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U.S. FOREIGN
INTELLIGENCE
SURVEILLANCE COURT

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

2015 JUL 14 PM 3:48

WASHINGTON, D.C.

LEEANN J. HILL
CLERK OF COURT

~~UNDER SEAL~~

(U) GOVERNMENT'S RESPONSE TO THE COURT'S ORDER OF JULY 7, 2015

~~(S//OC/NF)~~ The United States respectfully submits this response as required by the Order of the Foreign Intelligence Surveillance Court (FISC or Court) issued on July 7, 2015, in the above-captioned docket numbers. The Order directs the government to file a written submission explaining whether an extension of the time limit for the Court to complete its review of and issue orders concerning proposed DNI/AG 702(g) Certifications [REDACTED] and the accompanying targeting and minimization procedures, with the assistance of amicus curiae would be consistent with national security. As discussed below, the government respectfully submits that if the

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Court were to appoint an amicus curiae to assist the Court in its consideration of the [REDACTED] Certifications, an extension of the Court's thirty-day deadline to conduct its review would be consistent with national security.

(U) Procedural Background

~~(S//OC/NF)~~ On June 15, 2015, the government submitted to the Court in draft form certain documents associated with proposed DNI/AG 702(g) Certifications [REDACTED]

[REDACTED]

[REDACTED] Included among these documents were the draft targeting procedures to be used by the National Security Agency (NSA) and the draft minimization procedures to be used by the NSA, Federal Bureau of Investigation (FBI), and Central Intelligence Agency (CIA), under proposed DNI/AG 702(g) Certifications [REDACTED] ("the 2015 Reauthorization

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Certifications").¹ Proposed DNI/AG 702(g) Certifications [REDACTED] would reauthorize DNI/AG 702(g) Certifications [REDACTED] ("the 2014 Certifications"), which currently expire on August 28, 2015.

~~(S//OC/NF)~~ On or about July 15, 2015, the government intends to file with the Court the 2015 Reauthorization Certifications, targeting and minimization procedures, and a memorandum addressing changes to those procedures as compared to those submitted with the 2014 Certifications. In accordance with 50 U.S.C. § 1881a(i)(1)(B) and (3), the Court is required to conduct its review and issue an order and written statement of the reasons for the order within thirty days after section 702(g) certifications are submitted to the Court in final form. This deadline, however, may be extended "as necessary for good cause in a manner consistent with national security." 50 U.S.C. § 1881a(j)(2).

~~(S//OC/NF)~~ On July 7, 2015, the Honorable Thomas F. Hogan issued an Order regarding the provisions of the USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268, enacted on June 2, 2015 (USA FREEDOM Act), that amended 50 U.S.C. § 1803 to create a framework for the participation of amicus curiae in proceedings before the

¹ ~~(S)~~ The FBI targeting procedures, and National Counterterrorism Center (NCTC) minimization procedures, that will be submitted with the 2015 Reauthorization Certifications are the same as those submitted with DNI/AG 702(g) Certifications [REDACTED] and were most recently approved by the Court on August 26, 2014.

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Court. See *In re DNI/AG 702(g) Certification* [REDACTED]

[REDACTED]

[REDACTED] Order (FISA Ct. July 7, 2015) (hereinafter "July 7 Order").

Specifically, the USA FREEDOM Act requires that, consistent with statutory requirements that the Court "act expeditiously or within a stated time," the Court "shall appoint" a designated amicus curiae to assist in considering "any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such an appointment is not appropriate." 50 U.S.C. § 1803(i)(2)(A). In addition, the Court "may appoint an individual or organization to serve as amicus curiae . . . in any instance as such court deems appropriate." *Id.* § 1803(i)(2)(B). The July 7 Order stated that the Court is considering appointment of an amicus curiae for its review of the 2015 Reauthorization Certifications and acknowledges that "[a]bsent an extension of time under section 702(j)(2), it would be difficult to provide for meaningful assistance by an amicus curiae in considering the 2015 Certifications and revised procedures."² July 7 Order, at 3. The

