UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE DNI/AG CERTIFICATION [redacted]	Docket Number 702(i)-08-01

MEMORANDUM OPINION

This matter is before the Court on the "Government's Ex Parte Submission of Replacement Certification and Related Procedures and Request for an Order Approving Such Certification and Procedures," filed on August 5, 2008 ("Ex Parte Submission"). For the reasons stated below, the government's request for approval is granted.

I. BACKGROUND

A. Section 702 of the Foreign Intelligence Surveillance Act

The government filed the Ex Parte Submission pursuant to Section 702 of the Foreign Intelligence Surveillance Act ("FISA"), which was enacted as part of the FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (Jul. 10, 2008) ("FAA"), and is now codified at 50 U.S.C. § 1881a. Subsection (a) of Section 702 permits the government to authorize, "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." 50 U.S.C. § 1881a(a). The implementation of any authorization under Section 702 must conform to the

limitations enumerated in subsection (b), which provides that "[a]n acquisition authorized under subsection (a)":

> (1) may not intentionally target any person known at the time of acquisition to be located in the United States;
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> (2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;
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> (3) may not intentionally target a United States person reasonably believed to be located outside the United States;
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> (4) may not intentionally acquire 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; and
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> (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States.

50 U.S.C. § 1881a(b).

Absent exigent circumstances, before implementing any authorization under Section 702, the Attorney General and the Director of National Intelligence ("DNI") must provide the Foreign Intelligence Surveillance Court ("FISC") with a written certification, accompanied by targeting and minimization procedures, and must obtain the Court's approval of the certification and the procedures. Id. §§ 1881a(a), (g), and (i). In the certification, the Attorney General and DNI must attest that:

> (1) there are procedures in place that are "reasonably designed" to "ensure that an acquisition authorized under subsection (a) 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";

(2) "the minimization procedures to be used with respect to such an acquisition . . . meet the definition of minimization procedures under [50 U.S.C. § 1801(h) or § 1821(4)], as appropriate" and either "have been approved, have been submitted for approval, or will be submitted with the certification for approval by the [FISC]";

(3) the Attorney General and DNI have adopted "guidelines . . . to ensure compliance with the limitations in subsection (b) [of Section 702] and to ensure that an application for a court order is filed as required by [FISA]";

(4) the targeting procedures, minimization procedures, and guidelines adopted by the government "are consistent with the Fourth Amendment";

(5) "a significant purpose of the acquisition is to obtain foreign intelligence information";

(6) "the acquisition involves obtaining foreign intelligence information from or with the assistance of an electronic communications service provider"; and

(7) "the acquisition complies with the limitations in subsection (b)."

50 U.S.C. § 1881a(g)(2)(A).

The certification must be accompanied by targeting and minimization procedures adopted pursuant to Section 702(d) and (e), respectively, and it must "be supported, as appropriate, by the affidavit of any appropriate official in the area of national security who is . . . appointed by the President, by and with the advice and consent of the Senate," or " the head of an element of the intelligence community." 50 U.S.C. §§ 1881a(g)(2)(B) and (g)(2)(C). Additionally, Section 702, as applicable here, requires that the certification include "an effective date for the authorization that is at least 30 days after the submission of the written certification to the court." Id. § 1881a(g)(2)(D)(i).

B. Judicial Review

The FAA provides the FISC with jurisdiction to review the certification, the targeting and minimization procedures, and any amendments to those procedures. 50 U.S.C. § 1881a(i)(1)(A). That review, however, is limited. The FISC's role with respect to the certification is merely to "determine whether [it] contains all the required elements." Id. § 1881a(i)(2)(A). The Court reviews the targeting procedures to "assess whether the procedures are reasonably designed to – (i) ensure that an acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States; and (ii) 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." Id. § 1881a(i)(2)(B). As for the minimization procedures, the Court must "assess whether such procedures meet the definition of minimization procedures under [50 U.S.C. § 1801(h) or § 1821(4)], as appropriate." Id. § 1881a(i)(2)(C).

Section 702 requires the FISC to enter an order approving the certification and the use of the targeting and minimization procedures if the Court finds that the certification contains all the required elements, and that the targeting and minimization procedures are consistent with the requirements of 50 U.S.C. §§ 1881a(d)(1) and (e)(2) and with the Fourth Amendment. 50 U.S.C. § 1881a(i)(3)(A). Should the Court conclude that it cannot make those findings, it must direct the government either to correct any deficiency or to refrain from implementing the authorization for which the certification was submitted. Id. § 1881a(i)(3)(B). Any order entered under Section 702 must be accompanied by "a written statement of reasons for the order." Id. § 1881a(i)(3)(C). The FISC must complete its review and issue an order not later than 30 days after the government's

submission of its certification and procedures, unless the Court "extends that time as necessary for good cause in a manner consistent with national security." Id. § 1881a(i)(1)(B), (j)(2).

C. The Government's Ex Parte Submission

The government's Ex Parte Submission includes "DNI/AG 702(g) Certification [redacted]" which was executed by the Attorney General and the DNI on [redacted] 2008, and which authorizes the targeting of certain non-United States persons reasonably believed to be located outside the United States to acquire foreign intelligence information (the "Certification"). Accompanying the Certification are the supporting affidavits of the Directors of the National Security Agency ("NSA"), the Central Intelligence Agency ("CIA"), and the Federal Bureau of Investigation ("FBI"). Also included in the government's Ex Parte Submission are two sets of targeting procedures (one set to be used by the NSA and the other by the FBI), and three sets of minimization procedures (one set each for the NSA, the FBI, and the CIA).

Following the Court's preliminary review of the Ex Parte Submission, the FISC staff met with counsel for the government to communicate the Court's questions regarding the proposed targeting and minimization procedures. Thereafter, on August 26, 2008, the government submitted its "Preliminary Responses to Certain Questions Posed by the Court" ("Govt. Responses"). On August 27, the Court held a hearing during which the government answered additional questions and provided additional information about the scope and meaning of the proposed procedures. Following the hearing, the government made two supplemental submissions addressing, among other things, an issue of law it raised with the Court shortly before the hearing. The government has also submitted a copy of the guidelines adopted by the Attorney General and the DNI for ensuring

compliance with the limitations set forth in 50 U.S.C. § 1881a(b).[1] This Memorandum Opinion relies on the entire record before the Court, including each of the above-referenced submissions and information received at the August 27 hearing.

