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In the
United States Foreign Intelligence Surveillance Court of Review

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IN RE: DNI/AG 702(h) CERTIFICATIONS 2018 [redacted]

Docket No. [redacted]

On Petition for Review of a Decision of the
United States Foreign Intelligence Surveillance Court

Decided: July 12, 2019

Before CABRANES, TALLMAN, and SENTELLE, *Judges*.

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[redacted] (John C. Demers, Stuart J. Evans, J. Bradford Wiegmann, [redacted] *on the brief*), Appellate Counsel, Office of Law and Policy, National Security Division, Department of Justice, *for Petitioner*.

AMY JEFFRESS (John Cella, *on the brief*), Arnold & Porter Kaye Scholer LLP, Washington, D.C., and JONATHAN G. CEDARBAUM, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, D.C., *as Amici Curiae*.

Also Present at Oral Argument:

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[redacted] Deputy Chief, Oversight Section, Office of Intelligence, National Security Division, Department of Justice;

[redacted] Chief, Special Operations Unit, Office of Intelligence, National Security Division, Department of Justice;

Dana Boente, General Counsel, Federal Bureau of Investigation;

[redacted] Section Chief, National Security & Cyber Law Branch, Federal Bureau of Investigation;

[redacted] Senior Counsel for Policy, Legislation, and Compliance, National Security & Cyber Law Branch, Federal Bureau of Investigation;

[redacted] Assistant General Counsel, Federal Bureau of Investigation;

[redacted] Associate General Counsel, Office of the Director of National Intelligence;

[redacted] Attorney Advisor, Office of General Counsel, Central Intelligence Agency; and

[redacted] Attorney – FISA Team, Office of the General Counsel, National Security Agency.

PER CURIAM.

The questions presented in this appeal are:

(1) Whether the requirement in Section 702(f)(1)(B) of the Foreign Intelligence Surveillance Act ("FISA"), that procedures for querying information acquired pursuant to Section 702 "include a technical procedure whereby a record is kept of each United States person query term used for a query," 50 U.S.C. § 1881a(f)(1)(B), requires that the Federal Bureau of Investigation ("FBI") keep records

in a manner that differentiates between query terms related to United States persons and those related to non-United States persons.

(2) Whether the FBI's proposed querying and minimization procedures comply with the requirements of FISA and the Fourth Amendment to the United States Constitution.

On October 18, 2018, the Foreign Intelligence Surveillance Court (the "FISC") (James E. Boasberg, *Judge*) decided both issues adversely to the Government, concluding that (1) the FBI's practice of maintaining records that do not identify United States person query terms as such does not comply with Section 702(f)(1)(B); and (2) the FBI's proposed querying and minimization procedures do not comply with the requirements of FISA and the Fourth Amendment. The Government appealed.

We conclude 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. Because this conclusion necessarily requires the Government to amend the FBI's proposed procedures, we decline to reach the second issue presented. As the Government undertakes the required revisions, it can consider whether—and, if so, how—to respond to the statutory and constitutional deficiencies the FISC identified. The FISC will then be able to evaluate whether the newly revised procedures—which will

include, at a minimum, a procedure that complies with Section 702(f)(1)(B)—comport with the requirements of FISA and the Fourth Amendment.

Accordingly, the FISC's October 18, 2018 order is **AFFIRMED IN PART**. The stay entered pursuant to our November 16, 2018 order shall remain in effect until further order of the FISC when it issues a decision approving or declining to approve the newly revised procedures.

I. BACKGROUND

A. FISA Section 702

Enacted in 1978, FISA "authorize[s] and regulate[s] certain governmental electronic surveillance of communications for foreign intelligence purposes."[1] FISA is a critical component of our national security infrastructure, not least because it "authorizes extremely powerful investigative techniques" that "can help the [G]overnment prevent (or mitigate) terrorism, espionage, and other foreign threats to national security."[2]

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[1] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013).

[2] 1 David S. Kris & J. Douglas Wilson, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS § 4:1 (2d. ed. 2016).

In its original form, FISA "did not regulate electronic surveillance . . . conducted outside the United States."[3] This changed in July 2008, when Congress enacted the FISA Amendments Act of 2008 (the "2008 Amendments Act").[4] The 2008 Amendments Act added to FISA a new section, 702, which was intended to "creat[e] a new framework under which the Government may seek the FISC's authorization of certain foreign intelligence surveillance targeting the communications of non-[United States] persons located abroad."[5] Under Section 702, on "the issuance of an order" by the FISC, "the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information."[6] As the Supreme Court has observed, "[u]nlike

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[3] *Id.* § 17:1.

[4] *See* FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (July 10, 2008).

[5] *Clapper*, 568 U.S. at 404.

[6] 50 U.S.C. § 1881a(a). FISA defines "foreign intelligence information" as follows:

> (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—
>
> (A) actual or potential attack or other grave hostile acts

traditional FISA surveillance, [Section 702] does not require the Government to demonstrate probable cause that the target of the electronic surveillance is a foreign power or [an] agent of a foreign power."[7] Nor does it require the Government to "specify the nature and location of each of the particular facilities or places at which the electronic surveillance will occur."[8]

As its text makes clear, surveillance programs approved pursuant to Section 702 are intended to target non-United States

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of a foreign power or an agent of a foreign power;

(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

Id. § 1801(e).

[7] *Clapper*, 568 U.S. at 404.

[8] *Id.*

persons reasonably believed to be outside of the United States. But there is necessarily some risk that such programs will result in the incidental acquisition of communications of or concerning United States persons.[9] This might occur, for example, "when a [United States] person communicates with a non-[United States] person who has been targeted," or "when two non-[United States] persons discuss a [United States] person."[10]

Section 702 contains several substantive limitations intended to minimize the extent to which Section 702 programs encroach on the privacy interests of United States persons. For instance, such programs "may not intentionally target" any person "known . . . to be located in the United States" or a United States person even if he or she is "reasonably believed to be located outside of the United States."[11] Nor

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[9] A "United States person" is "a citizen of the United States, an alien lawfully admitted for permanent residence [in the United States], . . . an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States," unless such an association or corporation "is a foreign power." 50 U.S.C. § 1801(i).

