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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

[REDACTED]

This matter is before the court on the government's Motion for Reconsideration, filed

[REDACTED] orders issued by this court [REDACTED]. For the reasons hereinafter stated, the motion is denied in part and granted in part. A review of the procedural history in Docket No. [REDACTED] will be useful in understanding the issues presented by the Motion.

I. Procedural History of Docket No. [REDACTED]

A. The Application

[REDACTED]

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Derived from: Pleadings and Transcript in Docket No. [REDACTED]
Declassify on: X1 [REDACTED]

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[REDACTED]

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[REDACTED]

II. Mootness

A case becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” City of Erie v. Pap’s A.M., 529 U.S. 277, 287 (2000) (quoting County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)). More specifically, the standard for whether a previously justiciable case has become moot is whether

(1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur, and

(2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Davis, 440 U.S. at 631 (internal quotations omitted). “When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.” Id.

[REDACTED]

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The court finds that these conditions are not met. The court cannot say with assurance that there is no reasonable expectation that the government will resume the practices at issue.⁷ The court therefore concludes that the case presents “live” issues in which the government retains “a legally cognizable interest in the outcome.” Pap’s A.M., 529 U.S. at 287 (internal quotations omitted); see also id. at 288 (city suffers “an ongoing injury because it is barred from enforcing” an ordinance; “[i]f the challenged ordinance is found constitutional, then [the city]

7 [REDACTED]

[REDACTED] to result in mootness, it must be absolutely clear that, absent the Denial Order and the Supplemental Order, the FBI [REDACTED] See Vitek v. Jones, 445 U.S. 480, 487 (1980) (case was not moot where it was “not absolutely clear, absent the injunction [issued by the district court against the challenged practice], that the allegedly wrongful behavior could not reasonably be expected to recur”) (internal quotations omitted); accord, e. g., Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (“[T]he standard we have announced for determining whether a case has been mooted by the defendant’s voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”) (internal quotations omitted). [REDACTED]

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can enforce it, and the availability of such relief is sufficient to prevent the case from being moot”).⁸

Accordingly, the court turns to the merits. [REDACTED]

[REDACTED]

[REDACTED]

II. Targeting and Direction of FISA Surveillances

For an order authorizing electronic surveillance under FISA to be issued, this court must find, inter alia, “probable cause to believe that – (A) the target of the electronic surveillance is a foreign power or agent of a foreign power . . .; and (B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.” 50 U.S.C. § 1805(a)(3) (emphasis added). The order must also specify, inter alia, “the identity, if known, or a description of the target of the electronic surveillance,” “the nature and location of each of the facilities or places at which the electronic

⁸ In addition, with respect to the second requirement for mootness stated in Davis, the [REDACTED] the court cannot conclude that such is the case on the current record. In any case, under current minimization practices, the [REDACTED] themselves would remain in the FBI’s possession for [REDACTED]. Accordingly, with respect to this issue, the court cannot find “that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation,” Davis, 440 U.S. at 631, such that it has “become[] impossible . . . to grant any effectual relief whatever.” Pap’s A.M., 529 U.S. at 287 (internal quotations omitted).

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surveillance will be directed, if known,” and “the type of information sought to be acquired and the type of communications or activities to be subjected to the surveillance.” Id.

§ 1805(c)(1)(A)-(C).⁹

[REDACTED]

[REDACTED] As the government recently stated in a different matter, FISA

[REDACTED]

In Re Electronic and Data Communications Surveillance Definitions, Memorandum of Law and Fact Regarding Electronic and Data Communications Surveillance Under the Foreign Intelligence Surveillance Act, filed November 5, 2003, at 4.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹ There is a limited exception to the requirements of § 1805(c)(1)(C), but that exception does not apply in this case. See note 36 below.

¹⁰ Accordingly, [REDACTED]

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[REDACTED]

[REDACTED] Moreover, "the target of the surveillance is the individual or entity about whom or from whom information is sought." H.R. Rep. No. 95-1283, pt. 1, at 73 (1978), quoted in In re Sealed Case, 310 F.3d 717, 740 (Foreign Int. Surv. Ct. Rev. 2002) (per curiam). Since the purpose of a FISA surveillance is to obtain information about [REDACTED], [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, as discussed below, acquiring wire communications of U.S. persons unrelated to the target or [REDACTED] activities would violate principles of FISA minimization, except where such acquisition is reasonably necessary to acquire foreign intelligence information about the target and [REDACTED] activities. Moreover, it is doubtful that a surveillance that [REDACTED] [REDACTED] in circumstances reasonably allowing a more narrowly directed surveillance would be constitutional.¹²

[REDACTED]

¹² Under the Fourth Amendment, "[d]etermining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its (continued...)

