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UNITED STATES

U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

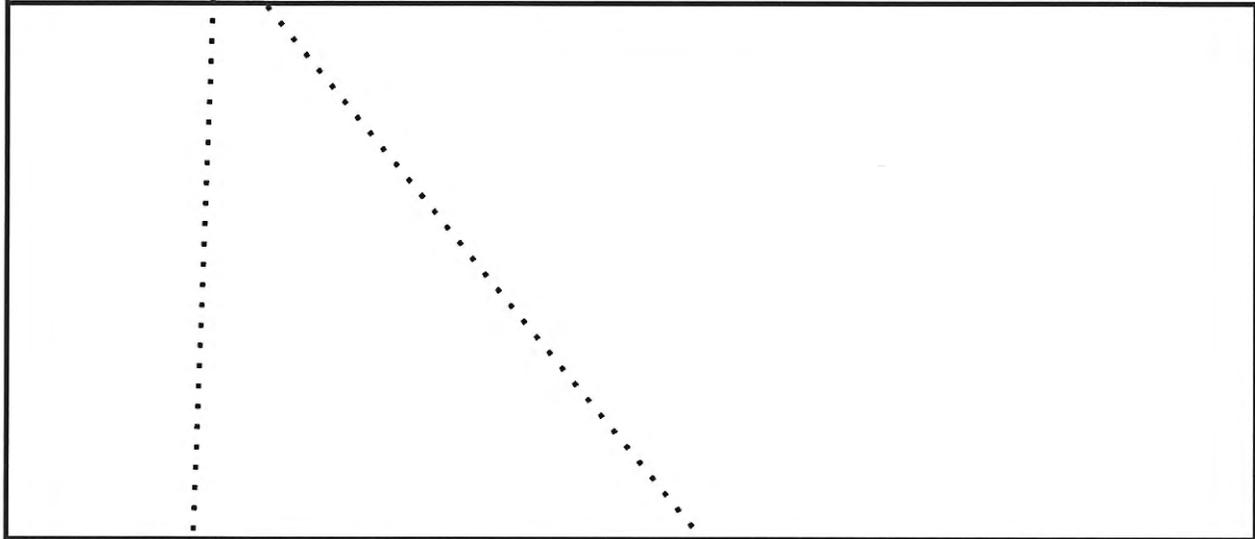
FOREIGN INTELLIGENCE SURVEILLANCE COURT

2019 AUG 12 PM 3:00

LEEANN FLYNN HALL
CLERK OF COURT

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

WASHINGTON, D.C.



**(U) 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**

~~(S//OC/NF)~~ In accordance with subsection 702(j)(1)(C) of the Foreign Intelligence
Surveillance Act of 1978, as amended (FISA or "the Act"), the United States of America,
by and through the undersigned Department of Justice attorney, hereby submits ex
parte and under seal the attached (b)1 and 3 per ODNI (b) 7E per FBI

(b) 3, 7E per FBI as amended. Attached as Exhibit I to

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Classified by: Chief, Operations Section, OI, NSD, DOJ
Reason: Multiple Sources
Declassify on: 20440812

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the Amendments to the 2018 Certifications are amended querying procedures to be used by the Federal Bureau of Investigation (FBI).

~~(S//OC/NF)~~ In addition, the 2018 Certifications, as amended, also include amendments to (b)1 and 3 per ODNI 7E per FBI [redacted] 3, 7E per FBI [redacted] 3, 7E per FBI [redacted]

Specifically, these amendments authorize the use of the querying procedures attached herewith as Exhibit I to the 2018 Certifications, as amended, in connection with foreign intelligence information acquired in accordance with the predecessor certifications.

(U) Procedural History

~~(S//OC/NF)~~ In March 2018, the Attorney General and the Director of National Intelligence (DNI) executed reauthorization certifications (i.e., the 2018 Certifications) that were intended to reauthorize the acquisition of foreign

¹ (U) Prior to passage of the FISA Amendments Reauthorization Act of 2017, Pub. L. No. 115-118, 132 Stat. 3 (Jan. 19, 2018) (hereinafter "Reauthorization Act"), the current subsection (h) of section 702, "CERTIFICATIONS," was located at subsection (g). The government continues to refer to certifications adopted prior to that Act using their historical statutory reference (i.e., "DNI/AG 702(g) Certification").