[10] Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* 6 (July 2, 2014) ("PCLOB Report"), available at https://www.pclob.gov/library/702-Report.pdf.

[11] 50 U.S.C. § 1881a(b)(1), (b)(3).

may they "intentionally target a person reasonably believed to be located *outside* of the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be *in* the United States."[12] In addition, all acquisitions must be "conducted in a manner consistent with the [F]ourth [A]mendment to the Constitution of the United States."[13]

Section 702 programs are also subject to certain procedural requirements. For example, acquisitions of information pursuant to Section 702 must "be conducted only in accordance with . . . targeting and minimization procedures" adopted by the Attorney General and the Director of National Intelligence.[14] Targeting procedures must be "reasonably designed to . . . ensure that any acquisition . . . is limited to targeting persons reasonably believed to be located outside the United States," and to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States."[15] Minimization procedures must be "reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning

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[12] *Id.* § 1881a(b)(2) (emphasis added).

[13] *Id.* § 1881a(b)(6).

[14] *Id.* § 1881a(c)(1)(A).

[15] *Id.* § 1881a(d)(1).

unconsenting United States persons" but should "allow for the retention and dissemination of information that is evidence of a crime."[16]

In addition, Section 702 programs are subject to judicial review. As noted above, with certain exceptions not relevant here, the Attorney General and the Director of National Intelligence can execute a Section 702 authorization only after the FISC enters an order approving the proposed acquisition.[17] To have such an order entered, the Attorney General and the Director of National Intelligence must provide the FISC with "a written certification" regarding the proposed acquisition that addresses, among other things, targeting and minimization procedures.[18] If the FISC determines that a certification "contains all the required elements" and is "consistent with [statutory] requirements . . . and with the [F]ourth [A]mendment," it must "enter an order approving the certification."[19]

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[16] *Id.* § 1801(h)(1), (h)(3).

[17] *Id.* § 1881a(a).

[18] *Id.* § 1881a(h)(1)(A), (h)(2)(A).

[19] *Id.* § 1881a(j)(3)(A). We note that two Circuits have held that the Fourth Amendment's warrant requirement does not apply to searches of United States citizens conducted outside of the United States. *See United States v. Stokes*, 726 F.3d 880, 885 (7th Cir. 2013); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 167 (2d Cir. 2008) ("*In re Terrorist Bombings*"). Such searches are, however,

Finally, Section 702 programs are subject to periodic review within the Executive Branch. Every six months, the Attorney General and the Director of National Intelligence must "assess compliance with" applicable procedures.[20] These assessments must be submitted to the FISC and to certain committees of the Senate and House of Representatives.[21] In addition, the Inspector General of the Department of Justice and the Inspectors General of the relevant agencies "are authorized to review compliance" with the procedures established pursuant to the applicable certifications.[22] Finally, "[t]he head of each element of the intelligence community conducting [a Section 702] acquisition" must "conduct an annual review to determine whether there is reason to believe that foreign intelligence information has been or will be obtained from the acquisition."[23]

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subject to the Fourth Amendment's reasonableness requirement. *See Stokes*, 726 F.3d at 885; *In re Terrorist Bombings*, 552 F.3d at 167. Because we do not reach the FISC's conclusion that the FBI's practices violate the Fourth Amendment, we need not precisely define the Fourth Amendment protections applicable here.

[20] 50 U.S.C. § 1881a(m)(1).

[21] *Id.*

[22] *Id.* § 1881a(m)(2)(A).

[23] *Id.* § 1881a(m)(3).

B. Reviewing Information Acquired Pursuant to Section 702

Authorized personnel at the intelligence agencies that have access to information acquired pursuant to Section 702 can review that information in a variety of ways. They can, for instance, review it on a communication-by-communication basis. But because doing so in all circumstances would consume untold resources—and might well undermine the agencies' ability to safeguard national security—agency personnel can also "query" Section 702 information.[24] A query is, in essence, the equivalent of an Internet search—*i.e.*, a task in which "data is searched using a specific term or terms for the purpose of discovering or retrieving" information, here previously collected Section 702 information.[25] Each "term" or "identifier" used in a query is "just like a search term that is used in an Internet search engine" and "could be, for example, an email address, a telephone number, [or] a key word or phrase."[26] The ability to query Section 702 information—as opposed to reviewing it communication-by-communication—greatly facilitates the agencies' ability to assess and respond to potential national security threats.[27]

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[24] *See* PCLOB Report 55.

[25] *Id.*

[26] *Id.*

[27] *See* App. 311 (Decl. of Christopher A. Wray, Director of the Federal Bureau of Investigation) (stating that database queries are "a critical tool used by the FBI to

C. The FISA Amendments Reauthorization Act of 2017

On January 19, 2018, Congress adopted the FISA Amendments Reauthorization Act of 2017 (the "2017 Reauthorization Act"), which made several changes to Section 702.[28] *First*, the 2017 Reauthorization Act added a new section, 702(f)(1), which requires "[t]he Attorney General, in consultation with the Director of National Intelligence, [to] adopt querying procedures consistent with the requirements of the [F]ourth [A]mendment."[29] Such querying procedures must "include a technical procedure whereby a record is kept of each United States person query term used for a query."[30] The 2017 Reauthorization Act does not define the phrase "United States person query term." But the procedures submitted in connection with the certifications that are the subject of this appeal construe it to mean "a term that is reasonably likely to identify one or more specific United States persons," which "may be either a single item of information or information that, when

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identify threat streams such as terrorist attacks, [redacted]; *see also* PCLOB Report 55 ("[Q]ueries . . . permit the [G]overnment to more efficiently search through and discover information in the data the [G]overnment has already acquired.").

