UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D. C.

[redacted]

This Opinion shall not be served immediately on counsel for the parties, and shall be handled in accordance with the Court's Order Regarding Review of Opinion on the Merits issued on [redacted] 2014.

MEMORANDUM OPINION

On [redacted] 2014, the government filed a Petition for an Order to Compel Compliance with Directives of the Director of National Intelligence and Attorney General ("Petition"), pursuant to Section 702(h)(5)(A) of the Foreign Intelligence Surveillance Act of 1978 ("FISA"), as amended, (50 U.S.C. §§1801-1885c), and Rules 22 and 23 of the Foreign Intelligence Surveillance Court ("FISC" or "Court") Rules of Procedure. The Petition seeks an order from this Court compelling [redacted] directives issued by the Director of National Intelligence ("DNI") and Attorney General ("AG") pursuant to Section 702(h)(1), which were served [redacted] ("the 2014 Directives"). For the reasons set forth below, the Court concludes that the directives meet the requirements of Section 702 of FISA and are otherwise lawful, and is issuing the requested Order.

I. PROCEDURAL HISTORY

On July 24 and 25, 2014, the DNI and the AG executed [redacted] certifications pursuant to Section 702 of FISA, which is codified at 50 U.S.C. § 1881a: DNI/AG 702(g) [redacted] (collectively referred to as "the 2014 Certifications").[1] Each of the 2014 Certifications authorizes "the targeting of non-United States persons reasonably believed to be located outside the United States to acquire foreign intelligence information" for a period of one year. [redacted]

The government submitted the 2014 Certifications and accompanying targeting procedures and minimization procedures, together with supporting affidavits and an explanatory memorandum (collectively "2014 Submission") to the FISC on July 28, 2014, for *ex parte* review in accordance with Section 702(i) of FISA (50 U.S.C. §1881a(i)).[2] On August 26, 2014, the FISC found that the 2014 Certifications contain all the required statutory elements, and that the related targeting and minimization procedures comply with 50 U.S.C. §1881a(d)-(e) and are consistent with the requirements of the Fourth Amendment. [redacted] Memorandum Opinion and Order at 41 (FISC 2014) ("August 2014 Opinion").

[redacted] (collectively referred to as "2014 Directives") to [redacted] to "immediately provide the

[1] The 2014 Certifications were executed by the AG on July 24, 2014 and by the DNI on July 25, 2014. [redacted]

[2] Because the certifications, targeting procedures, and minimization procedures are relied upon in this Opinion, the Court directs the Clerk of the FISC to include the 2014 Submission in the record for this case [redacted] References to targeting or minimization procedures in this Opinion are to the procedures that were included in the 2014 Submission.

Government with all information, facilities, or assistance necessary" to accomplish the acquisition of foreign intelligence information authorized in the corresponding certification. 2014 Directives at 1(emphasis added).[3] In particular, each 2014 Directive states that:

[redacted] the government served the 2014 Directives on [redacted] informed the government [redacted] was unwilling to comply with the 2014 Directives. Petition at 6 and Exhibit 3.

[3] Each 2014 Directive is entitled "Directive of the Director of National Intelligence and the Attorney General Pursuant to Subsection 702(h) of the Foreign Intelligence Surveillance Act of 1978, as Amended," and references the certification under which the directive is issued, i.e., [redacted]

On [redacted], 2014, the government filed its Petition with the FISC.[4] In accordance with FISC Rule 24(b) [redacted] filed its Response on [redacted], 2014,[5] and the government filed its Reply with a supporting *ex parte* affidavit on [redacted] 2014.[6] The Court held an *in camera* hearing on [redacted] 2014, [redacted] testimony and both parties presented oral argument.

II. BACKGROUND

A. [redacted]

[redacted]

[4] Because the Presiding Judge of the FISC was traveling outside Washington, D.C., at that time, the Clerk notified the undersigned Judge, pursuant to FISC Rule 26, who, in her capacity as acting Presiding Judge, assigned the matter to herself at 9:00 a.m. on [redacted] 2014, in accordance with FISC Rule 27(a). The Court must render a decision on the merits within thirty days of assignment of the petition unless the Court, by order for reasons stated, extends that time as necessary for good cause in a manner consistent with national security. 50 U.S.C. §1881a(h)(5)(C), (j)(2).

[5] [redacted] Petition for an Order to Compel Compliance with Directives of the Director or National Intelligence and Attorney General (FISC filed [redacted] 2014) ("Response").

