UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN [redacted]	Docket Number: PR/TT 2016-[redacted]
[redacted] A U.S. PERSON.	

CERTIFICATION OF QUESTION OF LAW TO THE FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW

Pursuant to 50 U.S.C. § 1803(j) and for the reasons explained below, the Court hereby certifies to the Foreign Intelligence Surveillance Court of Review ("FISCR") a question of law respecting the acquisition of post-cut-through digits by pen register/trap and trace ("PR/TT") devices authorized under 50 U.S.C. § 1842.

Procedural History

On January 21, 2016, in the above-captioned docket, the undersigned judge of the Foreign Intelligence Surveillance Court ("FISC") approved an Application for Pen Register and Trap and Trace Device(s) ("Jan. 21, 2016 Application") upon finding that it met the requirements for a PR/TT authorization under the applicable provisions of the Foreign Intelligence Surveillance Act ("FISA"), which are codified at 50 U.S.C. § 1842(b), (c). See Docket No. PR/TT 2016[redacted] Primary Order for Pen Register and Trap and Trace Device(s) ("Jan. 21, 2016 Primary Order") at 1-2. The resulting authorization, which expires on April 19, 2016, provides for the installation and use of PR/TT devices on a cellular telephone number used by [redacted] [redacted] with the assistance of the provider for that number, [redacted] See id. at 3-7.

As requested by the Government, see Jan. 21, 2016 Application at 28, the Jan. 21, 2016 Primary Order granted "the authority to record and decode all post-cut-through digits, as described in the Government's Verified Memorandum of Law Regarding the Collection of Post-Cut-Through Digits Through Telephone Pen Register Surveillance Under the Foreign Intelligence Surveillance Act, filed with the Court on August 17, 2009, in Docket Numbers PR/TT 09-36, PR/TT 09-37, and PR/TT 09-38." Jan. 21, 2016 Primary Order at 3. It further provided that the Government "shall not make any affirmative investigative use of post-cut-through digits acquired through pen register authorization that do not constitute call dialing, routing, addressing or signaling information, unless separately authorized by this Court." Id. A secondary order to [redacted] directed it to "furnish . . . all information, facilities, or technical assistance necessary to accomplish the installation and operation of the [PR/TT] device(s)," to "include the recording and decoding of all post-cut-through digits." See Docket No. PR/TT 16[redacted] Secondary Order Authorizing the Installation and Use of Pen Register and Trap and Trace Device(s) ("Jan. 21, 2016 Secondary Order") at 2-3.

The above-described authorization was consistent with prior FISC practice. Since 2006 FISC judges have issued PR/TT orders under 50 U.S.C. § 1842 that, at the Government's request, authorize acquisition of all post-cut-through digits, while generally prohibiting use of those digits that are not dialing, routing, addressing or signaling ("DRAS") information unless additional authorization is obtained from the FISC.[1]

[1] The Government has never sought FISC authorization to use such information. The FISC-imposed prohibition on use varies from the language typically proposed by the Government, which would prohibit "any affirmative investigative use of post-cut-through digits acquired through pen (continued...)

Post-Cut-Through Digits

Post-cut-through digits are digits entered by a caller after a phone call has been initially placed (or "cut through"). Sometimes those digits represent instructions about processing the call to the number the caller is ultimately trying to reach: for example, a caller connects with an international calling card service, then is prompted to enter the number of the person with whom the caller actually wants to speak. Other times, those digits can represent substantive content unrelated to processing a phone call: for example, a caller connects with a bank's automated service and, in response to prompts, enters digits that signify, "Transfer $1000 from my savings account to my checking account."

In the calling-card example, the post-cut-through digits are non-content DRAS information. In the banking example, the post-cut-through digits are not DRAS information, but rather the substantive contents of a communication that are unrelated to processing a phone call. This distinction is significant under applicable statutory provisions.