[28] *See* FISA Amendments Reauthorization Act, Pub. L. No. 115-118, 132 Stat. 3 (Jan. 19, 2018) ("2017 Reauthorization Act").

[29] 50 U.S.C. § 1881a(f)(1)(A).

[30] *Id.* § 1881a(f)(1)(B).

combined with other information, is reasonably likely to identify one or more specific United States persons."[31] Examples of such terms include "names or unique titles; government-associated personal or corporate identification numbers; [redacted] and street address, telephone, an[redacted]"[32]

Second, the 2017 Reauthorization Act added another new section, 702(f)(2), which states that, "in connection with a predicated criminal investigation . . . that does not relate to the national security of the United States, the [FBI] may not access the contents" of Section 702 information that was "retrieved pursuant to a query made using a United States person query term that was not designed to find and extract foreign intelligence information," unless authorized to do so by an order of the FISC.[33] In other words, this section permits the FBI to query Section 702 data for domestic law enforcement purposes, and to review the metadata of communications returned thereby, but not to review the substance of those communications absent approval by the FISC.

Finally, the 2017 Reauthorization Act added a new reporting requirement directed to the FBI's querying practices. Specifically, the

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[31] App. 232 (September 2018 FBI Querying Procedures § III.A at 1).

[32] *Id.* at 233 (September 2018 FBI Querying Procedures § III.A at 2).

[33] 50 U.S.C. § 1881a(f)(2)(A).

Inspector General of the Department of Justice must, within one year after the FISC "first approves the querying procedures adopted [by the FBI] pursuant to Section 702(f)," provide a report to certain committees of the Senate and House of Representatives.[34] This report must include information concerning "[a]ny impediments, including operational, technical, or policy impediments, for the [FBI] to count . . . the total number of . . . queries that used known United States person identifiers."[35] The 2017 Reauthorization Act did not, however, alter an existing FISA provision exempting the FBI from certain public disclosure obligations related to its use of United States person query terms.[36]

D. The 2018 Certifications

In March 2018, the Attorney General and the Director of National Intelligence executed certifications (the "March 2018 Certifications") to reauthorize the acquisition of foreign intelligence

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[34] 2017 Reauthorization Act, § 112(a).

[35] *Id.* § 112(b)(8)(B).

[36] *See* 50 U.S.C. § 1873(b)(2)(B) (requiring the Director of National Intelligence to make publically available "a good faith estimate" of "the number of search terms concerning a known United States person used to retrieve" Section 702 information), (b)(2)(C) (same for "the number of queries concerning a known United States person"), (d)(2)(A) (exempting FBI from requirements of § 1873(b)(2)(B) and (b)(2)(C)).

information pursuant to the prior year's certifications.[37] The March 2018 Certifications, submitted by the Government to the FISC for approval, included proposed targeting, minimization, and querying procedures for the FBI, the National Security Agency ("NSA"), the Central Intelligence Agency ("CIA"), and National Counterterrorism Center ("NCTC").[38]

The proposed querying procedures submitted in connection with the March 2018 Certifications permitted the FBI to comply with Section 702(f)(1)(B)—which, again, requires that "a record [be] kept of each United States person query term"—by adhering to its prior practice of keeping a record of all query terms used to query Section 702 information without differentiating between query terms that relate to a United States person and those that do not.[39] The procedures also allowed the FBI to conduct queries, and to review Section 702 material those queries returned, without contemporaneously documenting the justification for believing that the query was "reasonably likely to retrieve foreign intelligence information" or

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[37] *See* App. 587–707 (Government's Ex Parte Submission of Reauthorization Certifications and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certifications and Amended Certifications ("March 2018 Submission")).

[38] *See id.* (March 2018 Submission).

[39] *Id.* at 612–17 (March 2018 Submission at 26–31).

"evidence of a crime"—the FBI's proposed "querying standard."[40] In contrast, the proposed querying procedures for the NSA, CIA, and NCTC stated that those agencies would implement procedures that require agency personnel to document only United States person query terms, thus obviating any need to document whether a particular term relates to a United States person.[41] In addition, the NSA, CIA, and NCTC querying procedures require agency personnel to contemporaneously document their justification for conducting a query.[42]

On reviewing the March 2018 Certifications, the FISC determined that they presented novel issues of law and appointed Jonathan G. Cedarbaum, Amy Jeffress, and John Cella to serve as amici curiae ("Amici").[43] The Government and Amici were invited to submit briefing concerning, among other matters, the proposed querying and minimization procedures pertaining to the FBI.[44] On July 13, 2018, the FISC held oral argument, during which Amici raised several concerns

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[40] *Id.* at 599 (March 2018 Submission at 13 n.12).

[41] *Id.* at 598–99 (March 2018 Submission at 12–13).

[42] *Id.* at 599 (March 2018 Submission at 13).

[43] *Id.* at 4 (October 18, 2018 Memorandum Opinion and Order ("FISC Op.")).

[44] *Id.* (FISC Op.).

regarding the FBI's proposed procedures.[45] After argument, the FISC informed the Government that it shared some of Amici's misgivings.[46]

On September 18, 2018, the Government submitted to the FISC amended certifications (the "September 2018 Certifications") with revised querying and minimization procedures designed to respond to certain of the FISC's concerns.[47] The revised procedures pertaining to the FBI leave its recordkeeping practices unchanged.[48] In addition, the FBI's revised querying and minimization procedures do not require FBI personnel to contemporaneously document their justification for believing that a query satisfies the FBI's querying standard.[49] But the revised procedures do include a provision requiring FBI personnel to obtain approval from counsel before reviewing the contents of Section 702 information returned using a "categorical batch query," that is, a query that relies on a categorical

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[45] *Id.* at 329–82 (Proposed Hearing Transcript of July 13, 2018 Hearing).e

[46] *Id.* at 4–5 (FISC Op.).

