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UNITED STATES

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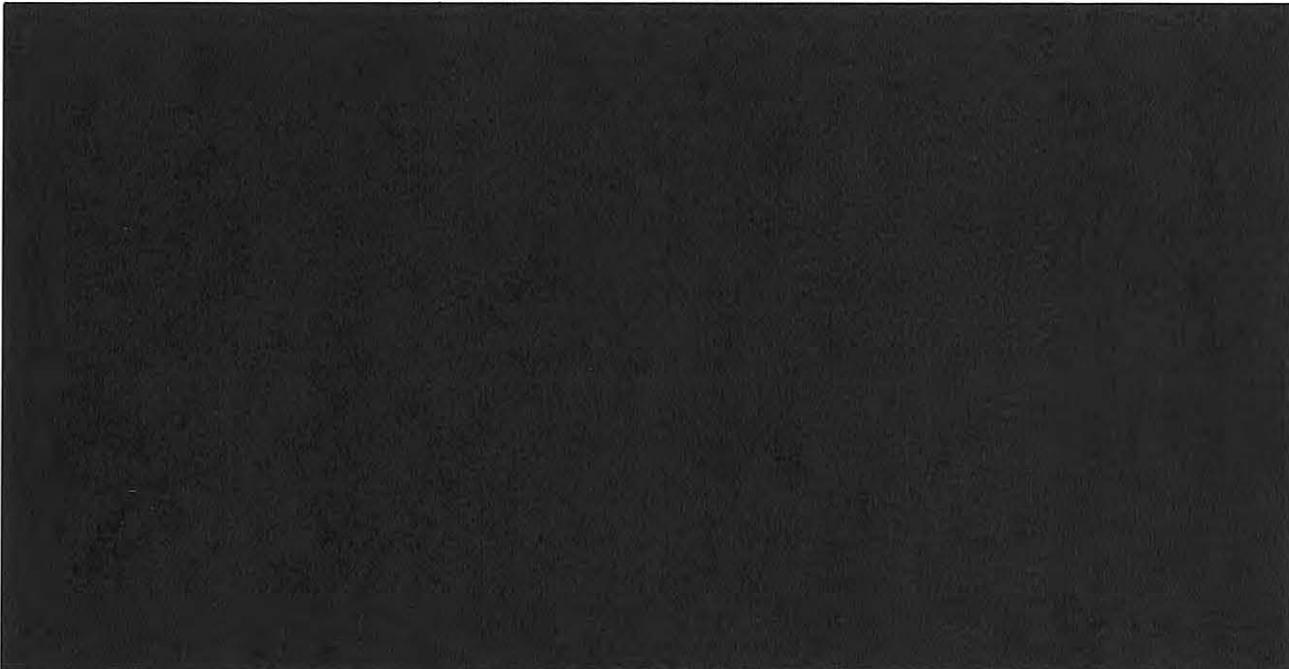
United States Foreign  
Intelligence Surveillance Court

AUG 13 2015

LeeAnn Flynn Hall, Clerk of Court

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.



### ORDER APPOINTING AN AMICUS CURIAE

For the reasons set out below, the Court appoints Amy Jeffress to serve as amicus curiae in the above-captioned matter for the purpose of assisting the Court in considering the issues specified herein. This appointment is made pursuant to section 103(i)(2)(B) of the Foreign Intelligence Surveillance Act of 1978 (FISA), codified at 50 U.S.C. § 1803(i)(2)(B), as most recently amended by the USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268. This Order also addresses certain administrative matters relating to the participation of the amicus.

#### Background

On July 15, 2015, the government submitted [REDACTED] certifications and accompanying targeting and minimization procedures (“the 2015 Certifications”) pursuant to section 702 of FISA, codified at 50 U.S.C. § 1881a. The 2015 Certifications reauthorize certifications under

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section 702 that the Court approved on August 26, 2014 (“the 2014 Certifications”). They also amend the 2014 Certifications, as well as predecessor certifications under section 702, to provide that information acquired pursuant to those certifications shall henceforward be governed by the minimization procedures that accompany the 2015 Certifications.