FISA incorporates by reference the definitions of "pen register" and "trap and trace device" that appear at 18 U.S.C. § 3127. See 50 U.S.C. § 1841(2). "Pen register" is defined in relevant part as "a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the

[1](...continued)
register authorization that do not constitute call dialing, routing, addressing or signaling information, except in rare cases in order to prevent an immediate danger of death, serious physical injury, or harm to the national security." See, e.g., Jan. 21, 2016 Application at 28.

contents of any communication . . . ." 18 U.S.C. § 3127(3) (emphasis added).[2] Under the applicable definition of the term, "contents" "includes any information concerning the substance, purport, or meaning" of a "wire, oral, or electronic communication." See 18 U.S.C. §§ 2510(8), 3127(1).

FISC Practice

In May 2006, the Government first submitted to the FISC a brief addressing the lawfulness of acquiring post-cut-through digits under PR/TT orders. See Docket Nos. PR/TT 2009-36, PR/TT 2009-37, and PR/TT 2009-38, Verified Memorandum of Law in Response to the Court's June 18, 2009 Supplemental Order filed on Aug. 17, 2009 ("Aug. 17, 2009 Memorandum") at 2-3. On July 27, 2006, the Court ordered the Government to submit another brief regarding Magistrate Judge Smith's decision on post-cut-through digits, which was reported as In re Application of the United States, 441 F. Supp.2d 816 (S.D. Tex. 2006). Aug. 17, 2009 Memorandum at 4. The Government filed a responsive brief on September 25, 2006. Id. at 4-5.

As discussed below, the Government's argument in favor of acquiring post-cut-through digits under PR/TT orders depends on the current state of technology. On June 18, 2009, the Court directed the Government to update the technological representations it had made in its

---

[2] Similarly, "trap and trace device" is defined as

> a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication.

18 U.S.C. § 3127(4).

2006 submissions, as well as its legal arguments in view of additional decisions regarding post-cut-through digits. See Docket Nos. PR/TT 2009-36, PR/TT 2009-37, and PR/TT 2009-38, Supplemental Order issued on June 18, 2009, at 3-4. In response to that order, the Government submitted its Aug. 17, 2009 Memorandum, which remains its most extensive submission to the FISC regarding post-cut-through digits. The Government continues to rely on the Aug. 17, 2009 Memorandum when it seeks FISC authorization to acquire post-cut-through digits under 50 U.S.C. § 1842. See, e.g., Jan. 21, 2016 Application at 28.

On July 8, 2015, the Court again ordered the Government to provide an update on the state of relevant technology. See Docket No. PR/TT 2015-53, Supplemental Order issued on July 8, 2015. The Government made a responsive submission on October 2, 2015. See Docket No. PR/TT 2015-53, Submission Regarding Post-Cut-Through Digits filed on Oct. 2, 2015 ("Oct. 2, 2015 Submission").

On October 29, 2015, in conjunction with entertaining the immediately prior application for [redacted] the Court ordered the Government to submit a brief addressing, among other things, the lawfulness of acquiring post-cut-through digits under PR/TT orders. See Docket No. PR/TT 2015-78, Supplemental Order issued on Oct. 29, 2015. That briefing order was issued after the FISC judges discussed the issues presented by post-cut-through digits at their semi-annual conference on October 27, 2015. Id. at 1. Following that discussion, it was the consensus of the judges that further briefing was warranted in view of concerns expressed by some judges about continuing to authorize the acquisition of post-cut-through digits under PR/TT orders.

The Government submitted a brief in response to that order on January 15, 2016. See Docket No. PR/TT 2015-78, Brief in Response to the Court's October 29, 2015 Supplemental

Order filed on Jan. 15, 2016 ("Jan. 15, 2016 Brief"). [redacted]

Statutory Rationale for Authorizing Acquisition of Post-Cut-Through Digits

To date, there has been no FISC opinion explaining a judge's rationale for authorizing the acquisition of post-cut-through digits under 50 U.S.C. § 1842. In granting such authorizations, FISC judges have accepted the Government's principal statutory argument, which hinges on 18 U.S.C. § 3121(c). See Jan. 15, 2016 Brief at 14-18, 20-23; Aug. 17, 2009 Memorandum at 33-34, 36-38, 43-52, 62-67. That provision reads as follows:

> **Limitation.**–A government agency authorized to install and use a pen register or trap and trace device under this chapter[3] or under State law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications.

