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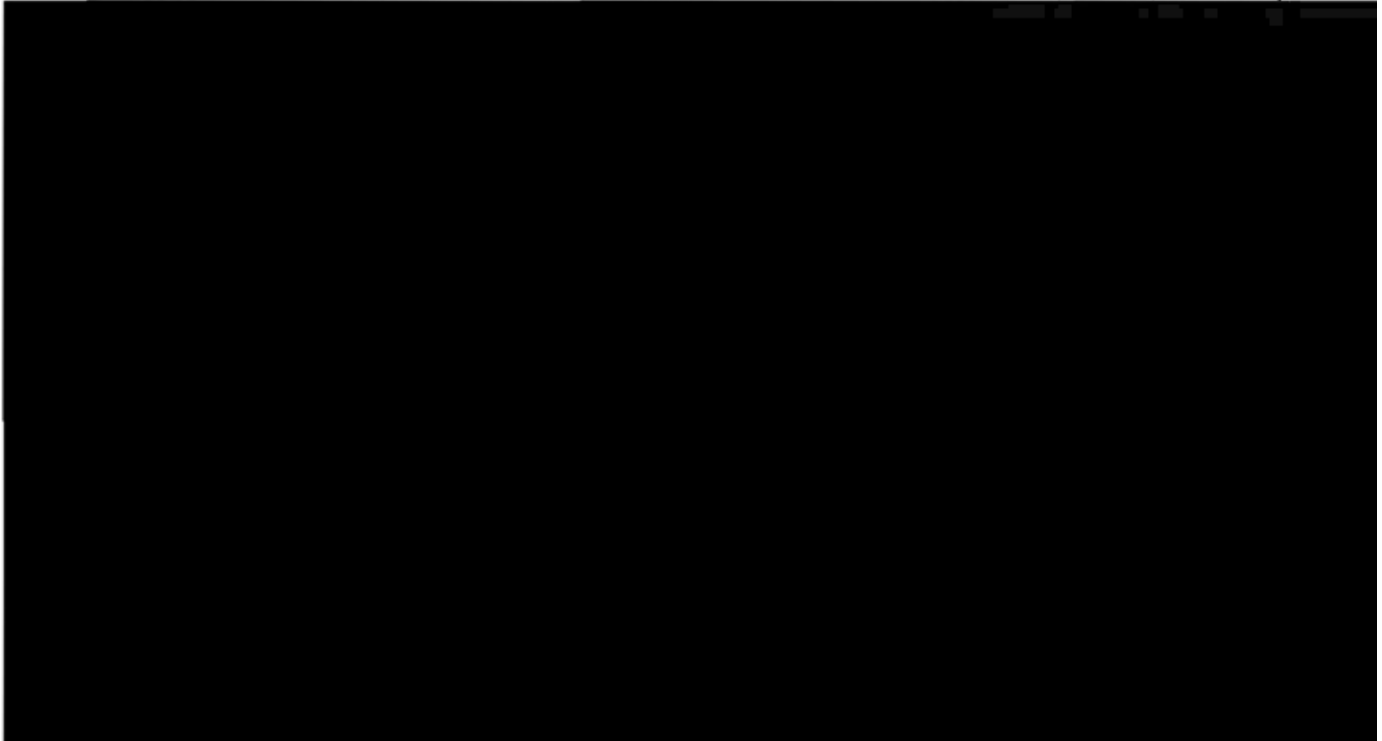
OCT 18 2018

UNITED STATES

LeeAnn Flynn Hall, Clerk of Court

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.



MEMORANDUM OPINION AND ORDER

The Foreign Intelligence Surveillance Court today addresses the “Government’s Ex Parte Submission of Reauthorization Certifications and Related Procedures, Ex Parte Submission of Amended Certifications, and Request for an Order Approving Such Certifications and Amended Certifications,” filed on March 27, 2018 (“March 27, 2018, Submission”), and the “Government’s Ex Parte Submission of Amendments to DNI/AG 702(h) Certifications and Related Procedures, Ex Parte Submission of Amendments to DNI/AG 702(g) Certifications, and Request for an Order Approving Such Amended Certifications,” filed on September 18, 2018

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(“September 18, 2018, Submission”). The March 27, 2018, Submission, as amended by the September 18, 2018, Submission, is subject to review by the Court under Section 702 of the Foreign Intelligence Surveillance Act (FISA) as amended, codified at 50 U.S.C. § 1881a. The government’s request for approval of the amended certifications and related procedures is *granted in part and denied in part* for the reasons stated in this Memorandum Opinion and Order.

Part I of this Opinion summarizes the government’s submissions and the procedural history of these matters. In Part II, the Court finds that the certifications before it contain the elements required by Section 702(h).

Part III of the Opinion addresses the targeting procedures and issues relating to the scope of acquisition, including the “abouts limitation” at Section 702(b)(5). The Court finds that the targeting procedures satisfy the requirements of the statute and are consistent with the requirements of the Fourth Amendment and approves the proposed scope of acquisition.

The Court examines the querying procedures and minimization procedures in Part IV. After reviewing the applicable statutory provisions, see Part IV.A, the Court finds that the FBI’s querying procedures do not comply with the requirement at Section 702(f)(1)(B) to keep records of U.S.-person query terms used to conduct queries of information acquired under Section 702. See Part IV.B. The Court next examines the prevalence of non-compliant queries conducted by FBI personnel to return information about U.S. persons from Section 702-acquired data. It ultimately finds the FBI’s querying and minimization procedures, as implemented, to be inconsistent with statutory minimization requirements and the requirements of the Fourth

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Amendment. See Part IV.C. The Court then examines and approves certain exemptions that appear in each agency's set of querying and minimization procedures, see Part IV.D, as well as certain changes to the FBI's minimization procedures. See Part IV.E.

Part V addresses certain other instances of non-compliance and the government's responses thereto. Those instances do not require any further findings of deficiency. In Part VI, the Court summarizes its disposition and imposes certain reporting and other requirements on the government.

I. PROCEDURAL HISTORY

The Court begins with a description of the 2018 certifications and their amendments and then describes their subject matter.

A. The 2018 Certifications and Amendments

The March 27, 2018, Submission includes [REDACTED] certifications executed by the Attorney General and the Director of National Intelligence pursuant to Section 702: [REDACTED]

Each of those certifications (collectively referred to as "the March 27, 2018, Certifications") is accompanied by:

- (1) Supporting affidavits of the Director of the National Security Agency, the Director of the Federal Bureau of Investigation, the Director of the Central Intelligence Agency, and the acting Director of the National Counterterrorism Center;
- (2) Two sets of targeting procedures, which govern NSA and the FBI respectively. The targeting procedures for NSA appear as Exhibit A to each certification and those for the FBI appear as Exhibit C. The targeting procedures for each certification are identical;

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(3) Four sets of minimization procedures, which govern NSA, the FBI, the CIA, and NCTC respectively. The minimization procedures for NSA appear as Exhibit B to each certification, those for the FBI appear as Exhibit D, those for the CIA appear as Exhibit E, and those for NCTC appear as Exhibit G. (Exhibit F [REDACTED])

[REDACTED] identifies [REDACTED] entities targeted under those certifications. [REDACTED] The minimization procedures for each certification are identical; and [REDACTED]

(4) One set of querying procedures (“March 27, 2018, Querying Procedures”) for NSA, the FBI, the CIA, and NCTC, which appears as Exhibit H to each certification.

The March 27, 2018, Submission also includes an explanatory memorandum prepared by the Department of Justice (“March 27, 2018, Memorandum”).

The Court was initially required to review and rule on the certifications and procedures within 30 days of their submission – *i.e.*, by April 26, 2018. See § 702(j)(1)(B). In order to allow for participation of amici curiae, however, the Court extended this period by 90 days, until July 25, 2018, under Section 702(k)(2). See Order, April 5, 2018. The Court appointed Jonathan G. Cedarbaum, Esq., and Amy Jeffress, Esq., to serve as amici curiae. See Order Appointing Amici Curiae, Apr. 23, 2018. At the request of Ms. Jeffress, the Court later appointed John Cella, Esq., as amicus curiae to assist in amici’s work. See Order Appointing Additional Amicus Curiae, May 7, 2018. The Court appreciates the diligent and learned assistance provided by amici, both in their written submissions and in their oral advocacy at hearings. Their efforts have greatly benefited the Court’s review of these matters.

Following briefing by amici and the government, the Court heard oral arguments by amici and representatives from the government on July 13, 2018. At the Court’s direction, staff orally

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informed the government three days later of the Court's concerns regarding the procedures submitted by the government on March 27, 2018.

In particular, the Court raised the following significant concerns with the Government:

- (1) The querying and minimization procedures included exemptions from otherwise applicable requirements for lawful training functions and lawful oversight of an agency's personnel or systems. Those exemptions seemed unreasonably broad under the standards of the Fourth Amendment and FISA's definition of "minimization procedures." See 50 U.S.C. §§ 1801(h), 1821(4);
- (2) Under the querying procedures, the FBI would keep records of all queries run against Section 702 data, but those records would not indicate whether the query term used was associated with a United States person. This recordkeeping practice appeared to be inconsistent with the statutory requirement that the querying procedures "include a technical procedure whereby a record is kept of each United States person query term used for a query." § 702(f)(1)(B); and
- (3) The querying procedures did not require FBI personnel to document the basis for finding that each United States-person query term satisfied the relevant standard — *i.e.*, that queries be reasonably designed to return foreign-intelligence information or evidence of crime. Without such documentation and in view of reported instances of non-compliance with that standard, the procedures seemed unreasonable under FISA's definition of "minimization procedures" and possibly the Fourth Amendment. The Court noted it was favorably inclined toward amici's suggestions that the Court require that, if FBI personnel want to examine the contents of Section 702 information returned by a United States-person query, they would first be required to document why that query met the applicable standard.

On July 20, 2018, the government filed a motion seeking a further extension until October 18, 2018, in order for it to amend its procedures in an effort to address at least some of the Court's concerns. See Mot. for Order Extending Time Limit Pursuant to 50 U.S.C. § 881a(k)(2). That motion stated, "In particular, the government believes it would be consistent with national security for the extension to provide sufficient time both for the government to

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formulate and execute amendments and for the Court to review the amended 2018 Certifications.” *Id.* at 9. On that same day, the Court granted the motion.

The government timely filed its September 18, 2018, Submission, which includes amendments to the [REDACTED] March 27, 2018, Certifications: Amendment to [REDACTED]

[REDACTED] The Court will collectively refer to them as “the September 18, 2018, Amendments” and to the certifications, as thereby amended, as “the 2018 Certifications.” The September 18, 2018, Amendments are accompanied by:

- (1) [REDACTED] supporting affidavits of the Director of NSA, the Director of the FBI, the Director of the CIA, and the acting Director of NCTC;^e
- (2) Amended minimization procedures for the four agencies, which are identical for each amended certification. The amended minimization procedures for NSA appear as Exhibit B to each of the September 18, 2018, Amendments; those for the FBI appear as Exhibit D; those for the CIA appear as Exhibit E; and those for NCTC appear as Exhibit G; and
- (3) Amended querying procedures, which are identical for each amended certification and are broken out by agency: NSA Querying Procedures, which appear as Exhibit H to the September 18, 2018, Amendments; FBI Querying Procedures, which appear as Exhibit I; CIA Querying Procedures, which appear as Exhibit J; and NCTC Querying Procedures, which appear as Exhibit K.^e

The September 18, 2018, Submission also includes an explanatory memorandum prepared by DOJ (“September 18, 2018, Memorandum”) and a supplemental declaration of the Director of the FBI (“Supplemental FBI Declaration”).

