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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

SUPPLEMENTAL ORDER

On March 5, 2010, in Docket Nos. [REDACTED] the Court granted electronic surveillance and physical search authority on the terms requested in the government's applications. Those authorizations included electronic surveillance by means the government describes [REDACTED]

[REDACTED] Primary Order at 3. The Court understands that it is sometimes unclear whether the targeted [REDACTED]

[REDACTED] Both cases involve targets [REDACTED]

The government's applications did not specify which parts of the statutory definition of electronic surveillance apply to [REDACTED] but the pertinent provisions appear to be 50 U.S.C. §§ 1801(f)(2) or (f)(4). Section 1801(f)(2) defines electronic surveillance to include "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States...if such acquisition occurs in the United States...." Section 1801(f)(4) defines it to include "the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes." A "wire communication" is defined at 50 U.S.C. § 1801(l) as "any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications." The statute does not define "radio communication."¹

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The government's submissions present the Court with ambiguities regarding the legal basis for [REDACTED]. If this type of communication is a "wire communication" pursuant to Section 1801(i), then its acquisition is excluded by definition from Section 1801(f)(4). Furthermore, Section 1801(f)(2) defines electronic surveillance as

[REDACTED] are not "wire communications" pursuant to Section 1801(i), then the Court's orders would be confusing in that they authorize, under the rubric of "wire communications surveillance" (as described in the Standard Description of Means of Electronic Surveillance and Manner of Physical Search filed in Docket No. [REDACTED]), the acquisition of communications that are not "wire communications" as defined by the statute.

In view of these circumstances, and the likelihood that the government will continue to submit applications for authority to conduct electronic surveillance [REDACTED] it is hereby ORDERED as follows:

On or before May 7, 2010, the government shall make a written submission to the Court regarding the statutory basis for authorizing electronic surveillance [REDACTED]

[REDACTED] in the Standard Description of Means of Electronic Surveillance and Manner of Physical Search filed in Docket No. [REDACTED]. This submission shall include:

(1) A technical description [REDACTED]

(2) An explanation whether, or in what circumstances, [REDACTED]

be understood as electronic surveillance as defined at 50 U.S.C. §§ 1801(f)(2), (f)(4), or some other portion of § 1801(f).

(3) A legal discussion of whether, or in what circumstances, [REDACTED]

involve the acquisition of "wire communications" as defined at 50 U.S.C. § 1801(i), to include whether specified persons [REDACTED] "common carriers."

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(4) A legal discussion of whether the Court may authorize acquisition of [REDACTED] electronic surveillance under 50 U.S.C. § 1801(f)(2), and direct specified persons to assist in such surveillance.

(5) A discussion of any other issues the Court may need to be aware of in analyzing the Court's jurisdiction to order [REDACTED] particularly when the [REDACTED]

ENTERED this 5th day of March, 2010 in Docket Nos. [REDACTED]

Susan Webber Wright
SUSAN WEBBER WRIGHT
Judge, United States Foreign
Intelligence Surveillance Court

[REDACTED] Deputy Clerk
FISC, deny that the document
is a true and correct copy

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