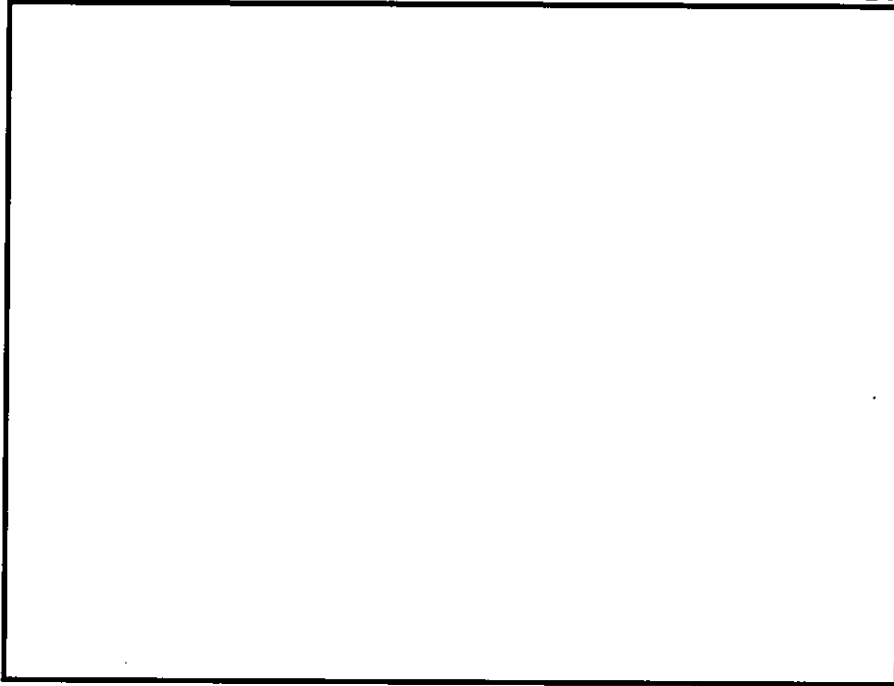


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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

July 13, 2018
10:30 a.m.



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

TRANSCRIPT OF PROCEEDINGS
HELD BEFORE THE HONORABLE JAMES E. BOASBERG
FOREIGN INTELLIGENCE SURVEILLANCE COURT

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APPEARANCES:

For Amica Curiae:

Jonathan Cedarbaum	Wilmer Hale
Amy Jeffress	Arnold & Porter
John Cella	Arnold & Porter

For the Government:

6.7C	[REDACTED]	DOJ	
	[REDACTED]	DOJ	
	Stuart Evans	DOJ/NSD	
6.7C	[REDACTED]	DOJ/NSD/OI	
	[REDACTED]	FBI	
	[REDACTED]	FBI	
	[REDACTED]	ODNI	
(b)1,3,6	[REDACTED]	CIA (b) (3)-P.L. 86-36
	[REDACTED]	NSA	
6.7C	[REDACTED]	NCTC	

COURT STAFF:

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

MORNING SESSION, JULY 13, 2018

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(10:40 a.m.)

THE COURTROOM CLERK: The purpose of today's hearing is to discuss 702 reauthorization. Would everyone please state your names for the record. You can start over here.

MR. CEDARBAUM: Jonathan Cedarbaum from Wilmer Hale, Amicus Curiae.

MS. JEFFRESS: Amy Jeffress from Arnold Porter, Amicus Curiae.

MR. CELLA: John Cella from Arnold Porter, Amicus Curiae.

6,7C [redacted] associate general counsel.

6,7C [redacted] Department of Justice.

6,7C [redacted] Department of Justice.

MR. EVANS: Stuart Evans, Department of Justice.

6,7C [redacted] Department of Justice.

6,7C [redacted] FBI.

6,7C [redacted] FBI.

(b)1,3,6 [redacted] CIA. (b) (3) -P.L. 86-36

MR. [redacted]: [redacted] National Security Agency.

6,7C [redacted] NCTC.

THE COURT: Thank you. All right, great. Please, everyone, be seated. Thank you, everyone, for being here today, and thank you, as I'll also repeat in our order of thank you very much, to the amici for all of your hard work also on a fairly tight timetable. We greatly appreciate your service to the

1 Court. Thank you also to the government for all of its work and
2 responsiveness throughout this process. There are plenty of
3 different issues, and many of which are difficult, and we
4 appreciate the fact that you folks have thoughtfully briefed all
5 of them.

6 So, in terms of the argument today, we'll hear first from
7 the government for about a half an hour, and then a half an hour
8 from the amici. I may then take a quick break and just consult
9 with the advisors, and then we'll give the government a
10 ten-minute rebuttal argument. I don't know if the government has
11 a plan on how it wants to split up its argument in any way.

12 6,7C Good morning, Your Honor. 6,7C for the
13 Department of Justice. The government's plan for addressing the
14 Court's questions in this matter this morning is as follows: I
15 will be speaking to the Court's questions with respect to Section
16 103 of the Reauthorization Act and the prohibition on the abouts
17 collection, and my colleague, 6,7C is going to be
18 speaking to the questions with respect to the query procedures
19 and the minimization procedures submitted to the Court with the
20 certifications.

21 THE COURT: All right. So they may -- in my mind, some of
22 them may blend a little bit, but if I ask you some questions, you
23 can refer them to her.

24 I also thought that to start what I would do, and I don't
25 know who wants to argue that, is to give you a few minutes to --

1 if you want to respond to the points raised in the amici's reply
 2 briefs, since you haven't had a chance to, that's the latest
 3 thing that's been submitted, if there are certain things that you
 4 want to respond to on that, I'm happy to hear that before we
 5 start.

6 [REDACTED] 6,7C So my opening remarks actually do address some
 7 of the remarks in the amici and the reply beliefs, so I'm happy
 8 to begin there.

9 THE COURT: Go ahead.

10 [REDACTED] 6,7C Your Honor, the legislative history of the
 11 Reauthorization Act clearly and unambiguously reflects Congress's
 12 intent that Section 103's prohibition on abouts collection left
 13 intact both protections under the 702 collection that have
 14 continued since the NSA ceased its abouts collection in March of
 15 2017. One such form of ongoing collection that is the subject of
 16 particular focus by the amici is the acquisition of [REDACTED]

17 [REDACTED] (b)3,7E from downstream providers such as [REDACTED]
 18 [REDACTED] (b) (1)
 (b) (3) -50 USC 3024(i)

19 As the government fully explained in its brief, amici's
 20 suggestion that such collection may fall within the scope of
 21 Section 103 because Congress was unaware of that form of
 22 collection at the time it passed the Reauthorization Act simply
 23 ignores the statutory text of FISA itself and its legislative
 24 history. It also ignores the extensive record reflecting the
 25 government's longstanding acquisition of such data under Section

1 702 and other authorities.

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2 It's also squarely at odds with the purpose of 702
3 generally and Section 103 in particular. The government,
4 therefore, respectfully submits that longstanding and continuing
5 acquisition of [REDACTED] (b)3,7E from downstream providers is
6 wholly consistent with the abouts prohibition contained in
7 Section 103.

8 THE COURT: Okay. Anything else, then, on -- last
9 comments on their --

10 [REDACTED] 6,7C -- my colleague --

11 THE COURT: -- that you haven't already addressed?

12 [REDACTED] 6,7C My colleague may have some responses with
13 respect to the query and minimization procedures, Your Honor.

14 THE COURT: Yes.

15 [REDACTED] 6,7C I know there's, Your Honor, a multitude of
16 issues that were discussed by the amici and the Court asked the
17 government and the amici to address, but I want to focus some
18 remarks on a suggestion that you would get from their reply brief
19 and sort of the theme in their brief that somehow the
20 Reauthorization Act itself changed the Fourth Amendment
21 landscape, changed the Fourth Amendment analysis in some way, and
22 the mere passage of the Act requires that the Court impose more
23 stringent restrictions on the FBI's queries of its lawfully
24 collected 702 data, despite the fact that Congress was fully
25 aware of the FBI's querying practices before they passed that

1 bill, imposed a very narrow restriction on FBI's queries for
2 those evidence of a crime queries U.S. persons' queries that
3 returned 702 content.

4 There's nothing in the legislative history that suggests
5 that there was any intent to change the Fourth Amendment
6 framework. There's been no change in the Fourth Amendment
7 analysis that goes to queries of lawfully collected data since
8 the passage of this Act. Congress was very clear in the House
9 report that the passage of the Act did not reflect their
10 disagreement with past court opinions or a view that 702 data
11 should be subject to some different Fourth Amendment analysis
12 than other lawfully collected data, and they knew how to impose
13 additional requirements on the government. They chose an
14 additional requirement to place on FBI's queries that was narrow,
15 but they rejected other amendments that other congressional
16 members had suggested for the Act. They rejected those
17 amendments which would have imposed additional restrictions on
18 FBI.

19 In addition, the House report makes clear that the
20 querying procedures that were to be adopted by the Attorney
21 General were to reflect current practices and policies relating
22 to queries from the government.

23 The House report said that the Act reflects the belief
24 that the procedures and processes currently in place satisfy the
25 Fourth Amendment.

1 There's one particular suggestion I want to address from
 2 the reply brief of the amicus, which is the suggestion that FBI
 3 is running thousands of queries a day without, quote, so much as
 4 a reason for those queries. And it's that piece that is not
 5 accurate, Your Honor. FBI is required, has always been required
 6 under the query restrictions that were in past minimization
 7 procedures that now are in these current query procedures to have
 8 a reason to run those queries.

9 In fact, the query standard is a high one that's always
 10 been in the minimization procedures and is currently reflected in
 11 the query procedures before Your Honor.

12 That query standard requires a justification. It's just
 13 that that justification for FBI simply not have to be documented
 14 at the time that they run those queries, but they have to have
 15 those justifications. We talk to agents, analysts, other
 16 personnel in the field offices about those justifications.

17 And, in fact, the compliance incidents that the amicus
 18 focuses on that we've had during this past year, they focus on
 19 two particular compliance incidents (b)3,7E per FBI [REDACTED]

20 (b)3,7E per FBI [REDACTED]

21 [REDACTED] Certain queries were run against
 22 these particular individuals for a particular defined period of
 23 time, and then there were queries related to [REDACTED]

24 [REDACTED]

25 They suggest that those query incidents suggest that FBI

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1 doesn't have a reason for why they run queries, and this is why
2 they need to have justifications. And they suggest that the FBI
3 impose a post-query justification when they're running 702
4 queries. The fact of imposing a post-query justification would
5 not have prevented these query incidents from occurring.

6 The reason why these incidents occurred, it's not because
7 the FBI didn't have a justification or a reason for running the
8 queries. They did. It's just we came in and looked at these
9 queries that were run and determined that those queries did not
10 meet the high standard that's in the procedures. The query
11 standard can be broken down into what we like to think of as
12 three different areas. The standard is, is it reasonably likely
13 to return foreign intelligence information or for FBI evidence of
14 a crime. We think of it in three different ways. One, the query
15 can't be overly broad. It has to be designed in its limiting
16 terms to extract foreign intelligence information or evidence of
17 a crime. They have to have an authorized purpose, meaning they
18 can't be running a query for personal or [REDACTED]
19 reasons. It has to be for foreign intelligence information and
20 evidence of a crime.

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21 And finally, it has to be -- they have to have a
22 reasonable basis to expect that the query will return foreign
23 intelligence information or evidence of a crime. The agents who
24 are running those queries in [REDACTED] had a justification in their
25 minds for running them. They were looking for threats, terrorist

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1 threats in their area of responsibility, that could be posed by.
2 people [REDACTED]

3 [REDACTED]
4 We disagreed with them that that actually met the
5 standard, but that would have been the justification had they
6 been required to document it. They would have written that as
7 their justification, and they would have still run the queries.
8 They were incidents because there was no reasonable basis to
9 expect that any one of those queries would have returned foreign
10 intelligence information and evidence of a crime.

11 THE COURT: I'm going to stop you because I want to get to
12 the questions. And so -- Again, I don't care who argues first,
13 but I've got a bunch of questions that I wanted to give you a
14 brief rebuttal to the amici. So, do you want to start or do you
15 want [REDACTED] 6,7C

16 [REDACTED] 6,7C I can start.

17 THE COURT: All right. So, let me ask you on querying.
18 The general standard is a "must be reasonably likely to retrieve
19 foreign intelligence information."

20 [REDACTED] 6,7C Yes.

21 THE COURT: So, does that require a reasonable likelihood
22 of foreign intelligence information from 702 acquisition will
23 actually be returned?

24 So, in other words, let's say you had a scenario where an
25 analyst ran a hundred separate queries and it returned no

1 information at all. Does that mean the analyst is applying the
2 standard, or are you saying it should only be -- just show me a
3 likelihood that it will be retrieved, the foreign intelligence
4 information will be retrieved if responsive 702 information is in
5 the data that that's being queried?

6 [REDACTED] 6,7C It's two things. It's the latter, Your
7 Honor. There has to be some reasonable basis to -- there has to
8 be, first of all, some reasonable basis in the analyst's or
9 agent's mind when they're running the query to think that it's
10 likely to return foreign intelligence information or evidence of
11 a crime. There has to be some reason. It can't be

12 suspicionless. [REDACTED] 6,7C
13 (b)3,7E per FBI [REDACTED] there would be
14 no reasonable basis to expect it would return foreign
15 intelligence or evidence of a crime. [REDACTED]

16 (b)3,7E per FBI [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 (b)3,7E per FBI

2 THE COURT: But why isn't the amici proposal a reasonable
3 one, which is that you are required to document the justification
4 for U.S. person query only if you actually viewed the contents
5 retrieved by the query? In other words, you wouldn't have to do
6 it before you issued the query, and if the query turned up
7 nothing, then you don't have a problem, but you would have to do
8 so in order to view the contents? Why would that be so
9 burdensome?

10 6.7C There's two reasons. Well, before we get
11 to the burden, Your Honor, those -- the requiring of those query
12 justifications doesn't actually prevent the incident from
13 occurring. To tackle -- to prevent compliance incidents in
14 queries, we need better training and better guidance, which we
15 are doing and have been doing over the last year to reduce these
16 incidents.

17 THE COURT: But it would still -- nobody's privacy
18 information would be read without the justification. In other
19 words, I understand what you're saying, that it wouldn't prevent
20 an inappropriate query, but it would prevent inappropriate
21 queries being -- results being read.

22 6.7C It's the burden involved for FBI. So it
23 goes back to the fact that FBI -- When you think about what FBI
24 does, they get tips or leads across the country in their 56 field
25 offices, people calling in, tips and leads maybe every day on

1 different people or activities or events being based on
2 suspicious activity [sic] or threats or crimes that they think
3 may be occurring, and FBIs have been trained, as part of their
4 investigative operational activity, to just run those queries and
5 not stop and try to write justifications either post-query or
6 pre-query trying to describe what they already know is the reason
7 why they're running his query to figure out what do we know about
8 this person? And the requirement to impose a justification for
9 U.S. person queries that return content would require FBI to try
10 to figure out if these identifiers that they're running are
11 actually U.S. person identifiers, and that's not the focus of the
12 FBI when they're running down these tips or leads. It doesn't
13 matter whether you're a U.S. person or not a U.S. person if
14 someone is calling in a tip about you that you're hoarding
15 fertilizer, ammonia in your house and they think you're going to
16 commit an attack at a mall. It doesn't matter what their
17 citizenship status is. It matters what do we know in our
18 repositories about that person, and an FBI shouldn't be prevented
19 from spending time trying to write justifications or spend time
20 trying to research to figure out if someone is a U.S. person in
21 order to be able to look at the content that's returned from such
22 results which may reveal a threat that's gone undetected or a
23 threat or connection that they don't know about.

24 THE COURT: But let me ask you this: So Judge Hogan had
25 an order that you have to report to the FISC, I think the quote

1 is, each instance in which FBI personnel received and review
2 Section 702 acquired information that the FBI identifies as
3 concerning a United States person in response to a query that is
4 not designed to find and extract foreign intelligence
5 information. So, do you think -- how confident are you that this
6 wording is actually going on and that the auditing is
7 appropriate?

8 **6.7C** We go out to field offices. We look at all
9 of the queries for the sample of personnel at the field office
10 that they run. We try to figure out which ones were run for
11 evidence of a crime only purposes, which is Judge Hogan's
12 reporting requirement. They can be non-U.S. person queries as
13 well that fall into that reporting requirement.

14 When we do so, we talk to the agents and we actually see
15 them. We see instances in which there is evidence of a crime
16 only queries being run, but what happens is -- that there is no
17 actual content return or no 702 return or they actually excluded
18 the 702 or FISA dataset from their query, so we've only had that
19 **(b)3,7E per FBI** with this rare event of evidence of a crime only
20 query returning 702 content. However, in the -- the suggestion
21 by the amicus is to impose the justification requirement for
22 foreign intelligence queries, for all of their queries that are
23 U.S. person ones going into 702 content, and there's a large
24 amount of queries that are being done by FBI on a daily basis,
25 weekly basis. We looked at in a -- let's say in a year period in

1 2017, we looked at (b)1,3,7E per FBI field offices
2 with a sample of their personnel, and these were queries running
3 against FISA information, including 702 information. The sheer
4 number of it goes to the burden of why FBI cannot simply write --
5 stop their investigative work and be asked to write
6 justifications and figure out who's a U.S. person identifier and
7 who isn't, which would require research.