The September 18, 2018, Submission included a number of changes intended to address the Court’s concerns. With regard to the concerns noted above, the government:

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(1) significantly narrowed the scope of the exemptions for lawful training functions and lawful oversight of agency personnel or systems in the querying and minimization procedures; and

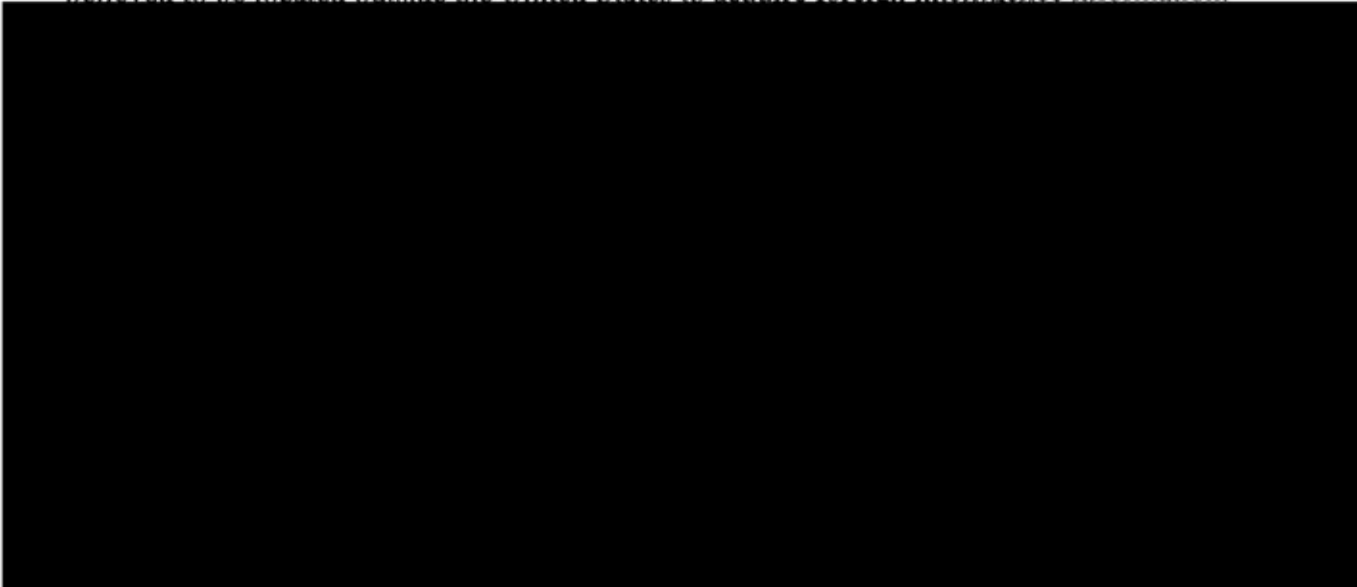
(2) did not alter the FBI's recordkeeping requirements, but in the Supplemental FBI Declaration described the operational consequences the FBI anticipates if it is required to maintain records that distinguish U.S.-person query terms from other query terms and to document why U.S.-person queries met the applicable standards before viewing any Section 702 content retrieved by the query; and

(3) included in the FBI Querying Procedures supplemental procedures for a "categorical batch queries" (as opposed to queries conducted on the basis of individualized assessments). Subject to certain exceptions, FBI personnel would be required to obtain the written approval of an FBI attorney before reviewing a Section 702 information retrieved using a categorical batch query.

The September 18, 2018, Submission was provided to amici, and on September 28, the Court heard oral arguments from amici and the government on the amended certifications and procedures.

B. Subject Matter of the Certifications

Each certification involves "the targeting of non-United States persons reasonably believed to be located outside the United States to acquire foreign intelligence information."



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[REDACTED]

The 2018 Certifications generally propose to continue acquisitions of foreign-intelligence information now being conducted under prior certifications that were initially submitted in 2016 (“the 2016 Certifications”). See March 27, 2018, Memorandum at 2. The 2016 Certifications,

[REDACTED]

amended by the government in March 2017 and approved by the FISC on April 26, 2017. See Docket Nos. [REDACTED] Mem. Op. and Order, Apr. 26, 2017 (“April 26, 2017, Opinion”), at 5-6, 95. The 2016 Certifications, in turn, generally renewed authorizations to acquire foreign-intelligence information under a series of certifications made by the AG and DNI pursuant to Section 702 that dates back to 2008. See Docket Nos. [REDACTED]

[REDACTED]

Those dockets, together with Docket Numbers [REDACTED]
[REDACTED] are collectively referred to as “the Prior 702 Dockets.”

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The government also seeks approval of amendments to the certifications in the Prior 702 Dockets, such that NSA, the CIA, the FBI, and NCTC henceforward would apply the same minimization and querying procedures to information obtained under prior certifications as they would to information to be obtained under the 2018 Certifications, as amended. See

September 18, 2018, Memorandum [REDACTED]

II. REVIEW OF THE 2018 CERTIFICATIONS AND PRIOR CERTIFICATIONS, AS AMENDED

The Court must review a Section 702 certification “to determine whether [it] contains all the required elements.” § 702(j)(2)(A). The Court’s examination of the 2018 Certifications confirms that:

(1) the certifications, including their amendments, have been made under oath by the AG and the DNI, as required by § 702(h)(1)(A), see [REDACTED]

(2) the certifications, including their amendments, contain the attestations required by § 702(h)(2)(A), [REDACTED]

(3) as required by § 702(h)(2)(B), each certification is accompanied by targeting procedures and minimization procedures adopted in accordance with § 702(d) and (e), respectively;

(4) each certification is supported by affidavits of appropriate national-security officials, as described in § 702(h)(2)(C); and

(5) each certification includes an effective date, which was changed by the September 18, 2018, Amendments as described in § 702(h)(3) – specifically, the certifications become effective on October 18, 2018, or the date upon which the Court issues an order

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concerning the certifications under § 702(i)(3), whichever is sooner. See [REDACTED]
[REDACTED] The statement described in § 702(h)(2)(E) is not required because there was no “exigent circumstances” determination under § 702(c)(2).)

The Court therefore finds that the 2018 Certifications contain all the required statutory elements.

Similarly, the Court has reviewed the certifications in the Prior 702 Dockets, as amended by the 2018 Certifications, and finds they also contain all the elements required by the statute.

Those amendments have the same effective dates as the 2018 Certifications. See [REDACTED]
[REDACTED]

III. TARGETING PROCEDURES AND SCOPE OF ACQUISITION

Section 702(d)(1) requires targeting procedures to be “reasonably designed” to “ensure that any acquisition authorized under [§ 702(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.” Additionally, the government uses the targeting procedures to ensure acquisitions do “not intentionally target a United States person reasonably believed to be located outside the United States.” § 702(b)(3). Pursuant to § 702(j)(2)(B), the Court assesses whether the targeting procedures satisfy those criteria. The Court must also assess whether the targeting procedures, along with the querying and minimization procedures, are consistent with the requirements of the Fourth Amendment. See § 702(j)(3)(A)-(B).e

In January 2018, Congress enacted the FISA Amendments Reauthorization Act of 2017 (“Reauthorization Act”), Pub. L. No. 115-118, 132 Stat. 3 (2018). The Reauthorization Act

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enacted Section 702(b)(5), which contains a limitation on the acquisition of “communications that contain a reference to, but are not to or from, a target of an acquisition authorized” under Section 702(a), which acquisition is colloquially referred to as “abouts” collection.

Reauthorization Act § 103(a)(3). It specifically imposed, with narrow exceptions for exigent circumstances, a requirement of congressional notification and a 30-day congressional-review period before the government can resume abouts collection under Section 702. See id.

§ 103(b)(1)-(4). This Opinion refers to that requirement as the “abouts limitation.” In addition, the government must “fully and currently inform” the Judiciary and Intelligence Committees of the House and Senate of “significant noncompliance . . . concerning any acquisition of abouts communications.” § 702(m)(4) (enacted by Reauthorization Act § 103(b)(5)).

A. Background on Section 702 Acquisition

The government targets a person under Section 702 by tasking for acquisition one or more selectors (*e.g.*, identifiers for email or other electronic-communication accounts) associated with that person. Section 702 encompasses different forms of acquisition. The government may acquire information “upstream,” as it transits the facilities of an Internet backbone carrier, as well as “downstream,” from systems operated by providers of service  See April 26, 2017, Opinion at 15. Traditional telephone communications may also be acquired upstream, but those acquisitions have not presented issues regarding scope of acquisition in the way that upstream Internet acquisitions have. In the following discussion, “upstream” collection refers to upstream acquisition of Internet communications under Section 702.

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NSA is the only agency to conduct upstream collection under Section 702, while both the NSA and FBI have roles in [REDACTED] downstream. Under the procedures, NSA is the lead agency in making targeting decisions under Section 702. The FBI Targeting Procedures

come into play only when the government

See FBI

Targeting Procedures § I.1 at 1. “Thus, the FBI Targeting Procedures apply *in addition to* the NSA Targeting Procedures,” [REDACTED] See Docket No. [REDACTED]

[REDACTED] Mem. Op., Sept. 4, 2008 (“September 4, 2008, Opinion”) at 20 (emphasis in original).

It is worth highlighting two salient features of upstream collection as conducted prior to March 17, 2017, that bear on the issues raised by the abouts limitation:

(1) NSA sometimes acquired “multiple communication transactions,” or “MCTs,” through upstream collection. An MCT is a bundle of communications transiting part of the Internet together [REDACTED]

[REDACTED] containing multiple messages [REDACTED]

See April 26, 2017, Opinion at 15-16.

(“Active user” refers to the user of a communication service to or from whom an MCT is in transit when it is acquired. See id. at 16.)

(2) In addition to information in transit to or from a tasked selector, NSA acquired communications, including MCTs, *about* – *i.e.*, containing a reference to – a tasked selector. For example, if a single email message within an MCT contained a reference to a tasked email account, the entire MCT could be acquired, including numerous additional email messages that

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did not contain a reference to a tasked selector. See id. For that reason, and because such MCTs could be acquired regardless of whether the active user was a Section 702 target, those additional email messages could be wholly unrelated to any target. See id. at 16-17.

As a result, upstream collection as conducted prior to March 17, 2017, was “more likely than other forms of Section 702 collection to contain information of or concerning United States persons with no foreign intelligence value.” Id. at 17 (internal quotation marks and citation omitted). Heightened restrictions were accordingly placed on NSA’s retention, use, and dissemination of information acquired through upstream collection, including a prohibition on queries that used U.S.-person identifiers as query terms. See id. at 17-18.

Beginning in October 2016, while the 2016 Certifications were pending before the FISC, the government reported that NSA had violated that querying prohibition much more frequently than had been previously disclosed. The FISC discussed this issue at length in its opinion ultimately approving the 2016 Certifications, which were amended by the government to address that non-compliance. See id. at 14-30. Specifically, the government chose to stop acquiring abouts communications under Section 702 and memorialized that change in amended procedures for the 2016 Certifications. For example, the NSA Targeting Procedures were amended to state that “[a]cquisitions conducted under these procedures will be limited to communications *to or from* persons targeted in accordance with these procedures.” 2016 NSA Targeting Procedures, as Amended, Mar. 30, 2017, § I at 2 (emphasis added). Consistent with that provision, NSA limited acquisition of MCTs to situations where a Section 702 target was the active user or, put another way, a sender or recipient of the entirety of each MCT acquired. NSA’s current minimization

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procedures (“2016 NSA Minimization Procedures”) were amended to state that Internet transactions acquired after March 17, 2017, “that are not to or from a person targeted in accordance with NSA’s section 702 targeting procedures are unauthorized acquisitions and therefore will be destroyed upon recognition.” 2016 NSA Minimization Procedures, as Amended Mar. 30, 2017, § 3(b)(4)b at 4. Relying on those changes, the Court approved the amended 2016 Certifications and procedures. See April 26, 2017, Opinion at 23-30, 95.

The 2016 NSA Minimization Procedures (as amended in March 2017 and approved in April 2017) required the sequestration and destruction of all upstream Internet collection during the timeframe affected by the compliance incident. Aside from information retained subject to restricted access for litigation-hold purposes (see, e.g., Gov’t Fifth Update Regarding Info. Acquired On or Before Mar. 17, 2017, Pursuant to NSA’s Section 702 Upstream Internet Collection, July 18, 2018, at 5-8) NSA has completed the necessary destruction.

The government is not seeking Court approval to resume what it regards as the acquisition of abouts communications under the 2018 Certifications and accompanying procedures. The Court nonetheless identified issues concerning the potential applicability of the abouts limitation to some information within the proposed scope of acquisition under the 2018 Certifications and appointed amici to address the following:

- (a) Do the preconditions on acquiring “abouts communications” imposed by Section 103(b) of the [Reauthorization Act] apply only to forms of acquisition that the government discontinued under Section 702 in March 2017?
- (b) If the answer to (a) is “no,” do any forms of acquisition to be conducted under the 2018 Certifications involve acquisition of abouts communications, with particular consideration of [REDACTED]

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[REDACTED]

Order Appointing Amici Curiae, Apr. 23, 2018, at 4. The Court appreciates the helpful briefing it received from amici and the government on these issues.

B. Analysis

The Court's examination will begin with [REDACTED] collection. There is substantial agreement between the government and amici that such collection [REDACTED] comports with the abouts limitation.

The Court next addresses [REDACTED] described in element (b)(i) above. It examines that information as acquired upstream (in-transit) and then as acquired downstream [REDACTED]. With respect to upstream collection [REDACTED] the Court concludes, again based on substantial agreement between amici and the government, that [REDACTED] collection will be conducted in a manner that complies with the limitation.

