choice --

7 [REDACTED] 6, 7C per NSD This footnote deals --

8 JUDGE CABRANES: How about for each of those things?

9 [REDACTED] 6, 7C per NSD If I could start with the second one  
10 first, Your Honor. This footnote is actually addressing the  
11 context of the argument and brief here, the second issue, and  
12 addressing the argument that written justifications for queries  
13 are necessary to aid in compliance. And the answer to that is  
14 that our experience has been, and it's certainly the case, for  
15 each of the compliance incidents that the FISC identified in  
16 its brief, that personnel did not have a problem recalling the  
17 justifications for the queries.

18 JUDGE CABRANES: Forget it. I mean, they may not  
19 have problems; some may have it, some may not have it, the  
20 recall. But doesn't this solve the problem of recollection?  
21 You don't have to recall it, *in futurae*. Why can't you just  
22 adopt this kind of system that you yourself referred to here?

23 [REDACTED] 6, 7C per NSD We're not arguing that it would be  
24 impossible to do so. I think that the director, in his  
25 declaration pointed out, I think it's the burden of either

1 tracking U.S. persons --

2 JUDGE CABRANES: That's my question. What's the  
3 burden? What's the big deal?

4 6, 7C per NSD It's the concern that in the aggregate,  
5 making these U.S. person determinations or recording  
6 written justification --

7 JUDGE CABRANES: Not in the aggregate. Forget the  
8 aggregate. The individual situation. You have an individual  
9 situation, you're trying to do a query; you've got, I'm sure,  
10 lots of paper around anyway, but why shouldn't this be readily  
11 available so one can check an appropriate box?

12 6, 7C per NSD Because, Your Honor, it's not as easy as  
13 one would suggest, even when presumptions are involved. I  
14 mean, there are cases where it would be straightforward, but  
15 there are other cases where the agent would either know in his  
16 own head or have knowledge of information that might point in  
17 different directions about U.S. person status, would have to  
18 review that information and try to reconcile it and --

19 JUDGE SENTELLE: If there's any difficulty, why  
20 doesn't it just become an unknown?

21 6, 7C per NSD I thought we were talking about using  
22 presumptions, or if we're using -- presumptions --

23 JUDGE SENTELLE: We are. Once you've done that, you  
24 still don't know, you still don't know the parties, put  
25 "unknown"?



1           6, 7C per NSD           It can take a lot of time and effort to  
2           get to the point where you say you're unknown. And even the  
3           presumptions don't apply -- for the FBI, the presumptions only  
4           come into play for this (f) (2) requirement, when -- for  
5           purposes of running an evidence of a crime query, that  
6           requirement is triggered only for U.S. person queries.

7           The presumptions, though, do not allow the government  
8           to -- they have to do due diligence. They have to take at  
9           least the information they have at hand and try to make an  
10          assessment of that information.

11          JUDGE CABRANES: There's no suggestion, is there,  
12          that you have to have an independent, autonomous inquiry before  
13          you suggest -- before you check such a box?

14          6, 7C per NSD           Well, I guess in the statute, no. There's  
15          no such requirement. If we're talking about the record --

16          JUDGE CABRANES: I'm just trying to address this  
17          question of the difficulty that is said to be imposed by the  
18          decision of the FISC. And I'm reverting to my original  
19          concerns: What is the big deal here?

20          6, 7C per NSD           I guess -- again, I'm having trouble  
21          keeping the two issues separate, but --

22          JUDGE CABRANES: Take your choice of which issue.  
23          Regardless. Either issue.

24          6, 7C per NSD           On the statutory question, again, it's  
25          that -- there would be, in the aggregate, I know, at least in

1 some cases it's going to be difficult to make these. And the  
2 presumptions aren't applied in the abstract, they're applied --

3 JUDGE CABRANES: Judge Tallman just gave you the  
4 obvious answer. Even with the presumption, we can't be sure.  
5 You check the box, we can't be sure.

