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FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE: DNI/AG 702(g) .
CERTIFICATION [redacted] . [redacted], 2008
~~(S)~~ .
. . . . . Washington, D.C.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARY A. McLAUGHLIN
UNITED STATES FISC JUDGE

APPEARANCES:

Department of Justice: [redacted]
MATTHEW OLSEN

National Security Agency: [redacted]

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P R O C E E D I N G S

THE COURT: Good morning again, everyone, and we are on the record. Well, thank you all for coming. I really appreciate it. Before I swear in the nonlawyers who will be speaking, let me just get everybody to introduce themselves, at least those who may be participating in this, and that perhaps I guess could be everybody. Is this [redacted]

[redacted] to my far left and [redacted] And then go ahead, sir.

[redacted]: (b)(6); (b)(7)(C), National Security Division.

THE COURT: All right.

(b)(6); (b)(7)(C): (b)(6); (b)(7)(C) from the National Security [redacted]

MR. OLSEN: Matt Olsen from National Security [redacted]

THE COURT: Then we're with (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C) FBI.

(b)(6); (b)(7)(C), FBI.

(b)(6); (b)(7)(C), FBI Office of General [redacted]

[redacted] from NSA General Counsel's [redacted]

THE COURT: And especially those in the back, please speak up so the court reporter can hear you and the little mic can pick up. So that was [redacted] and this is?

[redacted]: I'm [redacted] the FISA technical lead from Oversight and Compliance at NSA.

THE COURT: Thank you. Yes, ma'am.

(b)(6) [redacted] I'm here on behalf of the Director of National Intelligence, Office of General Counsel.

[redacted]: [redacted] from NSA/OGC.

[redacted]: [redacted] from NSA.

[redacted] (b)(6): I'm (b)(6) [redacted] from the Office of General Counsel for CIA.

THE COURT: Very good. And why don't we have our staff introduce themselves as well.

(b)(6) [redacted]

THE COURT: All right. Thank you.

Now I would like to swear in the nonlawyers who may be speaking today. Whoever that consists of, do you want to rise? I'll do it all at one time. All right.

(The witnesses are sworn.)

THE COURT: Well, let me state for the record why we're here, although I think we all do know why we're here.

The purpose of today's hearing is for the Court to receive additional information and/or clarification with respect to its judicial review under section 702(i) of the FISA Amendments Act of 2008.

The Court, of course, did receive from the government on August 5, 2008, an ex parte submission entitled "Government's Ex Parte Submission of [redacted] and Related Procedures and Requests for an Order Approving Such Certification and Procedures."

At that point, the Court reviewed the submission, as the staff did, and after that the staff met with certain members of the government and relayed my questions and their questions to the government. We then received yesterday, August 26, a document entitled "Government's Preliminary Responses to Certain Questions Posed By the Court."

That was very helpful to get that, and I know you must have had to work hard to put it together on such short notice. So I appreciate it, and it was very helpful.

What I'd like to do today is go over some questions that I still have. I think your written response answered -- the questions that you did deal with I think were answered completely, and I probably won't be doing too much with them. I may just want to confirm a couple of things.

Then I have some additional questions that I think probably you're prepared for because the staff raised them, but I didn't

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see them in your responses. Okay?

All right. Let me just start with, again, this first couple things I'm doing relates to what you filed yesterday, and again it's just to sort of pinpoint a couple of things on page 5 of yesterday's submission where you were responding to my question concerning [redacted]

In particular, I raise the issue of some concern about the phrase [redacted]

And you did a lengthy response to that, and I appreciated it, and I just want to sort of confirm and hone in on the fact that it is going to be a situation where you're all going to try -- they're going to try to figure out whether this person is a U.S. person. That was the only issue I had, was what's the due diligence that will go on.

And especially I'm impressed with the second bullet point where you said, [redacted] And then you go on and elaborate.

So I just want to get a confirmation that this is not a situation where, [redacted]

[redacted] I mean, it's after due diligence and analysis [redacted] That is correct, Your Honor. As you know, the statute requires us to have a reasonable belief that a target is located outside the United States. The targeting procedures are designed to ensure that NSA analyzes information that gives rise to that reasonable belief. So it is the targeting procedures that imposes the due diligence requirement on the NSA in that respect.

THE COURT: Okay. That's fine. And I think that answers my question.

My next question with respect to what you had given us is on No. 6, page 7, and it's the discussion of the post targeting analysis done by NSA in the targeting procedures, and my question was the procedure said that that [redacted] and I sort of asked that that be fleshed out a little bit, and you all did, and the first two points I understand.

I wasn't too sure, though, what the meaning of the third bullet point was. I mean, I understand the words, but I'm wondering if someone could flesh that out for me a little. It says, "In all cases, analysts remain responsible for following their target's location and for the validity of continued acquisition of information regarding the target."

[redacted] It's my understanding -- and, [redacted] correct me if I'm wrong -- NSA analysts track particular targets. So it is the analyst who determines the extent to which they need to rely on content analysis to determine a target's location as opposed to something more [redacted]. But it is ultimately the analyst's responsibility for maintaining a reasonable belief that that target is located outside the United States.