The government had submitted versions of the 2015 Certifications in draft form on June 15, 2015. After reviewing those drafts, the Court concluded “that this matter is likely to present one or more novel or significant interpretations of the law, which would require the Court to consider appointment of an amicus curiae” under section 103(i)(2). See [REDACTED]

[REDACTED] Order issued on July 7, 2015 (“July 7 Order”), at 3. The Court further noted that the 30-day review period specified by section 702(i)(1)(B) would, as a practical matter, foreclose amicus participation. *Id.*

The Court may, however, extend that 30-day review period “as necessary for good cause in a manner consistent with national security.” § 702(j)(2). To help the Court decide “whether to extend the time it would have to act on the 2015 Certifications and revised procedures in order to allow for meaningful amicus assistance in reviewing them,” the Court ordered the government to “explain in writing 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.” July 7 Order at 4.

On July 14, 2015, the government timely filed its Response to the July 7 Order, advising that “the government assesses that an extension of 60 to 90 days . . . would be consistent with national security.” See [REDACTED]. Government’s Response to the Court’s Order of July 7, 2015, filed on July 14, 2015, at 7.

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On July 23, 2015, the Court found that “the need for an extension to allow for [amicus] participation constitutes ‘good cause’” for an extension under section 702(j)(2). See [REDACTED] [REDACTED] and predecessor dockets, Order issued on July 23, 2015, at 3. Accordingly, it extended “the period for Court review under section 702(i)(1)(B) for 90 days, such that this review must be completed no later than November 12, 2015.” Id. The Court explained that it

does not expect or intend to use the entirety of this extended period. Rather, in order to avoid the burdens and costs that the government has ascribed to implementing multiple extensions, see Response at 8 n.8, the Court has decided in a single order to extend the period to the outermost date that is consistent with the government’s assessment of national security.

Id.

#### Appointment of Amicus Curiae

By the terms of section 103(i)(2)(A), the court “shall appoint” to serve as amicus curiae an individual who has been designated as eligible for such service under section 103(i)(1) “to assist . . . in the consideration of 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 appointment is not appropriate.” Under section 103(i)(1), the presiding judges of the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review have until November 29, 2015, to jointly designate individuals as eligible to serve as amicus under section 103(i)(1).<sup>1</sup> To date, no such designations have been made. Under present circumstances, therefore, the appointment of such an individual “is not appropriate” under section 103(i)(2)(A), because, as of yet, there are no designated individuals who can serve.

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<sup>1</sup> Section 103(i)(1) requires such designations to be made “not later than 180 days after” the date of enactment of the USA FREEDOM Act, which was June 2, 2015.

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Section 103(i)(2)(B) provides that the Court “may appoint an individual or organization to serve as amicus curiae . . . in any instance as such court deems appropriate.” Persons appointed under this provision need not have been designated under section 103(i)(1). They shall, however, “be persons who are determined to be eligible for access to classified information, if such access is necessary to participate in the matters in which they may be appointed.” § 103(i)(3)(B).

Here, the Court finds it appropriate to appoint Amy Jeffress as amicus curiae under section 103(i)(2)(B). Ms. Jeffress is well qualified to assist the Court in considering the issues specified herein. The Security and Emergency Planning Staff (SEPS) of the Department of Justice has advised that she is eligible for access to classified information.