8 THE COURT: All right. Let me move to -- are you -- who's
9 going to handle training and oversight?

10 6,7C I am, Your Honor.

11 THE COURT: Okay. So, 6,7C came off easy. All
12 right. So, in that area, on -- under training exemption -- so
13 training we all agree can cover lots of subjects. That could be
14 training of foreign language training, how to conduct
15 intelligence, IT analysis, et cetera. The question is, are the
16 lawful training exemptions limited to training on 702 procedures,
17 or do they cover all kinds of training? And if the former, why
18 isn't -- why aren't the procedures written narrowly?

19 6,7C So, the training exemption that's in the
20 current query, 702 proposed query procedures and the minimization
21 procedures, would only cover queries into 702 information. It
22 wouldn't then allow queries into -- for training purposes into
23 other raw FISA titles, so they wouldn't be able to do this
24 because the data is co-mingled in the FBI data systems, unless we
25 changed the other procedures, too.

1 So if they were however able to limit the queries into a
2 particular 702 data set, they could do the training queries into
3 the 702 data set.

4 THE COURT: Even if it's not training regarding 702
5 procedures?

6 6,7C Well, it would be -- it has to be training
7 about 702 -- it has -- when they do their training, when they do
8 their raw FISA training -- they wouldn't allow people to have
9 access to 702 unless they were authorized to handle raw 702 data.
10 So they would be trained -- it would be people who were being
11 trained on 702; not people who are criminal agents who have no
12 connection to 702.

13 THE COURT: Similarly, why would you need to run training
14 with the U.S. person queries? In other words, this seems --
15 Amici raised a point. Why do you have to do it with U.S. person
16 queries? And even if you did, why couldn't you use it with past
17 queries that you already know what the results are? Why fresh
18 U.S. person queries as part of the training?

19 6,7C As we explained in our brief, Your Honor,
20 the agencies would mostly use non-U.S. person identifiers for
21 these training queries, but there could be an example where they
22 might want to use a U.S. person query, and I can think of two.
23 One is, in the context of the new reauthorization statute,
24 there's a new requirement on FBI for the new U.S. person evidence
25 of a crime only query and what to do. So they need to, when

1 they're training them on [REDACTED] and the systems that have
2 702s, they need to show them this is how you conduct this query.
3 If you conduct a U.S. person query, this is where you need to
4 stop in the system; don't click on this particular piece of
5 information because then you'll be accessing the content when you
6 should have come to the Court for a court order. So there could
7 be that scenario.

8 The other scenario is running a known U.S. person
9 identifier, which could be a past query that was run, but you
10 have to -- but it would be one where you know that you're going
11 to retrieve U.S. person information to show the agents and
12 analysts at FBI how to apply the retention requirement that they
13 have. And so at FBI, they mark communications that meet the
14 retention standard, they mark -- they apply all sorts of markings
15 to their communications. They have privilege markings. They
16 have to apply privilege communication rules in their system as to
17 the other agencies, and so hands-on training like that, rather
18 than talking theoretically to people about what to do and how to
19 apply these retention provisions, it's much more effective in our
20 view from a compliance perspective to actually show them hands-on
21 in the system, this is how it looks in the system, this is where
22 you click, this is how you apply the markings; and retention
23 requirements, this is how you indicate if you disseminated
24 something so we know to track it for compliance reasons. This is
25 all important training to enforce compliance with the procedures

1 that are before the Court, and that's why the government believes
2 it's a reasonable provision as written.

3 THE COURT: All right. Let me move on to the lawful
4 oversight exemption. So, if we take the exemptions in the
5 current procedures as an example, and I think there are six types
6 of oversight options listed, if an agency wants to rely on
7 exemptions, circumstances outside of those six types, it would be
8 required to file an FP --

9 6,7C [REDACTED] that's right, Your Honor --

10 THE COURT: -- before acting? And then NSD would come to
11 the FISC?

12 6,7C [REDACTED] That's right, Your Honor.

13 THE COURT: So do you believe that the provisions required
14 at FISC be notified before the agency takes an action?

15 6,7C [REDACTED] That's not how it's currently written
16 because it's written as to report the deviation. And so it's
17 written that we would come after, but if, for example, if we had
18 a particular oversight exemption that did not fit into one of the
19 enumerated examples and we reported it to Your Honor and Your
20 Honor and this Court felt that that was not really a lawful
21 oversight function and it was overly broad as applied by the
22 agencies, that would be a compliance issue and the agencies and
23 the government would know that we would not apply the provision
24 that way in the future. So Your Honor and this Court would
25 retain oversight at how the government's actually interpreting

1 and using this provision.

2 THE COURT: Parallel to an EA in that you're not seeing it
3 before hand but we're seeing it promptly thereafter? And how
4 promptly would we be seeing it?

5 6,7C We don't put a particular day, but we would
6 expect to notify you as soon as possible as -- For example, this,
7 I think, is similar to the emergency departure provision that's
8 in various sets of the minimization procedures that would permit
9 agencies to depart from the minimization procedures, and then we
10 tell the Court after the departure happens that so you're aware
11 of it, and we're supposed to report those to you promptly.

12 THE COURT: Similarly about I guess
13 there's a description of how you're investigating agencies'
14 activities to assess whether they
15 comply with the minimization rules. Can you tell us anything
16 more about that?

17 6,7C So these procedures -- whatever activities
18 are going on at the agencies that touch on raw FISA information
19 and FISA information generally have to comply with the procedures
20 that are before this Court, whether it's 702 data or other FISA
21 minimization procedures. And so we're looking -- we have
22 normally considered in the past
23 activities, which are done pursuant to presidential executive
24 order that was issued during President Obama's administration to
25 be a lawful oversight function of its personnel and its systems.

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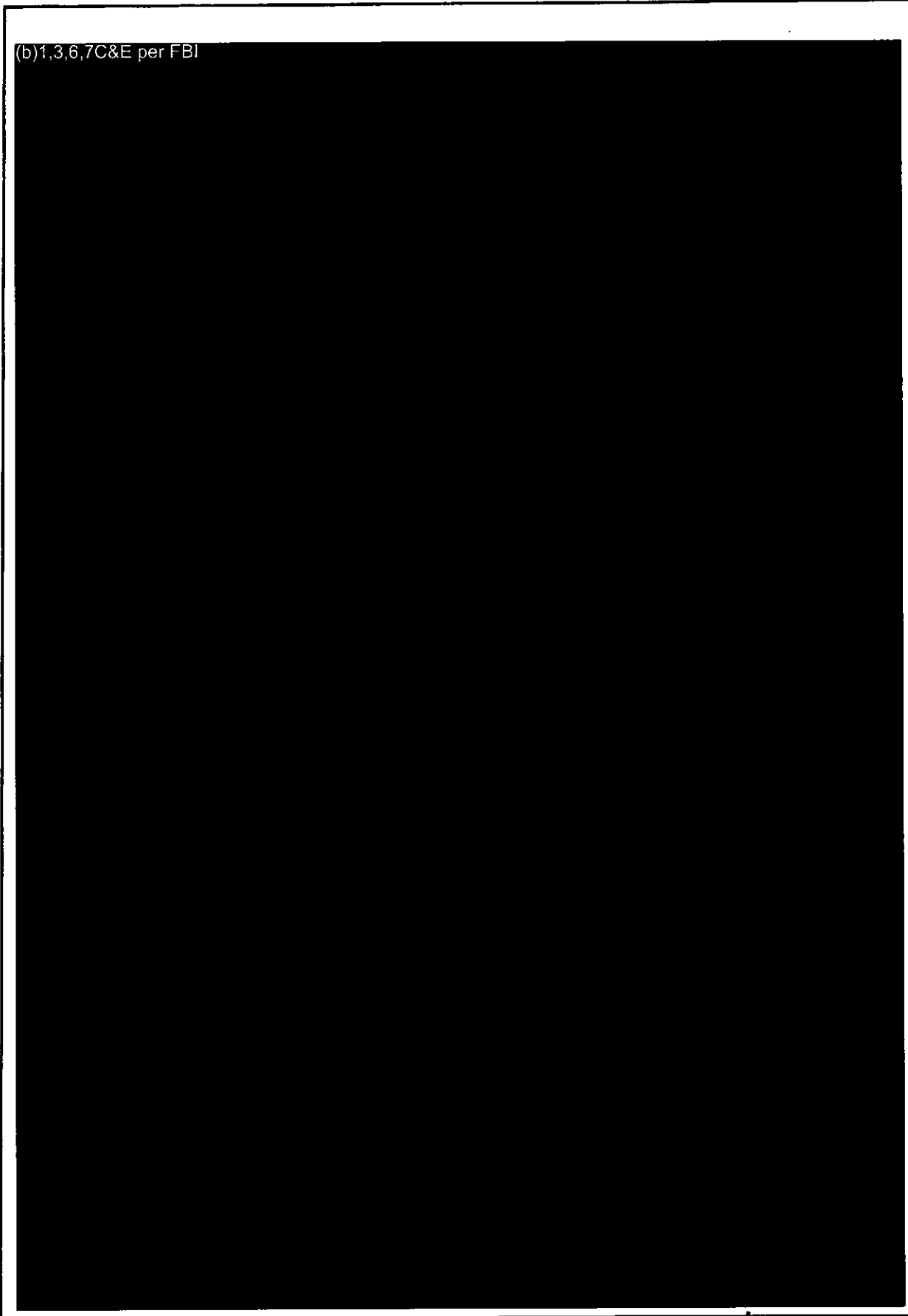
Once we have further information about that, we would report it to Your Honor as to whether it represents a compliance incident and is not compliant with the way these procedures are currently written and how we propose to remedy it.

THE COURT: Okay. Let's talk for a minute about some other minimization procedures, (b)1,3,7E per FBI

(b)1,3,7E

(b)1,3,6,7C&E per FBI

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(b)1,3,7E per FBI

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(b)1,3,7E per FBI

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THE COURT: Okay. All right. Thank you. Before
6,7C [redacted] gets too comfortable, I'm going to bring him up now --
and thank you -- for a few more minutes. Thank you very much,
6,7C [redacted] I appreciate all of your direct answers to the
questions.

All right, 6,7C [redacted] so let's talk about collections a
little bit. And so the -- one thing the amici raised is they'd
be interested, and we join them in the interest, in a fuller
description of the types of [redacted] (b)1,3,7E per [redacted] produced under
702. Is that something that you can talk about more today? And
if not, could you do so in response to an order?

6,7C [redacted] If the Court believes that it's necessary to
receive that information to further its consideration of the
reauthorize certification, that's something that we would
certainly take back and endeavor to accommodate such a request.

THE COURT: So that's -- you're not today in a position to
provide a fuller description?

6,7C [redacted] Not today. That's correct, Your Honor.

THE COURT: Okay. And then so, under amici's theory, why
shouldn't we view [redacted] (b)1,3,7E per [redacted] derived [redacted]

[redacted] as a communication

1 for purposes of assessing whether the data falls within absolute
2 limitation?

3 [REDACTED] 6,7C Because in the government's view, Your Honor,
4 the statute clearly makes distinctions among various types of
5 information that a provider may have. The provider may have the
6 contents of communications. [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 So, again, the statute makes those very distinctions that
12 amici say are meaningless in this context.

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13 THE COURT: And assume for the sake of argument that
14 they're right when -- in saying the [REDACTED] (b)3,7E does
15 constitute communications. Assume that for the moment. Are you
16 aware of any elements of the records that refer to a target but
17 aren't derived from communications to and from the target? In
18 other words, are these -- wouldn't these be abouts
19 communications?

20 [REDACTED] 6,7C I don't think they would be considered abouts
21 communications. Regardless of whether or not they're
22 communications or information, our acquisition of this sort of
23 data is directed at an account that is used by the Section 702
24 target, which is different from abouts collection. Abouts
25 collection historically has been conceived of as [REDACTED]

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[REDACTED]

[REDACTED]

And that's not what's occurring here.

In this instance, the government is directing its acquisition activity at the very facility used by the target, and that, I think, is a key distinction.

THE COURT: Any other issues that you otherwise want to respond to on the abouts communication question? I know that's tough, but I thought maybe there -- there seem to be certainly more issues that should be --

6,7C [REDACTED] No, understood. And as I mentioned in my opening remarks, Your Honor, I think the government's position is well reflected in the legislative history of the Reauthorization Act, the legislative history of the FISA Amendment Act of 2008 which added Section 702 to FISA. It's consistent with the government's longstanding practice of acquiring this data pursuant to not only Section 702, but its predecessor authorization, the Protect America Act, and also Title III orders issued by this Court. So, with that, I have really nothing further to add.

THE COURT: Okay. And that actually punctually completes your half an hour. So, thank you very much, 6,7C [REDACTED] Again, we'll have you folks rebut in a little while. All right. Tell me how you people want to divide your argument?

MR. CEDARBAUM: Good morning, Your Honor. Jonathan

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

1 Cedarbaum. I would propose to address the 103 issues, and then
2 my colleague will address the querying and minimization issues
3 with one exception, which is I am also the [REDACTED] repository
4 amicus --

5 THE COURT: Okay. And what I think -- I have fewer direct
6 questions for you folks, and I'm more interested -- some, but I'm
7 more interested in your responses to what the government has said
8 today in response to my questions and obviously any other points
9 that you want to raise in connection with -- so whenever you're
10 ready.

11 MR. CEDARBAUM: Thank you, Your Honor. If I may, before I
12 address the substantive issues, I did want to address -- raise
13 with the Court one procedural point that we raised in the course
14 of the proceedings with respect to the amici getting access to
15 the quarterly compliance reports concerning 702 that the Court
16 has ordered the government to provide.

17 As you know, the Court had decided not to give us access
18 to that, and we discussed that with the Court advisors on July
19 5th. I just wanted to make three quick points about that. One
20 is that one of the reasons given for denial of access to those
21 reports was that there wasn't sufficient time for a redaction
22 review to be carried out. I just wanted to note that amici did
23 make that request in writing in our opening brief which was filed
24 on May 31st, I believe, or the 29th -- May 31st, excuse me. That
25 was in footnote 37. Perhaps we should have made that --

1 THE COURT: I've got all -- you made it almost all the
2 way.

3 MR. CEDARBAUM: Perhaps we should have made that request
4 more prominently, but I just wanted to note that, for the record,
5 but also it goes to the broader point I wanted to make that I
6 think the Court appreciates, which is that as the Court itself
7 has said again and again, it's in review in 702 certifications,
8 its task in reviewing 702 extends not only to what's on paper in
9 the various required procedures, but equally important, its
10 review extends to, as Judge Collyer said last year, it's not
11 confined to the procedures as written, but rather the Court also
12 examines how the procedures have been and will be implemented.

13 And so amici think that that's an important point, and
14 that in future proceedings it would be very helpful for amici to
15 have access to materials like those that go to the government's
16 actual practice as well as what's on paper.

17 THE COURT: And just so the government's aware, we did
18 complete that. We did -- the legal advisors did speak to the
19 amici after the advisors consulted with me, and we said that in
20 this case, but certainly not as an all time rule or as a
21 precedent, that it would be logistically difficult to release
22 this information in time to make it useful to you folks and
23 useful to us, and the fact that it wouldn't remain a secret from
24 us because we would be aware of it, but I -- I think your point
25 is a valid one and one that we will be happy to take up next

1 time.

2 MR. CEDARBAUM: Thank you so much, Your Honor. So let me
3 turn to Section 103. In their -- and I'll just make a couple of
4 points. One is to pick up on the first question you posed to the
5 government which was a question that we suggested the Court pose
6 in our reply brief, and that is seeking a fuller account from the
7 government of the types of [REDACTED] (b)3,7E per FBI that the
8 government collects under 702.

9 And I think there are a couple of important reasons why we
10 would urge the Court to direct the government to provide that
11 information to us. One goes to the specific issue before the
12 Court today in terms of interpreting the language of Section 103,
13 and there, as you know from the briefing, our view is that this
14 sort of data, as far as we understand what it is, falls within
15 the most natural understanding of the term communication within
16 Section 103, and that therefore for the Court to make an informed
17 determination as to whether any of those types of [REDACTED]
18 (b)3,7E per constitute communications of the sort that are subject to
19 the Section 103 restrictions, the Court has to know what are
20 those types of data in the first instance.

21 So that's, I think, why it's important to have -- for the
22 Court to have that information in order to interpret Section 103.
23 But even more broadly, and I think this overlaps with how the
24 Court may approach understanding 103, is that, as the government
25 has pointed out, in terms of the history and the purpose of

1 limitations on Section 702 collection, the ultimate focus has
2 been on protection of the privacy interests of U.S. persons and,
3 of course, that's built into the statutory definition of
4 minimization procedures. And so, again, in order for the Court
5 to really understand whether it is the case or not, as the
6 government suggests, that because all this data is [REDACTED]
7 [REDACTED] account, there is no significant U.S. person privacy
8 interest at stake, the Court needs to know what is this data and
9 how closely tied is it to a target.