[47] *See id.* at 183–323 (September 2018 Certifications and Revised Procedures).

[48] *Id.* at 235–36 & n.4 (September 2018 FBI Querying Procedures § IV.B.3 at 4–5). The FBI's proposed querying procedures do require that the record contain, "at a minimum," the query term used, the date of the query, and the identifier of the user who conducted the query. *See id.* at 235 (September 2018 FBI Querying Procedures § IV.B.1 at 4).

[49] *See id.* at 234–37 (September 2018 FBI Querying Procedures § IV at 3–6).

justification for multiple query terms rather than an individualized assessment for each term.[50]

E. The October 18, 2018 Memorandum Opinion and Order

On October 18, 2018, the FISC filed a Memorandum Opinion and Order approving the September 2018 Certifications, with certain exceptions related to the FBI's proposed querying and minimization procedures.[51] These exceptions, which are now the subject of this appeal, are as follows:

First, the FISC concluded 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 term relates to a United States person.[52] Because the FBI's proposed procedures do not require it to keep records that "indicate whether terms are United States person query terms," the FISC held that these procedures do not comply with Section 702(f)(1)(B).[53]

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[50] *Id.* at 235 (September 2018 FBI Querying Procedures § IV.A.3 at 4).

[51] *See id.* at 1–138 (FISC Op.).

[52] *Id.* at 52, 61 (FISC Op.).

[53] *Id.* at 52 (FISC Op.); *see also id.* at 61 ("[The recordkeeping] requirement is not satisfied by procedures under which the FBI does not keep . . . records" of

Second, the FISC held that the FBI's querying and minimization procedures do not comply with the requirements of FISA or the Fourth Amendment.[54] The FISC determined that, as written, the proposed procedures pertaining to the FBI are consistent with applicable requirements.[55] But it concluded that the FBI had not implemented similar existing procedures consistently with those requirements—and, presumably, that it could be expected to implement the proposed procedures in a similarly deficient manner.[56] The FISC then described a number of considerations that, taken together, led it to conclude that the FBI's querying and minimization procedures do not comport with statutory requirements or the Fourth Amendment.[57] The FISC suggested that the Government could rectify the identified deficiencies by adopting a remedy proposed by Amici—to include in the FBI's querying procedures a requirement that FBI personnel "document in writing their bases for believing that queries of Section

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United States person query terms "in a readily identifiable manner.").

[54] *Id.* at 62 (FISC Op.).

[55] *Id.* at 66–68 (FISC Op.).

[56] *Id.* (FISC Op.).

[57] *Id.* at 80 (FISC Op.) (FISA requirements), 84 (Fourth Amendment).

702 data using [United States]-person query terms" are consistent with the FBI's querying standard.[58]

F. The Government's Appeal

In connection with its October 18, 2018 Memorandum Opinion and Order, the FISC issued two so-called "deficiency notices," which describe the problems with the FBI's querying and minimization procedures that the FISC had identified. The FISC directed the Government to either "correct the deficiencies identified" or to "[c]ease, or not begin, the implementation of authorizations for which the [September 2018] Certifications were submitted insofar as such implementation involves those deficiencies."[59]

The Government elected not to implement the corrective measure the FISC proposed. Instead, on November 15, 2018, the Government appealed.[60] We have jurisdiction under 50 U.S.C. § 1881a(j)(4)(A)[61] and are aided in our consideration of the issues

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[58] *Id.* at 92 (FISC Op.).

[59] *Id.* at 141, 144 (FISC Deficiency Orders).

[60] On November 16, 2018, we granted the Government's request to stay the implementation of those aspects of the FISC's deficiency orders that would preclude the FBI from conducting queries of Section 702 information. *See* 50 U.S.C. § 1881a(j)(4)(C).

[61] Section 1881a(j)(4)(A) provides, in relevant part: "The Government may file a petition with the Foreign Intelligence Surveillance Court of Review

presented in this appeal by Amici, whom we appointed by order dated November 30, 2018.

II. DISCUSSION

A. Standard of Review

We review the FISC's interpretation of the relevant statutory provisions *de novo*.[62]

B. The Recordkeeping Requirement

The Government first challenges the FISC's conclusion that the FBI's proposed querying procedures—which create "records that do not memorialize whether a query term used to query Section 702 data meets the definition of a United States-person query term"—fail to comply with Section 702(f)(1)(B).[63] The Government contends that the FISC's interpretation of Section 702(f)(1)(B) is inconsistent with its text, relevant statutory context, and legislative history. The Government

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[("FISCR")] for review of an order [of the FISC concerning the Government's proposed certifications]. The [FISCR] shall have jurisdiction to consider such petition."

[62] *See, e.g., Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039, 1042 (D.C. Cir. 2015) ("Our consideration of a pure legal question of statutory interpretation is . . . *de novo*."); *United States v. Williams*, 733 F.3d 448, 452 (2d Cir. 2013) (similar); *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1038 (9th Cir. 2006) (similar).