The government and amici disagree as to whether the abouts limitation has any application to downstream collection. The Court, for reasons stated below, concludes that it does and addresses the application of the limitation to various types of downstream collection. The Court concludes that [REDACTED] downstream acquisition [REDACTED] comports with the abouts limitation. The Court further concludes that [REDACTED] comports with the abouts limitation because [REDACTED]

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would be

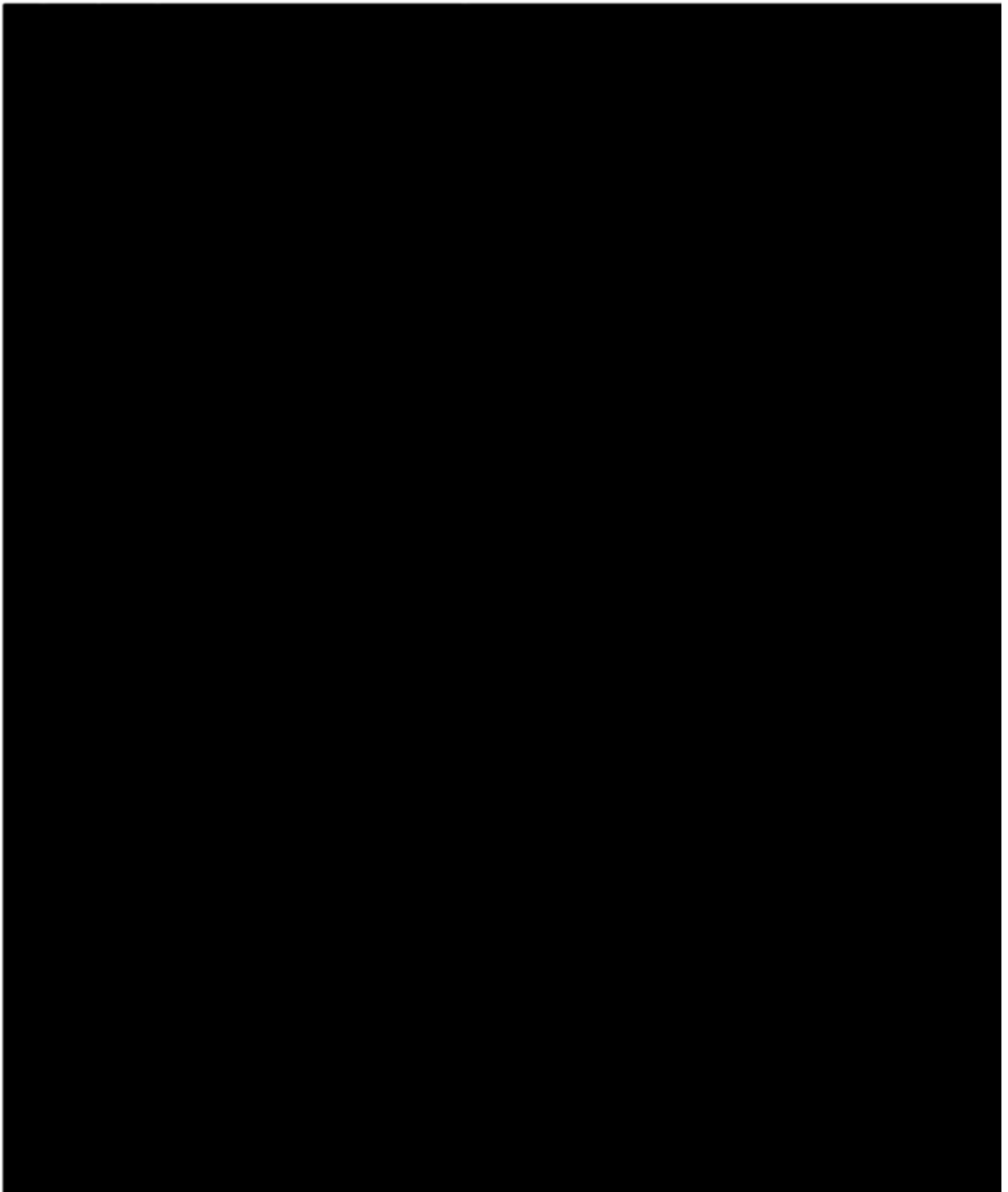
consistent with the limitation.

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[REDACTED]

Amici agreed with the government, and the Court accepts, that the NSA's [REDACTED]

[REDACTED] is consistent with the abouts

limitation. See, e.g., Br. of Amici Curiae ("Amici Brief"), May 31, 2018, at 40 ("[T]he

Government offers what to us are persuasive arguments that [REDACTED]

[REDACTED] are limited to acquisitions of communications to or from targets and thus

are not subject to the restrictions in section 103 of the Reauthorization Act.").

[REDACTED]

Amici conclude that the safeguards

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and procedures being employed

“ensure that [REDACTED] will avoid intentional acquisition of abouts communications.” Amici Brief at 41-42; see also § 702(b)(5) (authorized acquisition may not *intentionally* acquire abouts communications).

The Court is equally satisfied on the record before it that [REDACTED]

[REDACTED] is reasonably designed to avoid the acquisition of abouts communications (or any other non-target communications) and to require the destruction of any non-target communications unintentionally obtained through such collection.

[REDACTED] Amici make two sets of recommendations

[REDACTED] First, they recommend that the Court require the government to explain to the Court why [REDACTED] will only acquire communications to or from a Section 702 target, and to report on the methods it uses to audit information [REDACTED] to determine what percentage, if any, of communications acquired are neither to nor from a Section 702 target, and the results of that auditing. See Amici Brief at 43. The Court adopts these recommendations, in part, as reflected in the reporting requirements set out at the end of this opinion.

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Second, amici recommend that the Court require the government to brief Congress

periodically [REDACTED]

Id. at 43-44. Amici do not identify any particular reason to think

ordinary oversight processes are inadequate for this subject, and the Court sees no need to dictate the terms of executive-branch disclosures to Congress. The Court anticipates that congressional committees of jurisdiction will receive copies of this opinion. See 50 U.S.C. § 1871(c)(1) (requiring Attorney General to submit to specified Congressional committees any decision, order, or opinion of this Court that includes a “significant construction or interpretation of any provision of law”). Congress will then have an informed opportunity to decide for itself what further information it may desire [REDACTED]

2. [REDACTED]

[REDACTED] the Court will first briefly review

pertinent changes to the targeting procedures and [REDACTED] acquired under Section 702. It will then examine the acquisition of such information through both upstream collection and downstream collection, [REDACTED]

[REDACTED] The Court concludes that, while the

abouts limitation potentially applies to both upstream and downstream collection, the government may use both of those means to [REDACTED] without acquiring [REDACTED] abouts communications.

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a. Background

The government's submission refers to [REDACTED] acquired
pursuant to Section 702 [REDACTED]

[REDACTED] The government made what it regards as clarifying edits to its Section 702
procedures to account for [REDACTED]

[REDACTED]

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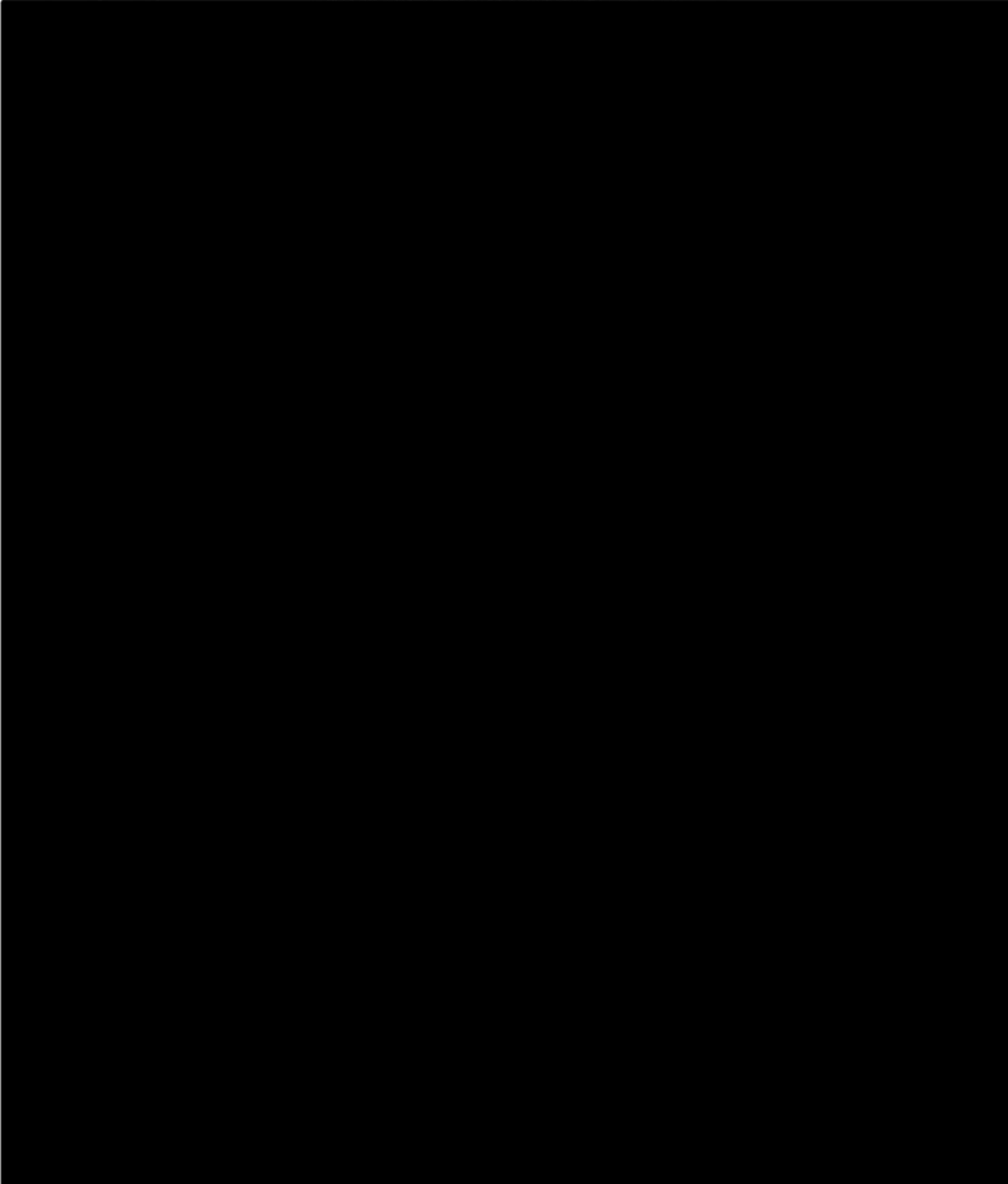
The Brief of Amici Curiae was particularly

helpful in this regard. See Amici Brief at 30-33.

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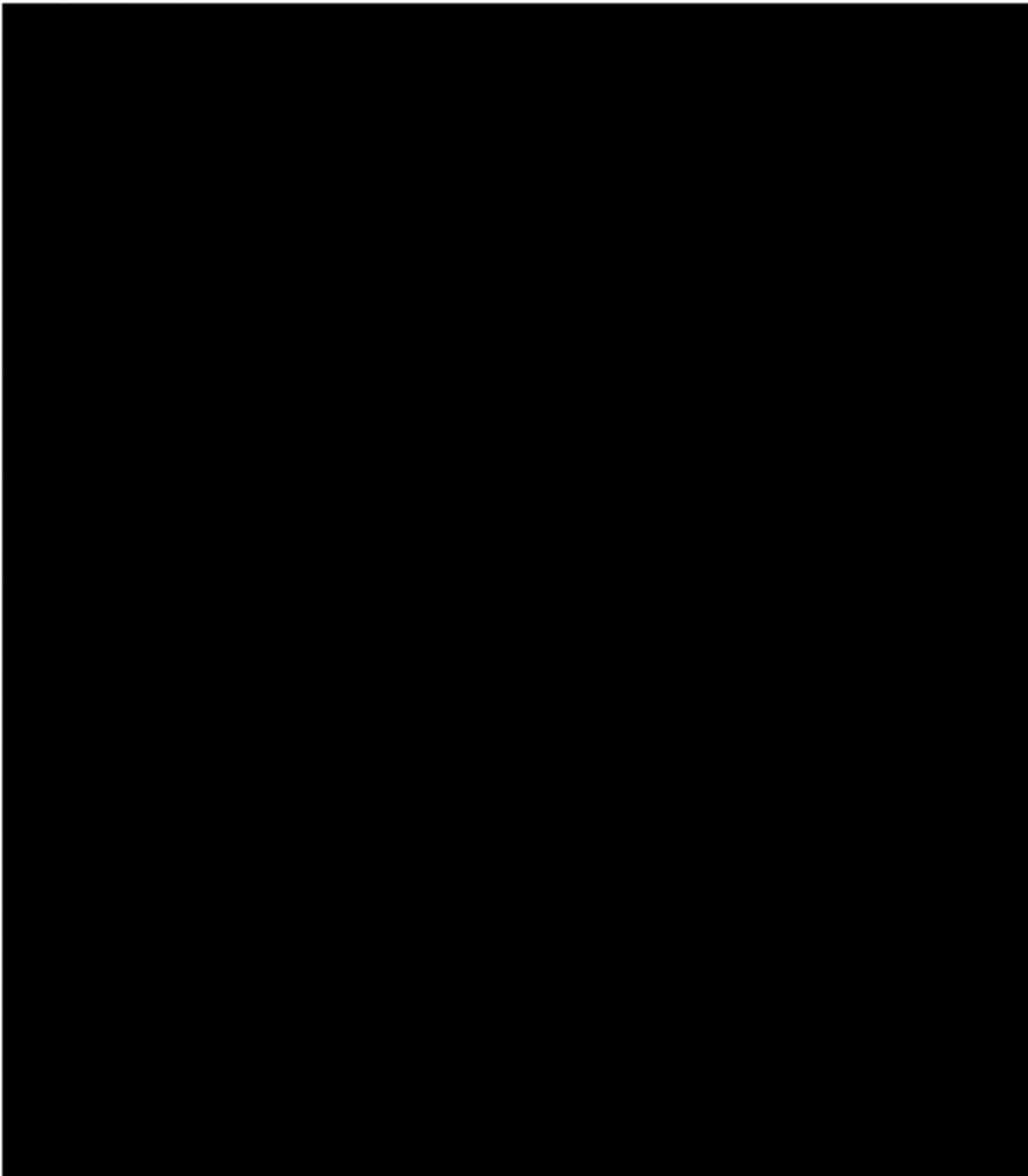
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The Court must now consider whether acquisition

is consistent with the abouts limitation. It is necessary to analyze that issue separately for each pertinent form of acquisition.

b. Upstream Collection

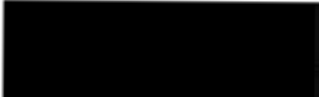
Amici contend, and the government does not contest, that such cases involve acquisition of “communications.” In support of that conclusion, amici point to the broad definition of “electronic communication” in the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510(12) (1986), as “any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic,

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photoelectronic or photooptical system that affects interstate or foreign commerce,’ subject to certain exceptions.” Amici Brief at 26. This Court has previously understood that definition to



For purposes of the abouts limitation, it is important that all of the above-described communications would be in transit to or from a person who is accessing or using the account in question – *i.e.*, the active user – at the time they could be acquired by upstream collection. So long as the active user is properly targeted under Section 702, the acquired communications would be to or from that target and therefore would fall outside the abouts limitation. And generally speaking, the active user of the account in question will be an authorized Section 702 target if the account is properly tasked for acquisition under Section 702. That is because, with a narrow exception for  all users of a facility tasked for acquisition under Section 702 are considered targets. See April 26, 2017, Opinion at 16 n.18; 2016 NSA Minimization Procedures, as Amended Mar. 30, 2017 § 4(c)(3) at 6 n.1 (“any user of a tasked selector is regarded as a person targeted for acquisition”). (If a tasking of a facility is found to be

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improper for some other reason – *e.g.*, because one of its users is a U.S. person – further acquisition would be unauthorized, but not due to the abouts limitation.)