10 THE COURT: What -- I'm sorry, go ahead.

11 MR. CEDARBAUM: And so I think just again, based on the
12 examples we have and as we note in our briefs, as a common sense
13 matter, it sounds like many of these categories and information
14 probably would easily fit --

15 THE COURT: What do you think -- my question is, as you
16 think about -- I'm sure you're hypothesizing about what types of
17 data these could be.

18 MR. CEDARBAUM: Yes.

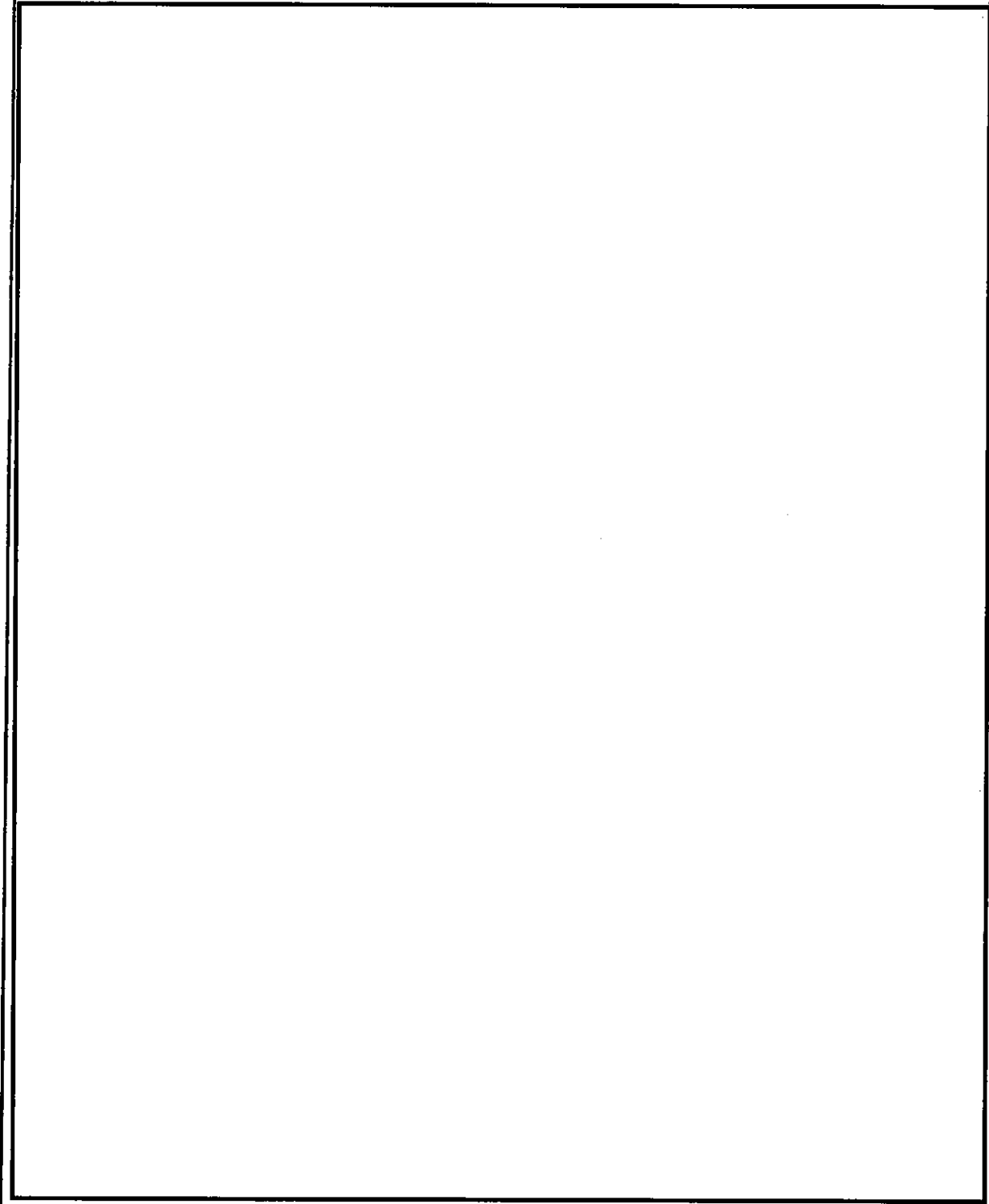
19 THE COURT: What along the spectrum worries you the most?
20 Do you think it's more of a privacy violation than others, either
21 what's already listed or what you think hypothetically could be
22 further [REDACTED] data that hasn't been yet fully described?

23 MR. CEDARBAUM: I will just mention two examples from the
24 existing briefing and then, of course, there is the world of
25 Secretary Rumsfeld's known unknowns. But in the briefing itself,

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

1 if you look at the description from [redacted] let me just get it. It's
2 from the [redacted] and we quote it in footnote 33 of
3 our brief, it lists a number of types of [redacted] data. And

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(b) (1)
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[REDACTED]

THE COURT: I'll ask you, on account -- account -- [REDACTED]
account records, this might be overly technical, but your -- you
point to ECPA's definition of electronic communication, which is
broad, but the Stored Communications Act does distinguish between
the contents of communications and [REDACTED]

[REDACTED]

Is that a distinction that you think could be relevant
here? In other words, the government compel or can you --
[REDACTED] with subpoenas, 2703 orders? Is that a
distinction that you think matters, if it's relevant here?

MR. CEDARBAUM: I don't think so, Your Honor, [REDACTED]

[REDACTED]

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THE COURT: All right. Let's do [REDACTED] issues then --

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MR. CEDARBAUM: -- please --

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THE COURT: -- for a minute, and one question I have for you relating to the system for the classified e-mails and IMs that for raw Section 702 information on those systems, would it be reasonable to have a destroy upon recognition requirement instead of a requirement to destroy after a stated time period where you have a -- In other words, the government has given us some representations about the FBI's technical limitations. So, what do you think is a better requirement in terms of destruction?

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MR. CEDARBAUM: I think that might well be a reasonable proposal, Your Honor. Again, the requirements that should be imposed, I think, go back to the statutory definition of minimization requirements, and then, of course, the Fourth Amendment obligations behind that. In terms of the definition, the first element, I believe, of the definition of the minimization requirements, the government is designed, in effect, to take whatever are reasonable steps to minimize the retention of the information of any U.S. persons. And so the destruction requirement you just described would certainly be a helpful step in that direction. It would certainly be better than what I

1 gather we have now, [REDACTED]

2 The one proposal that we had offered, as you may recall
3 that the government rejected, was an auditing requirement,
4 which -- like the one you have suggested, but in a different
5 vein, was designed to improve the system further in the direction
6 of privacy protection within what we understand are the bounds of
7 the FBI's technical and practical capabilities.

8 THE COURT: And you think that's -- would you also offer
9 that requirement on metadata?

10 MR. CEDARBAUM: Well, the auditing requirement we had
11 suggested, Your Honor, is auditing of who is getting access, and
12 so, yes, it wouldn't matter whether they're getting access to
13 metadata or content.

14 THE COURT: Okay. All right. Thank you very much,
15 Mr. Cedarbaum.

16 MS. JEFFRESS: Good morning, Your Honor. Amy Jeffress. I
17 will be addressing querying for most of my time and then both
18 minimization procedures for the remainder.

19 THE COURT: Okay. Do you want to start by responding to
20 anything that ^{6.7C} [REDACTED] had said in her responses to my
21 questions?

22 MS. JEFFRESS: I would like to do that.

23 THE COURT: All right.

24 MS. JEFFRESS: I will start that way. The -- ^{6.7C} [REDACTED]
25 raised some very interesting rejoinders to our arguments about

1 what we think the querying procedures should contain in terms of
2 greater protections and why we think those greater protections
3 are necessary. One point that I want to just say right at the
4 outset is that I think ^{6,7C} [REDACTED] raises a good point that the
5 written statement of reasons that we are suggesting the FBI
6 should adopt would be more effective in deterring improper
7 queries if it were required at the outset of any query, and we --
8 I argued this several years ago, as the Court knows, and did not
9 prevail, but I would still say that that would be ideal from
10 amici's perspective, that that requirement should be imposed.
11 And one question, Your Honor, that I would ask you to raise again
12 with ^{6,7C} [REDACTED] is that she said that the FBI agents do have
13 justification at the time that they run the queries; it's unclear
14 to us how they manage to remember those justifications when
15 they're not recorded. It seems to us that recording it is not a
16 significant burden, as the Court rightly asked, and so we, again,
17 would think that the requirement of a written Statement of Facts
18 to support a query is not a -- is not a burdensome one and would
19 add so much -- just so much protection and really just make it
20 clear that the agent has stopped and thought about it.

21 And she explained that FBI agents get a lot of leads every
22 day, and, of course, we want to encourage them to follow through
23 on significant leads, but we also want to make sure that they are
24 careful when they are querying this very sensitive data to do so
25 only when there is a justification.

1 THE COURT: So your argument really is a step beyond what
2 the brief is saying, which is they need to do justification
3 before viewing the contents; you're going back to your original
4 position that it needs to happen before the query.

5 MS. JEFFRESS: And we alluded to this in the reply brief,
6 Your Honor, and the reason why in the initial brief here, for
7 this proceeding, we suggested that there would be this interim
8 step that the Court could take to require it only in respect to
9 viewing the contents of 702 information that had been obtained in
10 response to a query, that that's consistent with what we thought
11 the Reauthorization Act suggested, that Congress thought this was
12 important, that Congress had imposed in certain circumstances the
13 requirement for a court order when a query is not designed to
14 obtain foreign intelligence information and is being sought for a
15 predicated criminal investigation not related to national
16 security.

17 So the court order requirement there that the FBI obtain a
18 court order when accessing the contents of the information
19 produced in response to queries, we thought, suggested that
20 Congress has taken a position about that stage in the process
21 that we think the querying procedures could go further than they
22 do and require a Statement of Facts, even where a court order is
23 not required but where the FBI does want to review content
24 information.

25 THE COURT: So is this more -- would you argue that this

1 is more of a statute -- a policy, statutory position than a
2 constitutional one? Because it wouldn't -- If it were a
3 Constitutional issue, wouldn't we have to determine that each
4 U.S. person queried is a search on the --

5 MS. JEFFRESS: I want to get to that, too, Your Honor,
6 because I think our position is that Congress required querying
7 procedures in the Reauthorization Act, and so that was also a new
8 requirement. So the Reauthorization Act changed the law in
9 requiring the Court order in certain circumstances and required
10 querying procedures that were apart from the minimization and
11 targeting procedures.

12 And so -- and then, of course, Your Honor has the
13 obligation to review the querying procedures and determine that
14 they're consistent with the statutory requirements and the Fourth
15 Amendment.

16 The *Carpenter* case is a very significant development, and
17 we only had about a week to evaluate it while we were writing our
18 reply brief, and it ended up in a footnote also because of some
19 page constraint issues that we faced as we were working to turn
20 that in, but as we have read the commentary from certain Fourth
21 Amendment experts who have studied these issues much more than I
22 have, such as Orin Kerr and the commentary that he has issued
23 even since we filed the reply brief, it's clear that the
24 *Carpenter* case has actually changed the Supreme Court's approach
25 and thus the law to searches in a much more profound way than

1 perhaps I realized when I initially read it the day or a couple
2 days after it came out. And specifically, had *Carpenter* -- the
3 search there, it's a different search than the Supreme Court has
4 traditionally considered in applying the Fourth Amendment. So
5 that -- the data that has been collected, the cell site data
6 collection that has been collected in the *Carpenter* case had been
7 collected pursuant to a 2703(d) order, which is actually a pretty
8 high standard, but the Court said that actually that's not even
9 sufficient, that it's a Fourth Amendment protected search, and so
10 the Fourth Amendment applies here. And I think actually that as
11 *Carpenter* gets extended to other situations and possibly to even
12 e-mails, this Court is going to need to consider whether the
13 *Carpenter* holding does require a different approach to the
14 collection and particularly the querying of Section 702 data.

15 And if you analogize what happened in *Carpenter*, it was
16 not the collection of the cell site location information that was
17 the problematic search. In fact, the provider collects that on a
18 routine basis and has that somewhat similarly to the collection
19 of 702 information. It's really the query, if you will, of that
20 data to determine where *Carpenter* was throughout the timeframe of
21 these robberies or burglaries that had been committed. That was
22 the search that the Court found should have been protected by the
23 Fourth Amendment, and I think that pretty much strengthens our
24 position that querying is potentially a search now in light of
25 the *Carpenter* decision.

1 So those were the arguments that I wanted to make in
 2 response to the arguments that the government made with respect
 3 to querying.

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

4 Just one more point about the compliance incidents,
 5 though. The way that government counsel described querying, it's
 6 not just that maybe one improper query gets made in the system,
 7 but the compliance incidents that were reported -- and we respect
 8 and greatly appreciate the work that the National Security
 9 Division does in finding these incidents and reporting them to
 10 the Court, but it wasn't just one or two queries,

(b)1,3,7E per FBI

11 (b)1,3,7E per FBI

12 (b)1,3,7E per FBI

13 I have friends overseas and I lived overseas for
 14 five years, I worked there. I probably have been in the 702
 15 collection at some point, so I don't want that, you know,
 16 invasion of my own privacy. These are very high numbers. These
 17 are not just one or two queries that maybe aren't justified, so I
 18 just wanted to flag that just to highlight, Your Honor, the
 19 seriousness of the intrusiveness here.

20 THE COURT: Let me ask you about a couple of issues on the
 21 exemptions and whether what the government proposes or possible
 22 cures are sufficient in your estimation.

23 So, starting with the lawful oversight exemption. So, the
 24 Court previously ordered the government to report whenever it
 25 relied on a lawful oversight exemption to deviate from querying

1 or minimization rules to respond to a Congressional request. If
2 we do so again, do you have any remaining concerns about the
3 government's invoking this exemption response to the
4 Congressional request?

5 MS. JEFFRESS: And would that requirement be for all
6 lawful oversight deviations or would it exclude the ones that
7 were in the enumerated list? I think one concern that we had is
8 that by providing the enumerated list, it seems that the
9 government might actually be restricting the incidents that it
10 would need to report to the Court, and we did not think that that
11 was appropriate.

12 THE COURT: So it's not just the enumerated list? It's
13 not confined to the enumerated list by --

14 MS. JEFFRESS: Then I think that does help, Your Honor.
15 We thought that -- Yes, if those incidents are reported to the
16 Court, then that does help ensure that there is, you know -- that
17 there is not wild deviation from the procedures that isn't
18 warranted.

19 THE COURT: But if it's simply an enumerated list, then
20 you're worried about --

21 MS. JEFFRESS: -- {Indiscernible conversation} -- the
22 enumerated list might be overbroad, and there may be deviations
23 that the Court may want to know about that the government felt it
24 didn't have the obligation to report.

25 THE COURT: Okay. And similarly, on the congressional

1 mandate, if we affirm the narrow interpretation that we've given
2 previously to that exemption and ordered the government to report
3 whenever it relied on either the specific congressional mandate
4 or the lawful oversight exemptions, any concerns about the
5 specific congressional mandate in that case?

6 MS. JEFFRESS: The congressional mandate does raise very
7 troubling issues because of some of the -- frankly, some of the
8 issues that we've seen recently with what Congress has been
9 accusing the government with doing with respect to applications
10 submitted to this Court. It seems that there might be some
11 member of Congress or even multiple members of Congress who would
12 try to obtain information or force the government to make queries
13 on persons that were targets of Congress for whatever political
14 purposes, so we do think there should be a bipartisan -- or some
15 more defined requirement for what the congressional mandate is
16 that's currently in that --

17 THE COURT: But if -- let's say we take -- so your
18 position is that if, even if one Congressperson makes a request,
19 that that's not enough but by -- unfortunately in our day and
20 age, bipartisanship seems to be a disappearing noun, but if you
21 had the chairman of the committee, would that be sufficient?

22 MS. JEFFRESS: I mean, I think that if there is a court
23 reporting requirement and some limitation on what is a
24 congressional mandate, then that would be better. I still
25 personally think that this is one that's prone to abuse, and I

1 would actually want what we asked for in our brief, which is that
2 it should be bipartisan. This is a serious privacy issue, and I
3 think it should be bipartisan, and we ought to force Congress to
4 decide that if we can.

5 THE COURT: Better you than I. We talked about
6 justifications on U.S. person queries. Let me just ask you,
7 before I talk to Mr. Cedarbaum about that, but can I ask you
8 about the recordkeeping of U.S. person queries, that if -- the
9 government argues that 702(f)(1)(B) should be read in the context
10 to leave the FBI's recordkeeping practices undisturbed, and
11 Congress has suggested then some of the requirements report the
12 number of U.S. persons queried terms used, so if that's the case,
13 shouldn't we interpret those sections harmoniously? Is there a
14 reason why you think we should be requiring more from the FBI in
15 terms of its requirements to report?

