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



ORDER

On [REDACTED] the government filed with this Court, in the above-captioned docket, a Verified Memorandum of Law Regarding the Collection of Post-Cut-Through Digits Through Telephone Pen Register Surveillance Under the Foreign Intelligence Surveillance Act (hereafter "Memorandum") to advise the Court regarding the Government's collection of post-cut-through digits through telephone pen register surveillance under the Foreign Intelligence Surveillance Act (FISA). In its Memorandum, the government takes the position that, under FISA, the Court may authorize the collection of post-cut-through digits that are call processing information as well as those that constitute the contents of a communication. The government's legal analysis rests in part on the government's assertion that 18 U.S.C. §3121(c) [REDACTED]



Memorandum, at 9.

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Derived from: Verified Memorandum of Law filed [REDACTED] in  
Docket Number [REDACTED]  
Declassify on: X1


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In the event post-cut-through digits that constitute call content are incidentally captured pursuant to pen register authority, the government undertakes to "make no affirmative investigative use of such information ..., except in a rare case in order to prevent an immediate danger of death, serious physical injury, or harm to the national security," and indicates that "this practice is consistent with criminal pen register applications submitted by the Government to United States District Courts under 18 U.S.C. §§ 3122 and 3123." Memorandum, at 11.

On July 19, 2006, the Honorable Stephen WM Smith denied a government application to acquire post-cut-through digits in a criminal investigation, expressly rejecting the government's argument that 18 U.S.C. §3121(c) implicitly authorizes the acquisition of contents using a pen register/trap and trace device, given the current state of filtering technology. *In re* Application of the United States for an Order Authorizing (1) Installation and Use of a Pen Register and Trap and Trace Device or Process, (2) Access to Customer Records, and (3) Cell Phone Tracking, \_\_ F.Supp.2d \_\_, 2006 WL 2033877, at 6, 9 (S.D. Texas, 2006).

Accordingly, the government is ordered to submit a written brief to the Court, no later than [REDACTED] discussing how, if at all, Magistrate Judge Smith's opinion affects the government's analysis of this issue as set forth in its Memorandum.

SO ORDERED, [REDACTED]



**COLLEEN KOLLAR-KOTELLY**  
Judge, United States Foreign  
Intelligence Surveillance Court

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