² (U) As previously explained to the Court, because the 3, 7E per FBI [redacted] became effective on 3, 7E per 3, 7E [redacted] and were effective for one year, the government did not need to submit certifications reauthorizing those certifications during 3, 7E [redacted]. Accordingly, there were no 3, 7E per FBI [redacted] intervening between the 3, 7E per FBI [redacted]

³ (S) [redacted]

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intelligence information authorized under the [REDACTED] 3, 7E per FBI which were then still in effect. The 2018 Certifications, accompanied by targeting, minimization, and querying procedures approved by the Attorney General in consultation with the DNI, were filed with the Foreign Intelligence Surveillance Court (FISC or "the Court") on March 27, 2018, for its review and approval.⁴

(U) The querying procedures accompanying the 2018 Certifications permitted the FBI to comply with the new statutory requirement that "a record [be] kept of each United States person query term" by continuing the FBI's longstanding practice of keeping a record of all queries of unminimized Section 702 information, without distinguishing between U.S. person query terms and other query terms. In accordance with existing practice, the querying procedures also did not require FBI personnel to furnish a written justification before running or reviewing the results of queries, including queries made using U.S. person query terms.

~~(S//NF)~~ On April 5, 2018, the Court extended the time for its review of the 2018 Certifications and amendments [REDACTED] 3, 7E per FBI through July 25, 2018. On April 23, 2018, the Court issued an Order appointing _____

⁴ (U) The 2018 Certifications included amendments proposing the use of the minimization and querying procedures filed therewith in connection with information acquired under all of those [REDACTED] 3, 7E per FBI [REDACTED] 3, 7E per FBI

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amici curiae and setting forth a briefing schedule for amici and the government. After a full round of briefing, the Court held a hearing on July 13, 2018, in which amici and representatives from the government participated. On July 20, 2018, the Court again extended the time for its review of the 2018 Certifications and amendments to their respective [REDACTED] through October 18, 2018.

~~(S//OC/NF)~~ On September 18, 2018, the government submitted amendments to the 2018 Certifications, as well as amended minimization and querying procedures⁵ to be used by the National Security Agency (NSA), FBI, Central Intelligence Agency (CIA), and National Counterterrorism Center (NCTC) in connection with the 2018 Certifications and the [REDACTED]

[REDACTED] The revisions to the minimization and querying procedures addressed many of the concerns raised by amici and the Court. Of note, however, the amended FBI querying procedures submitted in September 2018 continued FBI's longstanding practice of keeping records of all queries, and did not include a requirement to document a statement of facts for United States

⁵ (U) The querying procedures originally submitted as Exhibit H to the 2018 Certifications were consolidated procedures that applied to all four agencies. The querying procedures for NSA, FBI, CIA, and NCTC submitted with the September 2018 amendments to the 2018 Certifications were contained in separate documents for each agency.

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person queries. See 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, filed on September 18, 2018, at 15-18 (hereinafter "September 2018 Cover Filing").

~~(S//NF)~~ The Court held a second hearing on September 28, 2018, in which amici and representatives from the government participated. On October 18, 2018, the Court approved the 2018 Certifications, as amended, as well as the targeting, minimization, and querying procedures submitted therewith, but found the FBI's minimization and querying procedures deficient in two regards.

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3, 7E per FBI

3, 7E per FBI

First, the Court held that the requirement in Section 702(f)(1)(B) that querying procedures "include a technical procedure whereby a record is kept of each United States Person query term used for a query" requires agencies to adopt recordkeeping practices by which agency personnel document whether a query includes a U.S. person identifier. *Id.* at 61. Because the FBI's proposed querying procedures did not require it to keep records that "indicate whether terms are United States person query terms," and instead allowed the FBI to keep records of all queries, without identifying which included U.S. person identifiers, the Court held that these procedures did not