16 MS. JEFFRESS: Well, we are taking a position that it
17 seemed that in order to meet the requirement that they forward
18 U.S. person queries, that they know which are U.S. person
19 queries, and we do understand that there's a difficulty there,
20 but we thought that, perhaps another reason, as our brief pointed
21 out, that the IG report was requested so that we could get to the
22 bottom of whether it would be possible to at least have some
23 effort to determine whether these queries were U.S. person
24 queries, and if it's not possible, it's not possible, and the IG
25 report will set that out, but if it is possible, we think they

1 should be recorded as such and that that should be the
2 recordkeeping requirement.

3 THE COURT: Okay. Any last thoughts?

4 MS. JEFFRESS: I don't think so, Your Honor. The one
5 thing I did want to put on the record before I sit down, because
6 I think this is our last opportunity to speak, is that we have
7 had contact with government counsel during the course of
8 preparing for this argument today and preparing our briefs and
9 have tremendous respect for the attorneys who work in all the
10 agencies from the government who are represented here, and they
11 are truly talented lawyers and dedicated public servants. I will
12 put this on the record because I want the public to know that,
13 and then similarly the Court's own staff and advisors have been
14 extremely helpful. They understand these issues with just a
15 tremendous body of knowledge that I know is of great assistance
16 to the Court, and I don't think the general public or even,
17 perhaps, Congress is aware that they are here and that they are
18 providing such tremendously useful services to the Court, and so
19 I wanted to say both of those things, that we, as amici, have
20 really learned how many people are dedicated to making sure that
21 the government is doing the right thing on these issues, and I
22 wanted the public to know that when this transcript is eventually
23 released.

24 THE COURT: Great. And I second all of those thoughts.
25 All right. Let's take a ten-minute recess. We'll then return.

1 I'll let -- give the government ten minutes to rebut, and I just
2 want to make sure I'm not missing any areas of inquiry, all
3 right. Ten-minute recess. Thank you.

4 (Thereupon, a break was had from 11:40 a.m. until 12:00
5 p.m.)

6 THE COURT: Okay. Welcome back, everybody. So,
7 6,7C I have a few questions for you, and then I'm happy
8 to hear you or 6,7C or both to give whatever brief rebuttal
9 you want to make, and then I'll give a few moments to amici.

10 So, let me ask you first. When we talked about the
11 training exemptions, you really talked more about query, and so
12 how about -- why do we need exemptions for minimization for
13 training?

14 6,7C The reason why, Your Honor, we had to put
15 it into the minimization procedures, so as to avoid constant
16 violations of procedures when doing training with employees, is
17 when agents or analysts or personnel at agencies are authorized
18 to have access to raw FISA, 702 data and they are
19 required to get -- the procedures say that they must have
20 training before they get access to the information, the raw FISA
21 information, but it's like the chicken and the egg scenario. In
22 order to train them on how to minimize and to apply the retention
23 restrictions and some age-off restrictions that are in the
24 minimization procedures, we need to show them the raw FISA, the
25 systems, how to use them, so they are necessarily going to be

1 getting access to the system in the middle of training while
2 they're getting trained, and so that's why we needed to put it in
3 the procedures. It's not because we, as we explained in our
4 brief, because we intend to retain information for training
5 purposes beyond age-off requirements or to depart from other
6 aspects of the procedures. We wrote it the way we did in order
7 to enable them to have access to that as part of the training.

8 THE COURT: Isn't there a narrower way to draft that to
9 explain that this is really the only purpose for it?

10 6.7C The government, as we've said in prior
11 years with the congressional mandate provisions, there could be
12 ways, I acknowledge, to more narrowly write that into the
13 minimization procedures, but that doesn't mean that the
14 procedures aren't reasonable under the Fourth Amendment and that
15 they don't meet the statutory definition of minimization
16 procedures, and the government, we are saying how we interpret
17 the provision and how we intend to use it, and this Court could
18 acknowledge that in its opinion as to how the provision will be
19 implemented.

20 However, it doesn't make it, because we wrote it that way
21 for this initial set of procedures, it doesn't mean that the
22 procedures are not reasonable as written.

23 THE COURT: Okay. Let me ask you about Ms. Jeffress's
24 congressional mandate limit issue. I mean, she has a sanguine
25 view of cooperation that may be justified or not, but what do you

1 think of limits of the congressional mandate?

2 6.7C This provision dates back a number of
3 years. It actually dates back to 2012, and the NCTC Title I
4 minimization procedures. Back then and until now, we've always
5 told the Court that we've interpreted the congressional mandate
6 concept to be very narrow, and the record supports that view.

7 I know Ms. Jeffress has said in the reply brief and today
8 that there could be abuse of this provision and that there's a
9 suggestion that a Congressperson with a personal vendetta could
10 ask us to produce information in contravention of the procedures,
11 and we would use this provision to respond to some kind of
12 improper request like that, but that isn't the point of the
13 provision. We've actually never even invoked it all of these
14 years that it's been in both Title I and 702 FISA minimization
15 procedures, which shows the government has interpreted this
16 narrowly.

17 For example, when we got a congressional request during
18 the reauthorization period for NSA to try to identify
19 incidentally or count the number of incidentally acquired U.S.
20 person communications, we didn't consider that request a mandate
21 by Congress, and we actually consulted with the Court and used
22 the lawful oversight provision and then notified the Court of our
23 use of it to respond to that congressional request.

24 I'm not an expert on all the types of congressional
25 processes that there could be, but, for example, we would

1 consider a mandate to be, for example, a subpoena, a bill, a
 2 resolution from Congress. Whether it's bipartisan or not, I
 3 don't think that that matters. The chairman of the committee or
 4 the majority staffer -- or congressional members of the committee
 5 could subpoena the government to provide certain information as
 6 part of their lawful oversight activities.

7 The point of this provision is not that the government
 8 would use it in response to any one of those requests and depart
 9 from the procedures, but it simply provides the ability not to
 10 have the procedures be an obstacle to the government being able
 11 to respond to lawful oversight requests from the overseers in
 12 Congress.

13 THE COURT: Okay. And one last one, which is about the
 14 (b)1,3,7E per FBI [redacted] Is it technically feasible to
 15 destroy on recognition the raw FISA information unless it's
 16 subject to some specific order otherwise? Is that something you
 17 can actually do?

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

18 (b)1,3,7E per FBI [redacted]
 19 [redacted]
 20 [redacted]
 21 [redacted]
 22 [redacted]
 23 [redacted]
 24 [redacted]
 25 [redacted]

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THE COURT: Okay. I'll give you a couple minutes, if

1 there are any other issues that you want to rebut.

2 6,7C Thank you, Your Honor. I would like to
3 address the specific remarks from amici.

4 One, first with respect to the queries, the suggestion
5 today that there should be a pre -- not just a post-query
6 justification requirement but a pre-query justification on the
7 FBI, either way, both requirements would be a barrier to entry of
8 lawfully collected data, and Your Honor, the House and Congress
9 itself considered barriers to entry, other amendments that would
10 have required steps to be done and the FBI to take other steps,
11 whether it was court order or warrant requirements, before they
12 got access to 702 data, and those were rejected in the bill.
13 Those amendments did not pass, and they only imposed a limited,
14 narrow requirement to get a court order post-query on FBI.

15 In addition, the House bill -- the bill was supposed to
16 document current policies and practices of the intelligence
17 community agencies relating to queries, not impose new
18 requirements on the agencies, and said that they did not want the
19 requirements to interfere with FBI's ability to find, identify,
20 and act upon the information, and that's critical, because
21 imposing any kind of barrier to entry on lawfully collected
22 information on FBI when they're running these basic queries as
23 part of a simple, basic investigative step would prevent them
24 from timely acting upon information that they lawfully collected.

25 I also just want to briefly talk about Carpenter. I know

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

1 Ms. Jeffress mentioned that Carpenter -- there's a suggestion
2 that somehow that has changed the Fourth Amendment landscape. I
3 just want to briefly say that the majority opinion made very
4 clear that that opinion was limited to cell site location
5 information, historical cell site location information. It had
6 to do with requests to providers for information, not queries of
7 already lawfully collected information, and the majority said it
8 did not apply to foreign intelligence or national security
9 collection techniques, which is what we're talking about here.

10 In terms of the queries, the [REDACTED] - there's one thing I
11 just wanted to mention about the [REDACTED] queries. And we
12 acknowledge that those queries -- it was a significant compliance
13 incident, but those were individual errors by those personnel who
14 ran those queries. Justifications pre or post would not have
15 prevented those incidents. What those incidents come down to, as
16 well as other incidents that we've reported to the Court over the
17 past year, are fundamental misunderstandings by some FBI
18 personnel, what the standard reasonably likely to return foreign
19 intelligence information means. They were running those queries
20 for foreign intelligence purposes. They had what I would call a
21 good faith in running them, they just didn't understand that
22 running those queries, while you have a good intent and it's
23 defined foreign intelligence information, it doesn't mean there's
24 a reasonable basis to expect that the query will return foreign
25 intelligence information and evidence of a crime.

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

1 And I just want to quickly mention what we have done to
2 address this. We have not only done over the past year or more
3 targeted training on the specific query standard that I've been
4 talking about today at the field offices and talking to all of
5 their personnel when we're at the offices, but we've worked -- we
6 and the Office of the Director of the National Intelligence have
7 worked with FBI to come up with detailed guidance that has gone
8 out to FBI personnel. It talks about how to prevent compliance
9 incidents. It gives examples of improper and proper queries that
10 you can run, and it gives as examples as improper, the ones that
11 we reported to the Court regarding these [REDACTED] queries.

12 And it actually recommends to personnel that if they
13 intend to run queries that are based on what we call a
14 [REDACTED] reason, that's like these [REDACTED] queries where they
15 didn't have [REDACTED] reason for each identifier, there was
16 some [REDACTED] basis as to why they are running these queries,
17 that they actually consult with the Office of General Counsel
18 personnel before they run a query like that. Those are not
19 common queries that we're seeing on our field office reviews, and
20 so we thought that was a reasonable policy rule to put in place
21 essentially recommending that the personnel consult with OGC,
22 their Office of General Counsel, before running those.

23 THE COURT: Okay. Thank you. And [REDACTED] 6.7C, anything
24 that you want to respond to?

25 [REDACTED] 6.7C Unless you have any questions for me, I don't.

1 THE COURT: All right. So let me raise one other broader
2 issue for you folks. And this is about how we want to proceed
3 going forward. There is a great deal of information here. There
4 are a great number of issues, constitutional, statutory policy.
5 I appreciate the fact that everyone has spent so much time
6 digging into so many different issues with innumerable subparts
7 and innumerable different constructions, and that you folks are
8 here today ready to answer questions on a wide variety of topics
9 which require both technical, constitutional and statutory
10 knowledge, if I ultimately find that there are some deficiencies
11 in the querying procedures, for example, it seems that we have a
12 couple of options. One is that I go ahead and issue an opinion
13 that enumerates some of those and then, therefore, prevents you
14 from going forward until they're remedied. Another is to let you
15 know -- our opinion that I have to issue is due out by July 25th,
16 12 days from now, on a broad variety of topics, as we've said.
17 The other possibility is to let you know in the next few days
18 which those issues are and ask you at that point to tell us
19 pretty quickly whether you would like to seek an extension to
20 make certain amendments. You don't have to tell me the answer
21 now. It would be helpful to know, but because of our short
22 time-frame, what I don't want to hear is on July 23rd, well,
23 actually we want to amend a couple of things. What I prefer is
24 to be able to tell you, again, early next week if there are
25 certain deficiencies, here's what they are, what do you want to

1 do about them. I don't know whether you are prepared to answer
2 today about which course you want to take, and if not, that's
3 fine, but I'd ask you to be thinking about it such that you were
4 able to respond quickly once we let you know if that's the case.

5 MR. EVANS: Your Honor, Mr. Evans for the government. If
6 I could briefly thank you for that inquiry, and I'll certainly
7 take that back and consult, and we can respond to the Court's
8 staff more formally.

9 Standing here today in response to that, I think our
10 preliminary reaction would be it's always better from our
11 perspective to have more feedback and reaction sooner rather than
12 later, not just with the impending deadline for the expiration of
13 the certification to the extension order, but also because each
14 successive extension or deficiency order causes further
15 administrative burdens, costs on the government to go back to the
16 providers and extend the collection deadline, and so having any
17 additional time kind of allows us to kind of figure out what the
18 most appropriate path forward would be in that regard as well.

19 THE COURT: Okay. Thank you. And I'll also say, if we
20 do seek amendments in certain areas, then, again, the time would
21 be reasonably tight, but what we might be able to do is bring in
22 amici less formally, perhaps, even, to appear at a hearing
23 without submitting any brief and just giving their position on
24 any amendment. Again, I don't know the timing. I know you folks
25 have your own practices, but that's one way we could involve you

1 just to hear your reaction.

2 MS. JEFFRESS: Your Honor, we agree with the Court on both
3 of those options. We think it's -- we understand logistical
4 issues involved in maintaining the program and figuring out what
5 the requirements are of what the Court would want to impose
6 before the deadline comes -- approaches, so we would agree with
7 that, and we would welcome the opportunity to come to the hearing
8 as you suggest.

9 THE COURT: Okay. All right. Great. So, again, many
10 thanks for all of your hard work and responsiveness on a whole
11 host of issues, and we'll be back in touch with everybody soon,
12 all right. Good evening to all.

13 (Proceedings adjourned at 12:14 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Scott L. Wallace, RDR, CRR, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 21st day of August, 2018.

Official Court Reporter
United States Courthouse
Room 6503
333 Constitution Avenue, NW
Washington, DC 20001

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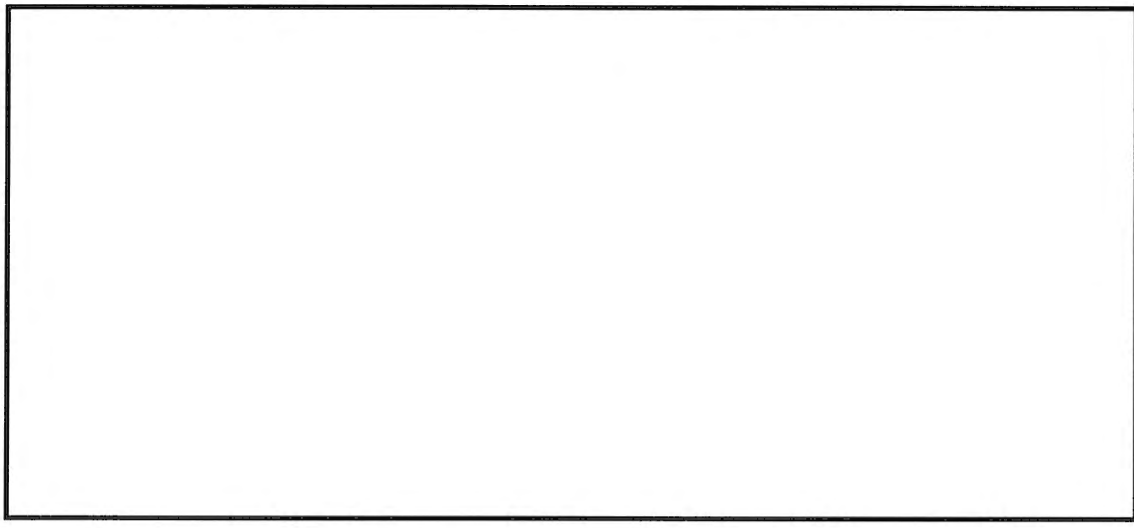
UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

SEP 13 PM 4:29
LEONARD J. HALL
CLERK OF COURT

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



(U) DECLARATION OF THE DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION

I, Christopher A. Wray, hereby declare the following:

(U) I am the Director of the Federal Bureau of Investigation (FBI), United States Department of Justice (DOJ), a component of an Executive Department of the United States Government (USG). I am responsible for, among other things, the national security

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Derived From: FBI NSIC CG
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operations of the FBI, including those conducted by the FBI's Counterterrorism Division (CTD), Counterintelligence Division (CD), and Cyber Division (CyD).

(U) The matters stated herein are based upon my personal knowledge, documents and information available to me in my official capacity, and information furnished by Special Agents and other employees of the FBI.

(U) Purpose of the Declaration

(U) This declaration is submitted in support of the Government's Ex Parte Submission of Amendments to DNI/AG 702(h) Certifications and Related Procedures, Ex Parte Submission of Amendments to DNI/AG 702(g) Certifications, and Request for an Order Approving Such Amended Certifications, including the amended FBI Section 702 minimization and querying procedures submitted therewith. More specifically, I am providing this Declaration to highlight the operational consequences the FBI anticipates experiencing should the FBI be required to 1) maintain records distinguishing between United States person and non-United States person query terms, and 2) maintain a written statement of facts establishing that the use of any United States person query term to query unminimized section 702-acquired content is reasonably likely to retrieve foreign intelligence information or evidence of a crime, prior to viewing any contents returned in response to such a query.