II. ANALYSIS

A. The Certifications Contain All the Required Elements.

The Court is required to review the Certification "to determine whether [it] contains all the required elements." 50 U.S.C. § 1881a(i)(2)(A). After examining the Certification, the Court finds that:

> (1) it has been made under oath by the Attorney General and the DNI, as required by 50 U.S.C. § 1881a(g)(1)(A), Certification ("Cert.") at 4-5;
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> (2) it contains each of the attestations required by 50 U.S.C. § 1881a(g)(2)(A) and enumerated at pages 2-3 supra, Cert. at 1-2;
>
> (3) as required by 50 U.S.C. § 1881a(g)(2)(B), it is accompanied by the applicable targeting procedures[2] and minimization procedures;[3]

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[1] The Ex Parte Submission and accompanying materials provided by the government consist largely of classified information. At the government's request, the Court has conducted its review ex parte and in camera. See 50 U.S.C. § 1881a(k)(2).

[2] See Procedures Used by the NSA for Targeting Non-United States Persons Reasonably Believed to be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("NSA Targeting Procedures") (attached to the Certification as Exhibit A); Procedures Used by the FBI for Targeting Non-United States Persons Reasonably Believed to be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("FBI Targeting Procedures") (attached as Exhibit C).

[3] See Minimization Procedures Used by the NSA in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("NSA

(continued...)

(4) it is supported by the affidavits of appropriate national security officials, as described in 50 U.S.C. § 1881a(g)(2)(C);[4] and

(5) it includes an effective date for the authorization in compliance with 50 U.S.C. § 1881a(g)(2)(D). Cert. at 3.[5]

Accordingly, the Court finds that the Certification "contains all the required elements." 50 U.S.C. § 1881a(i)(2)(A).

B. The Targeting Procedures and the Minimization Procedures Are Consistent With the Applicable Statutory Requirements

With respect to the targeting procedures and minimization procedures, the Court is required to assess whether they conform to the applicable statutory requirements. 50 U.S.C. § 1881a(i)(3)(A).

1. The Targeting Procedures Satisfy the Requirements of Section 1881a(d)(1).

The government has submitted two sets of targeting procedures, one for use by the NSA and one for use by the FBI. Each set of procedures is discussed in turn.

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[3](...continued)
Minimization Procedures") (attached as Exhibit B); Minimization Procedures Used by the FBI in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("FBI Minimization Procedures") (attached as Exhibit D); Minimization Procedures Used by the CIA in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of FISA, as Amended ("CIA Minimization Procedures") (attached as Exhibit E).

[4] See Affidavit of Lt. Gen. Keith B. Alexander, U.S. Army, Director, NSA (attached at Tab 1); Affidavit of Robert S. Mueller, III, Director, FBI (attached at Tab 2); Affidavit of Michael V. Hayden, Director, CIA (attached at Tab 3).

[5] The statement described in 50 U.S.C. § 1881a(g)(E) is not required in this case because there has been no "exigent circumstances" determination under Section 1881a(c)(2).

a. Overview of the NSA Targeting Procedures

NSA seeks to acquire foreign intelligence information from communications that are to, from, or about a targeted person. NSA Targeting Procedures at 2; Transcript of Proceedings on August 27, 2008 ("Trans.") at 19-22. It does so by tasking for acquisition a telephone number or electronic communications account (generically referred to as "selectors") believed to be used by a targeted person. NSA Targeting Procedures at 3; Trans. at 24.

(i) Pre-Targeting Determination

NSA is required to determine "whether a person is a non-United States person[6] reasonably believed to be outside the United States" before that person is targeted for acquisition. NSA Targeting Procedures at 1. NSA makes this determination "in light of the totality of the circumstances based on the information available with respect to that person, including [redacted]

For every such determination, NSA analysts must [redacted]

[6] "United States person" (hereinafter "U.S. person") is defined as

> a citizen of the United States, an alien lawfully admitted for permanent residence . . ., 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, but does not include a corporation or association which is a foreign power, as defined in [50 U.S.C. § 1801(a)(1), (2), or (3)].

50 U.S.C. §§ 1801(i) and 1881(a).

[redacted]

NSA analysts examine the same categories of information, in the manner described above, in assessing whether the proposed target is a non-U.S. person. NSA Targeting Procedures at 1. In addition, prior to each tasking, NSA [redacted]' in order to "ascertain whether NSA has

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[7] Although the government "reserve[d] the right to supplement and/or modify these responses" at the August 27, 2008 hearing, Govt. Responses at 1, nothing at the hearing detracted from the responses cited herein.

[8] [redacted]

reason to believe" that the proposed selector is being used by a U.S. person. Id. at 4. This step is taken to avoid targeting United States persons. See id.

NSA may avail itself of the following presumption regarding the nationality of a proposed target:

[redacted]

Id. NSA invokes the presumption only after analysts have exercised "due diligence" in attempting to ascertain the person's location under the NSA Targeting Procedures. Trans. at 5-6. Moreover, even in cases where "the actual location of the target may be unknown, [redacted]

[redacted]

(ii) Post-Targeting Analysis

NSA is also required to conduct post-targeting analysis "to detect those occasions when a person who when targeted was reasonably believed to be located outside the United States has since entered the United States" and to "enable NSA to take steps to prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States, or the intentional targeting of a person who is inside the United States." NSA Targeting Procedures at 6. In the event that NSA concludes that a target is

within the United States, or "that a person who at the time of targeting was believed to be a non-United States person was in fact a United States person," it will "terminate the acquisition without delay" and report the incident to the Department of Justice and the Office of the DNI. Id. at 9. [redacted]

[redacted]

This post-targeting analysis includes "routinely" comparing each selector [redacted] for indications that a tasked selector may be used inside the United States. Id. at 6-7; Govt. Responses at 7. NSA reviews the results of these comparisons [redacted] Govt. Responses at 7.

The post-targeting analysis also includes examination of the content of communications obtained through surveillance of a tasked selector for indications that a targeted person is now in, or may enter, the United States. NSA Targeting Procedures at 6-7. There is no set schedule for this form of analysis, and its timing can depend on the intelligence priorities attached to a particular target. Govt. Responses at 7-8; Trans. at 8. At the outermost limit, the analyst responsible for a particular tasking is required to conduct an annual review of the target, though in practice such reviews usually occur more frequently. Trans. at 8, 46.[9]

[9] See also 50 U.S.C. § 1881a(l)(3)(A) (requiring annual review of acquisition "to determine whether there is reason to believe that foreign intelligence information has been or will be obtained").