6 **6.7C per NSD** Our position turns as much on the: What  
7 would be the point of that? If saying Congress hasn't said we  
8 need to change the way we run the queries or the way we do  
9 oversight --

10 JUDGE CABRANES: The answer is Congress gave  
11 instruction that some kind of record be created. Why isn't  
12 that the record? You're being given an easy job. You're being  
13 given a very easy solution to this, but you're resisting it  
14 tenaciously. Why resist it? Why not just do it? Again, what  
15 is the big deal? I'm sorry to be so primitive and so unwilling  
16 to enter into prolonged, abstract discussions of legislative  
17 history or text.

18 But just assume, for the argument, that Judge  
19 Boasberg was right -- that's the hypothetical -- and you need  
20 to comply. What is the big deal?

21 **6.7C per NSD** I guess I don't want to overstate that  
22 it's a big deal, but I would refer to the director's  
23 declaration. I can't say it any better than he did. We do  
24 believe that -- we do believe that in individual cases it will  
25 be time-consuming to make these resolutions. And if we're just

1 going to sort of reduce it to a best-guess-off-the-top-of-our-  
2 head, that sort of begs the question why? Is that what  
3 Congress --

4 JUDGE CABRANES: We live in an imperfect world and  
5 we're not looking for perfection, and you shouldn't be  
6 searching for perfection. But if you have this kind of option  
7 available to you and the checklist can be made slightly more  
8 complicated because you enjoy complexity, apparently, fine, so  
9 you check two boxes as you move along; what is the big deal?

10 6, 7C per NSD Again, our position turns more on our  
11 reading of the statute than on the burden. But the burden is  
12 not insignificant. And I -- I can't --

13 JUDGE CABRANES: I understand. We understand your  
14 reading of the statute, and it's important and one that  
15 deserves great respect. Do not misunderstand any of our  
16 questions. But we're trying to get to the stage beyond the  
17 reading of the statute, which is how does -- which is the  
18 subject of Director Wray's affidavit, among other things, and  
19 it's the subject of various briefs, the whole question of the  
20 burden. We're now at that stage of it, it's called in the  
21 political science, implementation. What is the big deal in  
22 implementing this?

23 6, 7C per NSD I don't have a better answer than I've  
24 already given. And I just say, if we're reducing it to  
25 guesses, then we're really -- there's not much daylight between

1       what the FBI is already doing, which is effectively treating  
2       all U.S. person query terms. And one has to ask what's the  
3       point of doing so when the substantive standards and the  
4       oversight of the application of that standard turn in no way on  
5       that -- on the distinction between U.S. persons and non-U.S.  
6       persons. And when --

7                JUDGE CABRANES: Feel free to consult.

8                6, 7C per NSD       Again, the distinction between the  
9       agencies for the FBI and its domestic focus, we're talking  
10       about many queries. Many will be U.S. person queries. And in  
11       terms of written justifications, writing those will certainly  
12       result in a large burden over time. And when there hasn't been  
13       any indication, certainly in the case of the incident that the  
14       FISC relied on, that having those justifications on hand would  
15       have prevented the incident from taking place because in those  
16       cases, largely, the analysts or agent would have simply written  
17       down the wrong -- a justification that didn't meet the  
18       standard.

19               JUDGE SENTELLE: You know, in all other areas of law  
20       enforcement outside the FISC, if you're going to obtain this  
21       kind of information, you have to get a warrant, right?

22               6, 7C per NSD       That is true, yes, sir.

23               JUDGE SENTELLE: To get that warrant you have to  
24       write down the reasons you are entitled to that warrant,  
25       somebody writes down a probable cause statement.

1 [REDACTED] 6, 7C per NSD That's true, Your Honor.

2 JUDGE SENTELLE: The Bureau is used to doing this  
3 kind of thing. And they're used to doing it, and all the other  
4 variants of criminal context that are not different than this,  
5 do they not?