[REDACTED] its procedures, as described above, now require it to limit

acquisition to communications to or from a person targeted under Section 702. For example,

NSA would not acquire [REDACTED]

See Gov't Response at 9.

Amici agree that, so limited, acquisition [REDACTED]

[REDACTED] consistent with the abouts limitation. See Reply Br. of Amici Curiae

("Amici Reply"), June 29, 2018, at 4 (acknowledging that account information "acquired as a result of collecting communications to or from a targeted account [REDACTED]

[REDACTED] would "plainly fall outside" the abouts limitation).

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Based on the foregoing, the Court holds that upstream collection under Section 702 may acquire [REDACTED] without implicating the abouts limitation.

Amici make two recommendations with respect to upstream collection generally: (i) the government should be required to report on how it will comply with the abouts limitation when it tasks any new type of selector to upstream collection; and (ii) the Court should ensure that the government is systematically auditing compliance with the abouts limitation in such collection. See Amici Brief at 34-35. The Court agrees with amici's first recommendation, and it is reflected in the reporting requirements included at the end of this opinion. As to the second, the government is directed to include information in any such report describing steps that will be taken to ensure that tasking the new type of selector will acquire only communications to or from a target. To the extent compliance problems arise in such collection, the government will apprise the Court in response to its compliance-reporting obligations, and the Court will have the opportunity to respond to the situation.

c. Downstream Collection [REDACTED]

The government raises a threshold issue about whether the abouts limitation has any application to downstream collection at all. After answering that general question affirmatively, the Court then assesses whether the downstream acquisition [REDACTED] falls within the abouts limitation.

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~~TOP SECRET//SI//ORCON//NOFORN~~(i) Applicability of Abouts Limitation to Downstream Collection

Relying on legislative history, the government posits that Congress intended that limitation to apply only to reinstatement of upstream abouts collection, as previously conducted by NSA and discontinued in March 2017, and not to affect downstream collection. See Gov't Response at 1-2. For example, a report of the Senate Select Committee on Intelligence (SSCI) described Section 103 of the Reauthorization Act as "codif[ying] the Intelligence Community's (IC's) current prohibition on a subset of FISA collection under [Section 702] known as 'Abouts' Upstream collection." S. Rep. No. 115-182 at 1 (2017). A report of the House Permanent Select Committee on Intelligence (HPSCI) stated:

The Committee understands that the targeting procedures currently used by the NSA to conduct acquisitions pursuant to FISA Section 702 prohibit the acquisition of communications that are not "to" or "from" a FISA Section 702 target. *The new limitation established by Section [103] is intended to codify only current procedures and is not intended to affect acquisitions currently being conducted under FISA Section 702.*

H.R. Rep. No. 115-475, pt. 1, at 20 (2017) (emphasis added). Amici point out that the same general expectation was reflected in statements made by multiple members during floor debate on the Reauthorization Act. See Amici Brief at 22-23 & nn.24-25.

The government would have us take those statements to the bank. Amici largely concede the point of congressional intent, but argue that Congress might not have understood what particular kinds of information are acquired under Section 702. See id. at 28. They note that the legislative history of the Reauthorization Act does not discuss [REDACTED]

[REDACTED] they assert that silence with respect to a form of acquisition of which Congress

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might not have been aware should not be taken to suggest that the abouts limitation does not apply. See id. at 17. The government, in response, points to, among other things, legislative history of the FISA Amendments Act of 2008 and litigation involving challenges to directives brought by providers as evidence that Congress is fully on notice that the government acquires

[REDACTED] under Section 702. See Gov't Response at 2-4, 7.

The Court is not well positioned to assess congressional understanding on this point. In any event, it must be mindful that “[t]he starting point in discerning congressional intent is the existing statutory text.” Laime v. U.S. Trustee, 540 U.S. 526, 534 (2004); accord, e.g., Sebelius v. Cloer, 133 S. Ct. 1886, 1893 (2013) (“As in any statutory construction case, ‘[w]e start, of course, with the statutory text’”) (quoting BP America Production Co. v. Burton, 549 U.S. 84, 91 (2006)). The plain meaning of that text must be given effect if “the disposition required by the text is not absurd.” Laime, 540 U.S. at 534. Here, the text of Section 702(b)(5) does not distinguish between upstream and downstream collection or otherwise refer to how acquisition is conducted. The provision merely describes communications that are not to or from a target, but contain a reference to a target, and subjects the intentional acquisition of such communications to the notification and delay requirements of Section 103(b) of the Reauthorization Act. The Court discerns no absurdity in applying the abouts limitation, by its terms, to downstream collection and will advert to legislative history below only insofar as ambiguities are confronted in doing so. See Barnhill v. Johnson, 503 U.S. 393, 401 (1992) (“appeals to statutory history are well taken only to resolve statutory ambiguity”) (internal quotation marks omitted); see also Mohamad v. Palestinian Authority, 132 S. Ct. 1702, 1709

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(2012) (“[R]eliance on legislative history is unnecessary in light of the statute’s unambiguous language.”) (internal quotation marks omitted); United States v. Gonzales, 520 U.S. 1, 6 (1997) (“Given the straightforward statutory command, there is no reason to resort to legislative history.”).

(ii) Applying Abouts Limitation to Downstream Acquisition

[REDACTED]

The above analysis of how upstream acquisition of such

communications comports with the abouts limitation applies equally to [REDACTED]

effected downstream. The Court concludes that the downstream acquisition of such

communications [REDACTED]

does not implicate the abouts limitation.

[REDACTED]

As discussed above,

amici and the government disagree as to whether the abouts limitation applies to this

information. The government asserts that, consistent with longstanding practice, acquisitions

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under Section 702 can and do include [REDACTED]

and that this was understood by Congress in passing the Reauthorization Act. See Gov't

Response at 2-7.

Amici do not argue that

[REDACTED] cannot be collected under Section 702. Rather,

they assert that

It is worth noting that

[REDACTED] clearly constitute

“communications” for purposes of the abouts limitation. The Court does not understand the

government to assert that

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[REDACTED] The Court finds in any case [REDACTED] are clearly communications for purposes of the abouts limitation. For their acquisition to be authorized under the 2018 Certifications, such communications must be to or from a target.

At the other end of the spectrum, it is conceivable that [REDACTED]

The more difficult question, which is squarely presented here, is whether [REDACTED]

The statutory provisions describing the abouts limitation do not speak to this question, so the Court looks next to the broader statutory text and framework of Section 702.

Upon a determination of exigent circumstances under Section 702(c)(2) or the issuance of a FISC order under Section 702(j)(3), “the [AG] and [DNI] may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.” §702(a). FISA does not define “foreign intelligence information” in terms of the nature of the information itself, but rather the national-security purposes it may serve: for example, the definition includes “information that relates to, and if concerning a United States person is

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necessary to, the ability of the United States to protect against . . . international terrorism, . . . the international proliferation of weapons of mass destruction, [and] . . . clandestine intelligence activities” by foreign powers and their agents, as well as “information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to . . . the national defense or the security of the United States.” 50 U.S.C. § 1801(e)(1)(B)-(C), (2)(A).

Notwithstanding this broad charge to acquire “foreign intelligence information” in furtherance of national-security objectives, there are limitations on how acquisitions authorized under Section 702(a) may be conducted and against whom they may be directed. The abouts limitation is now one of them. It appears in Section 702(b) along with five other limitations on acquisitions authorized under Section 702(a). One of those other limitations, like the abouts limitation, applies to a certain type of communication and provides that an acquisition “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.” § 702(b)(4). The other limitations do not refer to communications. Three of them prohibit the intentional targeting of persons under certain circumstances – *e.g.*, a U.S. person reasonably believed to be outside the United States or anyone known to be in the United States, § 702(b)(1)-(3) – while the remaining one states that acquisitions shall be conducted in a manner consistent with the Fourth Amendment. See § 702(b)(6).

The statute also provides the means of accomplishing acquisitions authorized under Section 702(a): the AG and DNI “may direct, in writing, an electronic communication service

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provider to . . . immediately provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition in a manner that will protect the secrecy of the acquisition and produce a minimum of interference with the services” provided to the target of acquisition. See § 702(i)(1)(A). Section 701 of FISA (codified at 50 U.S.C. § 1881) defines “electronic communication service provider” to include among other entities:

(1) “a telecommunications carrier,” as that term is defined at 47 U.S.C. § 153.e
See § 701(b)(4)(A);e

(2) “a provider of electronic communication service, as that term is defined at [18 U.S.C. § 2510(15)].” § 701(b)(4)(B). Section 2510 defines “electronic communication service” as “any service which provides to users thereof the ability to send or receive wire or electronic communications.” 18 U.S.C. § 2510(15). It defines “electronic communication,” in turn, as “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce,” but excluding “any wire or oral communication” and certain other types of communications not pertinent here. See § 2510(12); ore

(3) “any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored.” § 701(b)(4)(D).e

The government clearly may acquire communications under Section 702 subject to the limitations at § 702(b):

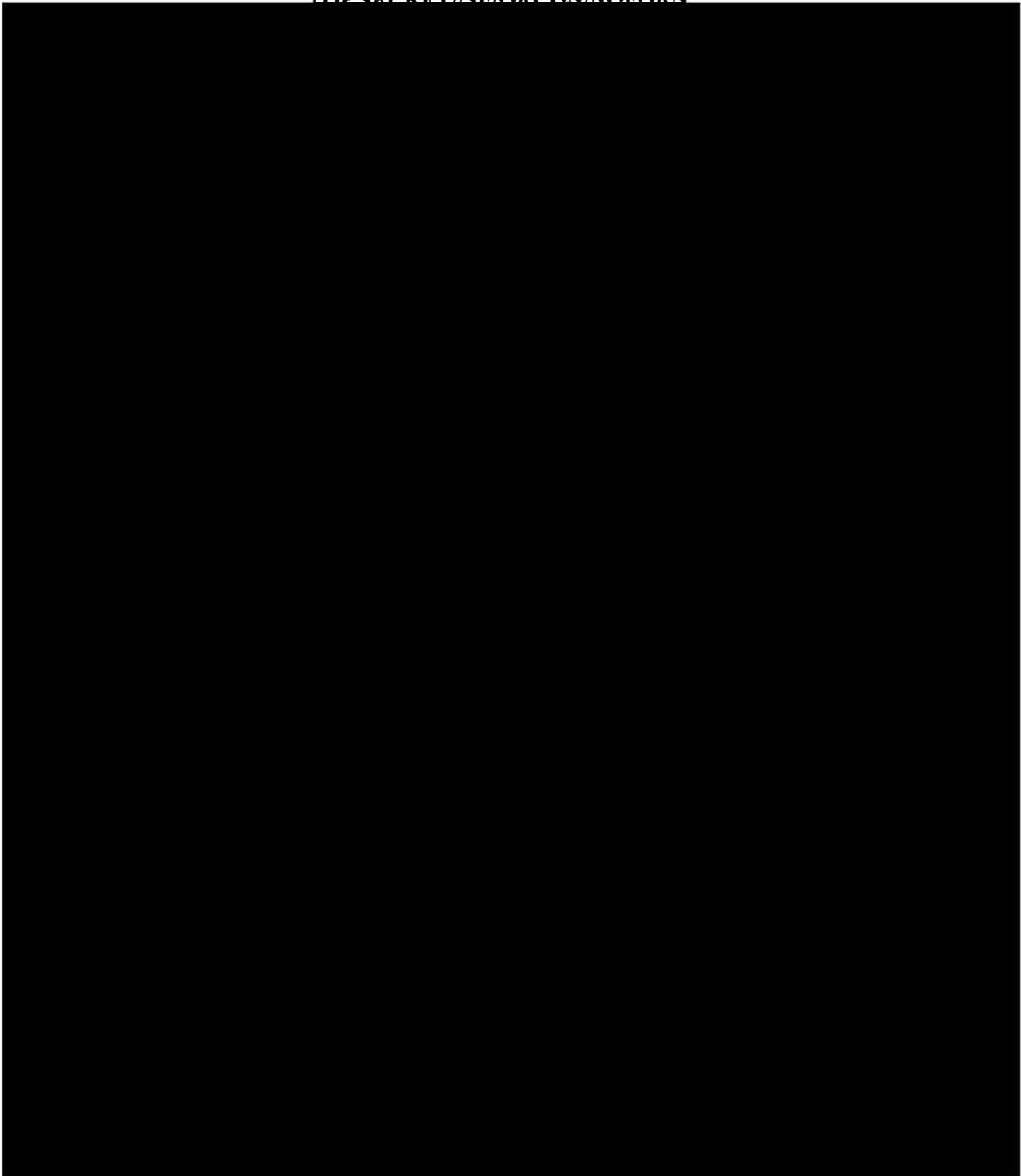
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As the government suggests, see Gov't Response at 6-7, that conclusion draws further support from language in Section 703 of FISA (codified at 50 U.S.C. § 1881b). Section 703, the original version of Section 702, and the definition of "electronic communication service provider" at Section 701(b)(4) were all enacted by the same provision of the FISA Amendments Act of 2008. See Pub. L. No. 110-261, § 101(a)(2), 122 Stat. 2436, 2437-53 (2008). Although Sections 702 and 703 differ in a number of ways – *e.g.*, whether the targets are U.S. persons or non-U.S. persons – there are also similarities. Both sections involve "the targeting" of persons "reasonably believed to be located outside the United States to acquire foreign intelligence information," §§ 702(a), 703(a)(1), and both provide for directing "an electronic communication service provider" to give the government "all information, facilities, or assistance necessary to accomplish [such] acquisition," §§ 702(i)(1)(A), 703(c)(5)(B).