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comply with Section 702(f)(1)(B). *Id.* Second, the Court held that the FBI's minimization and querying procedures did not comply with the requirements of FISA or the Fourth Amendment because they did "not require adequate documentation of the justifications for queries that use United States-person query terms." *Id.* at 133. Specifically, the Court found that, although the FBI's querying standard was adequate on its face, the manner in which FBI had been conducting queries involved a large number of unjustified queries, thus rendering the procedures insufficient without additional safeguards. *Id.* at 67, 81. The FISC expressed its belief that one way in which the minimization and querying procedures could be modified to cure this deficiency would be to adopt amici's proposal to include a requirement in the querying procedures that FBI personnel record a written justification explaining why a U.S. person query was reasonably likely to return foreign intelligence information, as defined by FISA, prior to reviewing the contents of any communications returned by such a query. *Id.* at 96-97. On November 15, 2018, the government filed a notice of appeal to the Foreign Intelligence Surveillance Court of Review (FISC-R).

~~(S//NF)~~ The FISC-R issued an order on November 30, 2018, appointing amici and setting a briefing schedule. After a full round of briefing, the FISC-R held a hearing on May 23, 2019, in which amici and representatives from the government participated. On July 12, 2019, the FISC-R affirmed the FISC's

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holding regarding the first deficiency, concluding that the FBI's proposed querying procedures "do not comply with Section 702(f)(1)(B) insofar as they do not include a procedure whereby FBI personnel document, to the extent reasonably feasible, whether a particular query term relates to a United States person or a non-United States person." 3, 7E per [REDACTED]

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

In light of this holding, the FISC-R declined to reach a conclusion regarding the second deficiency found by the FISC, but observed that the above-described written justification requirement seems to be a "modest measure that would alleviate the most significant concerns raised by the FISC." *Id.* at 41.

(U) Changes to the FBI's Querying Procedures

~~(S//NF)~~ The government has amended the FBI's querying procedures to remedy the deficiencies identified in the FISC and FISC-R opinions. To aid the Court in its review of the FBI's amended querying procedures submitted herewith, below is a discussion of the changes made to those procedures since the submission of the procedures with the 2018 Amended Certifications on September 18, 2018 (hereinafter "Amended September 2018 FBI Querying Procedures").

~~(S//NF)~~ First, the amended FBI querying procedures submitted herewith require the FBI to keep records that identify which queries of unminimized Section 702

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information use a U.S. person identifier. *See* Amended 2018 FBI Querying Procedures, Ex. I at 4, § IV.B.1. Specifically, the amended FBI querying procedures do not include the footnote which previously memorialized FBI's longstanding practice of keeping a record of all queries of unminimized Section 702 information, without distinguishing between U.S. person query terms and other query terms. *Cf.* Amended September 2018 FBI Querying Procedures, Ex. I at 4-5 n.5, § IV.B.3. As a result of this change, the FBI's amended querying procedures are now consistent in this regard with other agency's querying procedures that were submitted in September 2018 and approved by the Court in October 2018. *See* Amended September 2018 NSA Querying Procedures, Ex. H at 4, § IV.B.3; Amended September 2018 CIA Querying Procedures, Ex. J at 4, § IV.B.4; and Amended September 2018 NCTC Querying Procedures, Ex. K at 4, § IV.B.4.

~~(S//NF)~~ Second, the amended FBI querying procedures submitted herewith require the FBI to maintain a written statement of facts showing that a U.S. person query was reasonably likely to retrieve foreign intelligence information prior to reviewing the contents returned by such a query. *See* Amended FBI Querying Procedures at 4, § IV.A.3. Thus, the amended FBI querying procedures adopt the exact remedy first proposed by amici and discussed with approval by both the FISC and FISC-R. *See, e.g.,* Oct. 2018 FISC Op. at 96-97 ("The Court regards amici's documentation proposal as a measured and reasonable response to the statutory and Fourth Amendment deficiencies it has found in the FBI's implementation of its querying

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standard”); July 2019 FISC-R Op. at 41-42 (“[T]he remedy Amici propose—a requirement that FBI personnel document in writing their justification for running a query using a United States person query term before examining the contents of Section 702 information returned by such queries—appears to us a modest measure that would alleviate the most significant concerns raised by the FISC.”). In light of the additional safeguards introduced with the addition of this revision to the querying procedures, the FBI has also removed the categorical batch query provision previously set forth at Section IV.A.3 in the Amended September 2018 FBI Querying Procedures.