[63] App. 53 (FISC Op.).

also offers several policy arguments in favor of its position. We conclude that Section 702(f)(1)(B) is best interpreted as requiring some kind of technical procedure that requires agency personnel to memorialize, to the extent reasonably feasible, whether a query term is a United States person query term. Accordingly, we agree with the FISC that the FBI's proposed querying procedures, which do not contain such a procedure, do not comply with Section 702(f)(1)(B).

i. The Text of Section 702(f)(1)(B)

We begin, as we must, with the statute's text.[64] As previously noted, Section 702(f)(1)(B) requires that querying procedures "include a technical procedure whereby a record is kept of each United States person query term used for a query."[65] The question with which we are faced is whether procedures that do not require agency personnel to memorialize whether a query term is a United States person query

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[64] *See, e.g., Maslenjak v. United States*, 137 S. Ct. 1918, 1924 (2017) ("We begin, as usual, with the statutory text."); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002) ("Our role is to interpret the language of the statute enacted by Congress. . . . We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon [of statutory interpretation] is also the last." (internal quotation marks omitted)).

[65] 50 U.S.C. § 1881a(f)(1)(B).

term nevertheless effectively create "record[s] . . . of each United States person query term." We conclude that they do not.

A "record" is "an account in writing or print (as in a document) or in some other permanent form . . . intended to perpetuate . . . knowledge of acts or events."[66] Records of the type the FBI proposes to keep, which memorialize all query terms that FBI personnel use to query Section 702 information, "perpetuate . . . knowledge" of certain information—*i.e.*, that a query was run, the term or terms used, and the identity of the individual who ran the query.[67] And, because such records document every query term, in the Government's view, they necessarily capture and document those query terms that relate to United States persons. This is where the Government would end the analysis.

In our view, Section 702(f)(1)(B) requires something more. The FBI's proposed recordkeeping practices, comprehensive as they might be, fail to "perpetuate . . . knowledge" of a specific type of information expressly identified in the statute's text: whether a query term is a United States person query term. The absence of any documentation concerning United States person status has several obvious practical

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[66] *Record*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1898 (1976); *see also Record*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noun; "[a] documentary account of past events, usu[ally] designed to memorialize those events").

[67] *See* note 48, *ante*.

implications. For instance, the FBI would be unable to provide, for the purposes of oversight by other relevant offices of the Executive Branch, Congress, or the FISC, a comprehensive list of United States person query terms that FBI personnel had used to query Section 702 information. Nor would it be able to provide a representative sample of such query terms. Indeed, one would be unable to discern from reviewing any particular record whether the documented query term relates to a United States person or a non-United States person. Thus, although the records the FBI proposes to keep might fairly be described as records of "each . . . query term," no particular subset thereof constitutes a record of "each *United States person* query term." The Government's interpretation saps of much significance the reference in Section 702(f)(1)(B) to "United States person[s]." And it is well-settled that "[i]t is our duty to give effect, if possible, to every clause and word of a statute."[68]

The Government contends that our reading of the statute effectively reads the word "separate" into the statute's text—*i.e.*, querying procedures must "include a technical procedure whereby a [*separate*] record is kept of each United States person query term used for a query." The Government overreacts to our reading of the statute.

Duncan v. Walker, 533 U.S. 167, 174 (2001) (internal quotation marks omitted); *see also Washington Market Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)).

The word "separate" means "set or kept apart."[69] Our understanding of Section 702(f)(1)(B) does not require that records of United States person query terms be segregated in some manner from records of other query terms. Rather, we simply conclude that records of United States person query terms must, to the extent reasonably feasible, be identifiable as such—that is, that one generally must be able to deduce from a record whether the documented query term relates to a United States person.[70]

To be clear, we do not understand Section 702(f)(1)(B) as setting forth an inflexible substantive requirement that FBI personnel exhaustively investigate whether every query term used to query Section 702 information relates to a United States person. Indeed, Section 702(f)(1)(B) describes the requirement it imposes as "*technical*."[71] Of course, a certain amount of substantive knowledge is necessary to comply with even a simple technical procedure. In cases in which United States person status is self-evident or reasonably ascertainable, this task will be simple. In others, the FBI might direct

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[69] *Separate*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2069 (1976).

[70] Of course, the text of Section 702(f)(1)(B) does not preclude the FBI or any other agency from employing recordkeeping practices that document all query terms used to query Section 702 information. But to the extent the procedures do not require agency personnel to memorialize whether a query term relates to a United States person, they do not comport with Section 702(f)(1)(B).

[71] 50 U.S.C. § 1881a(f)(1)(B) (emphasis added).

its personnel to apply the presumptions concerning United States person status that are presently set forth in its proposed procedures.[72] And, finally, in those cases in which the presumptions fail to provide an answer, United States person status might simply be unknown or unknowable. The FBI can address such cases consistently with Section 702(f)(1)(B) by, for example, presuming that such query terms are United States person query terms or designating United States person status as "unknown" or "to be determined." These are merely suggestions, however, and we leave the ultimate decision regarding how best to comply with Section 702(f)(1)(B) to the Executive Branch.

In sum, we conclude that the plain text of Section 702(f)(1)(B) requires some kind of technical recordkeeping procedure whereby agency personnel document, to the extent reasonably feasible, whether a query term used to query Section 702 information relates to a United States person or a non-United States person. Accordingly, the FBI's proposed querying procedures, which provide no means by which FBI personnel can document this information, do not comply with Section 702(f)(1)(B).

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[72] *See* App. 234 (September 2018 FBI Querying Procedures § III.B at 3) (describing "guidelines [that] apply in determining whether a person whose status is unknown is a United States person").

ii. Statutory Context

The Government contends that relevant statutory context supports its interpretation of Section 702(f)(1)(B). We find its arguments largely unavailing.

First, the Government focuses on Section 702(f)(2), which was also added to the statute as part of the 2017 Reauthorization Act. Section 702(f)(2) requires the FBI—but no other agency—to obtain an order of the FISC before reviewing Section 702 information returned by a narrow category of queries that (1) involve a United States person query term; (2) are not designed to return foreign intelligence information; and (3) are conducted in connection with a predicated criminal investigation unrelated to national security.[73] We are informed by the Government that, before Congress passed the 2017 Reauthorization Act, the FBI kept undifferentiated records of all query terms used to query Section 702 information. According to the Government, Section 702(f)(2) contains a clear mandate to alter that preexisting practice in certain cases. Because the general recordkeeping requirement set forth in Section 702(f)(1)(B) contains no such specific command, it follows (in the Government's view), that Congress could not have intended to compel the FBI to change its practice in all cases.