And I don't know if you'd like to elaborate on that, [redacted]

[redacted] That's correct, and every selector that goes into an NSA [redacted] database has an analyst's name identified with that so we know who bears the ultimate responsibility, and we have processes set up in place to ensure they're doing their work.

THE COURT: Could you just do a minute or two on the processes?

[redacted]: Yes, ma'am. How far back should I start?

THE COURT: I don't know what that means, "how far back," but just hone in on the fact that they're responsible for following their target's locations; in other words, for following it and the validity of the continued acquisition. So having made the initial foreignness determination, how do you go about making sure they are remaining responsible?

[redacted] The first thing they would do, they would [redacted]

[redacted] And if NSA did intercept information, the first thing they would be responsible for would be to review the content of that information to ensure they got the right target and that it was providing foreign intelligence.

Once they do that, they're going to periodically check that depending on [redacted] the analyst has to ensure that they've reviewed that target and that it is meeting a foreign intelligence purpose.

THE COURT: Okay. Any of the staff have any questions on that topic before I move away from it?

All right. Now, this next one relates to an issue that came up at the December '07 hearing before Judge Kotelly on the Protect America Act, and it relates to oversight reviews.

Obviously, the targeting procedures that we're talking about now, at least with respect to the location of potential targets, are similar to what was reviewed by Judge Kotelly and requires oversight reviews by personnel of Justice and the Office of the Director of National Intelligence.

I read the transcript of the hearing before Judge Kotelly, and she took a lot of testimony concerning the oversight up to that point. Can somebody fill me in on where we are today on

that? Has the methodology that's been used by the reviewers changed at all? Could somebody summarize the results of those reviews?

(b)(6); (b)(7)(C) The methodology has been changed. It's been refined. Back in December, because of the volume of selectors and because we hadn't worked through an exact process in how we would conduct our oversight, we weren't in a position to be able to review every single tasking decision that the NSA had made.

We would do it on a sampling basis. Sometimes we randomly picked certain days and we would look at tasking decisions for those days, or if we had a range of selectors that had been tasked, we would randomly select the sources of information upon which the foreignness determinations for those particular selectors were based.

Since then, we've refined our process such that we're actually able to at the very least receive all of the documentation concerning every single tasking decision that NSA has made. Typically, they're sent to us in electronic format.

So we receive those, we print them off, and we review them to make sure that all of the documentation that the targeting procedures require is present, that being a notation about the foreign intelligence purpose of the collection and the source of the information upon which the foreignness determination for that particular selector was based.

~~TOP SECRET//COMINT//ORCON, NOFORN~~

~~As~~ we've gone on and we've refined our methodology and we've had back-and-forth with NSA over how we can improve their performance with respect to filling out particular fields in the sheets, as a result of that back-and-forth, we've actually had to review less and less sources because NSA is relying more and more on [redacted] we don't necessarily need to review per se.

I mean, the most common source of information that NSA relies upon is [redacted]

[redacted] selector is used by a [redacted] So therefore, we don't necessarily need to delve into too much more behind that foreignness determination [redacted]

[redacted]

So I guess in a nutshell, we've been able to do basically

more oversight because our oversight over time has become more efficient.

THE COURT: And how about -- and maybe you've in one sense maybe answered this in part, but what's the result of the reviews been? What are the problems you're seeing at this point?

(b)(6); (b)(7)(C) I would say the most common problem -- and "common" is a relative term here, because the volume of selectors is huge, and the number of problems that we're actually seeing is relatively small. As I've said, as we've engaged in oversight and engaged NSA in discussions on how they can improve the sheets and tasking determinations and things of that nature, the number of problems that we've seen have diminished over time.

I would say the most common problem is to the extent that a tasking determination is based on a wide range of information, there may be a problem with how the source of that information is cited, whether it be somebody just inadvertently mistyped [redacted] or inadvertently left out a [redacted] a key piece of information that was part of the broader range of circumstances upon which NSA made its foreignness determination.

So it's more the little technical things that we've been seeing problems with on a very small scale, and as I've said, it's diminished over time.

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THE COURT: I think before Judge Kotelly you identified about [redacted] cases where it appeared that a targeted person was in the U.S., and again, I don't even think I know what time frame that was for, but in any event, can you do anything like that now? I mean, since that hearing in December of '07.

(b)(6); (b)(7)(C) Since that time, that number captured a number of different types of incidents that were reported to us. There are incidents where there's true noncompliance with the targeting procedures that results in basically an improper tasking, whether it be because the person was actually located in the United States or the person was a U.S. person and we did not have 2.5 authority to target that person.

That number also captured instances where NSA had a reasonable belief that the person was located outside the United States at the time of targeting but since that time has roamed into the United States, what we call a "roaming incident."

A third type of incident that that number captured is what we would call a tasking error where NSA would run a particular facility through its targeting procedures but in the act of actually targeting that, by keying in the account or phone number into the tasking tool, there was a typo or something of that nature.

At the time of the hearing, we hadn't fully determined which incidents fell necessarily into which category. Since

that time, we've had an opportunity to do that. And for incidents that were reported to us through May 9 of this year, [redacted] incidents involved instances where a target was targeted improperly under the targeting procedures.