18 U.S.C. § 3121(c) (emphasis added).

The government represents that there is no technology reasonably available to it that would permit a PR/TT device at the time of acquisition to distinguish between post-cut-through

[3] FISC orders issued under 50 U.S.C. § 1842 are not, strictly speaking, "issued under" the chapter referenced in Section 3121(c) (i.e., chapter 206 of Title 18 of the United States Code). FISC judges have accepted that § 3121(c) applies in the FISA context because there is no indication that Congress, having adopted for purposes of § 1842 the Title 18 definitions of "pen register" and "trap and trace device," nevertheless intended PR/TT devices to operate differently under a § 1842 order than under an order issued under 18 U.S.C. § 3123.

digits that are non-content DRAS information used in processing a phone call (e.g., the calling-card example) from post-cut-through digits that are not DRAS information, but instead are contents unrelated to processing a phone call (e.g., the banking example). See Oct. 2, 2015 Submission at 4. Nor, according to the Government, is there a reasonably available technology that would allow it, at the time it receives data collected by a PR/TT device and without further analysis, to discard the digits that constitute contents and retain only the non-content DRAS information. Id. at 4-5. On the reading proposed by the Government and accepted by FISC judges, Section 3121(c) permits the Government to obtain all post-cut-through digits in the absence of such reasonably available technology, at least when the affirmative investigative use of contents is prohibited as described above. See Jan. 15, 2016 Brief at 13-18, 20-23.

Fourth Amendment Issues

The acquisition of post-cut-through digits that constitute contents also has constitutional implications. The use of a PR/TT device to acquire digits entered by a caller in order to place a phone call does not intrude on a reasonable expectation of privacy and does not constitute a search under the Fourth Amendment. See Smith v. Maryland, 442 U.S. 735, 741-46 (1979). In contrast, the use of a device to acquire the contents of private phone communications, at least as a general rule, does constitute a search under the Fourth Amendment. See Katz v. United States, 389 U.S. 347, 351-53 (1967).

The Government nonetheless argues that the acquisition of contents digits pursuant to a FISA PR/TT order comports with Fourth Amendment requirements. In the Government's view, the "national security" exception to the Fourth Amendment's warrant requirement is applicable. See Jan. 15, 2016 Brief at 7; Aug. 17, 2009 Memorandum at 69-70. Nevertheless, the Fourth

Amendment requires that all searches be reasonable, including those that may be conducted without a warrant. See In re Directives, 551 F.3d 1004, 1012 (FISCR 2008). Assessing reasonableness under the Fourth Amendment "requires the court to balance the interests at stake." Id. The "reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" United States v. Knights, 534 U.S. 112, 118-19 (2001) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)). "The more important the government's interest, the greater the intrusion that may be constitutionally tolerated." In re Directives, 551 F.3d at 1012.

The Government argues that, under the current state of technology, it is necessary to acquire some post-cut-through digits that constitute contents in order for it to acquire all of the non-content DRAS information relating to processing calls placed from a phone number targeted under a PR/TT order. The government has a weighty interest in obtaining the entire set of post-cut-through digits, as the only available alternative is to forgo acquisition of post-cut-through digits that constitute non-content DRAS information needed to identify with whom the subject of a national security investigation communicates – the very purpose of a FISA PR/TT surveillance. See Jan. 15, 2016 Brief at 8-9; Aug. 17, 2009 Memorandum at 72-73.

The Government's interest in acquiring such digits is concretely presented by this case.

[redacted]

[redacted]

In comparison, the privacy interests implicated by the acquisition of post-cut-through digits are not great. Although post-cut-through digits that constitute contents are at least arguably subject to a reasonable expectation of privacy, they nonetheless involve a narrow category of information from a subset of calls placed from a targeted phone number. This form of acquisition represents a lesser intrusion than, for example, obtaining the full contents of all calls to or from a targeted phone number pursuant to an electronic surveillance order under 50 U.S.C. § 1805. Moreover, as suggested by the Government, see Aug. 17, 2009 Memorandum at 71-72, the intrusion on privacy interests is also mitigated by the prohibition on affirmative investigative use of non-DRAS information. See In re Directives, 551 F.3d at 1012 ("If the protections that are in place for individual privacy interests are sufficient in light of the governmental interest at stake, the constitutional scales will tilt in favor of upholding the government's actions.").