[6] [redacted], Government's Reply [redacted] (FISC filed [redacted] 2014) ("Reply").

[redacted]

B. Section 702 Targeting and Minimization Procedures

Both parties urge the Court to consider how the government's Section 702 targeting and minimization procedures would be applied to [redacted] in assessing the lawfulness of the 2014 Directives. See generally Petition at 9-13; Response at 1. Accordingly, a review of those procedures and their implementation is instructive.

Pursuant to Section 702(c)(1)(A), all acquisitions authorized by a Section 702 certification must be conducted in accordance with targeting and minimization procedures that

[redacted]

are adopted by the AG, in consultation with the DNI. 50 U.S.C. §1881a(c)(1)(A), (d), (e). Both sets of procedures, as well as the underlying certifications, are subject to *ex parte* judicial review by the FISC. 50 U.S.C. §1881a(i).

1. Targeting Procedures

Section 702(d)(1) requires targeting procedures that are "reasonably designed" to "ensure that any acquisition authorized under [the certification] 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." 50 U.S.C. 1881a(d)(1). In addition to these statutory requirements, the government uses the targeting procedures as a means of complying with Section 1881a(b)(3), which provides that acquisitions "may not intentionally target a United States person reasonably believed to be located outside the United States." See National Security Agency ("NSA") Targeting Procedures at 1, 3-4, 7; [redacted]

In practice, the government implements the targeting procedures by tasking for acquisition a telephone number or electronic communications account (referred to as a "selector" by the government) that is believed to be used by a targeted person. NSA Targeting Procedures at 1, 3. The NSA is the lead agency in making targeting decisions under Section 702. Prior to tasking a selector, the NSA must determine that the targeted person is a non-United States person reasonably believed to be outside the United States. NSA Targeting Procedures at 1. The NSA makes this determination "in light of the totality of the circumstances based on the information available with respect to that person, including [redacted]

[redacted] Such information may include human source reporting, signals intelligence, and intelligence reporting from [redacted]

The targeting procedures also require that, prior to tasking, the NSA assess whether the person being targeted possesses, is expected to receive, and/or is likely to communicate the types of foreign intelligence information authorized for acquisition under the 2014 Certifications. NSA Targeting Procedures at 4-6; [redacted] Declaration of [redacted] at 1-2 (FISC filed [redacted] 2014) [redacted] Decl."). In making these assessments, NSA considers several factors, such as [redacted]. NSA Targeting Procedures at 5.

[8] [redacted]

[9] [redacted]

All tasking requests must be documented, and that documentation must indicate what information the analyst relied upon in determining that the targeted person is reasonably believed to be located outside the United States. NSA Targeting Procedures at 7-8. Before a tasking is approved, the documentation is reviewed by other NSA personnel to ensure that the requesting analyst has satisfied this requirement. Id. at 8. [redacted] information in the government's possession supports a reasonable belief that the person: 1) is located outside the United States; 2) is not a United States person; 3) uses the facility to be tasked; and 4) possesses, is expected to receive, and/or is likely to communicate the types of foreign intelligence information authorized for acquisition under the 2014 Certifications.[10] [redacted]

Nevertheless, because targets can travel, and even reasonable determinations can be called into question by new facts, the targeting procedures mandate an additional layer of protection in the form of post-tasking analysis. Specifically, the government is required to conduct post-targeting analysis to detect those occasions when a target, i.e., a user of a selector tasked for acquisition under Section 702: 1) is located in the United States; or 2) is a United States person. NSA Targeting Procedures at 6. In addition, the government conducts post-tasking analysis to ensure that the target is and remains "a source of the sought-after foreign intelligence information." [redacted] Decl. at 4. Any time the government determines that the

[10] [redacted]

target has entered the United States or is a United States person, all facilities used by that target must be detasked. Id. at 5; NSA Targeting Procedures at 7. Further, if the government determines that the intended target is not using a tasked selector, that facility must be detasked. [redacted] Decl. at 5.

The government's post-targeting analysis includes [redacted]

The contents of communications acquired from such selectors must also be reviewed for indications that the target has entered or intends to enter the United States, or is a United States person.[11] [redacted]

[redacted]

[redacted]

NSA's tasking decisions are subject to regular review and oversight. Internally, NSA oversight personnel "conduct periodic spot checks of targeting decisions." NSA Targeting Procedures at 8. In addition personnel from the Department of Justice ("DOJ") and the Office of the DNI ("ODNI") conduct periodic reviews of NSA's implementation of its targeting procedures approximately once every two months. Id. In the event that NSA reasonably targets a person based on available information and subsequently learns that the target is inside the United States or is a United States person, NSA must report the incident within five business days to DOJ and ODNI.[12] Id. at 9.