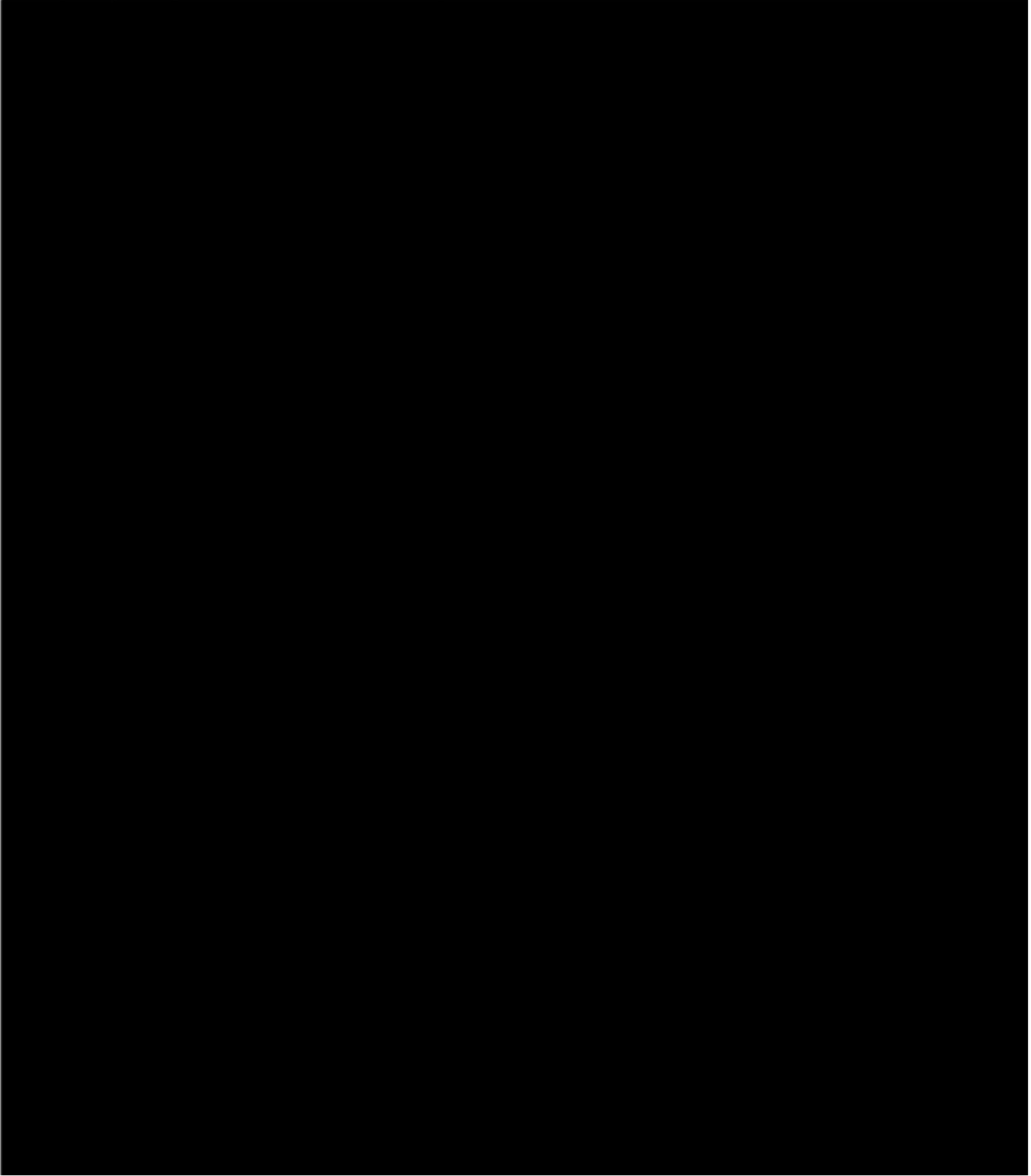
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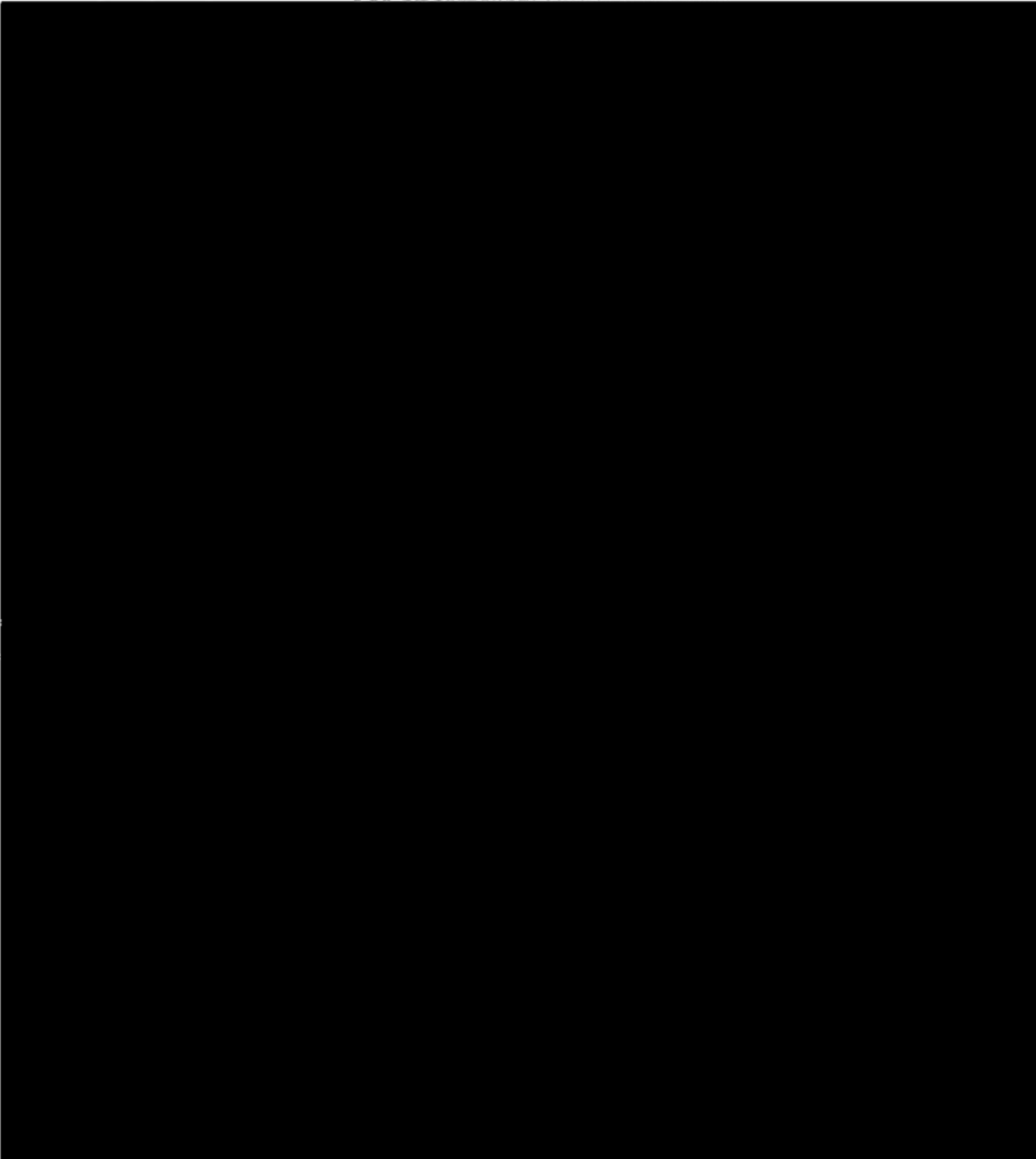
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The government, in contrast, argues that Congress was probably silent on this point because it did not contemplate or intend that the abouts limitation would apply to downstream acquisitions at all. See Gov't Response at 2. Amici concede that there is substantial support in the legislative history of the Reauthorization Act for that proposition. See, e.g. Amici Brief at 28 (“[T]here is considerable legislative history evidence to suggest that Congress understood the statutory restrictions it was putting in place as covering the same universe of communications that the Government had discontinued acquiring in March 2017, and even some evidence that some legislators understood that universe as related to upstream Internet communications.”). As noted above, the record evinces congressional concerns about a form of abouts collection that was unique to NSA upstream collection [REDACTED] and that had been discontinued by NSA at the time the Reauthorization Act was passed. See, e.g. S. Rep. No. 115-182, at 1 (noting that abouts limitation was intended to codify current prohibition of subset of Section 702 collection known as “‘Abouts’ Upstream collection”). The accompanying House Report expressly disavowed any intention “to affect acquisitions currently being conducted under FISA Section 702.” See H.R. Rep. No. 115-475, pt. 1, at 20. There is little doubt that Congress had NSA’s intentional upstream collection of “abouts” communications and MCTs in its crosshairs in enacting the abouts limitation [REDACTED]

The government also points to the legislative history of the FISA Amendments Act of 2008 to the effect that its various provisions were meant to enable [REDACTED]

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[REDACTED]

[REDACTED] in addition to their general oversight of Section 702

implementation, the government notes that congressional committees of jurisdiction have been specifically apprised of adversary proceedings brought by providers challenging directives. The government represents that those directives, and the judicial opinions addressing the provider challenges, have been produced to relevant committees and explicitly refer to [REDACTED]

[REDACTED] See id. at 3 nn.1-3.

To be abundantly clear, the Court does not rely on this history to support a conclusion that the abouts limitation does not apply to downstream collection as a general matter; on the contrary, as noted above, it holds the reverse.

[REDACTED]

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That conclusion does not leave the government at liberty to acquire [REDACTED]
[REDACTED] merely because it contains a reference to an account tasked for acquisition under
Section 702. The FBI Targeting Procedures only permit [REDACTED] that is
“contained in or pertains to” a tasked account. See FBI Targeting Procedures § 1.5 at 3. This
accords with longstanding practice under Title III of FISA. See Gov’t Response at 4-5, 7 n.6. So
understood, the FBI Targeting Procedures do much if not all of the work that could be done by
the abouts limitation if it were to apply [REDACTED]

In most cases, [REDACTED] derives from [REDACTED]
[REDACTED] *to or from* a target, to the extent [REDACTED] See
Part III.B.2.a above. For that independent reason, [REDACTED]

[REDACTED]

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limited information contrasts with the scope of NSA's pre-March 2017 upstream collection of abouts communications, including MCTs, which could acquire the contents of a large number of U.S.-person communications that were neither to nor from a target. See Part III.A above. In the present case, moreover,

Those circumstances

Section 702 target outside the United States, or even the target herself, which would further reduce the likely intrusion on U.S. persons' privacy. The Court is therefore satisfied

is consistent to with both the spirit and the letter of the abouts limitation.