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(U) The FBI's Investigative Authorities and Its Reliance on Databases

(U) As stated in the Attorney General's Guidelines for Domestic Investigations (AGG-DOM), the FBI is the primary investigative agency of the federal government and has the authority and responsibility to investigate all violations of federal law that are not exclusively assigned to another federal agency. In addition, the FBI is further vested by law and by Presidential directives with the primary role in carrying out investigations within the United States of threats to the national security, including the lead domestic role in investigating international terrorist threats in the United States, and in conducting counterintelligence activities to meet foreign entities' espionage and intelligence efforts directed against the United States.

(U) The AGG-DOM authorizes the FBI to collect information through well over a dozen investigative techniques, including accessing records from other government agencies, mail covers, undercover operations, the use of confidential human sources, and acquiring foreign intelligence information pursuant to the Foreign Intelligence Surveillance Act (FISA). These investigative techniques provide the FBI with a large amount of information that must be analyzed in an effort to identify threats to national security and potential violations of federal criminal law (collectively, threat streams). The FBI employs various databases to manage and analyze the substantial amounts of information collected during its investigations and assessments.

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~~(S//NF)~~ The vast majority of information that the FBI acquires is stored in databases that are designed based on the characteristics of the information contained therein. Because the FBI acquires a wide variety of information, the FBI has a wide variety of databases—b1, b3 per FBI—that are available to FBI personnel. A small number of those databases contain unminimized FISA collection, which is subject to strict access controls and retention requirements in accordance with the relevant FISA minimization procedures.

(U) After the events of September 11, 2001, and consistent with the recommendations of both the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) and the William H. Webster Commission (Webster Commission), the FBI worked diligently to eliminate balkanized information that impeded the ability of FBI personnel to identify and connect threat streams. The Webster Commission opined that “planning for enterprise data aggregation and consolidating and conforming the contents of these diverse databases are vital to the FBI’s ability to respond to the threat of terrorism.” Final Report of the William H. Webster Commission on the Federal Bureau of Investigation, Counterterrorism Intelligence, and the Events at Fort Hood, Texas, on November 5, 2009 (Webster Commission Report), p. 32. *See also id.* at 118 n.17 (“Data aggregation and integration of lawfully obtained information are critical to the FBI’s counterterrorism mission.”) The Webster Commission made these findings in the context of its review of, among other things, why specific b3, b7E per FBI

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In adopting the Webster Commission's and 9/11

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Commission's recommendations, the FBI worked to aggregate and integrate data so that queries across multiple datasets are indeed more effective and efficient.²

(U) The Importance of Database Queries

~~(S//NF)~~ Database queries are a critical tool used by the FBI to identify threat streams such as terrorist attacks, **[REDACTED]** and cyber intrusions. FBI personnel conduct queries during predicated investigations in an effort to identify, for example, members of a terrorism conspiracy, **[REDACTED]** and perpetrators and victims of cyber intrusions.

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in fiscal year

2017 personnel ran approximately 3.1 million queries.³ In order to timely identify threat

streams, agents and analysts run queries **[REDACTED]**

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Such queries are also relied upon

to quickly determine whether a new tip or lead from the American public, state and local law enforcement, other U.S. Government entities, or a foreign partner warrants opening

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an investigation, is related to an existing investigation, or requires no further action.

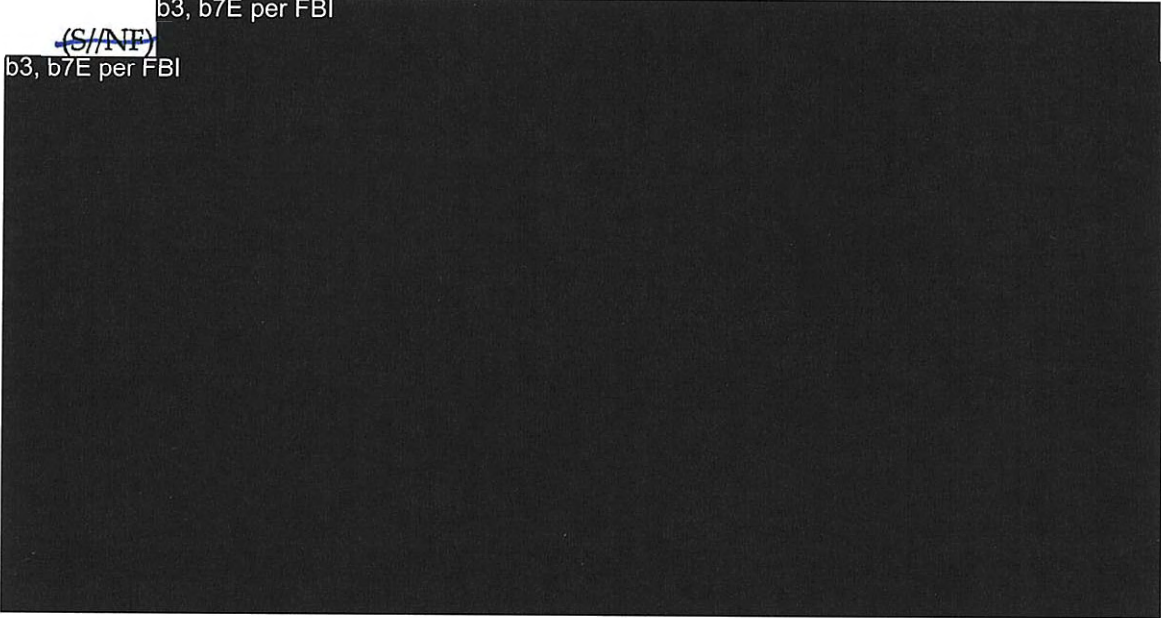
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(U) The Challenges Associated with Determining U.S. Person Status

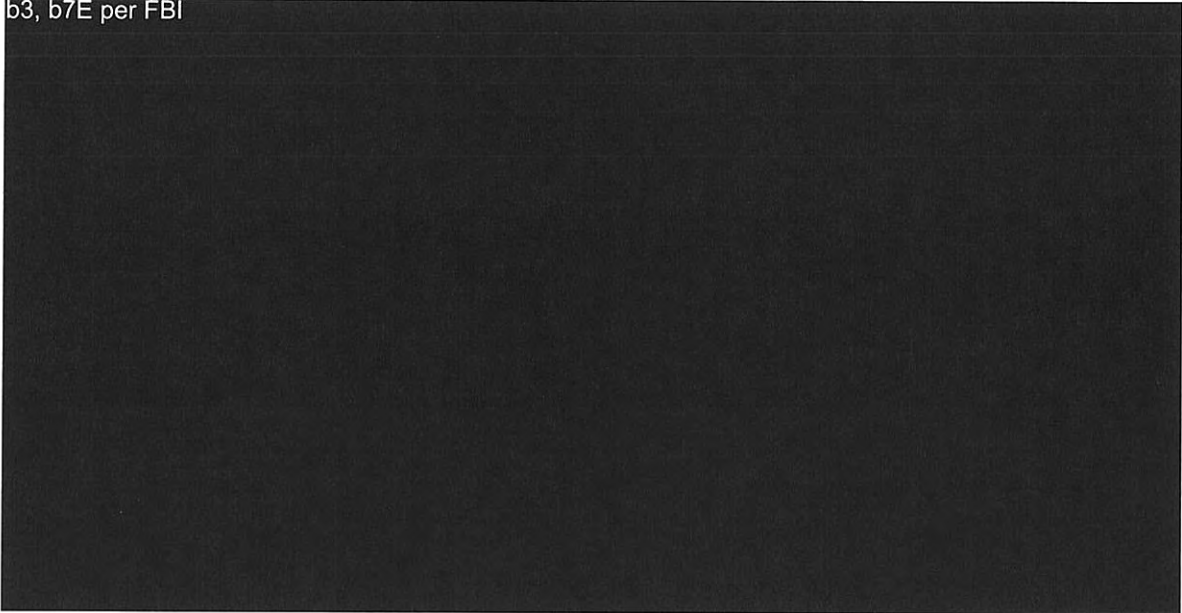
(S//NF) The FBI currently has a decade of experience determining U.S. person status through the application of its section 702 Targeting Procedures. Through this experience, the FBI has learned that the process of reviewing information in FBI's holdings and assessing what that information reveals about an individual's U.S. person status is, in some instances, a complex and time-consuming endeavor.

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⁴ (U) The AGG-DOM also states, "[I]t is axiomatic that the FBI must conduct its investigations and other activities in a lawful and reasonable manner that respects liberty and privacy and avoids unnecessary intrusions into the lives of law-abiding people." (Emphasis added.) This requirement is not limited to "law-abiding citizens" or even "law-abiding U.S. persons."

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**(U) Potential Impact of Requiring the FBI to Determine U.S. Person Status**

(U) It is my assessment that if FBI personnel are required to take the time to attempt to differentiate between U.S. person and non-U.S. person query terms in the context of conducting queries during the investigation of threat streams, that activity would have a significant negative impact on FBI operations by: (1) diverting investigative resources toward identifying the U.S. person status of the individuals associated with query terms, (2) delaying the FBI's ability to timely investigate and thwart threat streams, and (3) disincentivizing agents and analysts from querying FISA data during investigations.

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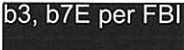


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**(U) Potential Impact of Relying on Personal Knowledge of U.S. Person Status**

(U) Even if FBI personnel are permitted to rely on their personal knowledge regarding U.S. person status, and are not required to review material in the FBI's "corporate" holdings to determine U.S. person status, the FBI has concerns about the impact of such a requirement.

A. (U) Inconsistent and Inherently Unreliable Information Concerning U.S.**Person Status**

~~(S//NF)~~ Reliance on personal knowledge of U.S. person status would almost certainly result in inconsistent and inherently unreliable information in FBI systems. The FBI receives new information on a daily basis from a wide variety of sources, including the American public, state and local law enforcement, and foreign partners. 

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**B. (U) Cultural Impact on the Importance of Accuracy**

(U) Although the practice would be less taxing on FBI resources, the FBI also has concerns that permitting FBI personnel to rely solely on personal knowledge would be in tension with other obligations that require more of FBI personnel. For example, FBI agents executing FISA applications cannot rely on their own personal knowledge, but must affirm that the FBI possesses records that support every factual assertion in a given application. 

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The FBI maintains a strong culture that places great emphasis on personnel consistently conveying true and accurate information, even if that requires them to go beyond what is in their personal knowledge or possession. Allowing FBI personnel to rely solely on their own personal knowledge conveys a message inconsistent with that culture—that there would be nothing wrong

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with one agent identifying someone as a U.S. person, while a colleague identifies the same individual as a non-U.S. person.

(U) Potential Impact of Requiring a Written Justification

(U) Separately, a requirement that FBI must include a written justification prior to reviewing any section 702-acquired results that are returned using a U.S. person query term would likewise hinder the FBI's ability to perform its national security and public safety missions.

(U) In order to know whether a written justification is required, FBI personnel would first need to determine whether the query term that returned the Section 702 information was a U.S. person query term. This obligation would impose the aforementioned administrative burdens associated with reviewing FBI material and assessing U.S. person status, as well as the same problems of speculation and inconsistency if the determination were instead based solely on the personal knowledge of the agent or analyst running the query.

~~(S//NF)~~ Even if the FBI decided to treat all individuals as U.S. persons and elected to apply a justification requirement to all queries that return section 702 collection, the impact on FBI resources would still be significant.


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As a result, such a requirement would certainly have an impact, and given the critical nature of the FBI's ability to conduct queries—and in particular, U.S. person queries—to its mission as described above, it is my assessment that there is a substantial likelihood that the impact would be significant.

~~(S//NF)~~ As an alternative to documenting justifications for every U.S. person query that returns Section 702 results, I understand that the Government has proposed to the Court an approach that, in my assessment, reduces the operational concerns described above and also addresses certain compliance incidents involving queries of unminimized Section 702 collection that have been reported to the Court. 

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(U) Conclusion

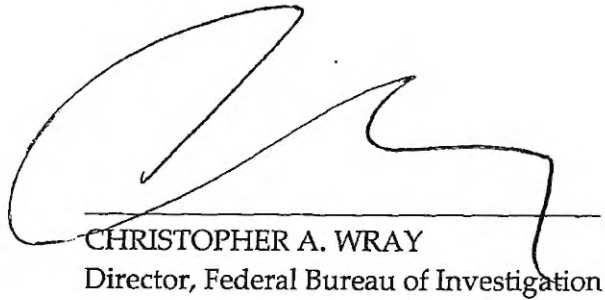
(U) For the reasons set forth above, I believe that requiring the FBI to (1) maintain records that distinguish between its queries of U.S. person and non-U.S. person selectors in its holdings collected pursuant to 50 U.S.C. § 1881a (Section 702), and 2) provide a written justification to view the contents provided in response to a query of a U.S. person selector in the FBI's Section 702 holdings would substantially hinder the FBI's ability to investigate and protect against threats to the national security.

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(U) I declare the foregoing to be true and correct, under penalty of perjury.

Signed this 14th day of September, 2018.



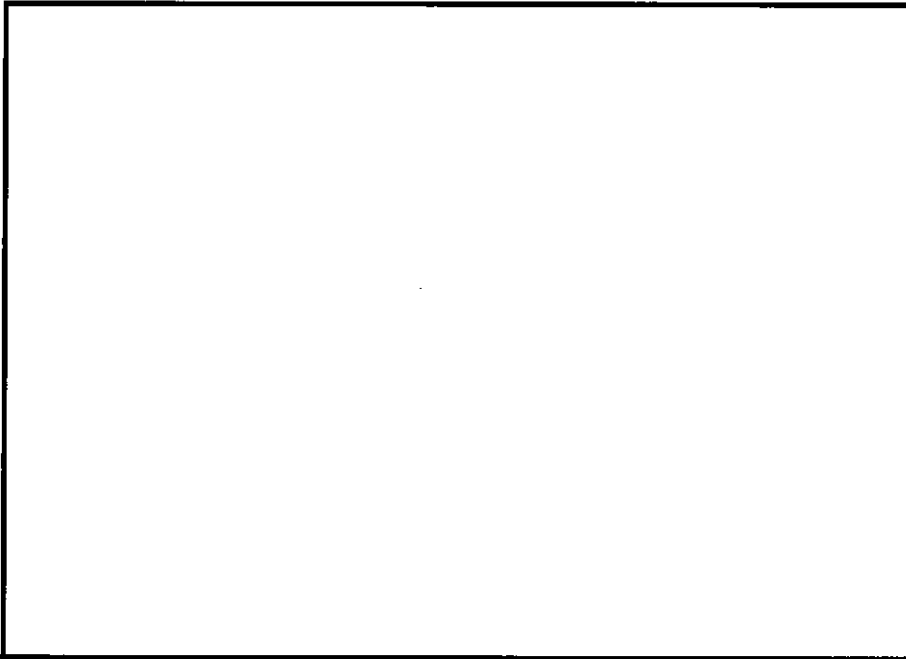
CHRISTOPHER A. WRAY
Director, Federal Bureau of Investigation

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

September 28, 2018
11:00 a.m.



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

TRANSCRIPT OF PROCEEDINGS
HELD BEFORE THE HONORABLE JAMES E. BOASBERG
FOREIGN INTELLIGENCE SURVEILLANCE COURT

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APPEARANCES:

Amicis Curiae:

Jonathan Cedarbaum	Wilmer Hale
Amy Jeffress	Arnold & Porter
John Cella	Arnold & Porter

For the Government:

6,7C [Redacted]

Stuart Evans

6,7C [Redacted]

(b)1,3,6 [Redacted]

6,7C [Redacted]

DOJ
DOJ
DOJ/NSD/OI
DOJ
DOJ
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FBI
ODNI
FBI
CIA
NSA
NCTC

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

6,7C [Redacted]

COURT STAFF:

COURT REPORTER:

Scott L. Wallace, RDR, CRR
Official Court Reporter
U.S. Courthouse, Room 6503
333 Constitution Avenue, NW
Washington, DC 20001
202-354-3196

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

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MORNING SESSION, SEPTEMBER 28, 2018

(11:11 a.m.)

THE COURT: Good morning, everybody. Please be seated. Nice to see you all again. As I said last time, I know that many of you have plenty of other commitments, and we appreciate you all being here and spending your time to help us out on these significant questions.

So, let me -- why don't we have counsel identify themselves, and then if government counsel wants to also introduce your colleagues, that's fine.

6,7C [redacted] I'm 6,7C [redacted] from the Department of Justice, National Security Division.

6,7C [redacted] Good morning, Your Honor. 6,7C [redacted] National Security Division.

MR. EVANS: Good morning, Your Honor. Stuart Evans from the National Security Division.

THE COURT: Good morning to all of you.

6,7C [redacted] And I think it would be helpful to introduce who's here from the different agencies, as well as there are other personnel from the Department of Justice.

