

**Nos. 18-1296, 18-1366**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

v.

No. 18-1296

BAKHTIYOR JUMAEV,  
Defendant-Appellant.

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

v.

No. 18-1366

JAMSHID MUHTOROV,  
Defendant-Appellant.

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**MEMORANDUM BRIEF FOR THE UNITED STATES**

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**STATEMENT**

The United States submits this Memorandum Brief in response to the Court's order of May 20, 2021 ("Order"). In the Order, the Court stated that "[i]n consulting with the court on security matters, the Classified Information Security

Officer (CISO) assigned to these appeals provided the court with a publicly available internet article” entitled *To Oversee or to Overrule: What is the Role of the Foreign Intelligence Surveillance Court Under FISA Section 702?* that was recently published at lawfareblog.com (“Article”). Order 2. The Court invited “[a]ny party wishing to address matters discussed in the article [to] file a memorandum brief.” *Id.*<sup>1</sup>

The Article discusses recent opinions of the Foreign Intelligence Surveillance Court (FISC) approving annual government certifications that authorize foreign intelligence acquisitions targeting non-U.S. persons outside the United States under Section 702 of the Foreign Intelligence Surveillance Act (FISA). In those opinions, the FISC found that the acquisitions were lawful under the statute and the Fourth Amendment. With respect to the 2018 certification, the FISC initially found that the government’s proposed procedures were insufficient in light of certain misapplications of the query standard that the government had disclosed to the court. The government subsequently adopted additional procedural safeguards that the FISC approved. *See* U.S. Br. (Muhtorov) 40 n.16. The Article generally contends that these opinions reflect an appropriate degree of

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<sup>1</sup> Undersigned government counsel has not communicated with the CISO about the Article and was unaware until receiving the Order that the CISO had provided it to the Court.

“oversight, review, and correction” by the FISC to ensure that Section 702 surveillance remains within statutory and constitutional limits.

### **DISCUSSION**

The government has no objection if the Court chooses to refer to the publicly-filed FISC opinions or to the Article’s commentary on those opinions. Although the government does not necessarily endorse all the Article’s conclusions, the Article generally supports the government’s argument (U.S. Br. 32) that prior judicial review by the Article III judges on the FISC is among the many procedural safeguards that support Section 702’s constitutional reasonableness. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 (2013) (recognizing the importance of the requirement that the FISC “assess whether the Government’s targeting and minimization procedures comport with the Fourth Amendment”).

The recent FISC opinions that the Article discusses are not directly applicable here because the Section 702 certification(s) governing the collection here were approved by the FISC in earlier years. Moreover, this Court’s analysis should focus on the way the government used the specific Section 702 information at issue in this case, and the evidence at issue here was not obtained or derived from any queries implicating the issues discussed in the recent FISC opinions. *See* U.S. Br. (Muhtorov) 44-46.

However, the recent FISC opinions may inform this Court’s assessment of the Section 702 collection at issue here in a number of ways. For example, the recent opinions demonstrate the FISC’s careful, exacting, and effective review of Section 702 certifications. Moreover, they show that the FISC’s review is not divorced from the way that the program is actually conducted in practice. Rather, the FISC has approved Section 702 certifications in light of the specific, real-world details of how the government has implemented its Section 702 authorities. *See* U.S. Br. (Muhtorov) 18-20.

The careful and “judicial” nature of these opinions also underscores the error in Muhtorov’s contention that the FISC’s role violates Article III. Although the Article emphasizes the FISC’s “oversight” role and the opportunity that Section 702 affords the government to correct deficiencies,<sup>2</sup> the FISC’s Section 702 opinions show that, like any Article III court considering the lawfulness of proposed surveillance, the FISC is fully empowered to rule not only on narrow procedural details but also on whether the basic framework of Section 702

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<sup>2</sup>More specifically, the Article explains that, under 50 U.S.C. § 1881a(j)(3)(B), if the FISC does not approve a certification or the use of targeting, minimization, or querying procedures, it must issue a “correction order” rather than an “outright denial” (thus providing the government an opportunity to correct an identified deficiency). *See* Article ¶ 20. However, if the government determines that it is unable to do so, it *must* stop or not begin an acquisition. And, in any event, the FISC must ultimately be satisfied that the certification and procedures are consistent with the statute and the Fourth Amendment in order for the government to continue and/or begin an acquisition.

collection is consistent with the Fourth Amendment. *See, e.g., In re DNI/AG Certification*, No. 702(i)-08-01 (FISC 2008) Mem. Op. 35-41 (analyzing the general constitutional reasonableness of Section 702 surveillance).<sup>3</sup> The FISC’s opinions represent the same kind of constitutional analysis that Article III courts conduct in any number of other contexts. More generally, the Section 702 certification process has now been examined by numerous Article III judges, including the FISC itself every year since 2008, a panel of the Foreign Intelligence Surveillance Court of Review, multiple district courts and two courts of appeals in criminal cases, and the Supreme Court in *Clapper*. Although not all of these courts have considered direct Article III challenges to the FISC’s role, none of them has found any Article III problem. *See United States v. Mohamud*, 843 F.3d 420, 444 n. 28 (9th Cir. 2016) (rejecting an Article III challenge to the FISC’s role in Section 702). Indeed, federal courts have uniformly recognized the “critical[]” review function performed by the FISC’s independent Article III judges in ensuring that Section 702 collections are lawfully authorized and conducted. *Clapper*, 568 U.S. at 414.

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<sup>3</sup> Available at <https://www.dni.gov/files/documents/0315/FISC%20Opinion%20September%204%202008.pdf>.

Respectfully submitted,

MATTHEW T. KIRSCH  
United States Attorney

JOHN C. DEMERS  
Assistant Attorney General

JAMES C. MURPHY  
Assistant U.S. Attorney  
District of Colorado

s/ Joseph Palmer  
JOSEPH PALMER  
STEVEN L. LANE  
Attorneys  
National Security Division  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, DC 20530  
202-353-9402  
Joseph.Palmer@usdoj.gov

## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitations of Tenth Circuit Rule 27.3(b)(3) and this Court's May 20, 2021 order inviting the parties to file a memorandum brief of no more than 10 pages. The brief contains fewer than 10 pages and has been prepared in 14-point, Times New Roman font.

## CERTIFICATE OF DIGITAL SUBMISSION

I certify that with respect to the foregoing Memorandum Brief:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file hard copies, that the ECF submissions is an exact copy of those documents;

(3) the digital submission has been scanned for viruses with the most recent version of Windows Defender (version 1.229.1832.0, dated June 1, 2021), and according to the program is free of viruses.

/s/ Joseph Palmer  
Joseph Palmer  
Attorney for the United States



## CERTIFICATE OF SERVICE

I certify that on June 1, 2021, I electronically filed the foregoing memorandum brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the ECF system. Participants in the case who are registered ECF users will be served by the appellate ECF system.

/s/ Joseph Palmer  
Joseph Palmer  
Attorney for the United States