(iii) Documentation and Oversight

At the time of targeting, analysts are required to "document in the tasking database a citation or citations to the information that led them to reasonably believe that a targeted person is located outside the United States." NSA Targeting Procedures at 8.[10] This documentation facilitates later oversight of how the procedures are implemented. Internally, NSA oversight personnel "conduct periodic spot checks of targeting decisions." NSA Targeting Procedures at 8. In addition, personnel from the Department of Justice and the Office of the DNI conduct reviews of NSA's implementation of its targeting procedures "at least once every sixty days." Id. NSA is also obligated within seven days to report to the Department of Justice and the Office of the DNI "any incidents of noncompliance" resulting in "the intentional targeting of a person reasonably believed to be located in the United States or the intentional acquisition of any communication in which the sender and all intended recipients are known at the time of acquisition to be located within the United States." Id. at 8-9. NSA similarly will report any incident of intentionally targeting a U.S. person. Govt. Responses at 8. "Any information acquired by intentionally targeting a United States person or a person not reasonably believed to be outside the United States at the time of such targeting will be purged from NSA databases." NSA Targeting Procedures at 9.

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[10] There is no requirement to record the basis for the reasonable belief that the target is not a U.S. person. However, the cited sources regarding the target's location, in conjunction with a [redacted] will often provide the grounds for reasonably presuming or concluding that the target is not a U.S. person. See Govt. Responses at 8.

(iv) Emergency Departure

The NSA Targeting Procedures contain the following emergency provision:

> If, in order to protect against an immediate threat to national security, the NSA determines that it must take action, on a temporary basis, in apparent departure from these procedures and that it is not feasible to obtain a timely modification of these procedures from the Attorney General and [the DNI], NSA may take such action and will report that activity promptly to [the Department of Justice and the Office of the DNI]. Under such circumstances, the Government will continue to adhere to all of the statutory limitations set forth in subsection 702(b) of [FISA].

Id. at 10 (emphasis added). The government expects that this departure provision will be invoked only under "very extreme circumstances," Trans. at 17-18, and in fact is not likely to be used at all. Id. at 19.[11] If it should be used, the government anticipates that such use would involve a relaxation of documentation requirements if [redacted] is unavailable at the time of the emergency, or a modification of the schedule for oversight reviews in the event that personnel must be redeployed to respond to the emergency. Id. at 18.

b. The NSA Targeting Procedures Comply With 50 U.S.C. § 1881a(d)(1) and Are Reasonably Designed to Prevent the Targeting of U.S. Persons.

Section 1881a(d)(1) requires:

targeting procedures that are reasonably designed to –

> (A) ensure that any acquisition . . . is limited to targeting persons reasonably believed to be outside of the United States; and

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[11] A similar provision was included in the NSA procedures previously adopted for acquisitions under the Protect America Act of 2007. Pub. L. No. 110-55, 121 Stat. 552 (Aug. 15, 2007). See In re DNI/AG 105B Certifications [redacted] Memorandum Opinion and Order entered January 15, 2008, at 22. That provision has never been implemented. Trans. at 18.

> (B) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States.

50 U.S.C. § 1881a(d)(1).

Section 1881a(d)(1) does not, by its terms, require that the targeting procedures seek to prevent the targeting of United States persons, as distinct from persons located in the United States. Nonetheless, another provision of the statute states that, pursuant to Section 1881a,[12] the government "may not intentionally target any person known at the time of acquisition to be located in the United States," and also "may not intentionally target a United States person reasonably believed to be located outside the United States." See 50 U.S.C. § 1881a(b)(1) and (b)(3) (emphasis added). Moreover, as discussed above, see pages 8-11 supra, the targeting procedures adopted under Section 1881a(d) require government analysts to assess whether a proposed target reasonably appears to be a U.S. person, as part of the same process whereby they ascertain whether a proposed target reasonably appears to be located outside the United States. Because the limiting of acquisitions to non-U.S. person targets is important to the Court's Fourth Amendment analysis, see pages 33-34, 37-38 infra, the Court will also assess how the NSA Targeting Procedures apply to determinations of U.S. person.

In assessing the NSA Targeting Procedures, it is useful to consider separately the acquisition of communications that are to or from a tasked selector ("to/from communications"), and the

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[12] Other sections of FISA provide separate means of authorizing electronic surveillance and physical search of targets in the United States, see 50 U.S.C. §§ 1804-1805, 1823-1824, and of targeting U.S. persons outside the United States. See id. §§ 1881b-1881c.

acquisition of communications that contain a reference to a tasked selector ("about communications").

(i) To/From Communications

For communications that are to or from a tasked selector, targeting procedures will satisfy both prongs of Section 1881a(d)(1) if they are reasonably designed to ensure that the users of tasked selectors are reasonably believed to be outside the United States. For purposes of Section 1881a(d)(1)(A), the persons targeted by acquisition of to/from communications are the users of the tasked selectors: their communications are intentionally selected for acquisition, whereas the communications of other persons are incidentally obtained only when they are communicating with the users of tasked selectors. And because a user of a tasked selector is a party to every to/from communication acquired by NSA, a reasonable belief that the users of tasked selectors are outside the United States will ensure that NSA does not intentionally acquire any to/from communication "as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States." 50 U.S.C. § 1881a(d)(1)(B).

The Court finds that the NSA Targeting Procedures are reasonably designed to ensure that the users of tasked selectors are reasonably believed to be outside the United States. Analysts are required in every case to consider [redacted] in assessing the target's location. They are also trained to review [redacted] Prior to targeting, an NSA analyst must form a reasonable belief that the user of a proposed selector is outside the United States. The basis for that belief is reviewed by a second analyst prior to tasking.

After targeting, additional analysis is conducted to ascertain whether the user may later be present in the United States. [redacted] Moreover, analysts' implementation of these procedures is subject to regular review and evaluation by NSA, the Department of Justice, and the Office of the DNI.

Finally, the provision permitting NSA to depart from these procedures temporarily to respond to an emergency is, as explained by the government, sufficiently narrow in scope that it does not undermine the Court's general assessment of reasonableness.

NSA's record of implementation of comparable procedures for acquisitions under the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (Aug. 15, 2007) ("PAA"), supports this conclusion. With over [redacted] targeting decisions made, Trans. at 43, only [redacted] instances of improper targeting had been identified through May 9, 2008. Id. at 13. Most instances of non-compliance have involved inadequate documentation or delayed reporting, rather than improper targeting decisions. Id. at 11, 13-14.

The Court further finds, as a predicate of its Fourth Amendment analysis, see pages 32-41 infra, that the NSA Targeting Procedures are also reasonably designed to ensure that the users of tasked selectors, i.e., the targets of acquisition for to/from communications, are reasonably believed to be non-U.S. persons. NSA analysts perform the same steps in assessing the U.S. person status of the prospective target as they do in assessing location, as well as an additional pre-tasking step to ascertain whether the proposed selector is known to be used by a U.S. person. Moreover, as explained by the government, the presumption of non-U.S. person status that NSA may make based

on the overseas location of the target, see page 10 supra, logically follows from the proposition, previously accepted by the FISC, "that the vast majority of persons who are located overseas are not United States persons and that most of their communications are with other, non-United States persons, who are also located overseas." In re Directives, Docket No. 105B(g): 07-01, Memorandum Opinion entered April 25, 2008, at 87 (footnote omitted), aff'd, Docket No. 08-01 (FISA Ct. Rev. Aug. 22, 2008).[13]

(ii) About Communications

For tasked electronic communications accounts, the NSA also acquires communications that contain a reference to the name of the tasked account.[14] The government asserts that, for purposes

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[13] The minimization procedures contain similar presumptions regarding non-U.S. person status, see NSA Minimization Procedures at 2; FBI Minimization Procedures at 1, which the Court finds reasonable on the understanding that they will be applied in the manner described for the presumption in the NSA Targeting Procedures.

[14] These about communications fall into [redacted] categories first described to the FISC in prior proceedings. Trans. at 40-41. Those categories are as follows (for ease of reference, the tasked account is called "tasked@email.com"):

[redacted]

of Section 1881a(d)(1)(A), the person being "targeted" by such an acquisition is the user of the tasked account, not other persons who are parties to the acquired communication.[15] Govt. Responses at 3; Trans. at 24. The Court accepts this conclusion. It is natural to regard the user of the tasked account as the "target" of the acquisition, because the government's purpose in acquiring about communications is to obtain information about that user. Trans. at 24.[16] The communication is not acquired because the government has any interest in the parties to the communication, other than their potential relationship to the user of the tasked account; indeed, the government may have

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See In re DNI/AG 105B Certifications Memorandum Opinion and Order entered January 15, 2008, at 17 n.18.

[15] In some cases the user of the tasked account may also be a party to an acquired about communication; for example, Trans. at 20.

[16] For purposes of FISA surveillances conducted under 50 U.S.C. §§ 1804-1805, the "target" of the surveillance "'is the individual or entity . . . about whom or from whom information is sought.'" In re Sealed Case, 310 F.3d 717, 740 (FISA Ct. Rev. 2002) (quoting H.R. Rep. 95-1283, at 73 (1978)). There is no reason to think that a different meaning should apply here.

no knowledge of those parties prior to acquisition. See id. at 19-20. And parties to an acquired about communication do not become targets of acquisition unless and until they are separately vetted under the NSA Targeting Procedures and a selector used by them is separately tasked. Id. at 26-27. Of course, anyone assessed to be a U.S. person or to be inside the United States cannot be targeted at all. See pages 8-11 supra.

Having concluded that this mode of acquisition targets the users of tasked selectors, and that the NSA Targeting Procedures are reasonably designed to ensure that the users of tasked selectors are reasonably believed to be outside the United States, see pages 15-16 supra, the Court finds that the NSA Targeting Procedures satisfy Section 1881a(d)(1)(A). Similarly, based on the discussion at pages 16-17 supra, the Court finds that the NSA Targeting Procedures are reasonably designed to prevent the targeting of U.S. persons in the acquisition of about communications.

A separate analysis is required of whether, in conformance with Section 1881a(d)(1)(B), the NSA Targeting Procedures are reasonably designed to prevent the intentional acquisition of about communications "as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States." For each acquisition of an about communication, NSA relies on [redacted] means of ensuring that at least one party to the communication is outside the United States: "NSA will [redacted] employ an Internet Protocol filter to ensure" that at least one party to a communication is outside the United States [redacted] NSA Targeting Procedures at 2.

The Court finds that these measures are reasonably designed to prevent the intentional acquisition of communications as to which all parties are in the United States.[17]

c. The FBI Targeting Procedures

In addition to NSA, the FBI may also conduct acquisitions under the certification, in conformance with the FBI Targeting Procedures. The FBI will apply its procedures "in acquiring foreign intelligence information, in the form of [redacted]" by targeting electronic communications accounts "designated by the [NSA]." FBI Targeting Procedures at 1. Prior to requesting the FBI to [redacted] for an account, NSA will have followed its own targeting procedures in determining that the user of the account "is a person reasonably believed to be located outside of the United States and is not a United States person." Id. Thus, the FBI Targeting Procedures apply in addition to the NSA Targeting Procedures, whenever [redacted] are acquired.

Because the FBI is only involved in the acquisition of to/from communications, Trans. at 32, the FBI Targeting Procedures will satisfy Section 1881a(d)(1) if they are reasonably designed to ensure that the users of tasked selectors are reasonably believed to be outside of the United States. See page 15 supra. Because the Court has found that the NSA Targeting Procedures meet this

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[17] The government has represented that these measures have prevented the acquisition of wholly domestic communications under the PAA. Trans. at 28; Govt. Responses at 5. With regard to Internet Protocol (IP) filters, the Court understands that [redacted] Trans. at 28-29. Although it is theoretically possible that a wholly domestic communication could be acquired as a result of [redacted] NSA is not aware of this actually happening. Id. at 29-31.

standard, see pages 15-16 supra, and also are reasonably designed to prevent the targeting of U.S. persons, see pages 16-17 supra, it should readily follow that the FBI Targeting Procedures, which provide additional assurance that users of tasked accounts are non-U.S. persons located outside the United States,[18] also pass muster. The Court has reviewed the FBI Targeting Procedures and found that they satisfy these criteria also.

2. The Government's Minimization Procedures Satisfy 50 U.S.C. § 1881a(e)(1).

Section 1881a(e)(1) requires the government to "adopt minimization procedures that meet the definition of minimization procedures" under 50 U.S.C. § 1801(h) or §1821(4), "as appropriate." Those definitions are substantively identical for purposes of this case,[19] and define "minimization procedures" as

> (1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance [or physical search], to minimize the acquisition and retention, and

[18] [redacted]

[19] They differ only in referring to electronic surveillance (§ 1801(h)) or physical search (§ 1821(4)), and to the procedure for emergency approval for those respective modes of collection in a context that does not apply to this case.

prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;[20]

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in [50 U.S.C. § 1801(e)(1)], shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; [and]

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes.

50 U.S.C. § 1801(h); see also id. § 1821(4).

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[20] "Foreign intelligence information" is defined as

(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 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.

50 U.S.C. §§ 1801(e) and 1881(a).

In this case, there are three sets of minimization procedures that have been adopted by the Attorney General: a set of procedures for each of the two agencies that will conduct acquisitions, the NSA and the FBI, and a third set of procedures for the CIA, which may receive from those agencies the raw data from acquisitions. NSA Minimization Procedures at 8; FBI Minimization Procedures at 2. Each of these sets of procedures closely resembles minimization procedures that have been found by judges of this Court to meet the definition of minimization procedures under section 1801(h) in the context of cases that have a significantly greater likelihood of acquiring communications to, from, or about United States persons. See, e.g., Docket Nos [redacted] (In re Various Known and Unknown Agents of [redacted] (In re [redacted (b)(1); (b)(3); (b)(7)(A); (b)(7)(E)] and [redacted] (In re [redacted (b)(1); (b)(3); (b)(7)(A)]).

The targeting of communications pursuant to Section 702 is designed in a manner that diminishes the likelihood that U.S. person information will be obtained. See page 17 supra. Yet, the protection to U.S. persons afforded by the proposed minimization procedures nearly replicates the protection afforded such persons in cases involving search or surveillance intentionally targeting U.S. persons. Procedures that have been found to be reasonably designed for the purpose of surveillance targeting U.S. persons should be reasonable for the acquisition of communications targeting non-U.S. persons abroad. The Court's review of the minimization procedures confirms that they are reasonable in the context of this case.

Although the procedures proposed by the government are not identical to these previously approved procedures, the differences, as discussed below, do not undermine a finding that they meet

the definition of minimization procedures under the statute. Therefore, for the reasons stated below, the Court finds that each set of minimization procedures is reasonably designed to minimize the acquisition and retention, and prohibit the dissemination, of private U.S. person information, consistent with the foreign intelligence needs of the government, and otherwise conforms to the statutory definition.

a. Cross-cutting Issues

Some issues worthy of discussion are presented by more than one agency's minimization procedures.[21]

(i) Special Retention Provisions

All three sets of minimization procedures permit the head of the agency, under certain circumstances, to authorize retention of information from communications acquired when the government reasonably believed that the target was a non-U.S. person outside the United States, when in fact the target was a U.S. person or was inside the United States.[22] For example, the CIA Minimization Procedures state:

> Any communication . . . acquired through the targeting of a person who at the time of targeting was reasonably believed to be a non-United States person located outside

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[21] The NSA and FBI minimization procedures include presumptions of non-U.S. person status based on a person's location outside the United States. NSA Minimization Procedures at 2; FBI Minimization Procedures at 1. The Court understands that those presumptions apply in the same manner as the analogous presumption in the NSA Targeting Procedures, which is discussed above. See page 10 supra. On that understanding, the Court finds that the minimization presumptions comport with the statutory definitions.

[22] For purposes of applying the NSA Minimization Procedures, such communications are treated as "domestic communications." NSA Minimization Procedures at 4.

> the United States but is in fact located inside the United States at the time such communication is acquired or was in fact a United States person at the time of targeting shall be destroyed unless the Director of the [CIA] determines in writing that such communication is reasonably believed to contain: significant foreign intelligence information; evidence of a crime that has been, is being, or is about to be committed; or information retained for cryptanalytic, traffic analytic, or signal exploitation purposes.

CIA Minimization Procedures at 6.[23] In addition to these categories of information, the Director of NSA may also authorize retention upon a finding that "the communication contains information pertaining to a threat of serious harm to life or property" or "information necessary to understand or assess a communications security vulnerability." NSA Minimization Procedures at 5-6.

For ease of reference, the Court will refer to these provisions collectively as "special retention provisions."[24] For the following reasons, the Court finds that the special retention provisions are reasonable and consistent with the statutory definition of minimization procedures.

First, the Court concludes that the government is authorized to acquire communications when it has a reasonable, but mistaken, belief that the target is a non-U.S. person located outside the United States. The Certification authorizes "the targeting of non-United States persons reasonably believed to be located outside the United States" in accordance with the targeting procedures. Cert. at 3; see also 50 U.S.C. § 1881a(a) ("the Attorney General and the [DNI] may

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[23] Corresponding provisions are in the FBI Minimization Procedures at 1-2 and the NSA Minimization Procedures at 5-6.

[24] Although the agencies' special retention provisions use somewhat different language to describe the form of approval, the government has explained that, for all three agencies, the agency head will make such determinations in writing on a case-by-case basis. Govt. Responses at 11; Trans. at 36-37.

authorize jointly . . . the targeting of persons reasonably believed to be outside the United States"). There may be cases where, after properly applying the targeting procedures, the government reasonably believes at the time it acquires a communication that the target is a non-U.S. person outside the United States, when in fact the target is a U.S. person and/or is in the United States. The acquisition of such communications is properly authorized under Section 1881a, notwithstanding the fact that the government is prohibited from intentionally targeting U.S. persons or any persons inside the United States, or intentionally acquiring a communication when it is known that all parties thereto are inside the United States.[25]

The Court also finds that 50 U.S.C. § 1806(i) does not require the destruction of information from such communications. Section 1806(i) provides that, in the case of

> the unintentional acquisition . . . of the contents of any communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person.

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[25] The government may not: (1) "intentionally target" any person "known at the time of acquisition to be located in the United States;" "intentionally target a United States person," even if such person is "reasonably believed to be located outside the United States;" or (3) "intentionally acquire 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." 50 U.S.C. § 1881a(b)(1), (3), and (4) (emphasis added). "Any information acquired by intentionally targeting a United States person or a person not reasonably believed to be outside the United States at the time of such targeting will be purged from NSA databases." NSA Targeting Procedures at 9.

50 U.S.C. § 1806(i) (emphasis added).[26] The government argues that, by its terms, Section 1806(i) applies only to a communication that is unintentionally acquired,[27] not to a communication that is intentionally acquired under a mistaken belief about the location or non-U.S. person status of the target or the location of the parties to the communication. See Government's filing of August 28, 2008. The Court finds this analysis of Section 1806(i) persuasive, and on this basis concludes that Section 1806(i) does not require the destruction of the types of communications that are addressed by the special retention provisions.[28]

Having concluded that such communications are within the scope of authorized acquisition, and that Section 1806(i) does not apply to such communications, the only remaining question is whether the special retention provisions comport with the statutory definition of minimization procedures. The Court concludes that they do. Once an agency head has made a case-specific, written determination that certain information falls within one of the categories specified in the

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[26] Prior to the FAA, this subsection had only applied to radio communications. See FAA § 106, 122 Stat. 2462 (replacing "radio communication" with "communication" in this subsection).

[27] A communication would be unintentionally acquired, for purposes of Section 1806(i), if, for example, the acquisition resulted from a technical malfunction or an inadvertent mis-identification of a selector.