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[73] *See* 50 U.S.C. § 1881a(f)(2)(A).

We draw from this provision a different set of inferences. Section 702(f)(2), it appears to us, is intended to address a different issue—compliance with the Fourth Amendment. We have previously held that "a foreign intelligence exception to the Fourth Amendment's warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States."[74] But this exception might not apply in everyday criminal investigations unrelated to national security and foreign intelligence needs. Section 702(f)(2) therefore appears to be designed to avert any constitutional challenge to the FBI's conduct, and it is reasonable to assume that Congress did not view it as affecting the general recordkeeping requirement set forth in Section 702(f)(1)(B). In other words, rather than narrowing the circumstances in which the FBI must employ the "technical procedure" that Section 702(f)(1)(B) requires, we may reasonably understand Section 702(f)(2) as setting forth additional substantive requirements for a subset of the queries to which that "technical procedure" should already be applied.[75] In addition, insofar as Section

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[74] *In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008); *cf. In re Terrorist Bombings*, 552 F.3d at 167 (holding that Fourth Amendment's warrant requirement does not apply to searches of United States citizens conducted outside of the United States).

[75] In any event, if the FBI uses some kind of mechanism to document whether a query involves a United States person query term for the purposes of

702(f)(2) says anything of note about recordkeeping, it makes clear that Congress understood the FBI to be capable of ascertaining and documenting whether a query term relates to a United States person because it is plain that, to comply with Section 702(f)(2), FBI personnel must know whether a query involves a United States person query term.

Second, the Government draws our attention to Section 603(d)(2)(A) of FISA, which exempts the FBI from being required to report "a good faith estimate of . . . the number of search terms concerning a known United States person" and "the number of queries concerning a known United States person" used to retrieve Section 702 information.[76] The Government urges that Congress' decision to recodify this exception in the 2017 Reauthorization Act shows that it intended to permit the FBI to comply with Section 702(f)(1)(B) by keeping undifferentiated records. Like the FISC, we are ultimately unpersuaded. As the FISC observed, the Government's argument assumes that Section 702(f)(1)(B) is intended only to improve the agencies' ability to comply with public reporting requirements.[77] But the Government admits that Section 702(f)(1)(B) is also intended to

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complying with Section 702(f)(2), expanding that procedure to other circumstances would, we think, require minimal effort.

[76] 50 U.S.C § 1873(b)(2)(B), (b)(2)(C).

[77] App. 55 (FISC Op.).

facilitate oversight by other offices of the Executive Branch, Congress, and the FISC over the agencies' querying practices. Exempting the FBI from public reporting requirements in no way undermines the latter purpose. Thus, without more, Congress's decision to recodify this exception does not overcome what we view as the best reading of Section 702(f)(1)(B).

Finally, we turn to another provision that Congress added to FISA in the 2017 Reauthorization Act, which requires the Inspector General of the Department of Justice to report information concerning the FBI's querying practices to certain committees of the Senate and House of Representatives.[78] Specifically, under Section 112 of the 2017 Reauthorization Act, one year after the FISC first approves the FBI's proposed querying procedures, the Inspector General must provide to the designated committees information concerning, among other things, "[a]ny impediments, including operational, technical, or policy impediments, for the [FBI] to count . . . the total number of . . . queries that used known United States person identifiers."[79] The Government argues that this provision would have little meaning if Congress intended Section 702(f)(1)(B) to require the FBI to track which queries use United States person query terms. In the Government's view, it would make little sense for Congress to require the FBI to adhere to a

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[78] *See* 2017 Reauthorization Act, § 112(a).

[79] *Id.* § 112(b)(8)(B).

requirement while also soliciting information concerning why compliance might present difficulties.

This argument is not without force, but the opposite view is equally plausible. For example, under Section 603 of FISA, the Director of National Intelligence must make publically available "the total number of orders issued pursuant to . . . [Section 702](f)(2)" and "a good faith estimate of . . . the number of targets of such orders."[80] To enable compliance with these requirements, the FBI must document, at a minimum, the subset of United States person query terms that trigger the requirements of Section 702(f)(2). At the same time, pursuant to the 2017 Reauthorization Act, the Inspector General must report on "[a]ny impediments . . . for the [FBI] to count . . . the total number of queries for which the [FBI] received an order of the [FISC] pursuant to [Section 702(f)(2)]."[81] Accordingly, that the 2017 Reauthorization Act requires the Inspector General to provide information concerning the difficulties the FBI faces in meeting certain statutory requirements by no means precludes the possibility that Congress in fact intended the FBI to comply with those requirements.

Ultimately, these related provisions lend little, if any, support for the Government's interpretation of the statutory text.

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[80] 50 U.S.C. § 1873(b)(2).

[81] 2017 Reauthorization Act, § 112(b)(8)(C).

iii. Legislative History

The Government and Amici draw our attention to certain legislative history that they contend supports their interpretation of Section 702(f)(1)(B). Since we view the statutory text as virtually decisive, we need not dwell on this issue.[82]

To the extent we are inclined to consider it, however, the legislative history either supports our interpretation or is, at most, ambiguous. For instance, a House Permanent Select Committee on Intelligence report concerning the 2017 Reauthorization Act (the "House Report") states, in reference to Section 702(f):

> The Committee understands that certain lawmakers and privacy advocates worry about the ability of the Intelligence Community to query lawfully acquired data using query terms belonging to United States persons. . . . The Committee is dedicated to providing assurances to the American public that the procedures and processes currently in place satisfy the Fourth Amendment, and do not impede on United States person privacy. . . . [Section 702(f)(1)(B)] *is not intended to, and does not impose a requirement that an Intelligence Community element maintain records of United States person query terms in any particular manner, so long as appropriate records are retained and thus*

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[82] *See N.L.R.B. v. SW General Inc.*, 137 S. Ct. 929, 942 (2017) ("The [statutory] text is clear, so we need not consider . . . extra-textual evidence" consisting of "legislative history, purpose, and post-enactment practice.").