Weight of Contrary Authority

As stated previously, FISC judges have authorized the acquisition of post-cut-through digits by PR/TT devices when the requirements for a PR/TT order under 50 U.S.C. § 1842 have otherwise been met. In granting the requested authorization in this case, the undersigned judge accepted the Government's arguments as summarized above. Other courts, however, have seen similar, if not identical, issues differently and denied Government requests to acquire post-cut-

through digits that constitute contents in applications for the installation and use of PR/TT devices in support of law enforcement investigations under 18 U.S.C. § 3122.[4] Indeed, the Government has not cited any decision by another court to authorize investigators to obtain such digits under a PR/TT order and, insofar as research in publicly available sources indicates, the FISC may be the only court to have done so. See Fern L. Kletter, Annotation, Allowable Use of Federal Pen Register and Trap and Trace Device to Track Post-cut-through Dialed Digits (PCTDD), 37 A.L.R. Fed.2d 323 § 2 ("No court has concluded that the pen/trap statute permits the government to obtain PCTDD . . . .") (originally published in 2009; updated weekly on WESTLAW).

Although the rationales put forward by other courts for denying such requests differ somewhat, those courts have generally concluded that the definitions of "pen register" and "trap and trace device" exclude a device or process that acquires contents, see In re Application of the United States, 622 F. Supp.2d at 421-22; In re Application of the United States, 2008 WL 5255815 at *3; In re Application of the United States, 441 F. Supp.2d at 823, 826-27, and that the "technology reasonably available" language at § 3121(c) is better understood to reinforce, rather than qualify, the obligation to exclude contents from a PR/TT collection, see In re Application of the United States, 622 F. Supp.2d at 421-22; In re Application of the United

[4] See In re Application of the United States, No. 08 MC 595(JO), 2008 WL 5255815 (E.D.N.Y. Dec. 16, 2008) (Magistrate Judge Orenstein); In re Applications of the United States, 515 F. Supp.2d 325 (E.D.N.Y. 2007) (Magistrate Judge Azrack), aff'd, Nos. 06-mc-547, 06-mc-561, 07-mc-120, 07-mc-400 (E.D.N.Y. Dec. 17, 2007) (District Judge Gleeson); In re Application of the United States, 622 F. Supp.2d 411 (S.D. Tex. 2007) (District Judge Rosenthal); In re Application of the United States, 441 F. Supp.2d 816 (S.D. Tex. 2006) (Magistrate Judge Smith); In re Application of the United States, No. 6:06-mj-1130 (M.D. Fla. May 23, 2006) (Magistrate Judge Spaulding), aff'd, No. 6:06-mj-1130 (M.D. Fla. June 20, 2006) (District Judge Conway).

States, 441 F. Supp.2d at 824-27. Some of those decisions also have found that the Fourth Amendment requires a probable cause-based warrant for the Government to acquire post-cut-through digits that constitute contents, or at a minimum that Fourth Amendment concerns weigh heavily in favor of a statutory interpretation that precludes the acquisition of contents under a PR/TT order. See In re Applications of the United States, 515 F. Supp.2d at 335-39; In re Application of the United States, 441 F. Supp.2d at 836-37.

Procedural Options Afforded by USA FREEDOM Act

The USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268, amended FISA, inter alia, to give the FISC new options when presented with a significant legal issue: appointment of an amicus curiae from a pre-designated pool of experts to assist the FISC, and certification of a question of law to the FISCR.