Indeed, even if one assumes that

amici point to no plausible acquisition of that crosses the line. Based on a strained reading of language appearing in certain directives, amici hypothesize that the government might

See July 13, 2018, Proposed Tr. at 30; see also Amici Brief at 27 n.33. (Even in that hypothetical, if the Court understands it correctly, the

communication to the targeted account, so as not to constitute an "about" communication.) Amici further question whether

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[REDACTED] so as to qualify as an

“abouts” communication.) The Court views these examples as hypothetical and, so far as the Court is aware, counterfactual. In short, based on the current record, amici raise no serious concerns that any [REDACTED] is remotely likely to be conducted under the FBI Targeting Procedures would run afoul of the abouts limitation, even if [REDACTED]

That being said, the government notes that the above-described [REDACTED]

[REDACTED] See, e.g., March 27, 2018, Memorandum at 34-35. The Court

understands that [REDACTED]

[REDACTED] Amici suggest that the government should be required to provide more information

with regard to [REDACTED] obtained under Section 702. See, e.g.,

Amici Brief at 37; Amici Reply at 2-3. The Court agrees with amici that a fuller accounting of

[REDACTED] acquired pursuant to Section 702 will inform future

assessments of whether particular acquisitions may be subject to the abouts limitation and are otherwise properly authorized. The government has stated it would “endeavor to accommodate” a request for such an accounting. See July 13, 2018, Proposed Tr. at 23. The Court consequently is ordering the government to provide additional information in this regard, as stated at the end of this opinion.

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~~TOP SECRET//SI//ORCON/NOFORN~~**C. Conclusion**

The Court accordingly finds that [REDACTED]

[REDACTED] not involve the acquisition of abouts communications.

Otherwise, the changes to the government's targeting procedures, see March 27, 2018, Memorandum at 37-43, present no impediment to the Court's finding that the targeting procedures comport with the requirements of § 702(d)(1) and the Fourth Amendment.

IV. THE QUERYING AND MINIMIZATION PROCEDURES**A. Statutory Provisions**

Pursuant to § 702(j)(2)(C)-(D), the Court must assess whether the querying procedures and minimization procedures comply with specified statutory requirements. Those statutory requirements are summarized separately below.

1. Requirements for Querying Procedures

The Reauthorization Act required the government to adopt querying procedures and provided for FISC review of them. See Reauthorization Act § 101(a)(1)(B), (b)(1)(F), 132 Stat. 3. The 2018 Certifications are the first ones subject to that requirement. Id. § 101(a)(2). Specifically, the AG, in consultation with the DNI, must "adopt querying procedures consistent with the requirements of the fourth amendment . . . for information collected" pursuant to a Section 702 certification, see § 702(f)(1)(A), and must "ensure" those procedures "include a technical procedure whereby a record is kept of each United States person query term used for a query." § 702(f)(1)(B). "Query" is defined as "the use of one or more terms to retrieve the unminimized contents or noncontents located in electronic and data storage systems of

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communications of or concerning United States persons obtained through acquisitions authorized” under a Section 702 certification. See § 702(f)(3)(B). The FISC must determine whether querying procedures satisfy the requirements of § 702(f)(1). See § 702(j)(3)(A)-(B).

The Reauthorization Act further amended Section 702 to require the government in specified circumstances to obtain a FISC order before accessing Section 702-acquired information. See Reauthorization Act § 101(a)(1)(B). Those amendments are codified at Section 702(f)(2). Specifically, that new statutory requirement applies:

(1) only to the FBI, not the CIA, NSA or NCTC. See § 702(f)(2)(A);e

(2) only to accessing “the contents of communications . . . that were retrieved pursuant to a query made using a United States person query term.” Id. For purposes of Section 702(f), the term “contents,” “when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication.” 18 U.S.C. § 2510(8) (incorporated by § 702(f)(3)(A)). The new requirement does not limit the authority of the FBI to conduct a lawful query, by which the contents of communications may be retrieved. See § 702(f)(2)(F)(i);e

(3) only with regard to “a query made using a United States person query term that was not designed to find and extract foreign intelligence information.” § 702(f)(2)(A). The new requirement does not limit the FBI’s authority “to review, without a court order, the results of any query . . . that was reasonably designed to find and extract foreign intelligence information, regardless of whether such foreign intelligence information could also be considered evidence of a crime.” § 702(f)(2)(F)(ii); and

(4) only “in connection with a predicated criminal investigation opened by the [FBI] that does not relate to the national security of the United States.” § 702(f)(2)(A). The new requirement does not limit the FBI’s ability “to access the results of queries conducted when evaluating whether to open an assessment or predicated investigation relating to the national security of the United States.” § 702(f)(2)(F)(iii).e

In addition, the FBI need not obtain a Court order if it “determines there is a reasonable belief” that the contents sought “could assist in mitigating or eliminating a threat to life or serious bodily harm.” § 702(f)(2)(E).

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When the triggering conditions are satisfied, FBI personnel must apply for and receive a FISC order before accessing contents retrieved by such a query. See § 702(f)(2)(A). The application must be made upon oath or affirmation and approved by the AG based upon a finding that the application satisfies the statutory requirements. See § 702(f)(2)(C). It must include “a statement of the facts and circumstances relied upon . . . to justify the belief . . . that the contents” sought “would provide evidence of: (I) criminal activity; (II) contraband, fruits of a crime, or other items illegally possessed by a third party; or (III) property designed for use, intended for use, or used in committing a crime.” § 702(f)(2)(C)(ii). Upon such an application, “the Court shall enter an order approving the accessing of the contents of communications” if it “finds probable cause to believe that such contents would provide any of the evidence” described above. See § 702(f)(2)(D). If such an order is not obtained when required, information concerning a U.S. person obtained through the pertinent query may not be used in a criminal proceeding against that person unless the AG determines the criminal proceeding relates to the national security or one of several specified serious crimes. See 50 U.S.C. § 1881e(a)(2)(A).

2. Requirements for Minimization Procedures

Section 702(e)(1) requires minimization procedures that “meet the definition of minimization procedures under [50 U.S.C. § 1801(h) or 1821(4)].” That definition requires

(1) specific procedures . . . 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 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;

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(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[.]

§ 1801(h). The definition of “minimization procedures” at § 1821(4) is substantively identical to the definition at § 1801(h) (although § 1821(4)(A) refers to “the purposes . . . of the particular physical search”). For simplicity, subsequent citations refer only to § 1801(h).

Each agency having access to “raw,” or unminimized, information obtained under Section 702 is governed by its own set of minimization procedures in handling that information. (This opinion uses the terms “raw” and “unminimized” interchangeably. The NCTC Minimization Procedures define “raw” information as “section 702-acquired information that (i) is in the same or substantially the same format as when NSA or FBI acquired it, or (ii) has been processed only as necessary to render it into a form in which it can be evaluated to determine whether it reasonably appears to be foreign intelligence information or to be necessary to understand foreign intelligence information or assess its importance.” NCTC Minimization Procedures § A.3.d at 2).

The minimization procedures submitted in the Prior Dockets contained rules for querying raw Section 702 information. See, e.g., 2016 FBI Minimization Procedures § III.D at 11-12. In response to the enactment of § 702(f), the AG and DNI have adopted querying procedures for each agency that appear in a document separate from the relevant set of minimization procedures.

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See page 6 above. Each agency's procedures nonetheless make clear that the querying and minimization procedures are to be read and applied together. See, e.g., NSA Querying Procedures § I at 1 ("These querying procedures should be read and applied in conjunction with [the separate] minimization procedures, and nothing in these procedures permits any actions that would otherwise be prohibited by those minimization procedures."); FBI Querying Procedures §d at 1 (same); NSA Minimization Procedures § I at 1 ("These minimization procedures apply in addition to separate querying procedures. . . . [They] should be read and applied in conjunction with those querying procedures, and nothing in these procedures permits any actions that would otherwise be prohibited by those querying procedures."); FBI Minimization Procedures § I.A at 1 (same). The Court therefore will assess whether each agency's minimization procedures, in conjunction with the corresponding querying procedures, satisfy § 1801(h).

B. Recordkeeping Requirement for U.S.-Person Query Terms

The statute's text plainly requires the relevant agencies, including the FBI, to keep records of U.S.-person query terms used to query Section 702 information. The FBI's practice of keeping records of all query terms in a manner that does not differentiate U.S.-person terms from other terms is inconsistent with that requirement. The Court begins with the statute and a textual analysis and then separately explains why the government's arguments regarding text, legislative history, and policy considerations do not alter the outcome.

1.e Background

As noted above, the querying procedures must "include a technical procedure whereby a record is kept of each United States person query term used for a query." § 702(f)(1)(B). The

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querying procedures for each agency define “United States person query term” as “a term that is reasonably likely to identify one or more specific United States persons,” which “may be either a single item of information or information that, when combined with other information, is reasonably likely to identify one or more specific United States persons.” CIA Querying Procedures § III.A at 1; NCTC Querying Procedures § III.A at 1; FBI Querying Procedures § III.A at 1; NSA Querying Procedures § III.A at 1. Depending on context, “names or unique titles,” “government-associated personal or corporate identification numbers,” [REDACTED]

[REDACTED] and “street address, telephone, and [REDACTED]” could all constitute United States-person query terms. See CIA Querying Procedures § III.A at 2; NCTC Querying Procedures § III.A at 2; FBI Querying Procedures § III.A at 2; NSA Querying Procedures § III.A at 2.e

Each agency’s querying procedures require the agency to “generate and maintain an electronic record of each United States person query term used for a query of unminimized information acquired pursuant to section 702.” CIA Querying Procedures § IV.B.1 at 3; NCTC Querying Procedures § IV.B.1 at 3; FBI Querying Procedures § IV.B.1 at 4; NSA Querying Procedures § IV.B.1 at 4. If, however, “it is impracticable” for a particular system “to generate an electronic record,” or if “an unanticipated circumstance . . . prevents the generation” of an electronic record, the agency “must generate and maintain a written record of each United States person query term that contains the same information required for electronic records.” CIA Querying Procedures § IV.B.3 at 4; NCTC Querying Procedures § IV.B.3 at 4; FBI Querying Procedures § IV.B.2 at 4; NSA Querying Procedures § IV.B.2 at 4. Agencies may run queries on

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systems that do not generate electronic records only when necessary for “technical, analytical, operational, or security reasons.” CIA Querying Procedures § IV.B.3 at 4; NCTC Querying Procedures § IV.B.3 at 4; FBI Querying Procedures § IV.B.2 at 4; NSA Querying Procedures § IV.B.2 at 4. The agencies must maintain their electronic and written records for at least five years from the date of the query (or in the case of NSA for at least five years from the date of approval to use a United States-person query term to query content information). See CIA Querying Procedures § IV.B.4 at 4; NCTC Querying Procedures § IV.B.4 at 4; FBI Querying Procedures § IV.B.3 at 4-5; NSA Querying Procedures § IV.B.3 at 4.

For the CIA, NCTC, and the FBI, the electronic record must include “the query term(s) used,” “the date of the query,” and “the identifier of the user who conducted the query.” CIA Querying Procedures § IV.B.1 at 3; NCTC Querying Procedures § IV.B.1 at 3; FBI Querying Procedures § IV.B.1 at 4. NSA’s use of United States-person query terms “to identify and select unminimized section 702-acquired content” information requires prior approval by its Office of General Counsel. See NSA Querying Procedures § IV.A at 3. The duration of such approvals may not exceed one year, but may be extended in increments of one year. Id. The electronic record for NSA’s use of a United States-person query term accordingly must include “the query term(s) used or approved”; “the date of the query or approval of the query terms(s)”; “the identifier of the user who conducted the query or sought approval of the query term(s)”; and “in the case of content queries, the approving official in NSA’s Office of General Counsel and duration of the approval.” § IV.B.1 at 4.

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Unlike the other agencies, the FBI “intends to satisfy the record-keeping requirement by keeping a record of *all* queries” of un-minimized Section 702 information. See FBI Querying Procedures § IV.B.3 at 4 n.4 (emphasis added). The resulting FBI records, in other words, will not distinguish between United States-person query terms and other query terms. See March 27, 2018, Memorandum at 27. In fact, the government represents that the FBI already keeps records of all Section 702 query terms without distinguishing between U.S.-person query terms and non-U.S.-person query terms and contends that Section 702(f)(1)(B) requires no change. See id. at 26.

2. Application of Section 702(f)(1)(B) to FBI Recordkeeping Practices

The issue presented by the FBI’s current recordkeeping is straightforward: Is the requirement for “a technical procedure whereby a record is kept of each United States person query term used for a query” satisfied by a procedure that results in records that do not indicate whether terms are United States-person query terms? The plain meaning of the statutory text suggests that the answer is “no.”

a. Textual Analysis

A “record” serves to memorialize information. See, e.g., Black’s Law Dictionary (10th ed. 2014) (defining “record” as, among other things, “1. A documentary account of past events, usu. designed to memorialize those events”); Webster’s II New College Dictionary 927 (2001) (defining “record” as “1. a. An account, as of information, set down esp. in writing as a way of preserving knowledge. b. Something on which such an account is made. . . 2. Information or data on a specific subject collected and preserved”). Section 702(f)(1)(B) identifies “each United

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States person query term used for a query” as the information that must be memorialized.

The government argues that records that document *all* terms used to query Section 702 information, regardless of whether the term is a United States-person query term or not, satisfies Section 702(f)(1)(B) because that provision “does not include any other term, such as ‘separately’ or ‘segregated,’ specifying that United States person query terms must be retained apart from other queries.” March 27, 2018, Memorandum at 27; see also Gov’t Response at 28-29 (statute “does not include any additional language specifying that U.S. person query terms must be retained separate and apart from other queries”). The government’s argument, however, misses the essential aim of the recordkeeping requirement, which is to memorialize when a United States-person query term is used to query Section 702 information. Just as records of all applicants admitted to a university are not records of out-of-state applicants admitted if they do not differentiate out-of-state from in-state, records that do not memorialize whether a query term used to query Section 702 data meets the definition of a United States-person query term do not preserve the information specifically required by Section 702(f)(1)(B).