> *available for subsequent oversight*. This [S]ection ensures that the manner in which the element retains records of United States person query terms is within the discretion of the Attorney General, in consultation with the Director of National Intelligence and subject to the approval of the FISC.[83]

This passage suggests that Congress enacted Section 702(f)(1)(B) in part to respond to concerns that the intelligence community's querying practices might themselves intrude on United States persons' privacy. Moreover, it makes clear that Congress envisaged that the records Section 702(f)(1)(B) requires would be available for its oversight. Records that do not differentiate between United States person query terms and other query terms serve only a single, limited oversight goal: investigating individual queries, regardless of United States person status. But such records in no way facilitate—and, in fact, render impossible—oversight over the agencies' United States person querying practices as a whole. It seems unlikely that Congress would have sought to effectuate only the first goal using language that better lends itself to both.

The Government contends that the FBI's proposed recordkeeping procedures are consistent with the House Report's suggestion that the Attorney General and the Director of National Intelligence have "discretion" concerning "the manner in which [an

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[83] H.R. Rep. No. 115-475 at 17–18 (2017) (emphasis added).

agency] retains records of United States person query terms."[84] We do not suggest that the agencies lack discretion in determining *how* to keep such records. The question here, however, is *whether* they must do so, a question on which this excerpt from the House Report is silent.

Finally, the Government draws our attention to one sentence from the House Report, which states that "the Committee believes that the Intelligence Community should have separate procedures documenting their current policies and practices related to querying of lawfully acquired FISA Section 702 data."[85] The Government contends that this passage supports the proposition that Congress intended to allow the agencies to continue employing their then-current practices. We disagree. Read in context, this statement plainly relates to the general requirement, set forth in Section 702(f)(1)(A), that the agencies document their querying procedures—something that Congress had never before required. But this sentence in no way suggests that Congress intended to ratify those existing practices.

On the whole, these snippets of legislative history, which either support our view or are ambiguous at best, do not undermine the conclusion we draw from the text of Section 702(f)(1)(B).[86]

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[84] *Id.* at 18.

[85] *Id.* at 17–18.

[86] *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018) ("[S]ilence in the legislative history, no matter how clanging, cannot defeat the better reading

iv. Policy Considerations

Finally, we turn briefly to the practical and policy-related concerns the Government raises. Although the Government's arguments are not without some appeal, we cannot substitute either the Government's policy view, or our own, for the expressed will of Congress.[87]

In broad strokes, the Government contends that interpreting Section 702(f)(1)(B) as we have today will not enhance oversight over the FBI's practices and, indeed, might hamper the FBI's ability to carry out its vital missions. As to the first, we respectfully disagree with the Government's contention that documenting, to the extent reasonably feasible, whether a query term relates to a United States person will not enhance oversight. Such a requirement serves a number of oversight purposes—among others, enabling specific auditing of queries that involve United States person query terms, and providing

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of the text and statutory context. If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity." (internal quotation marks and citation omitted)).

[87] *See Hall v. United States*, 566 U.S. 506, 523 (2012) (Although "there may be compelling policy reasons" for a proposed interpretation, "it is not for us to rewrite the statute" in light of its "plain language, context, and structure."); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008) ("[I]t is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress." (internal quotation marks omitted)).

other Executive Branch offices, Congress, and the FISC with previously unavailable information concerning the FBI's United States person querying practices as a whole. Although Congress has chosen to exempt the FBI from certain public disclosure requirements, additional transparency within the Executive, Legislative, and Judicial Branches alone enhances their ability to engage in oversight and make well-informed decisions concerning Section 702 programs.

In addition, we do not believe that the recordkeeping requirement, as construed herein, will have the deleterious effects the Government identifies. The Government contends that determining whether each query term constitutes a United States person query term would drain FBI resources, create unreliable records, and, potentially, harm national security. Like the FISC, we are sensitive to these concerns, which undoubtedly weigh in the Government's favor. But, as we have already indicated, we do not understand Section 702(f)(1)(B) as imposing a burdensome substantive requirement. The Government might elect to comply with Section 702(f)(1)(B) in a number of ways, many of which would significantly mitigate the burden on agency resources and limit whatever potential harm might flow from adding one (largely ministerial) item to the checklist that FBI personnel most likely already work through when conducting queries for investigative purposes. The only option not available to the Government is the one it proposes here—namely, a procedure that provides no mechanism by which FBI personnel can distinguish between United States person query terms and other query terms.

v. Conclusion

To summarize: the requirement in Section 702(f)(1)(B) of FISA, that querying procedures "include a technical procedure whereby a record is kept of each United States person query term used for a query," is best interpreted as requiring some kind of technical procedure that requires intelligence agency personnel to memorialize, to the extent reasonably feasible, whether a particular query term is a United States person query term. Because the FBI's proposed querying procedures do not contain any such technical mechanism, and therefore create records that do not distinguish between United States person query terms and other query terms, they do not comport with Section 702(f)(1)(B).

C. Compliance with the Requirements of FISA and the Fourth Amendment

The Government also challenges the FISC's conclusion that the FBI's querying and minimization procedures do not satisfy the requirements of FISA and the Fourth Amendment. Because our conclusion with respect to the proper interpretation of Section 702(f)(1)(B) will require the Government to amend the proposed procedures pertaining to the FBI, we decline to reach this issue at this time. We do, however, offer some guidance that might be of use to the Government as it undertakes the necessary revisions, and to the FISC as it evaluates the product thereof.