² ~~(S//OC/NF)~~ In the July 7 Order, the Court noted that, "[b]ased on its review of the drafts filed on June 15, 2015," it believes that the 2015 Reauthorization Certifications and revised targeting and minimization procedures are "likely to present one or more novel or significant interpretations of the law, which would require the Court to consider an appointment of an amicus curiae." July 7 Order, at 3. However, the Court also noted that it "has not yet had the benefit of the memorandum that the government is expected to file with the final form of the 2015 Certifications and revised procedures." *Id.* The government

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July 7 Order further directs that the government submit a written response by July 14, 2015, explaining "whether – and if so, how long – an extension of the time for the Court to review the 2015 Certifications and revised procedures would be consistent with national security, taking into account that the government would be authorized to continue to acquire foreign intelligence information under the 2014 Certifications and procedures, as now in effect, for the duration of an extended period for Court review." *Id.* at 4.

(U) Response

~~(S//OC/NF)~~ This Court has recognized that "[t]he government's national security interest in conducting acquisitions pursuant to Section 702 'is of the highest order of magnitude.'" *In Re DNI/AG 702 Certifications* [REDACTED]

[REDACTED] Mem. Op. at 39


(FISA Ct. August 26, 2014) (quoting *In re DNI/AG Certification* [REDACTED])

Mem. Op. at 37 (FISA Ct. Sept. 4, 2008)). As noted by the Court, however, were the Court to issue orders under 50 U.S.C. § 1881a(j)(2) extending the time limits for its review of the certifications so that the Court could appoint amicus curiae, the authorizations in the certifications being reauthorized, DNI/AG 702(g) Certification

submits that the Court may determine, following review of that memorandum, that appointment of an amicus curiae is not necessary.

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 would, by operation of 50 U.S.C. § 1881a(i)(5)(B), continue despite their expiration dates.³ The government respectfully submits that this result would be consistent with national security because it would allow the government's acquisition of vitally important foreign intelligence information under the 2014 Certifications to continue pending the completion of the Court's review of the 2015 Reauthorization Certifications.

~~(S//OC/NF)~~ As will be described in detail in the memorandum submitted in support of the 2015 Reauthorization Certifications, which the government intends to file with the Court on or about July 15, 2015, the 2015 Reauthorization Certifications and attached targeting procedures do not expand the government's targeting authority as compared with what is already authorized by the 2014 Certifications. Similarly, although certain changes have clarified and expanded several provisions in the NSA, CIA, and FBI minimization procedures, the extent to which these changes provide immediate operational benefits is relatively limited. Therefore, the government assesses

³ ~~(S//OC/NF)~~ The government's intended filing of the proposed 2015 Reauthorization Certifications on or about July 15, 2015, will comport with 50 U.S.C. § 1881a(i)(5)(A), which requires that if the government seeks to reauthorize an authorization issued under 50 U.S.C. § 1881a(a), the government must, to the extent practicable, submit to the Court a new certification executed under 50 U.S.C. § 1881a(g), with supporting documents, at least thirty days before the expiration of the certification being reauthorized. If a new certification is filed in accordance with 50 U.S.C. § 1881a(i)(5)(A), 50 U.S.C. § 1881a(i)(5)(B) provides that the existing certification being reauthorized shall remain in effect, notwithstanding its expiration date, until the Court issues an order under 50 U.S.C. § 1881a(i)(3) with respect to the new certification.