Section 702(f)(1)(B), moreover, imposes a recordkeeping requirement only for queries that use United States-person query terms, not for all queries. It is not reasonable to expect Congress to have focused on the circumstance of an agency’s generating records for *all* its Section 702 query terms and to have explicitly reiterated that, in such a case, the records must document which of those query terms are United States-person query terms. The language Congress chose to enact clearly conveys that the records are meant to memorialize when United

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States-person query terms are used, and the FBI is obligated to keep records that do so, regardless of whether it also keeps records for other query terms.

The government also argues that, in light of an exemption from certain aspects of public reporting required by Section 603 of FISA (codified at 50 U.S.C. § 1873), Section 702(f)(1)(B) should not be read as requiring the FBI to alter its current recordkeeping practices. Section 603 requires the DNI to report publicly on, among other things, “the number of search terms concerning a known United States person used to retrieve the unminimized contents of electronic communications or wire communications obtained” under Section 702 and “the number of queries concerning a known United States person of unminimized noncontents information relating to electronic communications or wire communications obtained” under Section 702, §603(b)(2)(B)-(C); however, “information or records held by, or queries conducted by,” the FBI are explicitly exempted from that reporting, except insofar they relate to FISC orders issued under Section 702(f)(2). See § 603(d)(2)(A). The government attributes this exemption of FBI queries to congressional recognition that the FBI lacked the capacity to provide the relevant information. See March 27, 2018, Memorandum at 29 (quoting H.R. Rep. No. 114-109, pt. 1, at 26 (2015) (“the FBI is exempted from reporting requirements that the agency has indicated it lacks the capacity to provide”)).

The government suggests that because Congress generally exempted FBI queries from the DNI’s annual reporting (only requiring reporting for FBI queries that relate to Section 702(f)(2) orders), the recordkeeping requirement of Section 702(f)(1)(B) should be read to make similar allowances for the FBI’s limited capabilities. See March 27, 2018, Memorandum at 30

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(Congress “presumably would have included such queries in the statistics required to be reported in the annual DNI report” if it had “intended for FBI to distinguish and separately track United States person queries.”). The premise of the government’s argument is that the only purpose for keeping records that identify United States-person query terms is to satisfy the DNI’s reporting obligations. That premise is belied by the government’s own briefing, which acknowledges oversight of the agencies’ querying practices as another purpose of Section 702(f)(1)(B)’s recordkeeping requirement. See March 27, 2018, Memorandum at 27. Because the recordkeeping requirement serves a purpose separate from the reporting obligations, there is no inconsistency between exempting from public reporting the number of U.S.-person queries conducted by the FBI and requiring the FBI to keep records that identify which Section 702 query terms are United States-person query terms. The explicit exemption set forth in Section 603(d)(2)(A) demonstrates, moreover, that if Congress intended for Section 702(f)(1)(B) to make similar allowances for the FBI, it would have been easy to provide for them expressly.

In support of its position, the government also cites Section 112 of the Reauthorization Act, which requires the Inspector General of DOJ to report to Congress on the FBI’s implementation of querying procedures within one year of their approval by the FISC. See March 27, 2018, Memorandum at 31. In addition to requiring the Inspector General to assess several aspects of FBI’s implementation of the querying procedures, Section 112 requires the Inspector General to assess any

impediments, including operational, technical, or policy impediments, for the [FBI] to count -

(A) the total number of queries where the FBI subsequently accessed information acquired under . . . section 702;e

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(B) *the total number of such queries that used known United States person identifiers; and*

(C) the total number of queries for which the [FBI] received an order of the Foreign Intelligence Surveillance Court pursuant to [Section 702(f)(2)].^e

§ 112(b)(8) (emphasis added). The government argues that Congress recognized “the limitation of FBI systems’ technical record-keeping function” when it enacted Section 112, and that this provision makes clear it “did not intend to impose any new obligation on the FBI to differentiate queries based on United States person status.” March 27, 2018, Memorandum at 31; see also Gov’t Response at 30 (“If, as amici claim, the Reauthorization Act newly mandates that FBI separately track U.S. person query terms, a new statutory directive requiring an IG report discussing ‘impediments, including operational, technical or policy impediments’ to do that very thing would be pointless.”). The government’s argument ignores that Section 112(b)(8)(C) of the Reauthorization Act directs the Inspector General to report on impediments to the FBI’s counting of U.S.-person queries for which it receives a FISC order under Section 702(f)(2) – information the DNI is explicitly required to report under Section 603 of FISA, as amended by the Reauthorization Act. See FISA § 603(b)(2)(B) & (d)(2)(A), as amended by Reauthorization Act § 102(b)(2)(B)(ii).^e

Amici contend that Congress did not acquiesce in current FBI practices, but rather imposed new recordkeeping requirements and deputized the Inspector General to scrutinize how the FBI implements them. See Amici Brief at 80-81. Amici have the better of the exchange. Congress can sensibly be understood to have directed the Inspector General to assess impediments toward the FBI’s counting queries that employ U.S.-person identifiers as query

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terms (Reauthorization Act § 112(b)(8)(B)), while simultaneously requiring the FBI and other agencies to maintain records necessary to perform that count.

b. Legislative History

The government further argues that the legislative history of the Reauthorization Act supports its conclusion that the FBI's recordkeeping is consistent with Section 702(f)(1)(B). Even if one assumes *arguendo* that the statute is reasonably susceptible to the government's interpretation, such that ambiguity justifies recourse to legislative history, see Part III.B.2.c(i) above, the government's arguments are unavailing.

The government points to the following statement in a HPSCI report:

[Section 702(f)(1)(B)] does not impose a requirement that an Intelligence Community element maintain records of *United States person query terms* in any particular manner, so long as appropriate records are retained and thus available for subsequent oversight. This section ensures that the manner in which [an agency] retains records of *United States person query terms* is within the discretion of the Attorney General, in consultation with the Director of National Intelligence and subject to the approval of the FISC.

H.Rep. No. 115-475, pt. 1, at 18 (emphasis added) (quoted in March 27, 2018, Memorandum at 27). The government suggests that the FBI's recordkeeping practices reflect a permissible exercise of the discretion of the AG and the DNI "to determine *how* an agency would keep records of queries in a manner that allows for meaningful oversight." March 27, 2018, Memorandum at 27 (emphasis added). But the issue presented is *whether* the FBI's records will memorialize the information required by the statute. The passage from the HPSCI report clearly indicates that, however records are kept, they must be "records of United States query terms." It provides no reason to think that (1) HPSCI understood "records of United States person query

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terms” to include records that do not indicate whether query terms are United States-person query terms, or (2) HPSCI intended to leave that determination to executive-branch discretion. In addition, the first sentence of the paragraph from which the above quotation is taken describes the required records in language that closely tracks the statutory text: “Section 201 [of the Reauthorization Act] further mandates that all querying procedures include a provision requiring that a record is kept for *each United States person query term used for a query* of FISA Section 702 data.” H. Rep. No. 115-475, pt. 1, at 18 (emphasis added). HPSCI’s reiteration of the “U.S. person” nature of query terms that must be recorded makes clear that the discretionary manner in which an agency keeps the required records does not include the freedom to decide not to record the fact that a query term is a United States-person query term.

The report’s reference to “subsequent oversight,” moreover, is consistent with an intent that the records document use of United States-person query terms, as such, particularly in view of HPSCI’s acknowledgment “that certain lawmakers and privacy advocates worry about the ability of the Intelligence Community to query lawfully acquired data using query terms belonging to United States persons.” *Id.* at 17. Such oversight would be best served if the records indicate whether a particular query term is a United States-person query term – *i.e.*, a term reasonably likely to identify one or more specific U.S. persons.

The government also relies on a statement in the same report that “the Committee believes that the Intelligence Community should have separate procedures documenting their *current* policies and practices related to the querying of lawfully acquired FISA Section 702 data.” *Id.* at 17-18 (emphasis added) (quoted in March 27, 2018, Memorandum at 28). The

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government argues that, because “Congress understood the FBI’s existing practice . . . and the limitations of FBI systems’ technical record-keeping,” the reference to query procedures that document *current* policies and practices demonstrates HPSCI’s intent that the FBI need not alter its recordkeeping in response to Section 702(f)(1)(B). See March 27, 2018, Memorandum at 26, 28. But the report’s generic reference to current policies and practices of the Intelligence Community appears in a discussion of the general requirement to adopt querying procedures, not the specific recordkeeping requirements of Section 702(f)(1)(B). The report, furthermore, does not mention any technical limitations of FBI systems or describe, let alone endorse, the FBI-specific practice of keeping records that do not identify which query terms are United States-person query terms. Neither the plain language of the statute nor the plain language of the report cited by the government supports its contention that Congress intended no changes to FBI’s existing querying practices in response to the Reauthorization Act.

c. Policy Considerations

Finally, the government contends that requiring the FBI to maintain records that differentiate United States-person query terms from other Section 702 query terms will have adverse consequences. See Supplemental FBI Declaration at 8-15. In his declaration, the Director of the FBI does not describe as a source of difficulty any “limitations of FBI systems’ technical record-keeping functions.” March 27, 2018, Memorandum at 26, 28. Instead, he posits that such a requirement would leave the FBI with two possible means of implementation, neither of which is desirable. Under one option, FBI personnel would conduct research in FBI holdings to inform their assessments of which proposed query terms are United States-person query terms

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for purposes of Section 702(f)(1)(B). See Supplemental FBI Declaration at 8-9. The Director anticipates that approach would divert resources from investigative work, delay assessment of threat information, and discourage its personnel from querying unminimized FISA information, to the detriment of public safety. Id. at 9-12. He also describes an alternative approach whereby personnel would be allowed to forgo such research and rely solely on their “personal knowledge” in making those assessments. Id. at 12. The Director expects that practice would “result in inconsistent and unreliable information in FBI systems,” id., thereby complicating other aspects of the FBI’s work – *e.g.*, implementing its Section 702 targeting procedures. Id. at 13-14. The Director also expresses concern that such an approach would be inconsistent with the FBI’s “strong culture that places great emphasis on personnel consistently conveying true and accurate information.” Id. at 14.

All of those points raise policy considerations regarding the advisability of requiring the FBI to keep records that identify United States-person query terms it has used to query Section 702 information. The Court, it should be emphasized, makes no determination as to the advisability of a particular policy on this subject. Regardless of how persuasive the FBI’s considerations may be, the Court is not free to substitute its understanding of sound policy – or, for that matter, the understanding of the Director of the FBI – for the clear command of the statute. See 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 270 (2009) (“Absent a constitutional barrier, ‘it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress.’”) (quoting Florida Dept. of Revenue v. Picadilly Cafeterias, Inc., 554 U.S. 33, 52 (2008)); Barnhart v. Sigmon Coal Co., 534 U.S. 438, 462 (2002) (“We will not alter

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the [statutory] text in order to satisfy the policy preferences of the Commissioner [of Social Security].”); Herb’s Welding, Inc. v. Gray, 470 U.S. 414, 427 (1985) (“[I]f Congress’ . . . decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them.”). In sum, the Court is it is merely enforcing what Section 702(f)(1)(B) plainly imposes.

d. Conclusion

In short, the Court should follow the “‘first canon’” of statutory construction: to presume that Congress says in a statute what it means and means in a statute what it says. Barnhart, 534 U.S. at 461-62 (quoting Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 253-54 (1992)). Section 702(f)(1)(B) plainly states that the querying procedures must include “a technical procedure whereby a record is kept of each United States person query term used for a query.” That requirement is not satisfied by procedures under which the FBI does not keep such records in a readily identifiable manner. The Court accordingly finds that the FBI Querying Procedures do not comport with Section 702(f)(1)(B).

The Supplemental FBI Declaration touches on another point that the Court will address because it may bear on curing this deficiency. Section III.B of the FBI Querying Procedures provides for certain presumptions regarding U.S.-person status. FBI Querying Procedures § III.B at 3. The Declaration, however, discounts their potential utility in alleviating the problems anticipated by the FBI because “they would generally require FBI personnel to evaluate information in FBI holdings before applying a presumption.” Supplemental FBI Declaration at 13 n.7. But the government can revise those procedures to address specifically what, if any,

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steps its personnel need to take before relying on presumptions in deciding what terms to treat as United States-person query terms for purposes of Section 702(f)(1)(B). Such revised procedures, of course, would be subject to FISC review pursuant to Section 702(j). In any event, there are clearly some queries for which FBI personnel *know* they are using United States-person query terms, and the obligation to keep adequate records of those terms pursuant to Section 702(f)(1)(B) will be readily apparent.

Finally, the Court does not hold that the FBI must immediately deploy a comprehensive technical means of generating appropriate records. So long as it is taking serious steps toward implementing such technical means, it may rely on “written” records, as described at FBI Querying Procedures § IV.B.2 at 4.