[28] In approving other minimization and targeting provisions that refer to "inadvertently" acquired communications, the Court relies on the government's representations that those provisions will be implemented in accordance with the explanations provided in the government's Notice of Clarification and Correction, filed September 2, 2008. So understood, those provisions of the minimization procedures do not implicate Section 1806(i).

special retention provisions, continued retention and appropriate dissemination of such information do not conflict with the requirements of Sections 1801(h) and 1821(4).[29]

(ii) Technical and Linguistic Assistance from Foreign Governments

The NSA and CIA minimization procedures provide for the sharing of raw data with foreign governments for "technical and linguistic assistance." NSA Minimization Procedures at 8-10 (permitting such sharing [redacted]; CIA Minimization Procedures at 4-5 (permitting such sharing with foreign governments generally).[30] Access to this raw information is restricted to foreign government personnel involved in rendering the necessary assistance to NSA or CIA, and the foreign government may not permanently retain or otherwise make use of information so received. NSA Minimization Procedures at 9-10; CIA Minimization Procedures at 4-5. Given these tight restrictions, the FISC

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[29] Specifically, evidence of a crime may be retained and disseminated for law enforcement purposes under Sections 1801(h)(3) and 1821(4)(C). "[S]ignificant foreign intelligence information" may be retained and, as appropriate, disseminated under Sections 1801(h)(1)-(2) and 1821(4)(A)-(B). "[I]nformation retained for cryptanalytic, traffic analytic, or signal exploitation purposes" – which NSA refers to as "technical data base" information, see NSA Minimization Procedures at 2 – may not, once fully processed, be identified as foreign intelligence information, but the Court is satisfied that retention of information for such purposes, and subject to other minimization requirements, is permissible as "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. §§ 1801(h)(1) and 1821(4)(A). Finally, in the context of acquisitions under this Certification, "information pertaining to a threat of serious harm to life or property" and "information necessary to understand or assess a communications security vulnerability" can reasonably be regarded as information to be retained under the above-quoted provisions of Sections 1801(h)(1) and 1821(4)(A).

[30] Previously, the FISC has authorized disseminations of raw FISA information to foreign governments on a more limited basis. See, e.g., Docket No. [redacted] Order [redacted].

finds that such information-sharing comports with the requirements of Sections 1801(h) and 1821(4).

b. NSA Minimization Procedures

The NSA Minimization Procedures in this matter are substantially similar to other sets of minimization procedures employed by NSA in the conduct of electronic surveillance in other contexts. The procedures proposed herein borrow from four sets of procedures: (1) the NSA Standard Minimization Procedures adopted by the Attorney General for use in nearly all NSA requests for electronic surveillance sought pursuant to Section 1804 and authorized by judges of this Court in accordance with Section 1805 ("SMP"); (2) the procedures adopted by this Court in In re Electronic Surveillance and Physical Search of International Terrorist Groups, Their Agents, and Related Targets, Order, No. [redacted] (May 2002), as extended and modified by orders of this Court, most recently on December 6, 2007 ("Raw Take Motion"); (3) the procedures proposed by the government and approved by several judges of this Court in several dockets captioned, In re Various Known and Unknown Agents of [redacted] most recently in Docket [redacted] ("Domestic Selector Procedures"); and (4) the procedures adopted by the government for use in acquisitions authorized pursuant to the PAA ("PAA Procedures").[31]

[31] Unlike the other sets of minimization procedures, the PAA Procedures have never been presented to a judge of the FISC for a determination as to whether they meet the definition of minimization procedures in Section 1801(h). However, a judge of this Court considered the minimization procedures as a factor that supported finding that certain directives issued in accordance with DNI/AG Certifications satisfied the reasonableness requirement of the Fourth (continued...)

Prior to now, any deviation from the SMP was made by asking the Court to adopt the SMP with specified modifications. Thus, to assess such minimization procedures, a judge needed to review the SMP as well as the proposed modification. The NSA Minimization Procedures in this matter, however, are drafted as a stand alone set of procedures, complete unto themselves. Notwithstanding the changed verbiage, the NSA Minimization Procedures at issue here are substantially the same as the Domestic Selector Procedures and the PAA Procedures.[32] The most significant difference involves the special retention provisions discussed at pages 24-28 supra.

Other differences appear to be of less moment. The NSA Minimization Procedures at issue here adopt the previously approved five-year period of retention for "inadvertently acquired information," i.e., information acquired "notwithstanding reasonable steps taken to minimize the acquisition of information not relevant to the authorized purpose of the acquisition." Government's submission of September 2, 2008, at 4 (internal quotations omitted).[33] The NSA Minimization Procedures at issue here, however, extend the period of time for which NSA may retain technical

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[31](...continued)
Amendment. In re Directives, Docket No. 105B(g): 07-01, Memorandum Opinion entered April 25, 2008, at 88-89, 94.

[32] For example, it is the Court's understanding that Section 3(b)(1) of the NSA Minimization Procedures at issue here is meant to convey the same meaning as Section 3(c)(2) of the SMP, as modified in the Domestic Selector Procedures and the PAA Procedures to permit retention for five years.

[33] See NSA Minimization Procedures at 3 ("Inadvertently acquired communications of or concerning a United States person may be retained no longer than five years . . . ."); see also note 28 supra.

data base information from one year to five years.[34] For the reasons presented by the government, both in its written submissions and in the hearing, and consistent with the findings of other judges of the FISC, the Court finds an outside retention period of five years, even for the technical data, to be reasonable.

c. FBI Minimization Procedures

The FBI Minimization Procedures are the standard FBI minimization procedures for a non-U.S. person agent of a foreign power, subject to certain modifications. They shall be implemented in accordance with a recent FBI policy directive, FBI Minimization Procedures at 2, and in the same manner in which that policy directive applies in cases where the FBI [redacted]. Govt. Responses at 10. In many orders authorizing [redacted] the FISC has found that those standard FBI minimization procedures, implemented in conformance with that policy directive, comply with the applicable statutory definition. Nothing in the case-specific modifications to those procedures presents any additional concern.

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[34] The NSA Minimization Procedures also include an additional category of technical information that may be retained for this period - information necessary to understand or assess a communications security vulnerability. NSA Minimization Procedures at 5-6.

d. CIA Minimization Procedures

The CIA Minimization Procedures are also similar in many respects to procedures previously approved by the FISC.[35] They include a new category of U.S. person information expressly authorized for retention and dissemination: information that "concerns a U.S. Government official acting in an official capacity." CIA Minimization Procedures at 2. The Court finds that this category is reasonable and complies with the statutory definition, on the understanding that CIA will disseminate this category of information, and other information disseminated pursuant to Paragraph 2 of the CIA Minimization Procedures, in a manner consistent with Section 1801(h)(2) – i.e., that nonpublicly available information that is foreign intelligence information as defined at Section 1801(e)(2) "shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance."