First, the manner in which an agency implements existing minimization procedures can be relevant to determining whether

proposed procedures comply with FISA's requirements. Section 702(e)(1) requires the Attorney General, in consultation with the Director of National Intelligence, to "adopt minimization procedures that meet the [statutory] definition of minimization procedures" set forth elsewhere in the statute.[88] This definition requires, among other things, procedures that are "reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination of nonpublicly available information concerning unconsenting United States persons."[89] The Attorney General and the Director of National Intelligence must submit proposed minimization procedures for approval by the FISC in connection with the certifications required by Section 702(h).[90] In reviewing proposed procedures, the FISC must of course evaluate whether they comply with statutory requirements as written. In certain circumstances, the FISC can also consider the manner in which existing procedures have been implemented.[91] But

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[88] 50 U.S.C. § 1881a(e)(1).

[89] *Id.* § 1801(h)(1); *see also id.* § 1821(4) (setting forth virtually identical definition).

[90] *See id.* § 1881a(h)(2)(B), (j)(1)(A).

[91] *See* App. 68 (FISC Op.) ("FISC review of minimization procedures under Section 702 is not confined to the procedures as written; rather, the Court also examines how the procedures have been and will be implemented."); *see also* FISC Docket Nos. [redacted] Mem. Op., June 22, 2010, at 11 ("Implicit in the requirement that the [G]overnment maintain procedures that satisfy the

prior practices are relevant only to the extent that they serve as indicia of how proposed procedures will be implemented in the future. This necessarily requires a sufficient degree of similarity between existing and proposed procedures. And, it almost goes without saying, where the proposed procedures deviate significantly from existing procedures, prior practice might have little bearing on whether the proposed procedures comply with FISA's requirements.

Second, we agree with the FISC that there are some reasons to question whether the FBI has implemented its existing querying and minimization procedures in a manner consistent with statutory requirements—and, thus, whether it will do so in the future. As the Government undertakes to revise the FBI's proposed procedures pursuant to our holding with respect to the recordkeeping requirement, it might consider addressing further some of the FISC's concerns. The Government can also, if it deems appropriate, provide the FISC with additional information concerning the practical effect, if any, of changes it has already implemented, such as the advice-of-counsel requirement for "categorical batch queries."[92] This will enable the FISC to better evaluate whether the FBI is likely to implement the newly revised procedures in a manner consistent with the requirements of FISA and the Fourth Amendment.

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statutory standards is a requirement that it comply with those procedures.").

[92] *See* App. 235 (September 2018 FBI Querying Procedures § IV.A.3 at 4).

Finally, the 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. This procedure could have several potential benefits. For instance, the need to contemporaneously record a justification for running a query could motivate FBI personnel to carefully consider, in a way that existing *ex post* review might not, whether a query satisfies the querying standard. The records produced by this process would facilitate Executive Branch oversight, which currently relies principally on the memories of FBI personnel and whatever limited context can be gleaned from a chronological sample of queries. These improvements might help the relevant offices of the Executive Branch detect practices that do not comply with the approved procedures, undertake appropriate remedial measures, and, ultimately, report on the foregoing to the FISC—and, perhaps, to Congress.

On the other side of the ledger, Amici's proposed remedy does not appear overly burdensome or likely to impede the FBI in carrying out the critical tasks that help ensure our safety. The requirement does not preclude FBI personnel from querying Section 702 information or reviewing the metadata of communications returned by such queries. Moreover, many queries might not return any Section 702 information, and, in such cases, the requirement simply would not apply. In addition, the FBI's proposed procedures already require FBI personnel

to know the information that they would be asked to record—namely, their reason for believing that a query satisfies the querying standard. The physical act of documenting this information, perhaps in no more than a single sentence or by making a check-mark next to one of several pre-written options, is unlikely to be overly onerous. As with the recordkeeping requirement, we are not persuaded that complying with this modest ministerial procedure will meaningfully handicap the FBI's ability to carry out its missions—if, indeed, it does so at all.

That said, like the FISC, we decline to require the Government to adopt this particular measure. Accordingly, we leave the decision regarding whether—and, if so, how—to address the FISC's statutory and constitutional concerns in the first instance to the Attorney General and the Director of National Intelligence.

III. CONCLUSION

To summarize, we conclude that:

(1) Section 702(f)(1)(b) of FISA, which states that procedures for querying information acquired pursuant to Section 702 must "include a technical procedure whereby a record is kept of each United States person query term used for a query," is best interpreted as requiring some kind of technical procedure that requires intelligence agency personnel to memorialize, to the extent reasonably feasible, whether a query term is a United States person query term. Because the FBI's proposed querying procedures do not contain *any* such technical

mechanism, and therefore create records that do not distinguish between United States person query terms and other query terms, they do not comport with Section 702(f)(1)(B); and

(2) Because our holding with respect to the first issue presented will require the Government to amend the proposed procedures pertaining to the FBI, we decline to decide whether the procedures submitted in connection with the September 2018 Certifications comply with the requirements of FISA and the Fourth Amendment. If it deems appropriate, the Government can make additional changes to the proposed procedures to address the statutory and constitutional concerns raised by the FISC in its October 18, 2018 Memorandum Opinion and Order and adverted to in this decision.

Accordingly, the FISC's October 18, 2018 order is **AFFIRMED IN PART.** The stay entered pursuant to our November 16, 2018 order shall remain in effect until further order of the FISC when it issues a decision approving or declining to approve the newly revised procedures.

[redacted] Chief Deputy Clerk, FISCR, certify that this document is a true and correct copy of the original.