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[REDACTED]

¹²(...continued)

inception,' . . .; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the [action] in the first place.'" New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1967)). See also Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) (unless established by the "common law when the [Fourth] Amendment was framed," 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").

¹³ [REDACTED]

¹⁴ [REDACTED]

(continued...)

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III. Minimization of FISA Surveillances

FISA requires that electronic surveillance applications include “a statement of the proposed minimization procedures,” 50 U.S.C. § 1804(a)(5), and that electronic surveillance orders include a finding that the proposed minimization procedures meet the statutory definition of such procedures, § 1805(a)(4), and direct that the minimization procedures be followed. § 1805(c)(2)(A). Information from a FISA electronic surveillance “concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures.” § 1806(a).

With respect to electronic surveillance, FISA defines “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, 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; [and]

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, 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.

¹⁴(...continued)

[REDACTED]

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§ 1801(h)(1)-(2) (emphasis added).¹⁵ “As is evident from the face of section 1801(h), minimization procedures are designed to protect, as far as reasonable, against the acquisition, retention, and dissemination of nonpublic information which is not foreign intelligence information.” In re Sealed Case, 310 F.3d at 731.

As reflected in the definition, minimization applies at the acquisition, retention, and dissemination stages. This case presents issues of acquisition and retention. The legislative history shows a preference for minimizing the acquisition of non-pertinent communications, where it is feasible for the government to do so, by real-time monitoring of intercepted telephone conversations to terminate recording once it is determined that a conversation does not pertain to the target or his activities.¹⁶ Specifically, “Congress envisioned that, for example, ‘where a switchboard line is tapped but only one person in the organization is

¹⁵ This definition further states that such procedures will “allow for the retention and dissemination of information that is evidence of a crime . . . and that is to be retained or disseminated for law enforcement purposes.” § 1801(h)(3). The government’s Motion does not rely on this provision.

¹⁶ By minimizing acquisition, the committee envisions, for example, that in a given case, where A is the target of a wiretap, after determining that A’s wife is not engaged with him in clandestine intelligence activities, the interception of her calls on the tapped phone, to which A was not a party, would be discontinued as soon as it is realized that she rather than A was the party.

S. Rep. No. 95-701 at 40, reprinted in 1978 U.S.C.C.A.N. 3973, 4009; accord H.R. Rep. No. 95-1283, pt. 1, at 55.

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the target, the interception should probably be discontinued where the target is not a party' to the communication"¹⁷ [REDACTED]

The advantage of minimization at the acquisition stage is clear. Information that is never acquired in the first place cannot be misused. One of the reasons for which Congress required minimization under FISA was to avoid the kind of misuses of surveillance information concerning U.S. persons that had previously occurred. See S. Rep. No. 95-701 at 42, reprinted in 1978 U.S.C.C.A.N. at 4011; H.R. Rep. No. 95-1283, pt. 1, at 55. However, "in practice FISA surveillance devices are normally left on continuously, and the minimization occurs in the process of indexing and logging the pertinent communications." In re Sealed Case, 310 F.3d at 740. The use of automatic recording is permitted by the standard minimization procedures applicable to this case. FBI Standard Minimization Procedures for a U.S. Person Agent of a Foreign Power ("Standard Procedures") § 3(d).¹⁸ "The reasonableness of this approach depends on the facts and circumstances of each case Given the targets of FISA surveillance, it will often be the case that intercepted communications will be in code or a foreign language for which there is no contemporaneously available translator, and the activities of foreign agents will involve multiple actors and complex plots;" such circumstances can justify less minimization at

¹⁷ In re Sealed Case, 310 F.3d at 731 (quoting H.R. Rep. No. 95-1283, pt. 1, at 55-56).

¹⁸ [REDACTED]

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the acquisition stage. In re Sealed Case, 310 F.3d at 740-41; see also H.R. Rep. No. 95-1283, pt. 1, at 55 (“in many cases it may not be possible for technical reasons to avoid acquiring all information”); S. Rep. No. 95-701 at 40 (“primarily for technological reasons, it may not be possible to avoid acquiring all conversations”), reprinted in 1978 U.S.C.C.A.N. at 4009.

“By minimizing retention, Congress intended that ‘information acquired, which is not necessary for obtaining[,] producing, or disseminating foreign intelligence information, be destroyed wherever feasible.’” In re Sealed Case, 310 F.3d at 731 (quoting H.R. Rep. No. 95-1283, pt. 1, at 56; emphasis in original); accord H.R. Rep. No. 95-1283, pt. 1, at 60 (“the better practice is to allow the destruction of information that is not foreign intelligence information or evidence of criminal activity”); S. Rep. No. 95-701 at 40 (“By minimizing retention, the committee intends that information acquired, which does not relate to the approved purposes in the minimization procedures, be destroyed.”), reprinted in 1978 U.S.C.C.A.N. at 4009.