We had [redacted] incidents -- one of the things that NSA is required to do when they identify somebody who has roamed into the States is to notify us of that within 72 hours of making that determination.

We had [redacted] instances where a person had roamed into the States but the NSA did not meet that 72-hour reporting requirement. But in all of those [redacted] cases, the tasking itself was reasonable; it's just that they failed to comply with the reporting requirement.

We're tracking a number of other incidents, but with respect to those incidents, we're pretty much in the same posture that we were back in December: They've been reported to us; we don't have all the facts with respect to those incidents yet in order to be able to categorize them and say, okay, this is a true noncompliance incident, this is just a roaming incident, or this is just a tasking error.

THE COURT: Now, the [redacted] situations where you hadn't been notified within 72 hours, you picked it up in a review much later, or how did it come -- did they report it in 72 hours plus 10, or was it picked up when you went over and --

[redacted] No. They actually reported those to us.

THE COURT: Okay.

[redacted] It was just for a variety of reasons they could not comply with the 72 hours. Sometimes it's just because a final determination can take a little while simply to the extent that the information is somewhat ambiguous. I think NSA errs on the side of caution and probably sets the date of that determination sooner rather than later such that the 72-hour reporting requirement is triggered basically at the first instance or first indication as opposed to when a final determination is made.

Again, we've sort of refined the reporting requirement and have explained to NSA basically when that 72-hour reporting requirement kicks in such that we've, again, seen less and less of these incidents as time has gone on.

THE COURT: So you've taken steps to make sure that NSA, their people understand at least your view of the 72 hours in order to cut down on the situations where things aren't reported.

[redacted] Yes. That's one of the most, I think, valuable aspects of the oversight visits. It's not just to, you know, we sit there and we review and go over things with NSA, but then we sort of have -- at the end, we sort of have a roundup where we all talk about issues that have been identified and ways that we can either fix problems or correct things. And I think we've won the fruits of that, as I said, because the

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number of incidents we've seen has been diminishing over time.

THE COURT: Okay. Now, what do you foresee under the FISA Amendments Act? Do you foresee the same procedures for your oversight being implemented? Are you planning on different procedures? What are your thoughts?

(b)(6); (b)(7)(C) I can't say for certain. I would anticipate that things would not change, simply because in my view they've been working very well. As I've said, we've seen improvement, I think, just the whole process as we've refined it over the last year. I think where we are right now is probably -- we're in a good spot with respect to oversight, in my view.

THE COURT: All right. Well, what about the non-U.S. person status, which of course is new under the FISA Amendments Act? Are you going to be changing anything in terms of focusing on that?

(b)(6); (b)(7)(C) We already sort of do with respect to -- the U.S. person status is so intertwined with the location of the target [redacted] to the extent that in the past NSA would actually affirmatively identify targeted U.S. persons to us on the sheets, because one of the additional fields that they put in the sheets is basically a blurb, an explanation and a description of the target.

Clearly, we're not allowed to target U.S. persons anymore, so I don't anticipate seeing any such descriptions on the

sheets. But again, since the status of the person, the determination of how that is made is so intertwined with the same information upon which NSA relies to make a foreignness determination, that it would be hard for us not to identify such information as we're conducting the reviews.

THE COURT: Has there been -- and maybe you've said this, but is there thought to be or are you planning to or have you already sat down with people or issued things so that they can now focus on the fact that we've got the non-U.S. person status, which is also something they need to be focusing on?

[redacted] I don't think we've had formal discussions about it. Again, this wasn't an issue that has cropped up out of nowhere where we sort of had to still deal with this issue in the context of the Protect America Act, because under the certifications, we were not allowed to target U.S. persons unless we had 2.5 authority.

THE COURT: Okay.

[redacted] So we always had this affirmative -- although it was not affirmatively stated in the targeting procedures, there was an implicit requirement to ensure that we're not inadvertently or intentionally targeting U.S. persons in the absence of such authority.

So the types of checks that we're doing now build upon checks that we were doing previously in order to satisfy that requirement or limitation.

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THE COURT: [redacted] did you want to follow up on that at all? I know you guys were here last time. Anything?

[redacted]: I don't think I have anything.

THE COURT: Okay. Thank you on that.

My next issue has to do with departures from procedures, if I can phrase it that way. Let me find out where we're going.

Here we are. I know that -- at least I believe the staff talked with you about this before this hearing, and it's page 10 of the targeting procedures. Let me just get them out.

"If, in order to protect against immediate threat to the national security, the NSA determines that it must take action, on a temporary basis, in apparent departure from these procedures," and I know that -- again, was it at the hearing perhaps? I'm not remembering whether it was at the hearing or not. In any event, I know in the past there has been a representation of the situations that you contemplate coming within this. I don't think you dealt with that in your response from yesterday.

[redacted] No, we didn't.

THE COURT: Okay. Could you just confirm for us -- I know you've already had discussions with staff, but tell me what you expect to be contemplated by this provision.