C. FBI Querying Practices and Statutory and Constitutional Requirements

The Court next independently finds that the FBI’s repeated non-compliant queries of Section 702 information preclude (1) a determination that its minimization and querying procedures are reasonably designed to minimize the retention, and prohibit the dissemination, of private information concerning U.S. persons, consistent with the government’s foreign-intelligence needs, and (2) a finding that such procedures are consistent with the requirements of the Fourth Amendment.

This section begins by describing the role of querying rules within minimization procedures and discussing the reasonableness of the FBI’s querying standard, as written. The Court then reviews numerous instances of non-compliance with that standard and three factors that contribute to the Court’s concerns about the FBI’s querying practices. The Court then

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considers steps the government has taken to respond to non-compliant queries, including requiring FBI personnel to obtain attorney approval before examining content information returned by certain categorically justified queries, and concludes they are insufficient to support the required findings. Finally, the Court examines amici's proposal regarding FBI documentation of query justifications, adoption of which the Court believes would remedy the deficiency.

1. Querying and Effective Minimization

The Foreign Intelligence Surveillance Court of Review (FISCR) has instructed:

By minimizing *retention*, Congress intended that "information acquired, which is not necessary for obtaining[,] producing, or disseminating foreign intelligence information, be destroyed where feasible." Furthermore, "[e]ven with respect to information needed for an approved purpose, *dissemination* should be restricted to those officials with a need for such information."

In Re Sealed Case, 310 F.3d 717, 731 (FISCR 2002) (per curiam) (quoting H.R. Rep. No. 95-1283, pt. 1 at 56 (1978) and adding emphasis; internal citations omitted).

Notwithstanding that preference for destruction of non-pertinent information when feasible, the FISC has approved minimization procedures that permit retention for considerable periods of time, even after information has been reviewed and not found to relate to foreign intelligence or evidence of crime. See, e.g., 2016 FBI Minimization Procedures § III.G.1.b at 23 (such information may be retained for up to 15 years, with enhanced access controls in place after ten years). The FBI minimization procedures now before the Court propose the same approach. See September 18, 2018, FBI Minimization Procedures § III.D.4.c at 17 (same). The reasonableness of such a retention period rests in part on the "complex and time-intensive nature

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of piecing together, and making sense of, the myriad pieces of information gathered during a lengthy surveillance.” United States v. Mubayyid, 521 F. Supp. 2d 125, 134 (D. Mass. 2007) (finding retention of FISA intercepts for ten years reasonable in circumstances of case). But it also importantly depends on querying rules and other access restrictions that guard against the indiscriminate review and use of U.S.-person information. See [REDACTED] Op. and Order, May 17, 2016 (“May 17, 2016, Opinion”) at 25 (“because raw FISA-acquired information [REDACTED] may be accessible by large numbers of persons in the FBI for a wide variety of investigative and analytical purposes, it is especially important for U.S. person information on those systems to be subject to appropriate access restrictions,” including querying rules); id. at 43 (“substantive standards for querying data” “guard against indiscriminate or improper accessing or use of U.S. person information”); [REDACTED] Mem. Op. and Order, Nov. 6, 2015 (“November 6, 2015, Opinion”) at 24 (relying on “several important restrictions” of CIA and NSA minimization procedures for §a702, “[m]ost notably” that all terms used to query the contents of communications must be “reasonably likely to return foreign intelligence information”) (internal quotation marks omitted).

The government notes that agency personnel do not need to run queries to find and examine Section 702 information concerning United States persons. They can, for example, review Section 702 data on a communication-by-communication basis and thereby encounter U.S.-person information. See Gov’t Response at 14-15. Despite the availability of that alternative, the rules for U.S.-person queries – *i.e.*, queries that use a “United States person query term” as defined at FBI Querying Procedures § III.A – are important to proper minimization of

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Section 702 information. The government's own submissions emphasize the operational importance of the FBI being able to *query* information and the large number of queries of FISA information conducted by the FBI. See, e.g., Supplemental FBI Declaration at 6 (“[d]atabase queries are a critical tool,” and in one system during fiscal year 2017, FBI ran approximately 3.1 million queries “against raw FISA-acquired information . . ., including section 702-acquired information”). Given the importance and prevalence of querying, it is a logical focus for efforts to balance protection of U.S. persons' privacy interests against foreign-intelligence needs. The enactment of Section 702(f) indicates Congress drew a similar conclusion.

Indeed, the rules for U.S.-person queries are especially important for minimization of Section 702 information. Section 702 provides a means for the government to target individuals who are reasonably believed to be non-U.S. persons located outside the United States. See §702(b)(1), (3) (prohibiting intentional targeting of U.S. persons and any persons located inside the United States); (d)(1)(A) (requiring targeting procedures reasonably designed to ensure only persons reasonably believed to be located outside United States are targeted). The government may acquire the full contents of communications under Section 702 without a finding of probable cause, as is needed for electronic surveillance and physical search under FISA. See 50 U.S.C. §§ 1805(a)(2), 1824(a)(2). When the government queries Section 702 data to identify and examine information about a particular U.S. person, moreover, it typically has an investigative or analytical interest regarding that person, who necessarily was not a target of the acquisition. As suggested by amici, it can also result in a further intrusion into the privacy of such U.S. persons, who may have enjoyed “the protection of anonymity” until information concerning them was

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retrieved by use of an individualized U.S.-person query directed at them. See Amici Reply at 9. And FBI queries intended to retrieve evidence of crime may be conducted in the course of law-enforcement investigations that are unrelated to national-security threats.

The FBI's querying practices under Section 702 are especially important because the FBI conducts many more U.S.-person queries than the other agencies. In 2017, NCTC, the CIA, and NSA collectively used approximately 7500 terms associated with U.S. persons to query content information acquired under Section 702, see Amici Brief at 51 n.47; Gov't Response at 32, while during the same year FBI personnel on a single system ran approximately 3.1 million queries against raw FISA-acquired information, including section 702-acquired information. See Supplemental FBI Declaration at 6. (As explained above in Part IV.B.1, FBI records do not differentiate between U.S.-person query terms and other query terms, but given the FBI's domestic focus it seems likely that a significant percentage of its queries involve U.S.-person query terms.) The large number of U.S.-person queries run by the FBI makes its querying practices significant, despite its receiving only a small percentage of the total information acquired under Section 702. See Gov't Response at 26-27 (it was reported in October 2017 that FBI received information for approximately 4.3% of persons targeted under Section 702).

2. The FBI's Querying Standard

The FBI Querying Procedures require: "Each query of FBI systems containing unminimized content or noncontent information acquired pursuant to section 702 of [FISA] must be *reasonably likely to retrieve foreign intelligence information*, as defined by FISA, or *evidence of a crime*, unless otherwise specifically excepted in these procedures." FBI Querying

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Procedures § IV.A.1 at 3 (emphasis added). (Certain of those exceptions are discussed below in Part IV.D.) As written and in the context of restrictions on the use and disclosure of U.S.-person information within the FBI Minimization Procedures, that querying standard is consistent with the statutory definition of minimization procedures; however, as implemented by the FBI, it is not.

The minimization procedures now in effect articulate the standard for FBI queries of Section 702 information differently: “To the extent reasonably feasible,” FBI personnel “must design” queries of unminimized Section 702 information “to find and extract foreign intelligence information or evidence of a crime.” 2016 FBI Minimization Procedures § III.D at 11. The government represents that “[i]n practice, the applicable standard remains the same” March 27, 2018, Memorandum at 24. Counsel for the government has characterized the FBI querying standard as a high one, having three elements: (1) a query cannot be “overly broad,” but rather must be designed to extract foreign-intelligence information or evidence of crime; (2) it must “have an authorized purpose” and not be run for personal or improper reasons; and (3) there must be “a reasonable basis to expect [it] will return foreign intelligence information or evidence of crime.” July 13, 2018, Proposed Tr. at 9; see also March 27, 2018, Memorandum at 25 (there must be “a reasonable basis to believe the query is likely to return foreign intelligence information or, in the case of the FBI only, evidence of a crime.”).

The FBI querying standard – as written and as explicated in the manner summarized above – presents no impediment to finding that the FBI Querying Procedures and FBI Minimization Procedures satisfy the definition at § 1801(h). Queries that are reasonably likely to

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return foreign-intelligence information, are conducted for that purpose, and avoid overbreadth should contribute to the minimization of private U.S.-person information, consistent with foreign-intelligence needs, as contemplated by § 1801(h)(1). (The same conclusion holds for the querying standards applied by the other agencies, which require queries to “be reasonably likely to retrieve foreign intelligence information,” unless specifically excepted. See NCTC Querying Procedures § IV.A at 3; CIA Querying Procedures § IV.A at 3; NSA Querying Procedures § IV.A at 3.) FBI queries that are reasonably likely to return evidence of crime comport with § 1801(h) for reasons explained at pages 30-36 of the November 6, 2015, Opinion and adopted herein.

3.e Non-Compliance with the Querying Standard

FISC review of minimization procedures under Section 702 is not confined to the procedures as written; rather, the Court also examines how the procedures have been and will be implemented. See, e.g., Docket No. [REDACTED] Mem. Op., Apr. 7, 2009, at 22-24; Docket Nos. [REDACTED] Mem. Op., Aug. 30, 2013, at 6-11. In this case, the government contends that the FBI’s implementation of the querying standard has provided appropriate protection for U.S. persons’ privacy. See Gov’t Response at 32-33. For reasons explained below, the Court does not agree.

Since April 2017, the government has reported a large number of FBI queries that were not reasonably likely to return foreign-intelligence information or evidence of crime. In a number of cases, a single improper decision or assessment resulted in the use of query terms corresponding to a large number of individuals, including U.S. persons. In brief:

- During March 24-27, 2017, the FBI’s [REDACTED] conducted queries using identifiers for over 70,000 communication facilities “associated with”

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persons with access to FBI facilities and systems. See Nov. 22, 2017, Notice at 2. [REDACTED] proceeded with those queries notwithstanding advice from the FBI Office of General Counsel (OGC) that they should not be conducted without approval by OGC and the National Security Division (NSD) of the Department of Justice. Id. at 3. The FBI did not examine the results of those queries. Id. [Most of the notices of non-compliant queries cited herein have a title including the language: "Notice of Compliance Incident[s] Regarding FBI's Querying of Raw FISA-Acquired Information Including Information Acquired Pursuant to Section 702 of FISA, and Storage of those Query Results." Those notices are cited in the form of "[Filing Date] Notice." If multiple notices were filed on the same date, their citations are distinguished by reference to the relevant FBI office.]

- On December 1, 2017, the FBI's [REDACTED] conducted over 6,800 queries using the Social Security Numbers of individuals [REDACTED]. See [REDACTED] Apr. 27, 2018, Notice at 2.

- During December 7-11, 2017, [REDACTED] also conducted over 1,600 queries using identifiers of persons [REDACTED]. See [REDACTED] Apr. 12, 2018, Notice at 2. The [REDACTED] who conducted those queries advised he did not intend to run them against raw FISA information, but nonetheless reviewed raw FISA information returned by them. Id.

- On February 5 and 23, 2018, the FBI's [REDACTED] conducted approximately 30 queries regarding potential [REDACTED] sources, e.g., persons who [REDACTED] where the subject of a [REDACTED] investigation was [REDACTED]. See June 7, 2018, Notice at 2-3.

- On February 21, 2018, the FBI's [REDACTED] conducted approximately 45 queries to retrieve information on persons [REDACTED] under consideration as potential sources of information. See [REDACTED] May 21, 2018, Notice at 2-3.

The government acknowledges that such queries generally resulted from "fundamental misunderstandings by some FBI personnel [about] what the standard 'reasonably likely to return foreign intelligence information' means." July 13, 2018, Proposed Tr. at 49.

In addition, the government has reported queries of information believed to have been obtained under Title I or V of FISA (not Section 702) that it characterizes as potentially non-compliant. See Prelim. Notice of Possible Compliance Incident Regarding FBI's Querying of Raw FISA-Acquired Information, Apr. 27, 2018 [REDACTED] Apr. 27, 2018, Notice"). Those queries were governed by a querying standard that requires FBI personnel, "[t]o the extent reasonably feasible," to "design . . . queries to find and extract foreign intelligence information or evidence of a crime." Id. at 1 (quoting Standard Minimization Procedures for FBI Electronic Surveillance and Physical Search Conducted Under FISA, May 17, 2016, § III.D.3.b at 18). The government understands that standard "to mean that the query terms must be reasonably likely to return foreign intelligence information," [REDACTED] April 27, 2018, Notice at 2, which is equivalent to the Section 702 standard for foreign-intelligence queries.

Specifically, the government reported that an unspecified FBI unit "conducted what may be considered queries against raw FISA-acquired [metadata] . . . using what appear to be identifiers of approximately 57,000 individuals who work [REDACTED]

[REDACTED] (The notice also refers to "queries of the 57,000 identifiers," vice "individuals."

Id.) The date of the queries is not provided, though it is reported that the FBI informed NSD of them on April 13, 2018. Id. As of April 27, the government was examining whether the queries were reasonably likely to return foreign-intelligence information. Id. At the argument on September 28, 2018, counsel for the government advised that internal discussions of the adequacy of the justification for those queries were continuing and agreed to update the Court within 60 days. Sept. 28, 2018, Proposed Tr. at 30-31.