However, because “it may not be feasible to cut and paste files or erase part of tapes where some information is relevant and some is not . . . minimizing retention can also include other measures designed to limit retention of such irrelevant material to an essentially non-usable form.” H.R. Rep. No. 95-1283, pt. 1, at 56.

Under the Standard Procedures, FBI personnel monitoring previously recorded phone conversations maintain a “permanent written record or ‘log,’” on which they make entries summarizing relevant communications. Standard Procedures § 3(e)(4). “[I]dentities or communications of or concerning United States persons that could not be foreign intelligence information or are not evidence of a crime . . . may not be logged or summarized.” Id.

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A separate provision further restricts the handling of intercepted phone conversations [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This provision does not limit

collection of information which may involve the conduct of criminal activities as set forth in

§ 4(a) below.” Id. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁹ Two other provisions of the Standard Procedures are potentially relevant to the minimization of [REDACTED]

(1) Section 3(i) provides that [REDACTED]

(2) Section 3(g)(1) provides that U.S. person communications “will be the subject of continuing analysis to establish categories of communications that are not pertinent to the authorized purpose of the surveillance.” “These categories should be established after a reasonable period of monitoring the communications of the target” and are to be stated in the application. § 3(g)(2), (6). Communications falling within these categories “normally should not be logged, summarized or indexed,” but information from such communications “may be logged” if it “appears to be foreign intelligence information.” § 3(g)(3), (5). [REDACTED]

[REDACTED]

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III. [REDACTED]

[REDACTED]

A. Application of the Standard Procedures

[REDACTED]

²⁰ This case involves the marking of [REDACTED] can be decided on the statutory basis of FISA's minimization requirements. This Opinion takes no view on the lawfulness of similarly marking the communications of [REDACTED] or on any constitutional questions that such marking practice might present.

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[REDACTED]

[REDACTED]

Section 3(e)(4) of the Standard Procedures refers to the “log” as “[a] permanent written record.” Section 4(a) of the Standard Procedures, captioned “Indexing,” refers to entries “into the general FBI indices” and the “Electronic Surveillance Index.” See also Motion at 7 n.2 (“A conversation is logged if the monitor creates a permanent documentary or electronic record of the conversation, which is usually a summary of the conversation. It is indexed if information from the log is uploaded into the FBI’s electronic surveillance indices.”).

It could perhaps be argued that, because the notations in question are limited to a “working copy” of the recorded conversations and thus are overwritten after [REDACTED], the notations do not involve logging or indexing under the Standard Procedures, and therefore are permitted by the Standard Procedures. The court does not find this interpretation of the Standard Procedures plausible. On this interpretation, the Standard Procedures would permit the FBI to summarize any U.S. person communications, as long as the summaries were not entered into the permanent “log,” and to take any steps to facilitate the retrieval of U.S. person communications, other than making entries into certain specified indices. Such a reading would reduce the protections afforded to the privacy of U.S. person communications to a point where the Standard Procedures would no longer be “reasonably designed . . . to minimize the acquisition and

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retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with" foreign intelligence needs. 50 U.S.C. § 1801(h)(1). In addition, a reading of the Standard Procedures under which FBI personnel would be free to adopt any of a range of practices for summarizing or marking U.S. person communications, as long as a practice was not expressly prohibited by the Standard Procedures, would not satisfy the requirement that minimization procedures be "specific." *Id.*

Rather, the Standard Procedures describe the authorized means of processing U.S. person information acquired during surveillances. Alternative or additional means of recording the contents of U.S. person communications, including the identities of U.S. persons who are parties to such communications, are not authorized under the Standard Procedures. Accordingly, the court concludes that the practice of marking the identities of non-target U.S. persons for the purpose of facilitating subsequent retrieval of those persons' communications violates the Standard Procedures, unless one of the circumstances stated in Section 3(h) applies. Since the FBI only marked communications that could not be logged and indexed under Section 3(h), the marking practice violated the Standard Procedures.

B. Proposed Modification of the Minimization Procedures

[REDACTED]

[REDACTED]

[REDACTED] In the Motion, the government notes that this court may, and in some cases has, approved minimization procedures that are less restrictive than the standard minimization procedures that would otherwise apply. However, in order to do so, the court must find, under 50

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U.S.C. § 1805(a)(4), that the procedures put forward by the government²² satisfy the definition of minimization procedures at 50 U.S.C. § 1801(h). If the court finds that the proposed procedures do not satisfy this definition, it may modify the procedures so that they conform to § 1801(h).²³

Of particular significance in this case is Section 1801(h)(1)'s requirement of "specific procedures . . . that are reasonably designed in light of the purpose and technique of the particular surveillance, 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" (emphasis added).

In applying this standard, the court first notes that "the purpose . . . of the particular surveillance" [REDACTED]

[REDACTED] See page 11 above. However, the communications to be marked

²² FISA minimization procedures must also "be adopted by the Attorney General." 50 U.S.C. § 1801(h)(1). That criterion is satisfied in this case by virtue of the Attorney General's having approved the Application, which incorporates minimization procedures that would expressly authorize the marking practice at issue.

²³ See 50 U.S.C. § 1805(a) (upon the required findings, "the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance") (emphasis added); S. Rep. No. 95-701 at 41 ("the judge, in approving the minimization procedures, could require specific restrictions on the retrieval of [retained] information"), reprinted in 1978 U.S.C.C.A.N. at 4010; H.R. Rep. No. 95-1283, pt. 1, at 56 (same); id. at 60 (minimization procedures adopted by the Attorney General "will be reviewed and approved, modified, or disapproved by the judge approving the surveillance"); id. at 61 ("If the judge believes a modification [to the procedures] is called for, he should require it.") id. at 78 ("judge has the discretionary power to modify" proposed minimization procedures); see also In re Sealed Case, 310 F.3d at 731 (court "was entitled to impose" minimization procedures, but "misinterpreted and misapplied" minimization principles in that case).

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are ones that cannot be logged or indexed under Section 3(h) of the Standard Procedures.

Section 3(h) gives the FBI considerable latitude regarding [REDACTED]

[REDACTED]

[REDACTED] The marking practice concerns communications that do not meet even this broad standard for information about the target.

Therefore, the government's justification for the marking practice -- that it would facilitate the future identification and retrieval of such communications -- is unrelated to the purpose of this particular surveillance. To state the point differently, the purpose of this particular surveillance would not be furthered by permitting the marking practice.

Second, the [REDACTED]

[REDACTED]

[REDACTED]

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For that reason, the instant case presents a surprising occasion for the government to seek a relaxation of the Standard Procedures applicable to [REDACTED]

[REDACTED]

[REDACTED]

The exceptionally broad range of [REDACTED]

[REDACTED]

[REDACTED] See H.R. Rep. No. 95-1283, pt. 1, at 55

(where minimization at the acquisition stage is not technically feasible, “the reasonable design of the procedures must emphasize . . . minimization” at later stages).

[REDACTED]

[REDACTED] Where a particular

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surveillance is especially likely to acquire communications that pertain to activities protected by the First Amendment, minimization procedures should be tailored to address the heightened concern that information could be used in a way that chills such activity. Cf. S. Rep. No. 95-701 at 42 (“The committee is concerned that the surveillance authorized . . . not result in the retention or dissemination of information which would adversely affect the exercise of first amendment rights.”), reprinted in 1978 U.S.C.C.A.N. at 4009; H.R. Rep. No. 95-1283, pt. 1, at 61 (for a wiretap of “a foreign spy acting as a newspaper reporter, . . . the committee expects that the minimization procedures . . . would be more strict to assure that information unrelated to his spy activities was not misused”).²⁵

This examination of “the purpose and technique of the particular surveillance” militates against a relaxation in this case of the Standard Procedures for minimization of [REDACTED]. The technique in question results in an overbroad acquisition of communications that are [REDACTED], and therefore to the purpose of the particular surveillance, but that do relate to activities of non-target U.S. persons protected by the First Amendment.

The court now considers the arguments in the Motion that permitting the marking practice would be consistent with the standard of “reasonableness” under 50 U.S.C. § 1801(h)(1). The Motion portrays the proposed relaxation of the Standard Procedures as modest and

²⁵ Of course, lawful lobbying activities, and “lawful gathering of information preparatory to such lawful activities,” cannot be the predicate for targeting U.S. persons for FISA surveillance. *In re Sealed Case*, 310 F.3d at 739 (quoting H.R. Rep. No. 95-1283, pt. 1, at 40).

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incremental: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The court does not find these arguments persuasive. First, under FISA’s minimization principles, it is not sufficient to assert that, because the Standard Procedures already permit the FBI a great deal of latitude, it is reasonable to grant a little more. This argument fails to assess the proposed minimization procedures “in light of the purpose and technique of the particular surveillance.” It also fails to take into account the important distinction between information related to the target or [REDACTED] activities and information that bears no such relation. For example, the government cites (Motion at 10) to legislative history recognizing the need for “some flexibility” when the purpose of the surveillance is to gather foreign intelligence information as described in 50 U.S.C. § 1801(e)(1)(B) or (C) (i.e., counterintelligence or counterterrorism information):

“Innocuous-sounding conversations may in fact be signals of important activity; information on its face innocent when analyzed or considered with other information may become critical.”

H.R. Rep. No. 95-1283, pt. 1, at 55. Fairly read, however, this discussion refers to information

[REDACTED]

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about U.S. persons that is somehow connected to the target or [REDACTED] activities. Compare id. at 58-59 [REDACTED]

[REDACTED]. If understood to apply to U.S. person information unrelated to the target, the point made in the above-quoted passage would be singularly weak: on what basis, if not by some connection to the target, should one suspect that the seemingly “innocuous” and “innocent” may really point toward clandestine intelligence or international terrorism activities? The same degree of theoretically possible connection to such activities could be attributed to any piece of information about anyone, acquired by any means.

Additionally, the government’s argument too readily assumes that restrictions will always be followed. See Motion at 15-16 [REDACTED]

[REDACTED]. But, as this case demonstrates, the FBI does not always adhere to applicable minimization procedures. It is partly for this reason that Congress intended that minimization rules would not only prohibit misuse, but also create circumstances in which it is impossible, or much more difficult, for misuse to occur. Thus, Congress intended that, whenever practical, minimization occur at the acquisition stage. See pp. 14-15 above. Information that is never acquired can never be misused. Similarly, Congress intended that, wherever feasible, the government would destroy information to be minimized at the retention stage. See p. 16 above.

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Destruction "safeguard[s] the privacy of individuals more effectively, insuring that irrelevant information will not be filed." S. Rep. No. 95-701 at 42, reprinted in 1978 U.S.C.C.A.N. at 4011; H.R. Rep. No. 95-1283, pt. 1, at 60. If destruction is not feasible, information may be minimized by reducing it to a non-usable form. See p. 16 above.

The Standard Procedures rest on the implicit premise [REDACTED]

[REDACTED]

[REDACTED] This ready means of retrieval would facilitate, rather than frustrate, the potential misuse of information concerning these [REDACTED]. In this case, the government acknowledges that any retrieval by such markings without further court authorization would be tantamount to conducting unauthorized electronic surveillance of [REDACTED]. The fact that the markings are overwritten in several months may lessen the potential for such misuse, but does not eliminate it.²⁸

²⁷ See H.R. Rep. No. 95-1283, pt. 1, at 60 (contrasting FISA minimization with Title III requirement to retain recordings for ten years for evidentiary reasons); S. Rep. No. 95-701 at 41-42 (same), reprinted in 1978 U.S.C.C.A.N. at 4010-11.

²⁸ The court does not imply that, in this case, FBI personnel intend to use the marked communications in any way other than as described in the government's pleadings. However, the court is persuaded that the reasonable design of minimization procedures includes making a realistic allowance for the possibility that overzealous or ill-intentioned personnel might be inclined to misuse information, if given the opportunity.

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The government also argues that minimal, if any, Fourth Amendment interests are implicated by the marking practice, and that to the extent that such interests are touched on, the practice is reasonable under the Fourth Amendment. *Id.* at 22-25. The Motion cites several cases holding that a warrant may authorize the seizure of items beyond the evidence being sought,²⁹ or that officers executing a warrant may seize such items even without such express authorization,³⁰ if it is not practical before seizure to identify items named in the warrant and separate them from other property. [REDACTED]

[REDACTED] However, they do not support the proposition that no Fourth Amendment interests are implicated by the flagging of communications of identified non-targets or that such a practice is reasonable under the Fourth Amendment. Rather, they show that the government must take reasonable steps to limit, so far as possible, the infringement on privacy and property interests from an unavoidably overbroad inspection and seizure.³¹ Finally, insofar as FISA minimization procedures are intended to have a

²⁹ *Guest v. Leis*, 255 F.3d 325, 334-35 (6th Cir. 2001); *United States v. Hay*, 231 F.3d 630, 636-37 (9th Cir. 2000), cert. denied, 534 U.S. 858 (2001).

³⁰ *United States v. Walser*, 275 F.3d 981, 985-86 (10th Cir. 2001), cert. denied, 535 U.S. 1069 (2002); *United States v. Santarelli*, 778 F.2d 609, 615-16 (11th Cir. 1985).

³¹ Thus, privacy interests were not “adversely affected” by the seizure and subsequent “examination of the documents off the premises, so long as any items found not to be relevant were promptly returned.” *Santarelli*, 778 F.2d at 616 (emphasis added). In *Walser*, a computer (continued...)

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prophylactic effect, *i. e.*, to create circumstances in which misuse is impossible or at least difficult, it is unpersuasive to argue that the proposed procedures should be approved merely because their faithful implementation would not directly involve a Fourth Amendment violation.³²

In the government's view, the advantage of resuming the marking practice would be to facilitate the future identification and review of these [REDACTED] if court authorization is obtained. Such facilitation would ease the burden of the FBI in retrieving these [REDACTED] in such event, and thus would be "consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." Motion at 19-20. However, the foreign intelligence value of the marking practice is, on the current record, unrevealed. [REDACTED]

³¹(...continued)

was seized to permit the identification of files related to drug transactions, as described in the warrant. While inspecting the computer's files, an officer found child pornography. He stopped inspecting the computer's contents and obtained a second warrant for evidence of child pornography before resuming his search. The court noted that, had the officer "conducted a more extensive search . . . by rummaging in folders and files beyond those he [actually] searched, he might well have exceeded the bounds of the warrant" and the standards of reasonableness under the Fourth Amendment applied in United States v. Carey, 172 F.3d 1268, 1271-74 (10th Cir. 1999). Walser, 275 F.3d at 987.

³² Because this decision is based on statutory grounds, the court does not reach the question of whether the minimization procedures proposed by the government would satisfy the Fourth Amendment. See In re Sealed Case, 310 F.3d at 740 ("at least some circuits have determined" that minimization procedures for law enforcement wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2522, "are constitutionally significant"); United States v. Falls, 34 F.3d 674, 680 (8th Cir. 1994) (imposing minimization requirement on video surveillance for law enforcement purposes to ensure compliance with Fourth Amendment); United States v. Bin Laden, 126 F. Supp.2d 264, 286 (S.D.N.Y. 2000) (assessing minimization of non-FISA foreign intelligence surveillance of U.S. citizen overseas for compliance with reasonableness requirement of Fourth Amendment).

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[REDACTED]

[REDACTED] There is no assurance that the court will grant, or even that the government will file,³³ [REDACTED] for authority to review previously acquired conversations involving [REDACTED]. Any foreign intelligence benefit of the marking practice is speculative and contingent on future events. In contrast, the identification of these non-target communications would present an immediate potential for misuse.³⁴

Accordingly, the court determines that the proposed modification to the Standard Procedures to authorize the marking practice would result in procedures that, in the circumstances of this case, do not satisfy the definition of minimization procedures at 50 U.S.C. § 1801(h). The government's request for authorization to engage in the marking practice is denied.

IV. Request for Clarification of Directive to Submit Modified Procedures

The Motion requests clarification of the Denial Order's directive to file revised minimization procedures, in the event that the court denies the government's request for

³³ [REDACTED]

³⁴ The government also suggests that the marking practice would further the privacy interests of other non-targets whose communications have been acquired, by eliminating the need for FBI personnel to listen to their communications [REDACTED]

[REDACTED] This claimed benefit to privacy protection is just as speculative as the foreign intelligence benefit described above.

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authorization of the marking practice. Motion at 29-30. The Motion states that the Government is unable to determine whether procedures that expressly prohibit the marking practice would be sufficient, or whether procedures that put further restrictions on the handling of non-target communications would be required. Id. at 30.

[REDACTED]

The Standard Procedures were crafted predominantly with the typical case in mind. An overbroad surveillance calls for minimization procedures that offer more, not less, protection for non-target communications than is afforded by the Standard Procedures.

This court necessarily relies on the government for its views on whether particular minimization practices are likely to be effective, practical or unduly burdensome in the context of FBI investigative, recordkeeping, and information management practices. With that caveat, the court suggests consideration of the following specific measures for minimizing information from

[REDACTED] obtained from overbroad wire communications surveillances:

35 [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

The court urges the government to begin work on special procedures for use in such overbroad surveillances and to pursue that work with diligence.

V. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Motion at 25-29. However, the court

finds that this practice is inconsistent with the specific statutory requirements of FISA.

FISA surveillance orders must include a finding that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power," 50 U.S.C. § 1805(a)(3)(B); that "the proposed minimization procedures meet the definition of minimization procedures," *id.* § 1805(a)(4); and that the application contains all required statements and certifications, and that, "if the target is a

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United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under [50 U.S.C. § 1804(a)(7)(E)],” *id.* § 1805(a)(5). FISA surveillance orders must also specify, among other things, the target’s “identity, if known,” *id.*

§ 1805(c)(1)(A); “the nature and location of each of the facilities or places at which the electronic surveillance will be directed, if known,” *id.* § 1805(c)(1)(B); “the means by which the electronic surveillance will be effected,” *id.* § 1805(c)(1)(D); and, “whenever more than one electronic, mechanical, or other surveillance device is to be used under the order, the authorized coverage of the devices involved and what minimization procedures shall apply to information subject to acquisition by each device,” *id.* § 1805(c)(1)(F).

FISA has parallel requirements for the government’s application, which must include “the identity, if known,” of the target, *id.* § 1804(a)(3); “a statement of the facts and circumstances relied upon by the applicant to justify his belief that . . . each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power,” *id.* § 1804(a)(4)(B); “a statement of the proposed minimization procedures,” *id.* § 1804(a)(5); “a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;” *id.* § 1804(a)(6); and, “whenever more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the coverage of the devices involved

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and what minimization procedures apply to information acquired by each device," *id.*

§ 1804(a)(11).³⁶

[REDACTED]

[REDACTED] For this reason, neither primary order alone would appear to satisfy the requirements of both § 1805(c)(1)(A) (identification of the target) and § 1805(c)(1)(B) (nature and location of each facility or place), and neither application would appear to satisfy both parallel requirements of § 1804(a)(3) and § 1804(a)(4)(B). Similarly,

[REDACTED]

[REDACTED] -- an arrangement that scrutiny of both orders,

³⁶ Under 50 U.S.C. §§ 1804(b) & 1805(d), certain otherwise required information may be omitted if (1) the target is a foreign power, as defined in § 1801(a) (1), (2), or (3); and (2) "each of the facilities or places at which the surveillance is directed is owned, leased, [or] exclusively used by that foreign power."

[REDACTED]

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separately or together, would not reveal -- one may try to patch together from both cases the required statements, findings, and specifications for that surveillance. However, the statute plainly does not contemplate such mixing and matching. Rather, it is clear that, to the extent known for a particular surveillance, the target, the facilities and places, the means of surveillance for each facility and place, and applicable minimization procedures are to be described in one case. This requirement is not a mere technicality. Rather, it is necessary to ensure that the court's findings of probable cause, review of certifications (particularly for U.S. person targets), and assessment of the proposed minimization procedures rest on an adequate understanding of the facts. This requirement also furthers the important interest in creating a clear and express record of what the court authorizes and on what findings its authorization is based. Cf. Groh v. Ramirez, No. 02-811, 2004 WL 330057, at *6 (U.S. Feb. 24, 2004) (requiring "written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit").

Relying on an analogy to the "plain view" exception to the Fourth Amendment's warrant requirement, the government contends that no further authorization is required to use surveillance directed at the [REDACTED]. Under the "plain view" doctrine, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." Minnesota v. Dickerson, 508 U.S. 366, 375 (1993); accord Horton v. California, 496 U.S. 128, 136-37 (1990). The court does not find this analogy sufficiently close to the facts of this case to justify departure from the specific statutory

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requirements discussed above.³⁸ It may be “immediately apparent” to FBI monitoring personnel

[REDACTED] to determine if they should be logged and indexed under the minimization rules

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Accordingly, the court holds that, once the FBI came to expect that, on a

regular basis, [REDACTED]

[REDACTED]

[REDACTED]

Because this opinion rests on statutory grounds, it is not necessary to rule on any constitutional issues presented by deliberate use of the [REDACTED]. However, the court’s understanding of the requirements of FISA is consistent with the statement in Marron v. United States, 275 U.S. 192, 196 (1927), that the particularity requirement of the Fourth Amendment “prevents the seizure of one thing under a warrant describing another.” The government suggests that this statement in Marron has been “superseded,” at least to some extent, by subsequent development of the “plain view” doctrine, under which officers executing a search warrant may, in some circumstances, seize items not specified in the warrant. See Motion at 27 & n.6. However, for the reasons explained above, the court is not persuaded that this analogy to “plain view” principles provides a sufficient basis to depart from applying FISA’s express requirements to this case.

³⁹ Moreover, contrary to the government’s suggestion (Motion at 29 n.7), full explanation of the means of, and facilities to be subjected to, surveillance of a particular target will guard against, rather than invite, [REDACTED] or other government subterfuge.

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[REDACTED]

This conclusion is consistent with the reasoning and holding in Bin Laden, 126 F. Supp.2d at 280-82, regarding the acquisition of the communications of Wadih El-Hage, a U.S. citizen, during an overseas foreign intelligence surveillance. In that case, the government argued that the acquisition of El-Hage's communications was incidental to the surveillance of others who used the same telephones at premises believed to be an al Qaeda safe-house. The court held that El-Hage's communications were not "intercepted 'incidentally' because he was not an unanticipated user of those telephones and because he was believed to be a participant in the activities being investigated." Id. at 281. Accordingly, express Attorney General authorization to conduct surveillance of El-Hage was required, despite the fact that the U.S. Intelligence

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Community did not need such authorization to conduct surveillance of the other users of those telephones. *Id.* at 281-82.⁴⁰

* * *

Based on the foregoing, the court makes the following findings:

1. This case is not moot and the court has jurisdiction over it.
2. The marking practice in this case, whereby notations were made on recorded communications as a means of identifying [REDACTED]

⁴⁰ The court recognizes that, under general Fourth Amendment principles that have developed principally in the context of law enforcement searches, the subjective intentions of officers conducting a search are irrelevant to whether their actions are objectively reasonable under the Fourth Amendment. *See, e.g., Whren v. United States*, 517 U.S. 806, 812-13 (1996); *see also Horton*, 496 U.S. at 134-42 (“plain view” doctrine does not require that discovery of item in plain view be inadvertent). Moreover, law enforcement search warrants “are not directed at persons; they authorize the search of ‘place[s]’ and the seizure of ‘things,’ and as a constitutional matter they need not even name the person from whom the things will be seized.” *Zurcher v. Stanford Daily*, 436 U.S. 547, 555 (1978). Accordingly, absent some specific statutory limitation, *see, e.g., 42 U.S.C. § 2000aa*, law enforcement search warrants may be issued where “there is probable cause to believe” that the items to be seized “are located in the place to be searched,” even if there is “no probable cause to believe that the third party” whose property will be searched “is implicated in the crime.” *Id.* at 554. In contrast, FISA makes the concept of the target -- “the individual or entity about whom or from whom information is sought,” H.R. Rep. No. 95-1283, pt. 1, at 73 -- central to the authorization and conduct of a foreign intelligence surveillance. For this reason, the requirements for FISA surveillance orders, which must specify (or at least describe) the target and require a finding of probable cause to believe that the target is a foreign power or an agent of a foreign power, are different than the requirements for law enforcement search warrants. *Cf. In re Sealed Case*, 310 F.3d at 740 (“FISA requires less of a nexus between the facilities and the pertinent communications than Title III, but more of a nexus between the target and the pertinent communications”). The distinction between incidental and non-incidental collection drawn in this opinion follows closely from the centrality of the target to foreign intelligence surveillances.

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[REDACTED] under the applicable FBI standard minimization procedures, violated those procedures for the reasons stated above.

3. The minimization procedures proposed by the government that would permit the marking practice do not, under the circumstances of this case, satisfy the definition of minimization procedures at 50 U.S.C. § 1801(h), for the reasons stated above.

4. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Accordingly, it is hereby ORDERED that:

1. The government's Motion For Reconsideration dated [REDACTED], is GRANTED in part and DENIED in part, as follows;

2. The Denial Order dated [REDACTED] and the Supplemental Order dated [REDACTED], both in this Docket, are hereby VACATED, in favor of the fuller discussion of the issues provided by this Opinion and Order;

3. The requested authority for the government to engage in the above-described marking practice is DENIED;

4. Within thirty days of this Opinion and Order, all notations made by the government on or concerning [REDACTED] that could not be logged, summarized, or indexed under the applicable FBI standard minimization procedures, as interpreted herein, shall be sequestered with this court, and thereafter shall be destroyed. The submission for

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sequestration shall include a sworn declaration that all such notations are being submitted for sequestration. In the event that some or all of such notations have been irretrievably erased or destroyed, through automatic over-recording or otherwise, the declaration shall set forth the circumstances of such erasure or destruction;

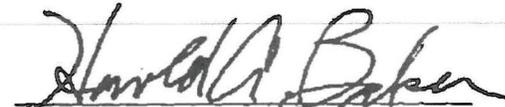
5. The government is directed, [REDACTED]

[REDACTED] Such procedures shall, in a manner consistent with this Opinion, afford a greater degree of protection to information from U.S. person communications to which [REDACTED] than is provided by the FBI's standard minimization procedures for electronic surveillance of a U.S. person agent of a foreign power.⁴¹

6. The government is directed, in the event that it intends to [REDACTED]

[REDACTED] in the manner discussed above, to seek, by motion or separate application, express authorization from this court to effect surveillance of that target by such means.

So ordered this 5th day [REDACTED]


Harold A. Baker, Judge
Foreign Intelligence Surveillance Court

⁴¹ While only the [REDACTED] is before the undersigned judge, it is expected that the government will also submit such procedures in other applications involving similarly overbroad surveillances.

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Karen E. Sutton, Clerk,
SC, certify that this document
is a true and correct copy
of the original.