[redacted] First, I think the circumstances under which this provision would be triggered would be very extreme

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circumstances: an imminent terrorist attack or a terrorist attack that has occurred or something of equal significance. With respect to the types of departures, I mean, in all cases we will continue to adhere to the limitations set forth in the statute.

We are anticipating that the types of departures would be on a more technical level such as perhaps because NSA personnel are devoted to addressing or countering this terrorist threat, they may not be able to devote the resources necessarily for us to conduct an oversight review within the allotted 60 days.

THE COURT: Has this been used? Has the PAA provision ever been used?

(b)(6); (b)(7)(C) [redacted] We've never invoked it.

THE COURT: Never invoked. Okay. Can you give me a little more meat on the bones on what you would contemplate?

[redacted]. [redacted] I think the other situation we thought of is an emergency, as (b)(6); (b)(7)(C) describes, and our actual system for recording things is down. So technically we can't get to the system where we'd record this. We'd still make a note of what we've done, so we would comply substantially with what's required, we wouldn't want the issue to arise and prevent us from doing what we need to do, are we complying in every detail.

So that's the kind of thing that I think we contemplate

that it could be used in, and again, my own expectation is it will never be used, but we did provide for it in the unlikely event.

THE COURT: Okay. All right. Let's talk for a little bit about these *about* communications.

What I would find very helpful -- can someone just briefly and with not a lot of technical but some technical aspects talk to me about how communications are acquired? Are they acquired in a different way than the *to-or-from* communications? I mean, as I understand it, you're not acquiring them from Internet service providers, like (b)(1); (b)(3); (b)(7)(E) [redacted]

[redacted]: Judge, if I may, I'm going to let [redacted] come to the table because he's one of the people who can explain this.

THE COURT: Oh, wonderful. Come on up, sir. This is [redacted]

[redacted] Yes, typically for *about* communications, right now we do not acquire them from Internet service providers [redacted]

So what happens there is you pick up things like two unknown communicants to us and the *to-from* talking about one of

our targeted selectors. That's a very useful case to us because (b)(1); (b)(3); (b)(7)(E)

That's one example.

Another example is (b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

In other arenas as well, (b)(1); (b)(3); (b)(7)(E) same kind of thing. We maybe find (b)(1); (b)(3); (b)(7)(E) of a known target that provides a unique insight into that foreign intel need.

And another example, just to flesh these out, a bit more is we would have a target who (b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

THE COURT: (b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E) How do you do it?

(b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

THE COURT: Yeah.

-- that then ensures (b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

THE COURT: Okay. Can we talk for a minute -- obviously, the issue for the Court and for the government, as you came up with all these procedures, is the reasonableness

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standard, and the Court is looking at that as well as, obviously, compliance with the Fourth Amendment, which in itself is a reasonableness standard, I guess, as well.

Do the *abouts* present a different issue in terms of the reasonableness, do you think? Let me just expand a little bit on that and have some response to it.

What percentage of the acquisitions are *abouts*, as opposed to *to* and *from*? Is an *about* acquisition more or less likely to pick up communications that otherwise you wouldn't be allowed to pick up for whatever reason? Do they present harder issues for reasonableness?

Somebody want to start discussing that with me? Have you thought about that?

[redacted] As far as the percentage number, we don't have a number for that, because as I mentioned earlier, when we [redacted] we find *to's* and *froms* and [redacted] so we don't categorize those separately to be able to count those communication as *abouts*.

So we don't have any numbers. I can tell you as far as usefulness, they're very useful, and we see them routinely, but I don't have a number for you on that.

THE COURT: And in terms of the usefulness, their importance to what you're trying to accomplish, talk to me a little bit about that. As important as a *to* or *from*, less important? What role do they play in what you're doing?

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[redacted] They're very useful in [redacted]

[redacted]

So, for example, in the [redacted] (b)(1); (b)(3); (b)(7)(E) (b)(1); (b)(3); (b)(7)(E)

(b)(1); (b)(3); (b)(7)(E)

[redacted]

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[redacted]

THE COURT: Now, you're saying in your response, still on the *abouts*, "the operation of the Internet protocol address filters or [redacted] prevents the intentional acquisition of communications about the target as to which the senders and all intended recipients are known at the time of acquisition to be located in the U.S."

[redacted] What about the U.S. person status, how that is more difficult to account for or to --

(b)(6); (b)(7)(C) Well, first of all, it's our position that the target of an *abouts* communication is still the user of the targeted selector. It's not the sender or recipient of the e-mail or other communication that contains the targeted selector. I mean, that's where the foreign intelligence interests lie, in the user of the targeted selector.

To the extent that the IP filters and [redacted] ensure that at least one end of the communication is outside the United States, more often than not, I would suspect both ends of the communication are outside the United States. We're collecting *abouts* of purely transient communications such that it's less likely that there's U.S. persons involved or U.S.-person information involved.

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But even to the extent that one of the communicants was a U.S. person or was located in the United States, to the extent that there's U.S.-person information in the *abouts* communication, that information will be subject to the minimization procedures.

THE COURT: Okay. Anything from staff on the *abouts*? I'm going to talk some more about the filter issue but from a different perspective. Anybody?