C. The Targeting Procedures and the Minimization Procedures Are Consistent With the Fourth Amendment.

The Court is also charged with assessing whether the targeting procedures and minimization procedures "are consistent . . . with the fourth amendment to the Constitution of the United States." 50 U.S.C. § 1881a(i)(3)(A)-(B). The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

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[35] See, e.g., In Re Various Known and Unknown Agents of [redacted] Docket No. [redacted] CIA Minimization Procedures (Exhibit D to Application) (including substantively identical provisions for retention of certain categories of information (¶ 3); handling of privileged communications (¶ 4a); and dissemination of intelligence reporting to foreign governments (¶ 4c).

> Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. There is no question that the government's acquisition of private telephone calls can constitute a "search" or "seizure" within the meaning of the Fourth Amendment. See, e.g., Katz v. United States, 389 U.S. 347, 353 (1967). Although the scope of Fourth Amendment protection for email communications is not settled,[36] the Court will assume that, at least under some circumstances, the acquisition of electronic communications other than telephone calls can also result in such a "search" or "seizure."

The Court concludes that the Fourth Amendment does not require the government to obtain a warrant for acquisitions under the procedures at issue, and that the procedures are reasonable and consistent with the Fourth Amendment.

1. The Government Is Not Required to Obtain a Warrant for Acquisitions Pursuant to the Procedures in Question.

The applicable targeting procedures are reasonably designed to confine acquisitions to targeting persons reasonably believed to be outside the United States. See pages 15-21 supra. They also are reasonably designed to avoid targeting U.S. persons. See pages 16-17, 20-21 supra.

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[36] See David S. Kris & J. Douglas Wilson, National Security Investigations & Prosecutions § 7:28 (2007).

Because there is no reason to think that these procedures will be implemented in bad faith,[37] the acquisitions can generally be expected to target non-U.S. persons located outside the United States.

Under these circumstances, it can be questioned whether the Warrant Clause of the Fourth Amendment has any application at all, insofar as the targets of acquisitions under the procedures are non-U.S. persons located overseas.[38] However, to the extent that the Warrant Clause might otherwise apply, the Court concludes that acquisitions under these procedures fall within an exception to the warrant requirement recognized by the Foreign Intelligence Surveillance Court of Review in In re Directives, Docket No. 08-01, Opinion at 28 (FISA Ct. Rev. Aug. 22, 2008) (hereinafter "In re Directives"). That case, like this one, involved the warrantless acquisition of communications targeting persons reasonably believed to be outside the United States. In re Directives at 3. Unlike this case, In re Directives involved acquisitions that targeted U.S. persons reasonably believed to be outside the United States. See id. at 25-26 (discussing requirements for targeting U.S. persons). In that case, the Court of Review found that an exception to the warrant requirement applied to "surveillance undertaken for national security purposes and directed at a

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[37] Cf. In re Directives, Docket No. 08-01, Opinion at 28 (FISA Ct. Rev. Aug. 22, 2008) ("Once we have determined that protections sufficient to meet the Fourth Amendment's reasonableness requirement are in place, there is no justification for assuming, in the absence of evidence to that effect, that those prophylactic procedures have been implemented in bad faith.").

[38] See United States v. Verdugo-Urqidez, 494 U.S. 259, 274-75 (1990) (observing that a warrant "would be a dead letter outside the United States" and holding that "the Fourth Amendment ha[d] no application" where respondent "was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico"); id. at 278 ("the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country") (Kennedy, J., concurring); id. at 279 ("I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches.") (Stevens, J., concurring in the judgment).

foreign power or an agent of a foreign power reasonably believed to be located outside the United States." Id. at 15-16.[39]

The acquisitions at issue here fall within the exception recognized by the Court of Review. They target persons reasonably believed to be located outside the United States, see pages 15-21 supra, who will have been assessed by NSA to possess and/or to be likely to communicate foreign intelligence information concerning a foreign power authorized for acquisition under the Certification. Cert. at 2-3; NSA Targeting Procedures at 4; Govt. Responses at 1-3; Alexander Affidavit at 3.[40] And the acquisitions are conducted for national security purposes, i.e., with a "significant purpose . . . to obtain foreign intelligence information." Cert. at 2.

Moreover, the Court of Review's reasons for recognizing and applying a foreign intelligence exception in In re Directives apply with equal force here. First, the government's purpose in conducting the acquisitions in this case "goes well beyond any garden-variety law enforcement

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[39] In so doing, the Court of Review analogized to cases in which the Supreme Court "excused compliance with the Warrant Clause when the purpose behind the governmental action went beyond routine law enforcement and insisting upon a warrant would materially interfere with the accomplishment of that purpose." Id. at 15 (citing, among other cases, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)).

[40] [redacted]

objective. It involves the acquisition from overseas foreign agents of foreign intelligence to help protect national security," a circumstance "in which the government's interest is particularly intense." In re Directives at 16.

Second, the Court of Review relied on the

> high degree of probability that requiring a warrant would hinder the government's ability to collect time-sensitive information and, thus, would impede the vital national security interests that are at stake. . . . Compulsory compliance with the warrant requirement would introduce an element of delay, thus frustrating the government's ability to collect information in a timely manner. In some cases, that delay might well allow the window in which [redacted] or information is available to slam shut before a warrant can be secured.

Id. at 18. This case similarly involves targets who are attempting to conceal their communications, thereby presenting the same concerns that weigh against requiring the government to obtain a warrant.[41] Moreover, the government tasked over [redacted] overseas selectors for acquisition under the PAA, Trans. at 43, and it is reasonably anticipated that the government will seek to task [redacted] selectors under Section 1881a certifications. Subjecting [redacted] number of targets to a warrant process inevitably would result in delays and, at least occasionally, in failures to obtain perishable foreign intelligence information, to the detriment of the national security.

For these reasons, the Court concludes that the government is not obligated to obtain a warrant before conducting acquisitions under the procedures in question.

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[41] Compare In re Directives at 18 (discussing [redacted] with Trans. at 23 (noting challenge of [redacted]).

2. Acquisitions Conducted Under the Procedures in Question Are Reasonable Under the Fourth Amendment.

The Court of Review opinion in In re Directives also provides the analytical framework for analyzing reasonableness under the Fourth Amendment. A reviewing court must consider "the nature of the government intrusion and how the government intrusion is implemented. The more important the government's interest, the greater the intrusion that may be constitutionally tolerated." In re Directives at 19-20 (citations omitted). The court must

> balance the interests at stake. If the protections that are in place for individual privacy interests are sufficient in light of the governmental interests at stake, the constitutional scales will tilt in favor of upholding the government's actions. If, however, those protections are insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality.