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that a reasonable delay in the approval and implementation of the 2015 Reauthorization Certifications would be consistent with national security.⁴

~~(S//OC/NF)~~ In 2011, this Court, first at the government's request and then *sua sponte*, ultimately extended its time period for review pursuant to 50 U.S.C. § 1881a(j)(2) for a total of approximately 153 days. This extension was accomplished in three separate orders in durations of 73 days,⁵ 60 days,⁶ and finally by 20 days.⁷ In each case, the Court considered all relevant circumstances, including appropriate durations based upon the complexity of the issues and posture of its review, before issuing each order. Consistent with this past practice and based upon its understanding of current circumstances, the government assesses that an extension of 60 to 90 days with respect to the 2015 Reauthorization Certifications would be consistent with national security. The government respectfully submits that in determining whether a further extension would be consistent with national security, all relevant circumstances, including

⁴ ~~(S//OC/NF)~~ The government notes that under different circumstances, such as the submission of a new, additional certification or an important change to the targeting or minimization procedures that provides the government with expanded authorities, an extension may not be consistent with national security.

⁵ ~~(S)~~ See, e.g., *In re DNI/AG 702(g) Certification* [REDACTED], Order (FISA Ct. May 9, 2011) (noting original deadline of May 10, 2011, and extending review period to July 22, 2011).

⁶ ~~(S)~~ See, e.g., *In re DNI/AG 702(g) Certification* [REDACTED], Order (FISA Ct. July 14, 2011) (extending deadline from July 22, 2011, to September 20, 2011).

⁷ ~~(S)~~ See, e.g., *In re DNI/AG 702(g) Certification* [REDACTED], Order (FISA Ct. Sept. 14, 2011) (summarizing prior extensions and extending time in same matter to Oct. 10, 2011).

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complexity of the issues, posture of the Court's review and length of any additional proposed extension would need to be assessed at that time.⁸

~~(S//OC/NF)~~ Should the Court choose to extend the time limits for its review of the 2015 Reauthorization Certifications, pursuant to 50 U.S.C. § 1881a(j)(2), the government would request, consistent with prior practice, that the Court issue a Notice of Extension to the electronic communication service providers that have received directives pursuant to 50 U.S.C. § 1881a(h) and the 2014 Certifications informing them of the extension and that the existing directives shall remain in effect for the duration of the extension. A Notice of Extension for providers will help ensure the continued cooperation of the providers under the 2014 Certifications.

~~(S//OC/NF)~~ Additionally, and as was noted in the Court's extension order of September 14, 2011, any order that may result in the immediate, or near immediate, transition from one set of certifications to another set of certifications may, for technical reasons, compromise the government's ability to seamlessly transition from one set of

⁸ ~~(S//OC/NF)~~ Although the government assesses that an extension would be consistent with national security, the government notes that extensions are not without costs. Whenever a certification expires, the expiration date assigned to each individual tasking with certain providers must be modified. Each extension requires an additional set of modifications to these expiration dates. Preliminary assessments, based on past experience, are that an extension would likely cost [REDACTED] to effectuate and require the time of multiple personnel at the FBI and the providers over a several day period.

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Certifications to the next.⁹ As an abrupt transition between Certifications may result in collection loss that could impact national security and/or cause compliance issues, the government respectfully requests that any extension of time take into account the fact that the government will need approximately 7 to 10 days' notice prior to the Court's final order pursuant to 50 U.S.C. § 1881a(i)(3) to transition between Certifications in a responsible manner.

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⁹ ~~(S)~~ See *In re DNI/AG 702(x) Certification* [REDACTED]

[REDACTED] Order at 2 ("[T]he Court orally informed the government that it intended to issue a one-week extension. The government informed the Court that, for technical reasons, such a brief extension would compromise the government's ability to ensure a seamless transition from one Certification to the next. Instead, the government requested that the Court issue an extension for a longer period of time.").

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(U) Conclusion

~~(S//OC/NF)~~ For the foregoing reasons, the government respectfully submits that should the Court issue orders under 50 U.S.C. § 1881a(j)(2) extending the time limit for the Court to complete its review of, and issue orders under 50 U.S.C. § 1881a(i)(3) concerning, proposed DNI/AG 702(g) Certifications [REDACTED] such an extension would be consistent with national security. Additionally, the government respectfully requests that the Court issue a Notice of Extension consistent with any such orders.

Respectfully submitted,

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By:

(b)(6); (b)(7)(C)

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