2. Minimization Procedures

The government's minimization procedures are implemented in tandem with the targeting procedures and serve to further mitigate the harm from any targeting errors and to reduce intrusions into the privacy interests of United States persons who may communicate with

[redacted]

[12] Any incidents of intentionally targeting a person in the United States or a United States person must be reported within five days to DOJ and ODNI, and any information acquired as a result of the intentional targeting must be purged. NSA Targeting Procedures at 8.

the user of a tasked selector. See In re Directives [redacted] (FISA Ct. Rev. [redacted] 2008) (redacted version published at 551 F.3d 1004). Section 1881a(e)(1) requires minimization procedures that "meet the definition of minimization procedures under [50 U.S.C. §§] 1801(h) or 1821(4)]." Sections 1801(h) and 1821(4) define "minimization procedures" in pertinent part as:

> (1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance [or physical search], to minimize the acquisition and retention, and 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;[13]
>
> (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

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[13] Section 1801(e) defines "foreign intelligence information" as

> (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against –
>
> > (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
> >
> > (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or
> >
> > (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
>
> (2) information with respect to a foreign power or a foreign territory that relates to, and if concerning a United States person is necessary to –
>
> > (A) the national defense or the security of the United States; or
> >
> > (B) the conduct of the foreign affairs of the United States.

> being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes[.]

50 U.S.C. § 1801(h); see also id. § 1821(4).[14]

[redacted] arguments is that there is a heightened risk of error in tasking [redacted] For that reason, it is useful to focus on how the minimization procedures respond to targeting errors.

Targeting errors can generally be described as falling into three categories:

> 1) the government's targeting of a person who, at the time of targeting, was believed to be located outside the United States, but who was located in the United States at the time a communication is acquired [redacted]
>
> 2) the government's targeting of a person who, at the time of targeting, was believed to be a non-United States person, but who was, in fact, a United States person at the time of acquisition; and
>
> 3) the government's tasking of a selector that, at the time of targeting, was believed to be used by a person who possesses, is expected to receive, and/or is likely to communicate the types of foreign intelligence information [redacted]

With regard to the first two scenarios, the minimization procedures first reiterate the requirement in the targeting procedures that, once the government learns that the target is located in the United States or is a United States person, it must terminate acquisition from selectors used by the target "without delay." NSA Minimization Procedures at 8. The procedures further require the government to destroy "upon recognition" a communication if, at the time the

[14] The definitions of "minimization procedures" set forth in these provisions are substantively identical (although Section 1821(4)(A) refers to "the purposes . . . of the particular physical search") (emphasis added).

communication was acquired, the government mistakenly believed that the user of the tasked selector was a non-United States person located outside the United States.[15] NSA Minimization Procedures at 8-9. This destruction requirement can be waived only if the Director or Acting Director of the NSA determines, in writing and on a communication-by-communication basis, that the user was properly targeted, i.e., that the government had a reasonable belief at the time of acquisition that the user was a non-United States person outside the United States, and that the communication satisfies certain limited criteria, e.g., that the communication contains "significant foreign intelligence information" or evidence of a crime. Id. at 9-10.[16]

When the government encounters the third scenario, [redacted] it ceases collection on that selector. [redacted] their retention, use, and dissemination are regulated by the minimization rules that generally apply to United States person information acquired under Section 702. That should not be a surprise, because the same circumstance – acquisition of a communication between a United States person and a non-United States person who is outside the United States, but who is not the intended foreign intelligence target – can easily arise when there has been no targeting error at all.

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[15] Any communications acquired by intentionally targeting a United States person or a person in the United States must also be destroyed. See *supra* note 12. This requirement is not subject to waiver.

[16] The minimization procedures for the FBI and the CIA have similar provisions. See FBI Minimization Procedures at 6; CIA Minimization Procedures at 8.

[redacted]

III. ANALYSIS

The Court must issue an order [redacted] comply with the 2014 Directives or any part of them, as issued or modified, if the Court finds that the directives meet the requirements of Section 702 of FISA (50 U.S.C. §1881a) and are otherwise lawful. 50 U.S.C. §1881a(h)(5)(C). Because the 2014 Directives are identical, except for each directive referencing the particular certification under which the directive is issued, the Court will consider the 2014 Directives collectively.

[17] [redacted]

The Parties focus almost entirely on the implementation of the 2014 Directives. Nevertheless, the Court must first consider whether the directives, on their face, satisfy the requirements of Section 702. Examination of the 2014 Directives confirms that:

(1) the directives were provided in writing and were signed by the AG and the DNI, see 50 U.S.C. §1881a(h)(1);

(2) the language of the directives is consistent with 50 U.S.C. §1881a(h)(1)(A) & (B);

(3) the directives require the government to compensate [redacted] for providing information, facilities, or assistance pursuant to the directives, see 50 U.S.C. §1881a(h)(2).

Because each directive was issued pursuant to a valid certification that was approved by the FISC, and comports with Sections 702(h)(1) & (2) of FISA, the Court finds that the directives facially meet the requirements of Section 702.

Next, the Court must consider whether the 2014 Directives, as implemented, would meet the requirements of Section 702 of FISA and are "otherwise lawful." See §1881a(h)(5)(C). The question before the Court therefore is a limited one, i.e., whether the government's expansion of Section 702 acquisitions to [redacted] would so undermine the protections afforded under the targeting and minimization procedures that this Court must conclude that the [redacted] compliance with the 2014 Directives would fail to satisfy the requirements of Section 702 or the Fourth Amendment. For the reasons set forth below, the Court finds that it would not.

A. The Targeting Procedures, [redacted] Satisfy the Requirements of Section 702.

[redacted] fail to satisfy the requirements of Section 702 and the Fourth Amendment.

Response at 2. [redacted] targeting and minimization procedures "render the directives invalid as applied to its service." Id. [redacted] this Court will first consider whether the targeting and minimization procedures continue to satisfy the requirements of Section 702 when applied in the context of the government acquiring information through the 2014 Directives.

1 [redacted] Does Not Render the Targeting Procedures Insufficient.

[redacted]

Response at 10. This argument is simply not supported by the facts.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

19 [redacted]

20 [redacted]

[redacted]

[redacted]

The Court is not convinced that [redacted] under any of the above-described circumstances occurs frequently, or even on a regular basis. Assuming *arguendo* that such scenarios will nonetheless occur with regard to selectors tasked under the 2014 Directives, the targeting procedures address each of the scenarios by requiring NSA to conduct post-targeting analysis [redacted]

21 [redacted]

2. The Targeting Procedures are "Reasonably Designed"

These arguments are unpersuasive.

[redacted]

22 [redacted]

[redacted]

[redacted]

23

[redacted]

[redacted]

[redacted]

24 [redacted]

[redacted]

25 [redacted]

[redacted] fails to show that the targeting procedures, [redacted], are not "reasonably designed" to achieve the objectives stated by Section 702(d)(1) (50 U.S.C. § 1881a(d)(1)). [redacted] Accordingly, the Court finds that the targeting procedures, [redacted] satisfy the requirements of Section 702(d)(1).

B. The Minimization Procedures, [redacted] Also Satisfy the Requirements of Section 702.

[redacted] why, in its view, the minimization procedures are inadequate [redacted] are largely a recapitulation [redacted] In essence, [redacted] minimization procedures that do not require the government to immediately delete such information do not adequately protect United States person information. [redacted]

For the reasons discussed *supra* at pages 16-21, the Court does not find that implementation of the 2014 Directives by [redacted]

[redacted]

[redacted] The minimization procedures will afford the same degree of protection [redacted] and, as stated *supra* at page 2, the FISC has found that those minimization procedures satisfy the applicable statutory requirements. Accordingly, the Court finds that the minimization procedures, as implemented through the 2014 Directives, meet the definition of minimization procedures under 50 U.S.C. §§ 1801(h) and 1821(4).

C. The Targeting Procedures and Minimization Procedures, [redacted] Are Consistent With the Requirements of the Fourth Amendment.

[redacted] Fourth Amendment arguments.[26] For the reasons discussed below, the Court also finds these arguments to be without merit.

1. [redacted] Standing to Bring a Fourth Amendment Challenge.

[redacted] the Court must first consider [redacted] are properly before the Court. As the provider having to bear the burden of implementing the 2014 Directives, the Court finds that [redacted] standing under Article III. In re Directives, at 10.

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[26] The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "As the text makes clear, the ultimate touchstone of the Fourth Amendment is reasonableness." Riley v. California, 134 S. Ct. 2473, 2482 (2014) (internal quotations omitted).

Moreover, the Foreign Intelligence Surveillance Court of Review ("FISCR") has held that: "[i]f Congress, either expressly or by fair implication, cedes to a party a right to bring suit based on the legal rights or interests of others, that party has standing to sue; provided, however, that constitutional standing requirements are satisfied." Id. at 9. In the context of the Protect America Act, Pub. L. No. 110-55, 121 Stat. 552 (2007) ("PAA") (the predecessor to Section 702), the FISCR found that, where the PAA permitted a service provider to "challenge the legality of [a] directive," and the PAA did "nothing to circumscribe the types of claims of illegality that can be brought," the statute was properly read to grant the service provider a right of action and to extend that right "to encompass claims brought by it on the basis of customers' rights." Id. at 10-11 (internal quotations omitted).

In this case, the Court is charged with determining whether [redacted] meet the requirements of Section 702 or are otherwise lawful, with no limitation on what legal claims [redacted] can make in defense of its refusal to comply. 50 U.S.C. §1881a(h)(5)(C). Accordingly, this Court finds that Congress has implicitly [redacted] the Fourth Amendment interests of third parties whose rights would allegedly be violated [redacted]

2. The Government's Surveillance [redacted] Falls Within the Foreign Intelligence Exception to the Fourth Amendment's Warrant Requirement.

The FISCR has previously held that "a foreign intelligence exception to the Fourth Amendment's warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States." In re Directives, at 18-19. Despite this clear statement of law [redacted]

[redacted] argues that a warrant should be required for "all surveillance conducted on the servers of a U.S.-based provider, regardless of whether the target of surveillance is a U.S. person or a non-U.S. person, and regardless of where that person is located when they use the service, because the communications of U.S. persons will be collected as part of such surveillance." Response at 17. [redacted]

The Court is bound to follow In re Directives. Accordingly, the Court finds that the government's proposed acquisition of foreign intelligence information through [redacted] falls within the "foreign intelligence exception" to the warrant requirement of the Fourth Amendment.

3. The Government's Surveillance [redacted] Consistent With the Reasonableness Requirements of the Fourth Amendment.

The remaining Fourth Amendment issue is whether the government's acquisition of communications and information through the implementation of the 2014 Directives, and in accordance with the targeting and minimization procedures, would be reasonable. In assessing the reasonableness of a governmental action under the Fourth Amendment, a court must "balance the interests at stake" under the totality of the circumstances presented. In re Directives, at 19-20.

> 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. If, however, those protections are insufficient to alleviate the risks of government error and abuse, the scales will tip toward a finding of unconstitutionality.

Id. at 20.

a. The Government's Interests Are Compelling.

[redacted] The government's national security interest in conducting acquisitions pursuant to Section 702 "is of the highest order of magnitude." In re Directives, at 20. This is no mere platitude. Intelligence Community investigation has revealed [redacted]

b. The Government's National Security Interests Outweigh [redacted] and Privacy Interests of United States Persons Whose Information May be Acquired.

With regard to the individual privacy interests involved, the Court has concluded, as discussed above, that the targeting procedures are reasonably designed to target non-United States persons who are located outside the United States. Such persons fall outside the ambit of

27 [redacted]

Fourth Amendment protection. See United States v. Verdugo-Urquidez, 494 U.S. 259, 274-75 (1990).

The Court must, however, balance the government's national security interests against the burden [redacted], as well as the privacy interests of United States persons and persons within the United States whose communications and information could be acquired [redacted] under Section 702.

The Court finds that the practical burden [redacted] would be minimal. [redacted] would be compensated for providing such services. In addition, the [redacted] compliance with the directives would be burdensome because compliance would be [redacted]

[redacted]

[redacted][28]

Response at 7-8. Assuming that these concerns weigh in the Fourth Amendment balance at all,[29] [redacted] only would be affected if the government surveillance is "unlawful." See Response at 7 [redacted] privacy interests of United States persons and persons in the United States. Its primary argument is that the privacy protections afforded by the targeting and minimization procedures are inadequate, [redacted] believes that the government will unreasonably intrude on the privacy interests of United States persons and persons in the United States [redacted] because the

[29] [redacted] its contention that compelled compliance with the 2014 Directives would "implicate its own First and Fourth Amendment rights" because it would be forced "to engage in conduct that [redacted]" Response at 8. None of these cases is on point. G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977), stands for the general (and in this case undisputed) proposition that corporations can have Fourth Amendment rights. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759, 2764-66 (2014), involved claims under the Religious Freedom Restoration Act of 1993, codified as amended at 42 U.S.C. §§ 2000bb--2000bb-4, that a government action substantially burdened the free exercise of religion by certain closely-held corporations [redacted] does not claim any religious objection to complying with the 2014 Directives, nor does it point to any comparable statutory protection that could apply here. Finally, in Patel v. City of Los Angeles, 686 F.3d 1085, 1087-90 (9th Cir. 2012), rev'd, 738 F.3d 1058 (9th Cir. 2013) (en banc), cert. granted, 2014 WL 1254566 (U.S. Oct. 20, 2014), the issue was whether a hotel operator had a Fourth Amendment-protected interest in its guest registry. The contested issue in this case is not whether the Fourth Amendment applies at all, but whether the 2014 Directives offend the Fourth Amendment.

government will regularly acquire, store, and use their private communications and related information without a foreign intelligence or law enforcement justification. See Response at 10-14.

For the reasons discussed *supra* at pages 16-21, the Court does not find that implementation of the 2014 Directives will result in any distinctive or heightened risk of the government's acquiring any greater volume of communications of or concerning United States persons [redacted] And the mere fact that there is some potential for error is not a sufficient reason to invalidate the surveillance. In re Directives, at 28-29 ("A prior judicial review process does not ensure that the types of errors complained of here (say, a misidentification arising out of the misspelling of an account holder's name) would have been prevented.").

To the extent the government may mistakenly task the wrong account, the targeting procedures require the government to conduct post-targeting analysis and the government terminates acquisition without delay if it determines that a user of the account is in the United States or is a United States person, or that the account is not being used by the intended foreign intelligence target. In addition, the minimization procedures provide additional safeguards restricting the use[30] of information of or concerning United States persons.[31]

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[30] [redacted]

[31] [redacted] Riley v. California, 134 S. Ct. 2473, 2491 (2014), for the proposition that "when it comes to the Fourth Amendment rights of U.S. persons, the Executive is not an adequate check on the Executive." Response at 15. But Riley reaffirmed that there are exceptions to the warrant requirement: the Court generally determines "whether to exempt a given type of search from the warrant requirement '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.'" Riley, 134 S. Ct. at 2484 (quoting

[redacted] acquisitions under the 2014 Directives will be appropriately focused on selectors used by non-United States persons who are outside the United States and who are valid foreign intelligence targets. On the whole, one would not expect a large number of communications acquired under such circumstances to involve United States persons. See *supra* at page 19 n.19. Moreover, a substantial proportion of United States person communications acquired under such circumstances are likely to be of foreign intelligence value. All these factors weigh in favor of the reasonableness of the surveillance at issue.

[redacted] facts underlying the FISCR's decision in In re Directives are sufficiently different that the FISCR's reasoning regarding the reasonableness of similar surveillance sheds little light on the constitutionality of Section 702 [redacted] Response at 13-14. The Court disagrees.

While the facts of this case are different from those in In re Directives in several respects, on balance those differences weigh in the government's favor. First, unlike the PAA, Section 702 does not permit the government to target United States persons, even when abroad. Therefore, unlike the FISCR in In re Directives, this Court need not consider whether, in the

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Wyoming v. Houghton, 526 U.S. 295, 300 (1999)). There is nothing in Riley that suggests that the FISCR erred in determining that a foreign intelligence exception to the warrant requirement should be recognized. See In re Directives, at 14-19.

Moreover, Riley's discussion of "government agency protocols," 134 S. Ct. at 2491, appears in an analysis of whether a warrant is generally required to search an arrestee's cell phone and particularly regarding how, if warrantless searches were permitted, the proper scope of such a search could be regulated. It does not address whether applicable "government protocols" may be relevant in assessing the overall reasonableness of a search, as the FISCR has twice found minimization procedures to be relevant to the reasonableness of foreign intelligence surveillance. See In re Directives at 22-23, 29-30; In re Sealed Case, 310 F.3d at 740-42; see also Board of Educ. of Indep. School Dist. No. 92 v. Earls, 536 U.S. 822, 833-34 (2002) (school district policy restricting disclosure and use of search results contributed to reasonableness of search); Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 658 (1995) (same).

absence of a warrant, the targeting and minimization procedures adequately protect the privacy interests of United States person targets.