Id. at 20 (citations omitted).[42] In conducting this balancing test, the court must consider the totality of the circumstances, In re Directives at 19; Samson v. California, 547 U.S. 843, 848 (2006), rather than rigidly apply a set of pre-determined factors. In re Directives at 20-21; Ohio v. Robinette, 519 U.S. 33, 39 (1996).

The government's national security interest in conducting these acquisitions "is of the highest order of magnitude." Id. at 20.[43] On the other side of the balance, the targeting procedures reasonably confine acquisitions to targets who are non-U.S. persons outside the United States. Such persons are not protected by the Fourth Amendment. United States v. Verdugo-Urqidez, 494 U.S.

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[42] Accord In re Sealed Case, 310 F.3d at 742 (describing "a balance of the legitimate need of the government for foreign intelligence information to protect against national security threats with the protected rights of citizens").

[43] Accord Haig v. Agee, 453 U.S. 280, 307 (1981) (there is no governmental interest more compelling than the security of the nation).

259, 274-75 (1990). As a result, the acquisitions will intrude on interests protected by the Fourth Amendment only to the extent that (1) despite the operation of the targeting procedures, U.S. persons, or persons actually in the United States, are mistakenly targeted; or (2) U.S. persons, or persons located in the United States, are parties to communications to or from tasked selectors (or, in certain circumstances, communications that contain a reference to a tasked selector).[44] These circumstances present a real and non-trivial likelihood of intrusion on Fourth Amendment-protected interests, but they do not, by themselves, render the procedures unreasonable under the Fourth Amendment.[45] Indeed, the extent of such intrusion will be less in this context than in cases involving the intentional targeting of persons protected by the Fourth Amendment or otherwise lacking comparable targeting procedures.

Weighing the government's national security interest in conducting the acquisitions against the degree of intrusion on Fourth Amendment-protected interests, the Court finds that the procedures are reasonable under the Fourth Amendment. In addition to the targeting procedures, which limit the extent of Fourth Amendment intrusion as described above, the Court relies on the following protections in reaching this assessment.

Foreign Intelligence Assessments: Prior to conducting acquisitions for a new target, NSA assesses whether the person to be targeted "possesses and/or is likely to communicate foreign

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[44] It is reasonable to presume that most persons in communication with a non-U.S. person target located overseas are themselves likely to be non-U.S. persons located overseas. See page 17 supra.

[45] See In re Directives, at 28 ("the fact that there is some potential for error is not a sufficient reason to invalidate the surveillances"), 30 ("incidental collections occurring as a result of constitutionally permissible acquisitions do not render those acquisitions unlawful").

intelligence information" concerning a foreign power authorized under the Certification. NSA Targeting Procedures at 4; Cert. at 3; Alexander Affidavit at 3. In making these assessments, NSA considers several factors, [redacted]

In In re Directives, the Court of Review examined similar factors[46] and found that they were "in conformity with the particularity showing contemplated by [the Fourth Amendment reasonableness analysis in] Sealed Case." In re Directives at 24. The corresponding provisions of the NSA Targeting Procedures at issue here likewise direct the government's acquisitions toward communications that are likely to yield the foreign intelligence information sought,[47] and thereby

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[46] A comparison of the factors identified in the NSA Targeting Procedures with those at issue in In re Directives, see FISC Docket No. 105B(g): 07-01, Classified Appendix submitted February 20, 2008, at pages [redacted] reveals that the two sets of factors are substantively identical, except for the references to the pertinent foreign powers and the inclusion of an additional factor in the NSA Targeting Procedures regarding [redacted] NSA Targeting Procedures at 6.

[47] It is fairly obvious why communications to and from targets identified under these procedures would be expected to contain foreign intelligence information. The Court has received (continued...)

afford a degree of particularity that is reasonable under the Fourth Amendment. Cf. In re Directives at 21 (rejecting suggestion that, to satisfy the Fourth Amendment, the government's procedures "must contain protections equivalent to the three principal warrant requirements: prior judicial review, probable cause, and particularity").

Minimization Procedures: As previously stated, see pages 21-32 supra, the minimization procedures used by the NSA, FBI, and CIA are "reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination," of U.S. person information, "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. § 1801(h)(1). These procedures constitute a safeguard against improper use of information about U.S. persons that is inadvertently or incidentally acquired, and therefore contribute to the Court's overall assessment that the targeting and minimization procedures are consistent with the Fourth Amendment. See In re Directives at 29-30.

The Court recognizes that there are differences between the procedures at issue here and those at issue in In re Directives. Most prominently, in In re Directives, the government followed procedures adopted under section 2.5 of Executive Order No. 12,333, requiring the Attorney General to find probable cause to believe that a U.S. person to be targeted for acquisition was an agent or an employee of a foreign power, and limiting the duration of an authorization for a U.S. person target to 90 days. In re Directives at 25-26. In this case, the government's procedures

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[47](...continued)
testimony that acquiring about communications enables the government to discover additional accounts used by targets, and to identify previously unknown persons who are associated with targets and may be involved in or possess information regarding targets' activities. See Trans. at 20-21.

provide for no comparable probable cause determination, presumably because U.S. persons cannot be intentionally targeted at all.

A probable cause determination by a high-level official is not an indispensable component of reasonableness in the circumstances of targeting non-U.S. persons overseas for foreign intelligence purposes. See United States v. Bin Laden, 126 F. Supp.2d 264, 281 (S.D.N.Y. 2000) (under Supreme Court decision in Verdugo, government not required to obtain a warrant or section 2.5 approval in order to conduct surveillance of non-U.S. persons' phone communications in Kenya). Where, as here, the government has "'special needs, beyond the normal need for law enforcement,'" even suspicionless searches can be reasonable under the Fourth Amendment. In re Sealed Case, 310 F.3d at 745 (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)). In this case, the NSA's assessment under its targeting procedures of the likelihood of obtaining foreign intelligence information provides a reasonable factual predicate for conducting the acquisitions, in view of the gravity of the government's national security interests and the other safeguards embodied in the targeting and minimization procedures.

III. CONCLUSION

Based on the foregoing statement of reasons and in reliance on the entire record in this matter, the Court finds, in the language of Section 1881a(i)(3)(A), that the certification "submitted in accordance with [Section 1881a(g)] contains all the required elements and that the targeting and minimization procedures adopted in accordance with [Section 1881a(d)-(e)] are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United

States." A separate order approving the certification and the use of the procedures pursuant to Section 1881a(i)(3)(A) is being entered contemporaneously herewith.

ENTERED this 4th day of September, 2008, in Docket No. 702(i)-08-01.

Mary A. McLaughlin

MARY A. McLAUGHLIN
Judge, United States Foreign
Intelligence Surveillance Court