Accordingly, it is HEREBY ORDERED as follows:

- (1) Amy Jeffress is appointed as amicus curiae (hereinafter “amicus”) in this matter pursuant to section 103(i)(2)(B).
- (2) Pursuant to section 702(i)(2)(C) and (i)(3)(A)-(B), the Court must assess, among other things: (a) whether the minimization procedures that accompany the 2015 Certifications meet the definition of minimization procedures under 50 U.S.C. § 1801(h) or § 1821(4), as appropriate; and (b) whether those procedures are consistent with the fourth amendment to the Constitution of the United States. The amicus is directed to address whether these requirements are satisfied in view of the provisions of the procedures that apply to:

(i) queries of information obtained under section 702, particularly insofar as queries may be designed to return information concerning United States persons, see NSA Minimization Procedures at 7, FBI Minimization Procedures at 11-12, and CIA Minimization Procedures at 3-4; and

(ii) preservation for litigation purposes of information otherwise required to be destroyed under the minimization procedures, see NSA Minimization Procedures

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at 8-9, FBI Minimization Procedures at 24-25, and CIA Minimization Procedures at 10-11.

The Court anticipates setting a briefing schedule at a later date.

(3) Pursuant to section 103(i)(6)(A)(i), the Court has determined that the materials identified in Exhibit A (attached hereto) are relevant to the duties of the amicus. By August 21, 2015, or after receiving confirmation from SEPS that the amicus has received the appropriate clearances and access approvals for such materials, whichever is later, the Clerk of the Court shall make the materials identified in Exhibit A available to the amicus.

(4) With the guidance and assistance of SEPS, the amicus shall handle classified information in accordance with the Security Procedures Established Pursuant to Public Law No. 95-511, 92 Stat. 1783, as Amended, By the Chief Justice of the United States for the Foreign Intelligence Surveillance Court And the Foreign Intelligence Surveillance Court of Review (Feb. 21, 2013) ("Security Procedures") (copy attached at Exhibit B). For purposes of the Security Procedures, the amicus shall be regarded as court personnel.

(5) Section 103(i)(6)(C) provides: "An amicus curiae designated or appointed by the court may have access to classified documents, information, and other materials or proceedings only if that individual is eligible for access to classified information and to the extent consistent with the national security of the United States." The Court believes that, in this matter, the amicus's access to classified information pursuant to paragraphs (3) and (4) above is consistent with the national security of the United States. If, however, the government believes otherwise, it shall provide written notice and explanation to the Court by August 18, 2015.

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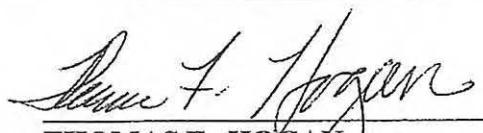
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(6) The attorney for the government shall ensure that the Attorney General receives a copy of this Order pursuant to the notification requirement at section 103(i)(7).

ENTERED this 13<sup>th</sup> day of August 2015, in [REDACTED]



**THOMAS F. HOGAN**  
Judge, United States Foreign  
Intelligence Surveillance Court

(b)(6)

FISC, certify true and correct copy of the above  
(b)(6)

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EXHIBIT A

Foreign Intelligence Surveillance Court of Review Materials

In re Directives, FISCR Docket No. 08-01, Opinion issued on Aug. 22, 2008

Foreign Intelligence Surveillance Court Materials

From [REDACTED]

Order issued on July 7, 2015

Government's Response to the Court's Order of July 7, 2015, filed on July 14, 2015

From [REDACTED], and predecessor dockets:

Order Appointing Amicus Curiae (to which this Exhibit A is attached)

Order issued on July 23, 2015

The Government's filing on July 15, 2015, of its 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 (including Certifications [REDACTED]

[REDACTED], accompanying targeting and minimization procedures, and supporting affidavits; unclassified discussion of the government's oversight efforts regarding Section 702 implementation; 2015 Summary of Notable Section 702 Requirements; and redline-strikeout versions of selected documents)

From predecessor 702(i) Dockets:

All Opinions or Orders approving or disapproving certifications, targeting procedures, and minimization procedures pursuant to Section 702(i)(3), including written statements of the reasons for such approval or disapproval

From [REDACTED], et al.:

Opinion and Order issued on Aug. 11, 2014

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## Exhibit B

**Security Procedures Established Pursuant to Public Law No. 95-511, 92 Stat. 1783, as Amended, By the Chief Justice of the United States for the Foreign Intelligence Surveillance Court And the Foreign Intelligence Surveillance Court of Review**

1. *Purpose.* The purpose of these procedures, as revised, is to meet the court security requirements of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, as amended ("the Act").<sup>1</sup> These security procedures apply to both the Foreign Intelligence Surveillance Court established under § 103(a) of the Act and the Foreign Intelligence Surveillance Court of Review established under § 103(b), and to all supporting personnel of said courts. Except for the judges of the two courts, the same facilities, personnel, and security procedures shall be used by both courts, subject to such exceptions as may be authorized by the Chief Justice. These procedures have been adopted in consultation with the Attorney General and the Director of National Intelligence as required by the Act and supersede the security procedures issued on May 18, 1979. The term "court" as used herein refers to both Courts.

2. *Quarters and Facilities.* The quarters and facilities of the court, including a hearing room, work chambers, and storage facilities for court records, shall be constructed and maintained in accordance with applicable construction standards pertaining to sensitive compartmented information facilities adopted by the Director of National Intelligence. The location of court facilities may be changed by the court from time to time in consultation with the Chief Justice, the Attorney General, and the Director of National Intelligence.

3. *Members of the Court.* Judges to be designated as members of the court pursuant to § 103 of the Act shall be subject, before designation, to an updated background investigation to be conducted by the Federal Bureau of Investigation under applicable Executive Branch standards for investigations performed in support of determinations of eligibility for access to sensitive compartmented information or other classified national security information, insofar as they may be deemed applicable to the court. If a question of suitability to serve on the court is raised at any time after initial appointment, the matter is to be referred to the Chief Justice, who may elect to consult with the Attorney General and the Director of National Intelligence regarding the security significance of the matter before taking such action as the Chief Justice deems appropriate.

4. *Appointment of Personnel.* The court may have a Clerk of Court and such other legal, administrative or support personnel as it may require. The court may also arrange for the services of a court reporter, as it deems appropriate. Such personnel may have access to court

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<sup>1</sup> Section 103(c) of the Act reads in pertinent part: "The record of proceedings under this Act, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence." See also § 302(e) (physical search proceedings); § 501(f)(4) (proceedings regarding the production of records or other tangible things); § 702(k)(1) (proceedings regarding certain acquisitions of foreign intelligence information).

records and proceedings, including sensitive compartmented information or other classified national security information contained therein, only as authorized by the court and only to the extent necessary to the performance of an official function. Personnel appointed by or designated for service to the court shall undergo appropriate background investigation by the Federal Bureau of Investigation under applicable Executive Branch standards for investigations performed in support of determinations of eligibility for access to sensitive compartmented information or other classified national security information. All court personnel having access to sensitive compartmented information or other classified national security information shall sign appropriate security agreements. If a question concerning the security clearance of court personnel is raised subsequent to appointment, the matter shall be referred to the court, which may consult with the Attorney General and the Director of National Intelligence regarding its security significance before taking such action as it deems appropriate.

5. *Security Officer.* The court shall designate as security officer the Director, Security and Emergency Planning Staff, Department of Justice, or another individual who has demonstrated competence in providing security for classified national security information and sensitive compartmented information from among candidates submitted by the Attorney General and the Director of National Intelligence. One or more alternate security officers may be designated by the court as required. The security officer shall serve at the pleasure of the court and will not be subject to removal by the Executive Branch without the concurrence of the court. The security officer (and alternates) may be Executive Branch employees and may perform other duties in the Executive Branch, so long as such duties do not conflict with their responsibilities to the court. Additional personnel may be provided by the Department of Justice to perform incidental security and administrative functions for the court provided appropriate security clearances have been obtained.