[redacted] (b)(6) Judge, I think I do have a question.

THE COURT: Yes. Go ahead, Phil.

[redacted] (b)(6) When you describe how [redacted] these *about* communications, you described it in a way -- well, you said that [redacted] acquiring the *to-or-from* communications [redacted], if you wanted to for whatever reason, would it be technically feasible to -- in the same manner [redacted] would it be technically feasible to acquire only communications that are to or from the selector account and not those communications that otherwise contain a reference or name of a selector account?

[redacted] It is technically feasible. The problem with doing so is if you end up discarding a number of communications that are truly *to-froms* that you should be able to collect but [redacted]

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[redacted]

So by trying to limit us to say no *abouts*, then we end up cutting out those kind of communications as well, truly *to-froms*. So it would be -- we're not surgical enough to take that out of the equation without impacting our ability to do *to-froms* effectively.

[redacted] (b)(6) Okay.

[redacted] Judge, may I offer --

THE COURT: Sure. This is [redacted] right?

[redacted] -- as to the reasonableness. I think you asked the question about reasonableness we haven't addressed. But one of the things the way we have this structured, we think it is akin to -- not exactly the same, but akin to finding a connection between a targeted e-mail address and a person outside the United States.

And for that communication only, we think it's reasonable to make that newly discovered person -- to acquire his communications. There's no automated tasking of that newly discovered person that takes place. Nothing happens as a matter of course. We only collect that single communication, and then

we assess it as to whether we want to make a new target there of the person overseas. But it's important, I think, to understand there's no follow-on automated, *now we found a new person, a new person, a new person*, and those are not automatically added to our task mode.

So it's a limited look with our target, the user of the e-mail address continuing to be our target, [redacted]

[redacted]

THE COURT: Yes. I'm glad you brought that up, [redacted] because what I understand, and I think you've just said it, is that when you're picking up the *about*, you're also getting information on the *to* and *from*. But if the *to* or *from* is now a person of interest, but if it's a U.S. person, for example, or something, you couldn't continue to just pick up that person, directed at the person, but then you'd have to come into court with an application or do whatever else. But you're not automatically then following that person.

[redacted] That's correct.

THE COURT: Now, on the IP -- this is getting to minimization, but because it relates to the filters, let's talk about it. And this is on page 5 of your written response from yesterday. The NSA minimization procedures, you're stating, "contain a provision for allowing retention of information

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because of limitations on NSA's ability to filter communications." My question I had was is the filter discussed in targeting the same filtering. I just wanted to understand that, and apparently it is.

But talk to me a little bit, because there seemed to be some tension there. [redacted]

[redacted]

(b)(6); (b)(7)(C) I think the inclusion of that provision in the minimization procedures was intended to be prophylactic in the event that the filters don't necessarily work, and NSA has represented that it's been their experience with the filters and [redacted] that they have not captured purely domestic communications with respect to the *abouts*.

But to the extent that [redacted]

[redacted]

this provision basically captures instances where the filters may not work in every instance.

THE COURT: You did respond to this, but I guess maybe just a little bit more on how limited are they. I mean, what are the limitation of these filters?

[redacted] Limitations really come down to -- the

filter is basically [redacted]

[redacted]

[redacted]

THE COURT: (b)(6) [redacted]

(b)(6) [redacted] Thank you, Judge.

[redacted]

[redacted]

THE COURT: Okay.

(b)(6) [redacted] With one other question. For example, with the filters, [redacted]

[redacted]

(b)(6) [redacted]

[redacted]

(b)(6) [redacted]:

MR. (b)(6) [redacted]

[redacted] (b)(6) [redacted]:

[redacted]

MR. (b)(6) [redacted]

[redacted]

(b)(6) [redacted]

[redacted]

MR. (b)(6) [redacted]

[redacted]

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THE COURT: Okay. Again, going on or continuing with minimization procedures, let me see where I am here. Just a couple of things that I think the staff confirmed with you prior to the hearing when they raised various issues. And it wasn't in your memo from yesterday, so I'll just raise it here. But as I understand it, (b)(1); (b)(3); (b)(7)(E) [redacted]

(b)(6); (b)(7)(C) That's correct.

THE COURT: Okay. And on page 1, I guess it was, of (b)(1); (b)(3); (b)(7)(E) [redacted]

[redacted] (b)(6); (b)(7)(C) Yes.

THE COURT: All right. And then I wanted to go to 3(b)(1) of the minimization procedures, a paragraph I will tell you that I had some struggles with, but now I think I understand it.

(b)(6) [redacted] This will be the NSA minimizations --

THE COURT: I'm sorry, NSA.

All right. Now, first of all, as I understand it, I thought there was a "not" missing, and there was.

(b)(6); (b)(7)(C) [redacted] There is.

THE COURT: Okay, that's fine. I kept reading and thinking I was missing something, and it took me awhile. But let me just say to you what I understand this paragraph to mean, and then tell me if it -- that "NSA shall destroy inadvertently acquired U.S.-persons communications once they are identified as both clearly not relevant to the authorized purpose of the acquisition and not containing evidence of a crime." And also "inadvertently acquired U.S.-person communications includes these electronic communications acquired because of limitations of the ability to filter." That was the filter issue.