(U) Third, the amended FBI querying procedures require that the FBI make available records generated for both of these requirements to enable oversight by NSD and ODNI. *See* Amended 2018 FBI Querying Procedures, Ex. I at 5, §§ IV.B.3 and IV.B.4. Such a requirement will enhance effective review of the implementation of FBI’s amended querying procedures.

~~(S//NF)~~ As described in the Affidavits of the Director of the FBI attached herewith to the Amendments to the 2018 Certifications, the amended FBI querying procedures

include additional recordkeeping provisions that necessitate modifications to FBI systems, as well as training of FBI personnel, in order to facilitate full compliance with all provisions of these procedures. The FBI will complete modifications of its systems and train its personnel as soon as practicable in order to comply with these new provisions.

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FBI Director's Affidavit at 2. At this time, the FBI assesses that it will complete the necessary training initiatives [REDACTED]

[REDACTED] draw Section 702-acquired information as follows: the FBI assesses that [REDACTED] will take until approximately November 15, 2019; and that modifying its [REDACTED] will take until approximately December 13, 2019. Training on the new requirements, including [REDACTED] will be available to FBI personnel by November 15, 2019. After December 13, 2019, any FBI personnel who have not completed the training will have their access to unminimized Section 702-acquired information terminated.

~~(S//NF)~~ The FBI reports that [REDACTED] would likely take longer, potentially ten months to complete, and could cost a considerable sum of money.⁶ The FBI is evaluating whether it would be worthwhile to invest the resources necessary [REDACTED]. During this evaluation and possible modification period, and beginning no later than August 30, 2019, the FBI will require [REDACTED] to maintain written records of U.S. person queries of unminimized

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~~(S//NF)~~ The [REDACTED] [REDACTED] which operates as an independent contractor. Building the recordkeeping requirements [REDACTED] reportedly would require [REDACTED] [REDACTED] hence the additional time and increased cost to the FBI.

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Section 702-acquired information and written records of justifications to the extent required by the amended procedures. According to the FBI, such written records will be available for oversight by NSD and ODNI. In addition, the FBI believes that such written records would be impractical and overly burdensome to maintain for FBI's

[Redacted] 3, 7E per FBI [Redacted]

3, 7E per FBI [Redacted]

~~(S//NF)~~ The government will submit a report every 45 days from the date of this filing apprising the Court of FBI's progress in implementing its amended querying procedures. The FBI has reviewed a copy of this document and confirmed the accuracy of the factual information contained herein.

(U) Conclusion

~~(S//OC/NF)~~ (b)1 and 3 per ODNI 3, 7E per FBI [Redacted] as

amended, contain all of the elements required by the Act, and the amended FBI querying procedures to be used under those certifications are consistent with the requirements of the Act and the Fourth Amendment to the Constitution of the United States. Likewise, the amended FBI querying procedures to be used in connection with foreign intelligence information acquired in accordance with [Redacted]

3, 7E per FBI [Redacted] and

[Redacted] 3, 7E per FBI [Redacted]

[Redacted] 3, 7E per FBI [Redacted]

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[redacted] are consistent with the requirements of the Act and the Fourth Amendment to the Constitution of the United States. Accordingly, the government respectfully requests that this Court enter orders pursuant to subsection 702(j)(3)(A) of the Act approving: [redacted] (b)1 and 3 per ODNI, 7E per FBI [redacted]

[redacted] as amended; the use of the amended FBI querying procedures attached thereto as Exhibit I in connection with acquisitions of foreign intelligence information in accordance with those certifications; and the use of the amended FBI querying procedures attached as Exhibit I to [redacted] (b)1 and 3 per ODNI, 7E per FBI [redacted]

[redacted] in connection with foreign intelligence information acquired in accordance with all predecessor certifications.

Respectfully submitted,

John C. Demers
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6, 7C per NSD

By:

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