THE COURT: Okay, great.

6,7C [redacted] Good morning. (b)1,3,6 [redacted] with the CIA, Office of General Counsel.

6,7C [redacted] Good morning. 6,7C [redacted] NCTC.

6,7C [redacted] Good morning. 6,7C [redacted] ODNI.

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[Redacted]

Hello.

[Redacted]

National Security

Agency.

[Redacted]

Good morning.

[Redacted]

FBI.

Good morning, Your Honor.

[Redacted]

FBI.

Good morning.

[Redacted]

Department of

Justice.

[Redacted]

Good morning, Your Honor.

[Redacted]

Department of Justice.

[Redacted]

Good morning.

[Redacted]

Department of

Justice.

THE COURT: Okay. Thank you all for coming in. And for the Amici.

MS. JEFFRESS: Good morning. Amy Jeffress, Jonathan Cedarbaum and John Cella.

THE COURT: All right. Welcome to all of you. Here's what I would propose for the hearing, that -- We're going to start with the Amici, and with generally open-ended questions asking for your reaction to certain amendments that the government has offered in its latest submissions.

We'll then take a recess -- I want to discuss with staff some of that briefly -- and then we'll come back and ask the government for responses, and then I have a number of specific questions for the government. And then I think what I'll end with is to give the Amici a few minutes to briefly respond to what the government has said during its arguments. Is there

1 anything preliminarily that either side wants to raise before we
2 proceed? 6,7C

3 6,7C No, Your Honor.

4 THE COURT: Ms. Jeffress?

5 MS. JEFFRESS: No, Your Honor.

6 THE COURT: Okay. I'll hear from whichever Amici would
7 like to start.

8 MS. JEFFRESS: Thank you, Your Honor. I'm speaking on
9 behalf of all three Amici who together have gone through the
10 government's submissions and discussed this, and so I'm speaking
11 for all three of us this morning.

12 We greatly appreciate the changes that the government made
13 to these procedures, and specifically we had criticized the very
14 broad language in the procedures where the procedures stated that
15 nothing in the procedures should restrict certain activities.
16 That language still remains, but there is now language that
17 limits the scope, specifically limits the scope of the deviation
18 to the maximum -- so that they would comply with the other
19 provisions of the minimization procedures to the maximum extent
20 practicable. And there's a little tension between that broad
21 language and that limiting language, but we do appreciate that if
22 that language was inserted consistent with an intent to comply to
23 the maximum extent practicable, then we appreciate that.

24 We're largely content with the limitations that have been
25 imposed on the training exemptions and also the lawful oversight

1 exemptions, so the government's now delineated the certain
2 functions that it believes are consistent with the deviations
3 necessary for lawful oversight, and we think that that's largely
4 helpful.

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

5 The one activity that was not specifically addressed there
6 was the [REDACTED]
7 that was mentioned in the cover brief, and we're not certain if
8 those activities are included or meant to be included in the
9 lawful oversight exemption. So we'd appreciate some
10 clarification of that.

11 THE COURT: And that's one of the questions that I have
12 for [REDACTED] 6,7C and I certainly want to hear from you on.

13 MS. JEFFRESS: So, our greatest concern with the
14 exemptions remains the congressional mandate exemption, and that
15 has been limited somewhat to a subpoena or similar process
16 consistent with congressional oversight, and we're concerned that
17 there's no definition of similar process consistent with
18 congressional oversight. Would that include a letter from a
19 single member of Congress claiming that the information that
20 might be compelled to be provided to Congress would be consistent
21 with congressional oversight. What if the member, a single
22 member of Congress were a chair of a particular oversight
23 committee, would that be consistent with congressional oversight?
24 You could see, for example, negative publicity about, you know,
25 radicalization activities in a certain mosque in some district

1 somewhere in the country, and if a single member of Congress
2 wanted information about that mosque, could it compel the
3 department to produce information? That would be further
4 complicated if a member of the mosque were running in a primary
5 campaign against that member of Congress. And so you can see
6 situations that might get very complicated and force the
7 Department of Justice to try to make decisions about what is and
8 isn't proper congressional oversight, and we think it would be
9 better to have a very clear definition of what the exemption
10 would cover.

11 So our recommendation is that subpoena would be consistent
12 with congressional oversight or a bipartisan letter from
13 Congress.

14 THE COURT: So I think we talked about this a little bit
15 last time in trying to figure out what both sides thought would
16 suffice, and I thought the -- my proposal, and maybe this wasn't
17 as clear as it could have been, was that either subpoena -- a
18 bipartisan letter or -- how about the committee chair? In other
19 words, wouldn't that be enough? It wouldn't be bipartisan, but
20 at least it wouldn't be simply some member.

21 MS. JEFFRESS: True, but let's say it's the committee
22 chair that has the primary opponent who attends the mosque that's
23 at issue. That then gets complicated quickly. We would
24 recommend that it be bipartisan, either a subpoena -- and under
25 the rules of many committees, a subpoena can come from only one

1 party, but to get a subpoena, that party has to go through a
2 certain notice process, and the full committee has to at least be
3 apprised of the subpoena, and so there is process under the rules
4 in Congress for that. So we would recommend either a subpoena
5 that has to go through that process but can be -- doesn't have to
6 be bipartisan, or a bipartisan letter. So if you're not going to
7 go through that process and it's just a letter, then we recommend
8 that it be bipartisan.

9 THE COURT: Okay.

10 MS. JEFFRESS: Just moving on to the recordkeeping issue
11 relating to U.S. person queries. We do sympathize with the
12 burden that was described in Director Wray's declaration and the
13 difficulties that the FBI would have distinguishing between U.S.
14 person and non-U.S. person queries. This is, though, a statutory
15 requirement that must be complied with, and we understand there
16 will be an OIG inquiry and report at some point about that, and
17 so we defer to the Court as to how the Court wishes to handle
18 that, but we do note that it's a statutory requirement, despite
19 the burden that it imposes.

20 THE COURT: How about -- can I ask you -- I know you may
21 be going to get to this, but I was going to ask you about the
22 categorical batch queries.

23 MS. JEFFRESS: We are getting to that.

24 THE COURT: Okay. I will wait.

25 MS. JEFFRESS: That's next after -- we -- while we

1 sympathize with the burden that is posed by the effort to

2 (b)3,7E per FBI



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24 THE COURT: Was your position last time that it should

25 be -- or fallback position could be that this could be done

1 before reading the material, as opposed to before querying? Are
2 you happy with that fallback still or would your view be that
3 it's preferable before the query itself?

4 MS. JEFFRESS: We still think it's preferable to have
5 before the query itself, but we do you understand that if they
6 want to do the query and then view the content, that they can put
7 it in at that stage, and that would be at least an acceptable
8 procedure that would comply with Fourth Amendment and statutory
9 requirements.

10 And so the government's come part of the way on that score
11 because they have imposed this requirement that the categorical
12 batch query, which is what the Court was just referring to, there
13 is now a requirement that there be a statement of reasons and
14 approval for those queries. Our difficulty there, as perhaps the
15 Court was getting to, is what is the definition of a categorical
16 batch query, and we don't think that that's clear, and we would
17 ask the Court to question the government about what defines a
18 categorical batch query. So the ones that were in compliance
19 incidents that we discussed at our last hearing are pretty
20 clearly categorical batch queries.

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THE COURT: I have some interesting hypotheticals.

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MS. JEFFRESS: Good. Thank you, Your Honor. I think those are all the points we wanted to make.

10

THE COURT: Okay. Great. Thank you very much. So let's -- I just want to take a brief recess. Given the Amici's position, I think this can be just a five-minute recess and we'll all be back to hear from the government. Thanks.

14

(Thereupon, a recess in the proceedings occurred from 11:24 a.m. until 11:32 a.m.)

16

THE COURT: Please be seated, everyone.

17

Okay. I'll hear from the government.

18

^{6,7C} Thank you, Your Honor. I know Your Honor may have some specific questions for the government, but if I may have the opportunity to respond briefly to some of the points that were raised by the Amici.

22

THE COURT: Please.

23

^{6,7C} Initially Ms. Jeffress noted the fact that for the [redacted] that we discussed about in the cover filing, she asked whether we meant to include this under

25

1 the lawful oversight exception that we narrowed within each set
 2 of procedures. And the government does not at this time consider
 3 it part of the lawful oversight exception in either sets of query
 4 procedures or minimization procedures for the agencies. That's
 5 why we discussed it. We want to handle it separately. We
 6 discussed it in the cover filing, that it is a potential issue.
 7 We don't know of an actual example of unminimized 702 information
 8 being handled in a way that does not comply with an aspect of the
 9 minimization procedures or proposed query procedures, but we are
 10 investigating this and gathering further information and intend
 11 to come back to the Court within set timelines that we laid out
 12 in our cover filing to provide an update on our investigation, as
 13 well as whether we think that how those activities are being
 14 handled at the agencies, whether they're -- whether they complied
 15 with the applicable procedures, and to the extent that any -- the
 16 government would propose any amendments to the procedures to
 17 address those particular activities at the agencies.

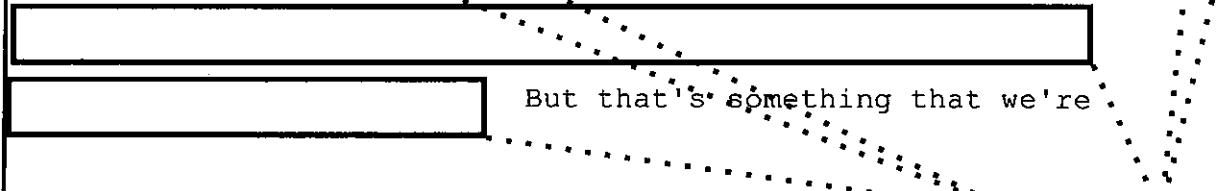
18 And one significant point I will point out is that these
 19 activities that we are talking about, we do not mean queries in
 20 the main repositories of raw 702 information at the agencies.

21 We're not talking about queries that insider threat folks are

22 (b)3,7E per FBI [redacted] at FBI or at the [redacted]
 23 for example. (b)3,7E per FBI [redacted] [redacted]

24 [redacted]

25 [redacted] But that's something that we're



1 looking into and we in no way mean to cover it under the lawful
2 oversight exception in the procedures.

3 THE COURT: All right. So there won't be deviation?

4 6.7C [redacted] That's correct, Your Honor.

5 THE COURT: And that relates to both [redacted]

6 [redacted] (b) (1)
7 6.7C [redacted] That's correct, Your Honor. (b) (3)-50 USC 3024 (i)

8 THE COURT: Okay.

9 6.7C [redacted] As to the congressional mandate points that
10 were raised by Ms. Jeffress, we did amend the procedures to
11 clarify what we meant by mandate, as Your Honor pointed out, to
12 refer to subpoena or similar process. We think that the
13 procedures are reasonable as written. They don't have to
14 delineate every type of process, official process that Congress
15 may have and provide to the government as our congressional
16 overseers.

17 There could be a congressional resolution, a statute that
18 tells us we have to provide certain information, but we feel that
19 the language clarifying what is meant by mandate is sufficient to
20 provide a better understanding or clarification of what mandate
21 means. In addition --

22 THE COURT: But -- I'm sorry, go ahead.

23 6.7C [redacted] Judge Collyer last year had ordered the
24 government to report on any instance in which the government used
25 that provision. We've never used that provision. It's been --

1 there was one instance where we possibly were considering using
2 it from a request from Congress during the last 702
3 reauthorization, and we chose not to use it, and we discussed it
4 with the Court, and the Court has maintained oversight of how the
5 government has used this provision, and we would intend to
6 continue to report to the Court how we would use this provision.

7 THE COURT: So how about Ms. Jeffress' hypothetical with
8 the sole Congressperson? She's running for office and she
9 submits this query. How do we know whether that constitutes
10 similar process consistent with congressional oversight?

11 6,7C The fact that this provision is in the
12 procedures just means that Congress could provide that process to
13 the government. It doesn't mean that the Department of Justice
14 or one of these agencies are going to take that process and
15 respond to it thinking that that is a proper process under the
16 procedures. There could be in that scenario -- there might be
17 discussions that that is not a proper use of the provision and we
18 wouldn't provide it to the congressional overseers, but we -- but
19 the provision is simply meant to enable the congressional
20 overseers the ability to serve a process that is a lawful process
21 on the government.

22 THE COURT: So is -- would your best argument be
23 summarized as, Look, it may not be completely clear and we can't
24 cover every hypothetical as inventive as Amici may be, but it
25 hasn't happened yet, and if it does, we'll let you know for next

1 time?

2 6,7C [REDACTED] That is the argument and also that the
3 procedures as written are reasonable. They don't have to
4 delineate every type of process. We've been operating -- I think
5 I mentioned this at the last hearing in July. We've actually had
6 this provision in other sets of minimization procedures dating
7 back to 2012 when we put it into NCTC's procedures, and so the
8 government has not had an issue with abusing this provision or
9 responding to processes that were not mandate, congressional
10 mandates. We've not -- it's not been invoked.

11 THE COURT: All right.

12 6,7C [REDACTED] The Amici also brought up the recordkeeping
13 issue in terms of whether -- and said that the statute requires
14 that the government distinguish between U.S. and non-U.S. person
15 queries, and Your Honor, I would like the opportunity to briefly
16 respond to that.

17 It is the government's view that the statute does not
18 require that the government separately distinguish between U.S.
19 and non-U.S. person queries. The statutory language said that
20 there would be a technical procedure by which a record is kept of
21 each U.S. person query term. What that means is that agencies
22 have to maintain records of U.S. person queries. FBI is
23 maintaining records of U.S. person queries. We see them when we
24 do the audits, we see them on the records being provided to them.

25 THE COURT: But they're not segregated from all queries,

1 right? I mean --

2 [REDACTED] 6,7C But there is no language in the statute
3 that says segregation. It just says -- it doesn't say separated
4 out or segregation.

5 THE COURT: Right, but if it -- but then why would the
6 language say "U.S. person queries"? It would just say "keep a
7 record of all queries."

8 [REDACTED] 6,7C Because Congress wanted to make sure that
9 there was some documentation of those queries. Congress,
10 obviously when you look at how they changed the statute, weren't
11 focused on non-U.S. person queries in 702. We just happen to
12 apply the query standard in everyone's query procedures to U.S.
13 and non-U.S. person queries. They made -- they wanted to have
14 records of queries. We just -- we're requiring that FBI -- FBI
15 is keeping records of all queries, including U.S. person queries,
16 and those are obvious to us when we are doing our auditing. We
17 can see which ones are when we talk to the agents and find out
18 what these terms are and why they were queried.

19 THE COURT: But then if that is -- Well, that sounds like,
20 if you can discern between U.S. and non-U.S., then why can't you
21 keep a record of it separately?

22 [REDACTED] 6,7C Because there's -- we can discern on the
23 back end when we're doing the auditing when we're talking to each
24 agent, was this a U.S. person query or not, this name that we
25 see. We sometimes can see, based on the naming convention of the

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name, (b)3,7E per FBI
[REDACTED]

[REDACTED] queries a day, over 3 million in 2017 alone [REDACTED]

[REDACTED] B3, 7E per FBI [REDACTED]

[REDACTED]

In addition, the legislative history from the House report reflected that Congress knew when they passed the Reauthorization Act what FBI's querying practices were and that they couldn't distinguish.

The bill from the House said that we do not impose a requirement that an intelligence community element maintain records of U.S. person query terms in any particular manner, so long as appropriate records are retained and available for subsequent oversight.

They also said that the intelligence community should have procedures documenting current policies and practices relating to queries. And that is why -- There are two other aspects of the statute from the statutory language that demonstrate Congress's intent here not to make FBI separate out U.S. and non-U.S. person queries.

1 So the first aspect of the statute where this comes into
2 play is Section 1873. That's the part of the statute that was
3 added or amended during the Freedom Act where Congress required
4 the director of National Intelligence to issue an annual report
5 describing certain statistics, some of which are FISA-related.
6 One of the requirements was that the DNI had to report annually
7 on the number of U.S. person metadata queries in 702 and the
8 number of U.S. person search terms used to query 702 content.
9 That requirement only applied to the three -- to the other
10 agencies, not FBI.

11 And there was a specific language that Congress wrote into
12 the statute exempting FBI from reporting those statistics about
13 U.S. person queries because they knew they couldn't distinguish.

14 During the Reauthorization Act, Congress changed Section
15 1873. They added new reporting requirements for the DNI, and
16 they altered some of the subsection provisions in that FBI
17 exemption paragraph to conform to other changes in the statute,
18 but they did not remove the exemption requirements. So they knew
19 FBI's current practices. They maintained that they were still
20 exempt from reporting on U.S. person queries in the statute.

21 Another example in the statute showing Congress's intent
22 as to why they didn't think FBI had to distinguish U.S. person
23 queries from non-U.S. person ones is in the Inspector General
24 part of the Reauthorization Act.