That's what will happen, and the time limit is a maximum of five years.

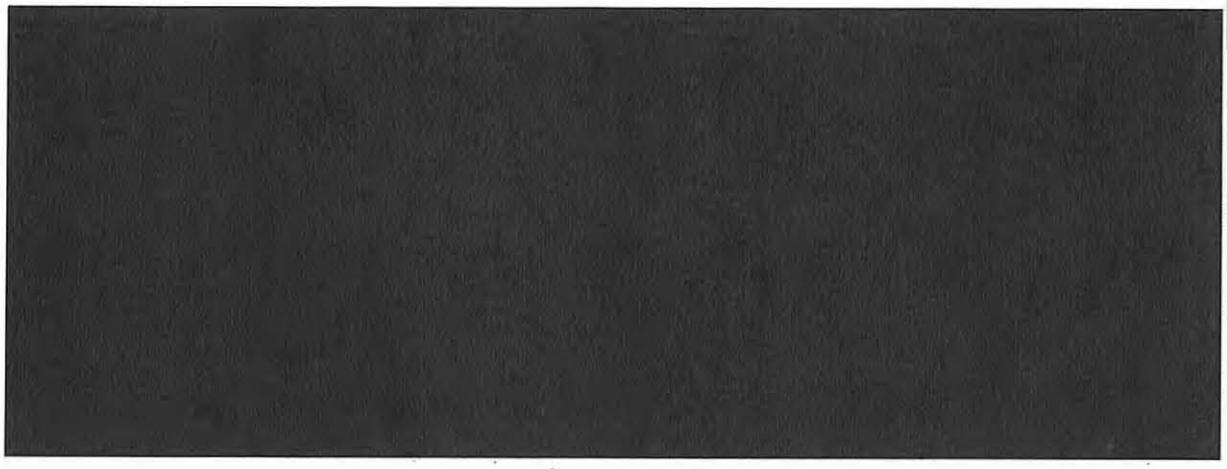
(b)(6); (b)(7) [redacted]: Correct.

THE COURT: It will be done at least with respect to the first part of 3(b)(1) at the earliest practical point, but at least five years --

(b)(6); (b)(7)(C) [redacted]: No later than five years.

THE COURT: No later than five years. And I understand that five years has been a time frame that has appeared in other procedures, but I think it probably would be helpful to just sort of talk a bit about where that comes from, why is that a number that's been selected.

(b)(6); (b)(7)(C) [redacted]: NSA can correct me if I'm wrong; the five years comes from the fact that [redacted]



That, I think, is the general thinking behind the five-year retention period. That's the potential analytical life cycle of a particular piece of information.

[redacted] Your Honor, this is [redacted] for the NSA.

THE COURT: Sure. Yes, sir.

[redacted] In a couple of other places in our minimization procedures, namely in Section 5 and Section 6, we talk about the five-year rule where in certain cases the intelligence director may extend that in the case of domestic communications or in the case of U.S.-person information if again it has foreign intelligence value or evidence of a crime.

So in 3(b)(1) we talk about five years, but there are a couple of other sections that might be invoked by our SID director where he could extend it.

THE COURT: Yes. Well, I think this makes clear that it's not talking about things that are not relevant -- it's only talking about things that are not relevant to the authorized

purpose of the acquisition and not containing evidence of a crime. So the implication is that if it does do that, the five years may not necessarily be -- fair enough.

All right. Number 13, page 11 of your response from yesterday. Now, I had a couple of questions with respect to the three minimization procedures and what they say about the director being able to do certain things, but (b)(6); (b)(7)(C), I understand that you alerted the staff before the hearing that there's another potential issue that you have thought of that could impact this issue.

(b)(6); (b)(7)(C) Correct. There's a provision in the FISA that was recently changed, 1806(i), which basically says -- the previous iteration of that provision of the statute said if you are unintentionally acquiring radio communications when the sender and all intended recipients are located in the United States, the attorney general has to determine whether or not that piece of information can be retained in very extreme circumstances, otherwise such circumstances have to be destroyed upon recognition.

The recent FISA Amendments Act struck "radio" out of that provision such that the provision appears to on its face apply to all types of acquisitions conducted under the act. Whether or not that particular provision applies to this type of collection such that it would require us to basically destroy domestic communications as they are recognized is an issue that

we're still trying to work through.

THE COURT: Okay. All right. And I'm sure we'll continue to talk on that as you work it through, and thank you for alerting us to that. Let me go forward, though, with the minimization procedures as they are, and let me ask a couple of questions about them, putting aside for the moment this issue with 1806.

We had one question for you, and now I don't know if we asked you this before, but the one question was the NSA and the CIA procedures had the directors doing things in writing. And the FBI provision didn't say "in writing," but as I understand it, the FBI, as you cite here, has represented that any such determination by the director would be made in writing even if not expressly required.

(b)(6); (b)(7)(C): Correct.