[redacted]

Finally, the Court fails to see how the compliance problems arising under the business record provisions of FISA in 2009, see Response at 7, shed any light on this matter. To be sure, compliance issues arise under Section 702 and significant problems can require modification of procedures. See [redacted] Memorandum Opinion (FISC Oct. 3, 2011) (available in redacted form at 2011 WL 10945618). But in the absence of a showing of misconduct by the government, a presumption of regularity applies. In re Directives, at 28 ("Once we have determined that protections sufficient to meet the Fourth Amendment's reasonableness requirement are in place, there is no justification for assuming, in the absence of evidence to that effect, that those prophylactic procedures have been implemented in bad faith").

In sum, neither the facts [redacted] nor its Fourth Amendment arguments cause this Court to call into question the adequacy of the targeting and minimization procedures,

[redacted]

[redacted] After considering the totality of the circumstances and balancing the competing interests at stake, the Court holds that the targeting and minimization procedures [redacted] the 2014 Directives, satisfy the requirements of the Fourth Amendment.

c. The Court Need Not Consider Interests of Non-United States Persons Abroad

[redacted] consider "the impact . . . on foreign persons when considering whether the requested surveillance is reasonable," apparently without regard to whether these persons are protected by the Fourth Amendment. Response at 16. But under § 1881a(h)(5)(C), the Court does not assess reasonableness abstractly. Instead, the Court must determine if "the directive meets the requirements of [Section 702] and is otherwise lawful." For that reason, the impact on foreign persons can be relevant only to the extent that an applicable legal requirement makes it relevant.

As support for its contention that the Court should consider the interests of such persons [redacted] cites Presidential Policy Directive 28. Response at 16. But that directive, by its terms, is not judicially enforceable.[33] [redacted] Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, see Response at 16, is equally unavailing. The former "does not of its own force impose obligations as a matter of international law," Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004), and the latter, though a binding treaty as a matter of international law, "was not

[33] "This directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." Directive on Signals Intelligence Activities, Presidential Policy Directive 28, § 6(d), 2014 Daily Comp. Pres. Doc. 31 (Jan. 17, 2014).

self-executing and so did not itself create obligations enforceable in the federal courts." Id.; see also Medellin v. Texas, 552 U.S. 491, 505 & n.2 (2008) (treaties "are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing" – i.e., to have "automatic domestic effect as federal law upon ratification" – and was "ratified on those terms") (internal quotations omitted).[34] Accordingly, whatever standards for a reasonable surveillance one might derive from these documents are inapplicable to the Court's review under § 1881a(h)(5)(C).

IV. CONCLUSION

For the reasons set forth above, the Court finds that the 2014 Directives meet the requirements of Section 702 and are otherwise lawful. Accordingly, pursuant to the Order issued contemporaneously with this Opinion [redacted] will be ORDERED to comply with the 2014 Directives.

ENTERED this [redacted] 2014 in [redacted]

ROSEMARY M. COLLYER
Judge, United States Foreign
Intelligence Surveillance Court

[34] Nor is there any indication that privacy standards rooted in the Universal Declaration on Human Rights or the International Covenant on Civil and Political Rights should be applied as a matter of customary international law. See Flores v. Southern Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003) ("In short, customary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.").

~~SECRET//NOFORN~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D. C.

[redacted]

ORDER COMPELLING COMPLIANCE WITH DIRECTIVES

This Order shall be served immediately on counsel for both parties.

The Court, having found that the directives [redacted] attached as Exhibit 1 to the Government's "Petition for an Order to Compel Compliance with Directives of the Director of National Intelligence and Attorney General," submitted in the above-captioned matter on [redacted] 2014 ("Directives"), as issued, meet the requirements of 50 U.S.C. § 1881a and are otherwise lawful,

IT IS HEREBY ORDERED, pursuant to 50 U.S.C. § 1881a(h)(5)(C) [redacted] shall comply with the Directives **FORTHWITH**.

Pursuant to § 1881a(h)(5)(C), an Opinion providing a written statement for the record of the reasons for the above-stated determination is being issued contemporaneously herewith.

SO ORDERED.

~~SECRET//NOFORN~~

ENTERED this [redacted] 2014, [redacted]

ROSEMARY M. COLLYER
Judge, United States Foreign
Intelligence Surveillance Court