25 So in that part, Congress asked the Inspector General --

1 ordered the Inspector General to report on any impediments,
2 operational, technical, or policy impediments for the FBI to
3 count the total number of queries that used known U.S. person
4 identifiers, and the Inspector General will look at the practice
5 of FBI with respect to their recordkeeping, retaining records of
6 queries for auditing purposes.

7 What Congress is doing is they're asking the Inspector
8 General to study why FBI can't distinguish between U.S. and
9 non-U.S. person queries and report back on whatever the
10 technological and operational burdens are, and then Congress can
11 consider that and decide, perhaps, if they want to amend the
12 statute in the future, whether before the next reauthorization or
13 at that time, but the first step is getting the Inspector
14 General's study to be completed.

15 THE COURT: I want to ask you, when you talk about (b)3,7E per
16 [REDACTED] FBI
17 can you sit here and tell me based on your
18 audits what percentage end up being U.S. person queries, in a
19 very ballpark sense?

20 (b)3,7E per FBI
21 6,7C [REDACTED] So we've reviewed [REDACTED]
22 [REDACTED] We've been auditing for ten years now. We've been
23 reviewing (b)3,7E per FBI [REDACTED] Not all of those are
24 running against 702, but the large majority of them are running
25 against repositories that contain 702. I can't say -- quantify a
specific percentage because we don't track -- When we go do an
audit, we'll sit down with the analyst or agent and ask them, why

1 did you query -- and I'm making this name up -- John Smith? What
2 is the purpose of your query? What did you know about them? And
3 I may learn they happen to be a U.S. person, there was a tip
4 called in about this person, or they're the subject of a full
5 investigation, but I am not -- we're not writing down, though,
6 "This is a U.S. person one," we're talking to the agents figuring
7 out which are compliant; which are not compliant queries.

8 THE COURT: Right, but you're telling me, we do look at
9 this and audit, and yet you can't give me even half, a quarter,
10 three-quarters, nothing?

11 6.7C We just haven't quantified it. I would say
12 it's probably sizable because -- a sizable amount may be U.S.
13 person queries because we see a lot of queries that are looking
14 at facilities of FISA Title I targets, and, as Your Honor knows,
15 many of the FISA Title I targets are U.S. persons, and so we see
16 a lot of the queries being done on their facilities that are
17 authorized through court orders.

18 There are plenty of U.S. persons who may be subject to
19 full investigations and preliminary investigations that we review
20 as well, and we see their names or identifiers queried as well,
21 but I can't give you a number. I would say that it's probably a
22 sizable amount (b)3,7E per FBI that may be (b)3,7E per FBI
23 [REDACTED]

24 On the other hand, when we're talking about queries in
25 for example, that has the 702 collection in it, agents who

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

1 handle 702-tasks selectors, which are (b)3,7E per FBI selectors,
2 can be running queries and should be running queries on their 702
3 targets and their associates. And so many of those queries are
4 also going to be (b)3,7E per FBI queries -- some of them will be.
5 There are ways for agents to bring up the collection in [] that
6 doesn't involve querying identifiers, so many of those
7 (b)3,7E per FBI might not be the 702 targets.

8 THE COURT: Let me ask you another question. Assuming I
9 ultimately disagree, and I am delighted to go back and look at
10 the legislative history again and look at this carefully and the
11 burden, because I don't blithely skirt past that, I appreciate
12 that, but if it turns out there is disagreement, do you feel that
13 Amici's fallback position of reviewing -- of putting in your
14 reasons before review rather than before submission helps you or
15 not particularly?

16 6,7C We would not say that it helps us for the
17 reasons that are explained in Director Wray's affidavit. It's
18 again -- it represents a barrier to entry. Yes, the query has
19 already been run, but if they can't -- if it's not easy to
20 (b)3,7E per FBI or they don't have the time
21 to figure it out, they're going to presume all (b)3,7E per FBI
22 and we know that's not true. And so
23 there's you've got people who are running down threat streams,
24 people are trying to commit attacks, and you're -- and basically
25 they're having to (b)3,7E per FBI

(b)3,7E per FBI

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THE COURT: Okay. All right. Let's -- do you want to move to the batch queries now?

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Yes.

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THE COURT: So why don't you -- I mean, the bottom line here is, can your personnel really distinguish what constitutes a categorical batch query from what doesn't?

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6,7C

So, to answer the question, I think that they can with proper training and guidance. We've put out training back in -- guidance back in June to the FBI before we even submitted these revised procedures with this provision recommending that agents come to their Office of General Counsel lawyer on any query that was what we call a categorical query. We gave them examples of what we consider categorical queries.

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THE COURT: Right. So give me an example.

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So an example -- I will give you examples of what we consider permissible and nonpermissible, which is what we've given the workforce at FBI.

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So, what we consider impermissible are some of the ones we've reported to Your Honor this past year and late last fall, which is that --

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to see if they posed a threat to the area of responsibility in that field office. They

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

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(b)1,3,7E per FBI

[Redacted]

THE COURT: Right, and maybe -- I'm sorry. Maybe I'm -- I think there are different distinctions. One is between what is a permissible categorical batch query and what is not, and I think that's what you're getting at there.

My point may be a little finer, which is, how do we know -- how do your people know what is a batch query to even go ask for advice, as opposed to thinking it's not a batch query, I don't need to ask for advice?

6.7C [Redacted] What we have told them is that a batch query -- a categorical batch query is one (b)1,3,7E per FBI [Redacted]

[Redacted] and we gave [Redacted]

[Redacted] There's a (b)1,3,7E per FBI [Redacted]

(b)1,3,7E per FBI [Redacted]

(b)1,3,7E per FBI [Redacted]

[Large Redacted Block]

[Redacted] (b)1,3,7E per FBI [Redacted]

(b)1,3,7E per FBI [Redacted]

THE COURT: Right, and I think no one would disagree that

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

(b)3,7E per FBI

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6,7C

Categorical batch query, yes.

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THE COURT: Okay. Agreed. Ten?

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6,7C

Yes.

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THE COURT: Two?

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6,7C

Yes.

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THE COURT: So --

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6,7C

(b)3,7E per FBI

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THE COURT: So the question -- so it revolves around, do you have any individualized suspicion. As long as your part --

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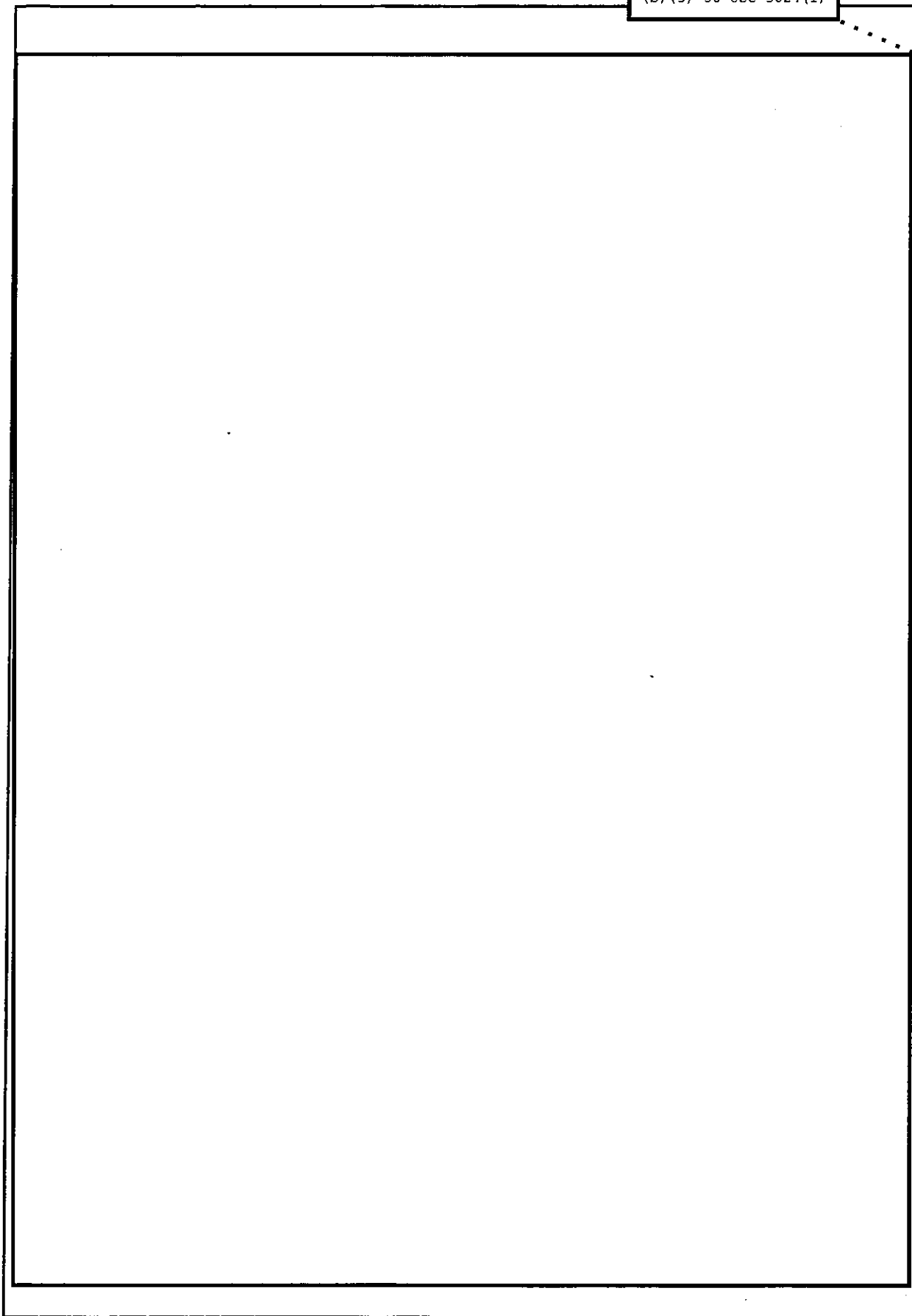
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[Redacted]

THE COURT: Well, your line seems pretty bright in the sense that if it's

(b)3,7E per FBI
[Redacted]

[Redacted]

6,7C [Redacted] It may be, right, if you don't have any assessment about them.

THE COURT: So the numbers are irrelevant, as long as they're more than one?

6,7C [Redacted] I think that's right.

THE COURT: And so, back to our hypothetical

[Redacted]

(b)3,7E per FBI
[Redacted]

(b)3,7E per FBI
[Redacted]

[Redacted]

(b) (1)
(b) (3)-50 USC 3024 (i)
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[REDACTED]

THE COURT: Right. So you're -- so you would take the second approach in my hypothetical?

6,7C [REDACTED] I think that's right. I do want to say that even if you have -- let's say (b)3,7E per FBI [REDACTED]

[REDACTED]

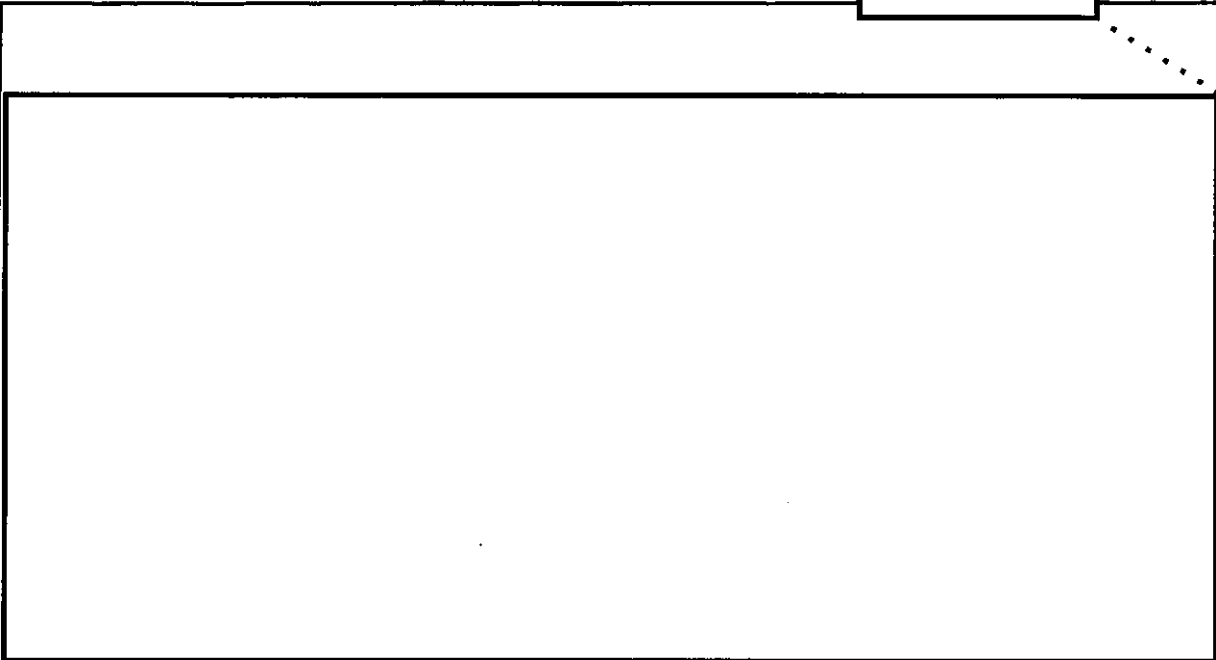
[REDACTED] (b)3,7E per FBI [REDACTED]

(b)3,7E per FBI [REDACTED]

[REDACTED]

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

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10 [6,7C] Right, that's right.

11 THE COURT: All right. Well, let me ask you -- I want to
12 ask about some specifics just to follow-up on some specific
13 potential querying violations at FBI.

14 We talked about these and I've talked with staff and
15 perhaps other judges, and I just wanted to follow-up. So, one is
16 relating to queries by [redacted]
17 from February.

18 I think that you filed a notice in February regarding a
19 compliance incident and said you were reviewing whether there
20 were other queries of raw FISA data sets that conducted that
21 complied with the querying standard, but we haven't heard back
22 from you. I think you were looking at [redacted]

23 [redacted] Can you update me on that?

24 [6,7C] So those queries were, as it turns out,
25 initially run in [redacted]

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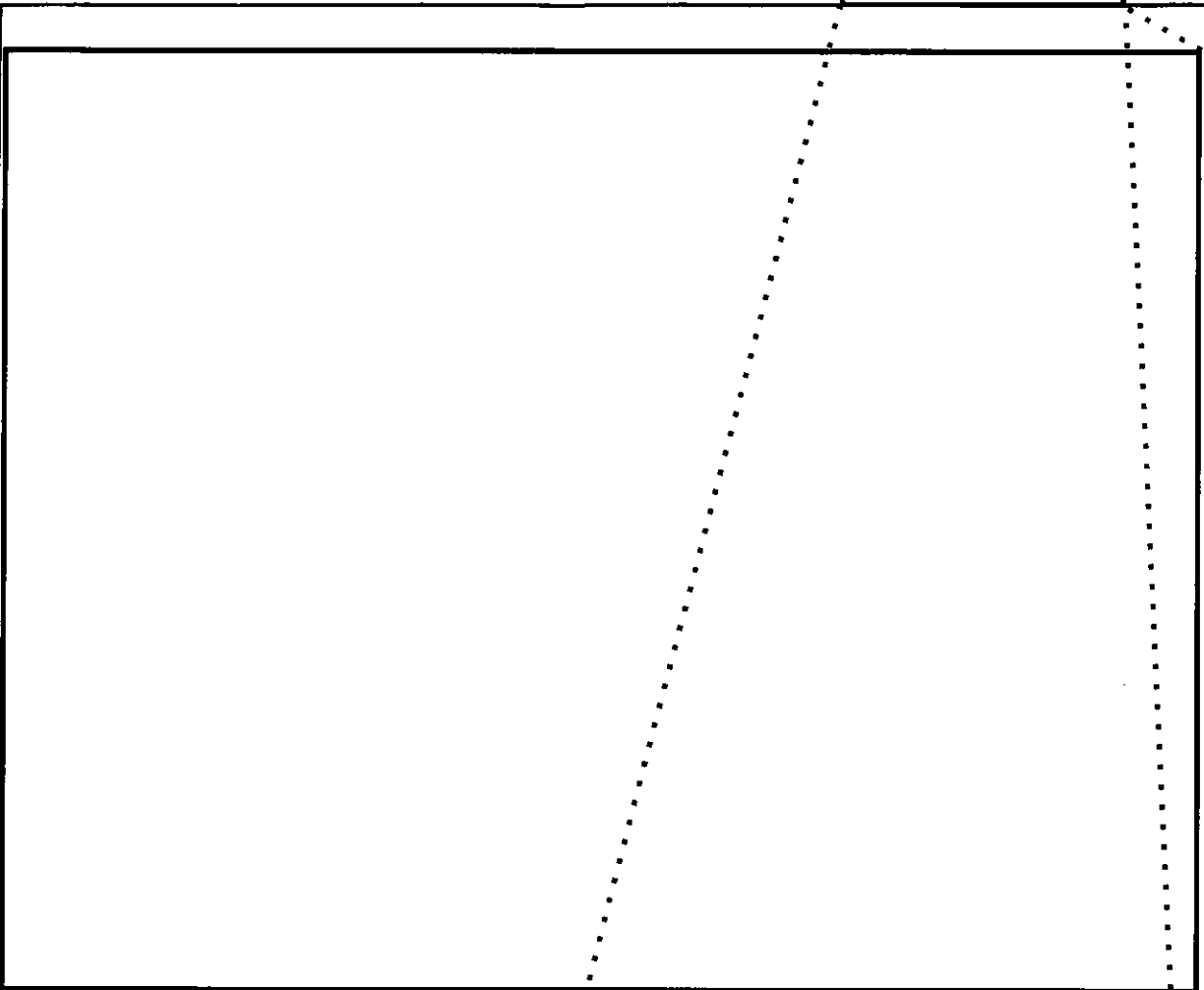
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THE COURT: I think that you folks, in your notice, indicated that you were reviewing whether there was any violation of querying procedures, and have you made a determination on that?