THE COURT: Okay. That answers that. Another similar kind of question. There may be no significance to the difference in language, but the NSA procedures at page 5 say, and I'm paraphrasing because I don't have the exact quote, that unless the director "specifically determines" something.

And then the FBI provisions simply say "unless the director determines," and I think the CIA also says "unless the director determines." Is there any meaning I'm supposed to take from "specifically?"

(b)(6); (b)(7)(C): No. I think "specifically" was just

intended to capture the notion that this would be on a case-by-case basis as opposed to just a broad-base, I'm going to exempt this particular gigantic class of communications.

THE COURT: But I take it the FBI and a CIA would also be on a case-by-case basis.

[redacted] Yes.

THE COURT: Yeah, I didn't think it had a lot of significance, but you never know, so I thought I'd ask.

You know, I may be at the end of my list. What I'd like to do is take a break. But since there's fewer of us than of you, we will step out, and then you can stay here and if -- because there's a lot of people here.

Obviously, use the time. If something was said here that you have an issue with because, you know, at least from your experience it doesn't work that way, please talk among yourselves and we can straighten that out. Or, if I had asked a question and you say, *Gee, I think the best answer is X and nobody said X*, please feel free to tell [redacted] and we can get that better answered on the record.

Okay. Thanks, everybody. Just give us a few minutes.

(Recess taken.)

THE COURT: Just a couple things. Going back to the *abouts*, if we can go back to them for a moment, you know the Court will have to do, obviously, a Fourth Amendment analysis in terms of the reasonableness -- of all the procedures, not just

of the *abouts*.

But I guess my question is, is there a different analysis for the *abouts* than for the *to* or *from*? Or to put it another way, could somebody articulate for me what you believe why the *abouts* don't present a different Fourth Amendment issue from the *to's* and the *froms*, that it's the same issue?

Again, to amplify even a little more, is the possibility of acquiring information that otherwise it would not be permissible to acquire in the *about* scenario different from the *to* or *from*?

In other words, is it incidental? Would you describe it in that way? If not, how would you describe it? Is it any less or more likely to happen with the *abouts* than with the *to* or *from*? Or any other aspect of the Fourth Amendment analysis that you think is relevant.

(b)(6); (b)(7)(C) I don't think that the Fourth Amendment analysis is any different with respect to an *abouts* communication or *to* or *from*. I mean, it's just as likely that one end of a *to* or *from* could be a U.S. person in communication with a target as an *about*.

In either case, the U.S.-person information contained in that communication would be subject to the minimization procedures, and it's not that U.S. person that is the target of the acquisition of that particular communication; it is the user of the targeted selector that appears in the body of that communication. So I think for Fourth Amendment purposes, with

respect to U.S. persons, I don't think the analysis is any different.

MR. OLSEN: We have given some thought to this, because *abouts* collections has been an issue in this collection as well as prior court orders. But I just would reiterate what (b)(6); (b)(7)(C) said in terms of our view of it in that it's essentially for the Fourth Amendment purposes an incidental collection where the target is the targeted account, and to the extent that a U.S. person's communication -- to or from a U.S. person, that would be deemed to be incidental to the collection.

And therefore under the analysis we put forward in, for example, the Yahoo litigation, that would be permissible and reasonable under the Fourth Amendment as long as minimization procedures are appropriately applied.

THE COURT: Is it more or less likely to pick up U.S.-person information in an *about* than a *to* or a *from*?

MR. OLSEN: I don't know the answer in practice. At least from my perspective in theory, I wouldn't see why it would be more likely than a targeted *to* or *from* collection where the target's outside the United States where there's similarly the possibility that that target would be in communication with someone in the United States, with a U.S. person in the United States.

So, just analytically, I think the same incidental collection subject to minimization procedures framework would

apply. And so under the Fourth Amendment applying, that we would submit would be reasonable under the Fourth Amendment.

(b)(6); (b)(7)(C) And I would note that in his opinion on the Yahoo litigation, Judge Walton recognized the reasonableness of a presumption that non-U.S. persons located overseas are more likely to communicate with other non-U.S. persons located overseas which may bear on the volume of potentially -- or *abouts* communications that potentially implicate U.S. persons versus non-U.S. persons. I think if you apply that presumption, it's more likely that an *about* will not implicate U.S.-person information.

THE COURT: Okay. Fair enough.

Well, that's really all that I --

(b)(6) Judge, I'm sorry.

THE COURT: Yes. Go ahead, (b)(6)

(b)(6) With regard to the *abouts*, it's occurred to me, just to be clear on the record, there were [redacted] sort of subcategories of such communications that were laid out in a footnote to Judge Kotelly's opinion in the PAA that in turn I think referred to an opinion issued or an order issued by Judge Vinson last year.

Do those [redacted] categories, as previously set out in those places, continue to be accurate and up to date and complete in terms of the communications that are obtained?

[redacted] I think so. If I recall correctly, and I

may not have all [redacted] categories off the top of my head, we have the instance where the selector is mentioned in the body of an e-mail sent between two communicants.

You have an instance where [redacted]

THE COURT: Well, there was [redacted]

[redacted] (b)(6); (b)(7)(C): Oh, [redacted] yes.

(b)(6) [redacted] And [redacted]

(b)(6); (b)(7)(C) [redacted]

(b)(6) [redacted]

[redacted] Yes.

THE COURT: Okay. Thank you, (b)(6), for that. Appreciate it. So I guess the only other outstanding issue at the moment is the 1806, I'll call it, issue, and what is your thinking in terms of timing? Obviously, at this point at least we have the September 4 deadline that we're looking at, but what are your thoughts on timing?

MR. OLSEN: We're going to turn to this immediately

following the hearing. This has been, as I think (b)(6); (b)(7)(C) mentioned, been an issue we identified yesterday or the day before in the evening.

So we have the right folks here to talk about it, and my expectation first would be that we would be able to communicate directly with the Court staff. I don't know how quickly we will have a definitive answer, but I would expect that we will have a definitive answer, understanding the timing of this overall, by tomorrow at some point and that what I expect to do is to have something in writing, perhaps not very formal, something along the lines of what we recently gave to the Court to address this issue.

It may be that that will be, in terms of our view, that we think we have a resolution to the issue and that no further action is necessary. It may be that we have other steps to propose to the Court, but we certainly understand the importance of moving quickly and turn to this right away.

THE COURT: Okay. Fair enough.

(b)(6); (b)(7)(C) And there were three other issues that we'd just like to clarify, statements that were made previously that we just want to provide maybe a fuller context to.

THE COURT: Sure.

(b)(6); (b)(7)(C) With respect to oversight and the number of compliance incidents that we've identified, just to give you some perspective on the relative nature of that number, since

the acquisition of the Protect America Act began, NSA has tasked over [redacted] selectors. So the fact that we've identified [redacted] or so actual compliance incidents is, relatively speaking, a very, very small number.

Another point that we'd just like to provide a little more clarification on is the point that [redacted] made with respect to extending the five-year retention period for particular communications, and maybe [redacted] can expand on this a little bit more.

We just want to make it clear that with respect to the determination by the SID director to extend that, that's not on a communication-by-communication or selector-by-selector basis. It can be a broader range of communications that the SID director may make that determination for and extend the retention period.

THE COURT: Are you focusing on a particular part of the procedures? Can we look at them? That will help me, I think. These are the NSA minimization procedures?

(b)(6) [redacted] It's section 6(b).

(b)(6); (b)(7)(C) [redacted] There's one in 6(b), and there's one in 5(3)(b).

(b)(6) [redacted]: May I ask a question?

THE COURT: Absolutely. Go ahead, (b)(6) [redacted]

(b)(6) [redacted] Has the SID director invoked this provision? Is there an extension currently in place?

[redacted]: There's not under PAA. [redacted]

[redacted]

[redacted]

(b)(6) [redacted]

[redacted]

[redacted]: [redacted].

(b)(6) [redacted]: Oh, I see.

[redacted]: [redacted]

[redacted] Our concern, we don't want to leave a misimpression, when you read this together, if we discover -- if we find that there are U.S.-person communications here, we will take this action.

If, however, we haven't discovered that and the SID director extends the period, it's possible it will be undiscovered U.S.-person communication during that seven-year period. So we don't want to give a misimpression by saying retained no longer than five years in any event.

I guess it should be read to say in any event -- I don't know where it is, but it allows the SID director to extend the retention period as invoked. In that case, undiscovered. We haven't realized it, but we have these kinds of communications. They would continue to be retained as well.

THE COURT: That's because they're undiscovered. If it's discovered, it's five years.

MR. [redacted]: That's correct. If it's discovered --

THE COURT: Yeah. If they're discovered.

[redacted] They would be destroyed at that time.

THE COURT: Obviously, if they're not -- okay.

(b)(6); (b)(7)(C), now that I've read them again, can you just repeat what you said you wanted to make clear, that this wasn't on a case-by-case basis?

(b)(6); (b)(7)(C) It can apply to a broader range of communications. It's not, okay, the SID director determines that this --

THE COURT: Particular little thing right there.

(b)(6); (b)(7)(C) -- meets this standard, therefore I can extend the retention duration beyond the five years. It can be a range of communications.

THE COURT: Just give me an example. I think we just had one. Can somebody give me an example?

[redacted]

THE COURT: I see. Okay. Thank you.

(b)(6); (b)(7)(C) And one last clarification. With respect to the ongoing requirement that an analyst keep track of its targets and basically is responsible for ensuring the continuing foreign intelligence purpose of the collection, [redacted] said NSA imposes a [redacted] that the analyst has to make that determination.

We just want it to be clear that that is the outer limit of the requirement that that determination be made and that in practice that determination is made on a much more ongoing basis than just [redacted]

THE COURT: And I don't think I understood it to mean [redacted] but I appreciate that clarification.

All right. Anything else?

(b)(6); (b)(7)(C) That's all, Your Honor.

THE COURT: Okay. Thank you so much, everybody. I appreciate it. All right. We are adjourned.

(Proceedings adjourned at 11:02 a.m.)

(b)(6) Deputy Clerk
FISC, certify that this document is a true and correct copy of the original. (b)(6)