6 [REDACTED] 6, 7C per NSD When obtaining information, Your Honor.  
7 But here, respectfully, we're not talking about acquiring  
8 information, we're talking about one means of accessing  
9 information that's already been lawfully acquired.

10 JUDGE SENTELLE: How is that any different, as far as  
11 the burden it places on the agency? If you have to write down  
12 your reasons for being entitled to the warrant or for  
13 information under FISC, why is it any more burdensome to do it  
14 in the FISC context than the criminal context?

15 [REDACTED] 6, 7C per NSD It wouldn't be more burdensome in one  
16 context. It's just not a burden that's warranted in this  
17 context because the system, as it currently exists, is  
18 sufficient without those justifications.

19 And I just want to clarify, first of all, with  
20 respect to written justifications, I don't think it's a fair  
21 reading of the FISC opinion that the FISC actually required us  
22 to adopt any particular written justification. It found a  
23 deficiency and said that one way to cure that problem would be  
24 to adopt this particular remedy.

25 We believe that the remedial measures we've adopted,

1       which actually address the problems, misapplications of the  
2       query standard more directly, is better designed to solve the  
3       issue and get at the fundamental problem than written  
4       justifications would. And that's why we selected it, more than  
5       the burden. Although I do, again, refer the Court to the  
6       director's declaration on that question.

7               With respect to *Carpenter*, again, we take the Court  
8       at its word that that was a narrow decision and that the Court  
9       specifically said that it was not addressing foreign  
10       intelligence collection or techniques. And here, unlike  
11       *Carpenter*, we're not dealing with the acquisition of  
12       information, it's just the handling of information that's  
13       already on hand.

14              And, you know, the Supreme Court has said, in many  
15       cases, that it's that Court's prerogative to decide, you  
16       know -- well, anyway I'll leave it at that. We'll take the  
17       Court at its word.

18              And I -- one final thing on the first issue. I would  
19       encourage the Court -- I never got to it -- the legislative  
20       history, insofar as the Court believes that our position on the  
21       statutory issue at least creates an ambiguity on the position,  
22       the legislative history strongly supports our position. The  
23       House Intelligence Report says that the purpose of requiring  
24       stand-alone query procedures was to have the agencies reduce to  
25       writing in a separate set of procedures the current policies

1 and practices with respect to querying.

2 The FBI's recordkeeping practices for querying would  
3 fall into that category. And the Court, likewise -- I mean,  
4 the committee, likewise, said that Congress's intent with  
5 respect to Section (f) (1) (B) was not -- not -- (f) (1) (B) was  
6 not intended to govern the way in which the recordkeeping --  
7 the records are held. It was, rather, just simply to require  
8 that records are kept and available for oversight purposes.  
9 And even our reading of the statute and existing practice  
10 ensures that that is accomplished.

11 JUDGE CABRANES: I want to make sure you've said  
12 everything you wanted to tell us.

13 **6, 7C per NSD** Let me check with my colleagues here, to  
14 make sure.

15 JUDGE CABRANES: It's very loose reins here.

16 **6, 7C per NSD** The point I intended to make but didn't  
17 get to, is sort of what is known about U.S. person status, it's  
18 not exactly -- what is known might be what is in the head of  
19 the particular analyst or what he has on his desk. What is  
20 known might also be whatever the FBI, in the whole, or the  
21 executive branch has in its possession and that is accessible  
22 to that person.

23 And this ties into the burden argument. At the time  
24 of running a query, deciding whether or not someone is a U.S.  
25 person -- the burden of doing that depends a lot on what is



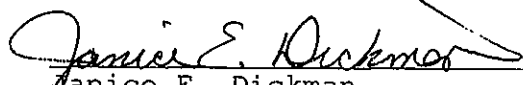


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Janice E. Dickman, RMR, 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 31st day of May, 2019.

  
Janice E. Dickman  
Official Court Reporter  
United States Courthouse  
333 Constitution Avenue, NW  
Washington, DC 20001