We are still gathering more facts about these queries from FBI. We hope to get a letter to the Court in the near future, but we're still gathering information about some



But the point is we are still gathering

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

1 information and we have not finished making the assessment yet on
2 that.

3 THE COURT: Okay. Well, can I ask you to file something
4 within 60 days, even if it's not your final assessment, to at
5 least give us an update on where we stand on that?

6 6,7C [REDACTED] Yes, Your Honor.

7 THE COURT: Okay. And then there's one other about [REDACTED]

8 There's (b)1,3,7E per FBI [REDACTED] notice about queries using [REDACTED]

9 [REDACTED] which again was -- involved metadata
10 under Title I. And also there was -- the notice -- you stated
11 that it was examining whether the standard was met about -- the
12 reasonably likely standard was met. Can you give us an answer on
13 that and tell us why it's been so long?

14 6,7C [REDACTED] So these queries are also -- both of these
15 queries, both the [REDACTED]

16 [REDACTED] (b)1,3,7E per FBI [REDACTED] are examples of (b)1,3,7E per FBI [REDACTED]

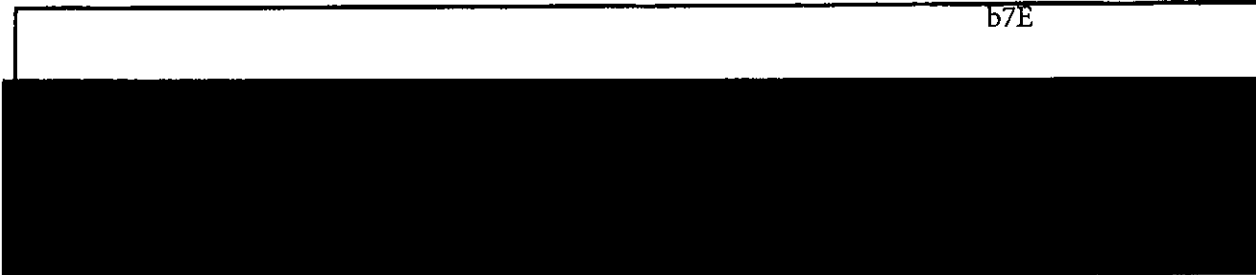
17 [REDACTED] in a sense, and we -- Since we provided the
18 preliminary notice on these [REDACTED] queries, we've gotten additional
19 information from FBI about their justification for why they ran
20 the queries, and so we are continuing to discuss with them
21 that -- those views on the justification.

22 THE COURT: All right. Because the justification --
23 because, again, analogizing to our earlier hypothetical, we

24 [REDACTED]
25 [REDACTED]

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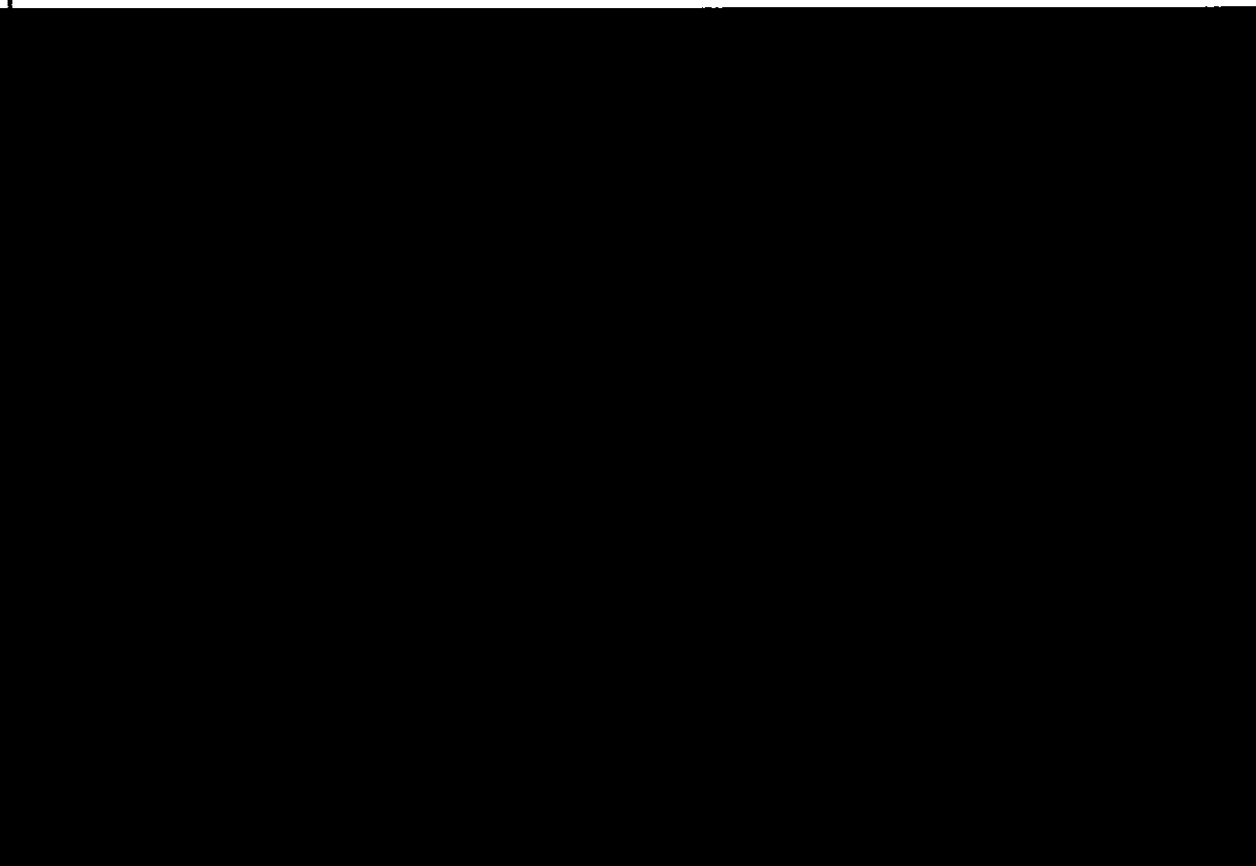
b6, b7C [redacted] That's right, Your Honor.

THE COURT: Okay. So, can I also ask you to give us an update in 60 days?

b6, b7C [redacted] Yes, yes.

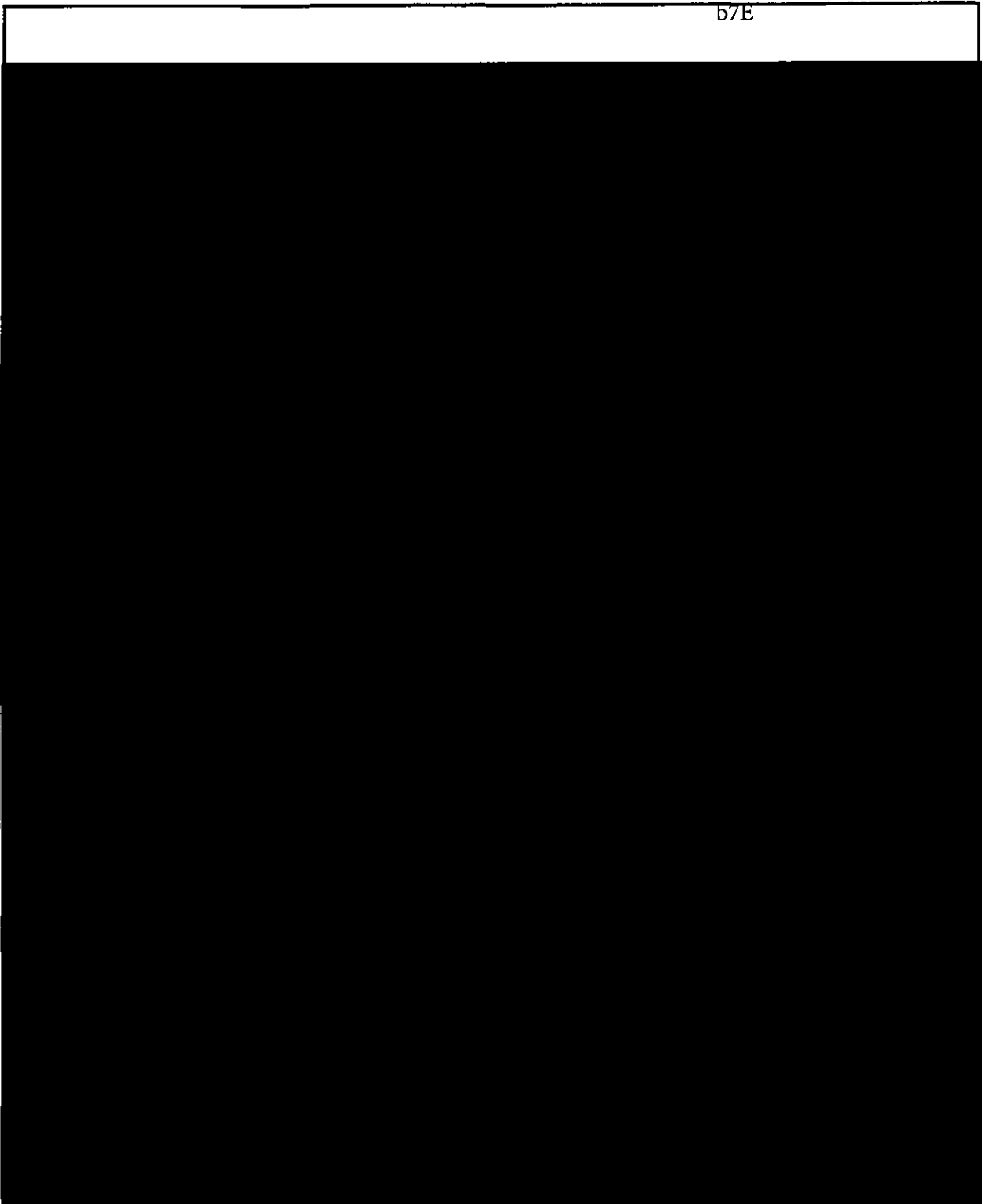
THE COURT: All right. I think that covers my questions. If there's anything else that you want to add, Ms. MacTough, go right ahead.

b6, b7C [redacted] There's one thing, Your Honor, I wanted to add, which is an explanation about why we proposed the b3 Per FBI



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THE COURT: I just want to confirm this, that if we, in fact, accept your definition of categorical batch query, I want to be sure that your agents that are in the field are aware -- I

1 guess not in the field, but doing the query, are aware of the
2 breadth of that definition of categorical batch which is, again,
3 (b)3,7E per FBI

4 So are you -- you will be providing them that information
5 so that they fully understand?

6 (b)6,7C So we already, Your Honor, did provide
7 actual written guidance that we worked out with ODNI and FBI back
8 in June that was sent out to all of the field offices. We've
9 been, since June -- and it defines categorical, gives all of the
10 examples of categorical. We've been, in our field office
11 training that we've been visiting, numerous field offices since
12 June, we've been hitting this issue on queries and categorical
13 queries, both individually sitting down with agents and analysts
14 at the field offices, but also in our larger training we do at
15 the offices to all personnel who handle national security
16 matters, and so we've been discussing this, and we expect that we
17 would refine this training as we go along, should we see
18 confusion, to give more examples or more guidance on it.

19 THE COURT: All right. Thank you, and I thank you also
20 for your willingness to answer directly all of my questions, both
21 today and in a prior hearing. I never find you evasive or
22 noncommittal. I appreciate your straightforward answers to all
23 of them, and I appreciate the fact that you're so comprehensively
24 informed about all the issues that you are able to answer them.
25 So thank you again.

1 6,7C Thank you, Your Honor.

2 THE COURT: Ms. Jeffress, are you or Mr. Cedarbaum taking
3 the floor?

4 MS. JEFFRESS: May I have just a minute.

5 THE COURT: Yes, of course.

6 (Brief pause in proceedings.)

7 THE COURT: You prevailed on the arm wrestling or you
8 lost?

9 MR. CEDARBAUM: I won't count on it, Your Honor, but thank
10 you.

11 THE COURT: I'm just happy to hear you, anything that you
12 want to respond to.

13 MR. CEDARBAUM: Sure. I think the Amici just wanted to
14 make two quick comments in light of the government's
15 presentation. One is on the congressional mandates issue and one
16 is on the issue of providing a statement or justification with
17 respect to queries.

18 On the congressional mandate, we just wanted to be clear
19 that our suggestion was that the Court could put in its order the
20 instruction about the scope of proper use of that exemption and
21 the requirement to report back to the Court any instances that
22 would be of concern. We weren't suggesting that the procedures,
23 the language of the procedures necessarily had to be revised but
24 the narrowing or the clarification could be achieved through the
25 Court's order.

1 THE COURT: Okay. So just via an annual report or --

2 MR. CEDARBAUM: Well, via --

3 THE COURT: Or for each incident?

4 MR. CEDARBAUM: Correct. If the government is considering
5 responding to a congressional inquiry that is not, for example, a
6 subpoena and therefore clearly is within the language, if there's
7 any uncertainty about whether the type of congressional inquiry
8 falls within the scope of the language, then the government
9 should be coming to the Court to get direction.

10 THE COURT: Okay.

11 MR. CEDARBAUM: That was our recommendation on that score.
12 And then, Your Honor, just to come back to the issue of what the
13 statute requires with respect to recordkeeping and U.S. person
14 queries, I think, you know, we have laid out our view in our
15 briefs, and I think the government was largely restating what
16 they had provided in their briefs.

17 Our own view, as your initial question to the government
18 suggested, Your Honor, is that we think the plain language of the
19 statute is quite clear. Why would Congress have specifically
20 imposed a requirement to record U.S. person queries if it had not
21 intended by that to require a system in which U.S. person queries
22 can be identified as such? Otherwise, there is not effectively a
23 recordkeeping requirement for U.S. person queries, and --

24 THE COURT: And you think the after-the-fact audit is
25 insufficient to comply?

1 MR. CEDARBAUM: Correct, Your Honor, but also the fact
2 that the government is engaging in the after-the-fact audit makes
3 us wonder why it is so much more difficult to identify them in
4 the first place.

5 THE COURT: But how about their response just in terms --
6 and maybe yours is, "tough, the statute says what the statute
7 says," but ^{6,7C} [REDACTED] says, (b)3,7E per FBI [REDACTED]
8 [REDACTED]

9 MR. CEDARBAUM: And as my colleague, Ms. Jeffress,
10 indicated, we certainly sympathize with the point made both by
11 government counsel and by Director Wray in his declaration on
12 that score, and that is why we had proposed an alternative, which
13 is the recording of at least a brief statement of reasons for all
14 queries, which should at least improve the ability to effectively
15 audit the adequacy of the justifications being offered and
16 particularly the adequacy of the justifications being offered
17 with respect to U.S. person queries. And on that score we don't
18 see anything, either from the government or from Director Wray,
19 that really explains why, as my colleague indicated, a mere one
20 sentence explanation, a mere writing down of what should be in
21 the agent's head would be a substantial burden.

22 THE COURT: And, Mr. Cedarbaum, anything on the -- I trust
23 you're, if not reassured, that your view -- given ^{6,7C} [REDACTED]
24 definition of what constitutes a categorical batch query, that
25 gives you some assurance that it's -- that there's some line and

1 a reasonable line that agents can comply with?

2 MR. CEDARBAUM: Your Honor, I will be candid with the
3 Court in reporting that the Amici were just discussing that point
4 among ourselves. We had not reached a consensus in the time
5 available.

6 THE COURT: All right. So at least it's a close question,
7 then, as far as the Amici?

8 MR. CEDARBAUM: Yes.

9 THE COURT: Okay. Great. Thank you very much. All
10 right. Again, thank you for everybody's hard work on this and
11 for your time. Have a nice weekend all.

12 (Proceedings adjourned at 12:11 p.m.).

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CERTIFICATE OF OFFICIAL COURT REPORTER

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I, Scott L. Wallace, RDR, CRR, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 21st day of August, 2018.

Official Court Reporter
United States Courthouse
Room 6503
333 Constitution Avenue, NW
Washington, DC 20001