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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT



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SUPPLEMENTAL ORDER

(S) [REDACTED] the Court granted pen register/trap-and-trace authority on the terms requested in the government's applications. Those authorizations included the following provision:

[T]his authority includes the authority to record and decode all post-cut-through digits,[¹] as described in the Government's Verified Memorandum of Law Regarding the Collection of Post-Cut-Through Digits Through Telephone Pen Register Surveillance Under the Foreign Intelligence Surveillance Act, filed with the Court of [REDACTED]. The Government shall not make any affirmative investigative use, through pen register authorization, of post-cut-through digits that do not constitute call dialing, routing, addressing or signaling information, unless separately authorized by this Court.

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The government first expressly raised the issue of acquisition of post-cut-through digits by pen registers before the Foreign Intelligence Surveillance Court (FISC) in Docket No. [REDACTED]

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¹ "Post-cut-through digits" are numbers dialed on a telephone after an initial connection is made (i.e., after the call is "cut through").

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(S) [redacted] See Government's Verified Memorandum of Law, Docket No. [redacted] (S)
[redacted] Government's Memorandum of Law in Response to the Court's July 27, 2006 Order,
Docket No. [redacted] Since then, most FISC orders authorizing the use of
pen registers on telephones or cellular telephones have contained a provision similar to the one
quoted above. (S)

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The government's submissions in Docket No. [redacted] represented that technology
then reasonably available to the government was unable to acquire all post-cut-through digits that
constituted non-content dialing, routing, addressing or signaling information, while excluding
from acquisition post-cut-through digits that constituted the contents of a communication. Under
this circumstance, the government argued, and the judges of the FISC have generally accepted,
that 18 U.S.C. § 3121(c)² should be understood to apply to pen registers authorized under 50
U.S.C. § 1842, and to permit the acquisition of all post-cut-through digits -- including content
digits -- subject to a prohibition on making affirmative investigative use of content post-cut-
through digits. (S)

[redacted] (S)
approach. Since the government's briefings to the FISC in Docket No. [redacted] (S)
[redacted] (S)

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² A government agency authorized to install and use a pen register
under this chapter or under State law shall use technology
reasonably available to it that restricts the recording or decoding of
electronic or other impulses to the dialing, routing, addressing, and
signaling information utilized in the processing and transmitting of
wire or electronic communications so as not to include the contents
of any wire or electronic communications.

18 U.S.C. § 3121(c) (emphasis added).

[redacted] (S)

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(continued...)

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Moreover, the approach generally adopted by the FISC rests on a factual premise that has not been revisited since 2006: that reasonably available technology is unable to distinguish between content and non-content post-cut-through digits prior to acquisition. Changes in technology could result in an enhanced capacity to distinguish between content and non-content post-cut-through digits, which in turn could call into question whether pen register orders should routinely authorize the acquisition of all post-cut-through digits.

In view of these circumstances, and the likelihood that the issue of acquiring post-cut-through digits will continue to be presented in pen register applications presented to the FISC, it is hereby ORDERED as follows:

On or before [REDACTED] the government shall make a written submission to the FISC regarding the acquisition of post-cut-through digits under pen register orders. This submission shall include: (S)

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(1) A description of whether and to what extent technology that is now reasonably available to the government can distinguish between content and non-content post-cut-through digits prior to acquisition, to include an explanation of whether such capabilities vary from case to case (e.g., depending on the provider or the nature of the service used by the target). If such technology does not currently

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exist, the submission shall include a description of what efforts are being made by the government to develop such technology.

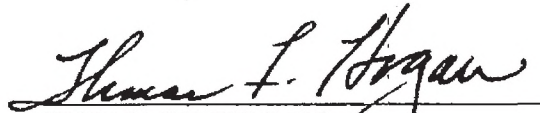
(2) A discussion of the legal issues presented, in light of the current technology and the opinions cited in footnote 3 above.

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ENTERED this

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

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[redacted] Deputy Clerk
SC, certify that this document
is a true and correct copy of
the original [redacted]