Pursuant to the amicus provisions, the presiding judges of the FISC and FISCR have designated "to be eligible to serve as amicus curiae" individuals "who possess expertise in privacy and civil liberties, intelligence collection, communications technology," or other areas "that may lend legal or technical expertise" to those courts. See 50 U.S.C. § 1803(i)(1), (3)(A). The FISC or FISCR – consistent with the requirement to conduct their proceedings "as expeditiously as possible" under 50 U.S.C. § 1803(c) –

> shall appoint [such] an individual . . . to serve as amicus curiae to assist [the] court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate.

50 U.S.C. § 1803(i)(2)(A).[5]

Here, the issues presented by post-cut-through digits have repeatedly been considered by FISC judges. Moreover, the Government has recently advised that there have been no significant changes in the relevant technology, see Oct. 2, 2015 Submission at 4-5, nor did the Government's Jan. 15, 2016 Submission present any new legal arguments. Accordingly, from the FISC's perspective, this matter does not present a "novel . . . interpretation of the law." Given the weight of contrary authority, however, the Court believes that a "significant interpretation of the law" may well be presented.

Nevertheless, the Court did not appoint an amicus pursuant to § 1803(i)(2)(A) because it found that it was not appropriate to do so under applicable time constraints and in view of the requirement under § 1803(c) to proceed as expeditiously as possible. The prior PR/TT authorization for [redacted] was set to expire on January 22, 2016. See Docket No. PR/TT 15-78, Primary Order for Pen Register and Trap and Trace Device(s) issued on Oct. 29, 2015, at 7. Pursuant to FISC Rule of Procedure 9(a), the Government submitted its proposed application to continue this PR/TT collection on January 15, 2016 (the same date that it filed its most recent legal brief on post-cut-through digits).[6] Unless the Court had permitted authorization for all PR/TT collection targeting [redacted] to lapse, it had one week to decide whether to grant or deny the Government's request to continue to acquire post-cut-through digits – a period of ti e that

[5] In addition, the FISC or FISCR "may appoint an individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate." 50 U.S.C. § 1803(i)(2)(B).

[6] The FISC received the final application, submitted pursuant to FISC Rule of Procedure 9(b), on January 21, 2016.

would have been insufficient for appointment of an amicus, formulation and presentation of an amicus's views, and consideration of those views by the Court.

With regard to certification, 50 U.S.C. § 1803(j) provides: "Following issuance of an order," the FISC "shall certify for review to [the FISCR] any question of law that may affect resolution of the matter in controversy that [the FISC] determines warrants such review because of a need for uniformity or because consideration by [the FISCR] would serve the interests of justice." To date, FISC judges have been uniform in their handling of the principal issues presented by post-cut-through digits, though some have recently expressed concerns about continuing to authorize acquisition of such digits under PR/TT orders. In any event, it appears that every other court to have issued a decision respecting such acquisitions has resolved the same, or substantially similar, issues differently. The disagreement between the FISC and other courts provides reason to believe that consideration of these issues by the FISCR would serve the interests of justice. The FISCR would also be able to assess whether it is appropriate to appoint an amicus without the strict time constraints that the January 22, 2016 expiration date placed on the FISC.

* * *

For the reasons stated above, the Court has found as follows:

(1) The appointment of an amicus curiae by the FISC under § 1803(i)(2)(A) was not appropriate in this matter.

(2) The following question of law may affect resolution of the matter in controversy and warrants review by the FISCR because consideration by that court would serve the interests of justice:

Whether an order issued under 50 U.S.C. § 1842 may authorize the Government to obtain all post-cut-through digits, subject to a prohibition on the affirmative investigative use of any contents thereby acquired, when there is no technology reasonably available to the Government that would permit:

(1) a PR/TT device to acquire post-cut-through digits that are non-content DRAS information, while not acquiring post-cut-through digits that are contents of a communication; or

(2) the Government, at the time it receives information acquired by a PR/TT device, to discard post-cut-through digits that are contents of a communication, while retaining those digits that are non-content DRAS information.

Accordingly, it is HEREBY ORDERED that the above-stated question of law is certified for review to the FISCR pursuant to 50 U.S.C. § 1803(j).

ENTERED this 12 day of February, 2016, in Docket Number PR/TT 2016-[redacted].

Thomas F. Hogan

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