The security officer shall be responsible to the court for document, physical, personnel, and communications security. Under the supervision of the court, the security officer shall take measures reasonably necessary to fulfill these responsibilities. The security officer shall arrange, at a minimum, for an annual security review of court quarters and facilities and shall submit a report to the court.

6. *Security Functions of the Clerk of Court.* The Clerk of Court, with the advice and concurrence of the security officer, shall establish and maintain a control and accountability system for all records of proceedings before the court that involve classified national security information, and any other records or documents the court may designate. The Clerk, in consultation with the security officer, shall further ensure that all court records are marked with appropriate security classifications in accordance with Executive Order 13526 and its successors, and procedures to be established by the court.

7. *Court Proceedings.* The court shall ensure that all court records (including notes, draft opinions, and related materials) that contain classified national security information are maintained according to applicable Executive Branch security standards for storing and handling

classified national security information. Records of the court shall not be removed from its premises except in accordance with the Act, applicable court rule, and these procedures. Insofar as the court may direct, the Clerk of the Court may, in coordination with the security officer, arrange for off-site storage of court records, provided that classified national security information contained therein is maintained according to the above-referenced security standards. Reports and exhibits submitted in support of applications to the court may be returned by the court to the applicant on a trust receipt basis.

Whenever a party other than the government makes a submission to the court that potentially contains classified national security information, the court shall promptly coordinate with the security officer to determine whether the submission contains classified national security information. The security officer shall, as directed by the court, consult with appropriate executive branch officials with regard to such a determination. The court may consider the submission while such a determination is pending, provided that the court safeguards the information in question as classified national security information in accordance with these procedures. The security officer shall, after consulting with the court, advise the parties of the results of the determination. If it is determined that the submission does contain classified national security information, the security officer shall ensure that it is marked with appropriate classification markings and the Clerk of Court shall ensure that it is handled in accordance with those markings under these procedures.

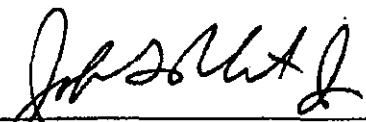
*8. Security Procedures for Section 102(a) and Section 302(a).* Certifications transmitted by the Attorney General to the court under seal pursuant to Section 102(a) or Section 302(a) of the Act shall be numbered in sequence by the Clerk of Court, who shall maintain a record of all certifications received by the designated number and date of receipt.

Certifications received by the court for retention only shall be filed under seal in separate storage compartments. They shall only be accessed jointly by a representative designated by the court and a representative of the Executive Branch designated by the Attorney General. They may be unsealed only in accordance with the provisions of the Act.

*9. Training.* Members of the court and court personnel shall be briefed on security measures appropriate to the functions of the court by designees of the Attorney General and the Director of National Intelligence.

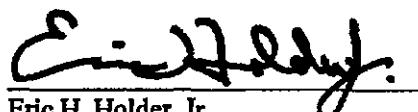
*10. Term.* These procedures shall remain in effect until modified in writing by the Chief Justice after consultation with the Attorney General and the Director of National Intelligence.

Issued this 21<sup>st</sup> day of FEBRUARY, 2013, after consultation with the Attorney General of the United States and the Director of National Intelligence as required by the Foreign Intelligence Surveillance Act.



John G. Roberts, Jr.  
Chief Justice of the United States

The Attorney General concurs in the procedures for safeguarding certifications filed under Section 102(a) or Section 302(a) of the Act, as set forth in paragraph 8.<sup>2</sup>



Eric H. Holder, Jr.  
Attorney General of the United States

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<sup>2</sup> Section 103(c) provides that the Chief Justice shall establish security procedures for the court in consultation with the Attorney General and the Director of National Intelligence. Sections 102(a)(3) and 302(a)(3) provide that certifications of the Attorney General issued in accordance with Section 102(a)(1) or Section 302(a)(1)(A) of the Act shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence.