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Introduction

This digest summarizes selected opinions of the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISC-R) regarding Section 702 of the Foreign Intelligence Surveillance Act (FISA). It covers the FISC's annual review of intelligence agencies' Section 702 certifications and the FISC and FISC-R's opinions related to the statutory definition of Electronic Communications Service Providers (ECSPs). Publicly available opinions are posted on the [FISC website](#), and further resources are available through the Intel.gov [IC on the Record Database](#), a website of the Office of the Director of National Intelligence (DNI).

The digest explains certain aspects of the opinions and is intended as a guide for readers to identify relevant material. This digest is necessarily incomplete; it is not intended as a substitute for consulting the opinions themselves.

Certification Opinions

On an annual basis, FISA requires the Attorney General (AG) and Director of National Intelligence (ODNI) to submit certifications attesting that there are procedures for targeting, minimizing, and querying Section 702 communications.¹ Each certification corresponds to a type of foreign intelligence information under FISA. In 2023, the Office of the Director of National Intelligence (ODNI) declassified and [released](#) the types of foreign intelligence covered by then-current certifications: (1) foreign governments and related entities, (2) counterterrorism, and (3) combatting proliferation of weapons of mass destruction. In 2025, a fourth category was added: the international production/distribution/financing of illicit drugs). The FISC reviews the certifications and approves them if they meet statutory requirements under U.S.C. § 1881a(h) and (j), discussed in more detail below.²

In the certification opinions, the Court first decides whether the targeting procedures are reasonably designed to ensure that Section 702 targets are limited to “persons reasonably believed to be located outside the United States” and prevent the intentional acquisition of communications whose sender(s) and recipient(s) are known to be inside the United States.³ Second, it assesses whether the minimization procedures are “reasonably designed in light of the purpose and technique of the particular surveillance” to minimize the unnecessary acquisition, retention, and/or dissemination of information concerning unconsenting U.S.

¹ 50 U.S.C. § 1881a(h) (requiring the Attorney General and the Director of National Intelligence to submit a certification and affidavit annually, absent exigent circumstances).

² 50 U.S.C. § 1881a(j).

³ 50 U.S.C. § 1881a(j)(2)(B).

persons and evidence of crimes for law enforcement purposes.⁴ Third, the FISC determines whether the querying procedures comply with statutory requirements.⁵ Fourth, the FISC decides whether the targeting, minimization, and querying procedures are consistent with the Fourth Amendment of the Constitution.⁶ Finally, the FISC reviews past compliance with the procedures as part of its assessment of whether the procedures “are likely to be *implemented* in a manner consistent with statutory and Fourth Amendment requirements.”⁷

ECSP Opinions

Under FISA Section 702, the AG and DNI may order electronic communications service providers (ECSPs) to assist in acquiring foreign intelligence information.⁸ Before RISAA, FISA defined an ECSP as: (A) a “telecommunications carrier,” (B) a “provider of an electronic communication service,” (C) a “provider of a remote computing service,” (D) “any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored,” and (E) “an officer, employee, custodian, or agent of an entity described in subparagraph (A), (B), (C), (D), or (E).”⁹ In 2024, RISAA expanded the ECSP definition to include “any other service provider who has access to equipment that is being or may be used to transmit or store wire or electronic communications.”¹⁰

Prior to RISAA, in 2022, the FISC considered whether a provider met the definition of an ECSP.¹¹ The provider, which the Court redacted, challenged an order for assistance by arguing

⁴ 50 U.S.C. § 1881a(j)(2)(C) (referencing the definition of minimization procedures under 50 U.S.C. § 1801(h)).

⁵ 50 U.S.C. § 1881a(j)(2)(D).

⁶ 50 U.S.C. § 1881a(j)(3)(A) (“If the Court finds that a certification . . . contains all the required elements and that the targeting, minimization, and querying procedures adopted in accordance with subsections (d), (e), and (f)(1) are consistent with the requirements of those subsections and with the fourth amendment to the Constitution of the United States, the Court shall enter an order approving the certification and the use, or continued use . . . of the procedures for acquisition.”); *see also* 50 U.S.C. § 1881a(f)(1) (describing the requirements for querying procedures, such as ensuring consistency with the Fourth Amendment and including “a procedure whereby a record is kept of each United States person query term used for a query”).

⁷ *See, e.g., In re DNI/AG 702(h) Certification 2024-A-C*, No. 702(j)-24-01-03, at 78 (FISA Ct. Sept. 17, 2024) (emphasis added).

⁸ 50 U.S.C. § 1881a(i)(1) (requiring ECSPs that receive an order to “immediately provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition in a manner that will protect the secrecy of the acquisition and produce a minimum of interference with the services that such [ECSP] is providing to the target of the acquisition”).

⁹ 50 U.S.C. § 1881(b).

¹⁰ *See* Reforming Intelligence and Securing America Act, H.R.7888, 118th Cong. §25(a) (2024); 50 U.S.C. § 1881(b)(4)(E) (codifying the amended definition).

¹¹ *In Re Petition to Set Aside or Modify Directive Issued to [redacted]*, at 6 (FISA Ct. 2022).

that it was not an ECSP.¹² The FISC agreed. In 2023, the FISC-R affirmed the lower court’s decision.

Section 702 Annual Certification Opinions

A. March 18, 2025 FISC and April 9, 2025 Certification Opinions ([March link](#)) ([April link](#))

Key issues: FISA Section 702 certifications; government procedures for targeting, minimization, and querying Section 702 data; foreign intelligence category D related to illicit drugs (50 U.S.C. § 1801(e)(1)(D)); the government’s compliance with procedures after the 2024 Reforming Intelligence and Security America Act (RISAA).

Citations:

- *In re DNI/AG 702(h) Certification 2025-A-C*, No. 702(j)-25-01-03 (FISA Ct. Mar. 18, 2025);
- *In re DNI/AG 702(h) Certification 2024-D*, No. 702(j)-24-04 (FISA Ct. Apr. 9, 2025).

Question(s) Presented

In these March and April 2025 opinions, the FISC evaluated whether the government’s amended FISA Section 702 certifications and procedures met statutory and Fourth Amendment requirements.¹³ Looking at the revised certifications, the court examined: (1) whether the scope of information that IC elements can collect under Certification D falls within FISA’s definition of foreign intelligence information, (2) how the procedures ensure that any U.S. person information obtained through Section 702 is *necessary*—not just *relevant*—to the government’s foreign intelligence activities, and (3) whether the procedures for IC elements disseminating any evidence of U.S. persons’ “ordinary” crimes (*i.e.*, crimes unrelated to national security) comply with the Fourth Amendment.¹⁴

The Government’s Amended Procedures

The NSA and CIA resubmitted its certifications and procedures after the Court had previously found some aspects of them deficient. Specifically, in September of 2024, the FISC declined to approve “Certification D” for using Section 702 to obtain foreign intelligence about illicit drugs.¹⁵ The government revised its minimization procedures to explicitly reference and

¹² See Shanzay Pervaiz, *The IAA Attempts to Narrow Expanded ECSP Definition*, PRIV. ACROSS BORDERS (July 29, 2024), <https://privacyacrossborders.org/2024/07/29/the-iaa-attempts-to-narrow-expanded-ecsp-definition/>.

¹³ *In re DNI/AG 702(h) Certification 2025-A-C*, No. 702(j)-25-01-03 (FISA Ct. Mar. 18, 2025) [hereinafter *March 2025 Certification Opinion*]; *In re DNI/AG 702(h) Certification 2024-D*, No. 702(j)-24-04 (FISA Ct. Apr. 9, 2025) [hereinafter *April 2025 Certification Opinion*].

¹⁴ *March 2025 Certification Opinion*, at 29.

¹⁵ *Id.* at 26–27 (“The deficiency inhered in not taking adequate account of the requirement that, in order for a U.S.-person query to be reasonably likely to retrieve foreign intelligence information, it must be reasonably likely to retrieve information that is *necessary to* – not merely related to – the ability of the United States to protect against, e.g., international terrorism or international production of illicit synthetic drugs. § 1801(e)(1)(C)-(D).”).

provide guidance regarding the heightened U.S. person necessity standard, including the need to disseminate or retain information about U.S. persons.¹⁶ Second, it revised its querying procedures to require documentation showing that a U.S. person query term is necessary to address one of the threats in FISA’s definition of foreign intelligence information.¹⁷ Third, it added a requirement for personnel training that provides guidance on the necessity standard.¹⁸ In light of these changes, the Court found that the amended Certification D and related procedures—as well as the certifications and procedures for categories A, B, and C—met statutory requirements.¹⁹

Fourth Amendment Analysis

The Court also evaluated whether the procedures were consistent with the Fourth Amendment.²⁰ The Court noted that, although the Fourth Amendment does not govern any searches of non-U.S. persons located outside the United States, it applies with respect to communications between U.S. persons and such Section 702 targets.²¹ It reiterated that the Section 702 program falls within the foreign intelligence exception to the Fourth Amendment’s warrant requirement and that its reasonableness analysis covers the program as a whole rather than each individual query of U.S. person data.²²

To determine whether the Section 702 certifications and procedures met the Fourth Amendment’s standard of reasonableness, the FISC weighed the government’s interest in obtaining foreign intelligence information against the intrusion on the privacy interest of U.S. persons for each priority area (*e.g.*, a potential attack from a foreign power, terrorist activity, clandestine intelligence activity, and the international production and distribution of illicit drugs).²³ The Court found that the amended procedures are consistent with the Fourth Amendment.²⁴ In particular, with respect to Certification D for foreign intelligence concerning illicit drugs, the Court’s analysis focused on U.S. person queries and the “dissemination of evidence of crimes involving covered illicit drugs that does not constitute foreign intelligence information.”²⁵ The Court concluded that

Because the retention and dissemination of U.S.-person information and the use of U.S.-person query terms are now expressly limited to documented circumstances affirmatively and justifiably determined to be necessary to achieve the national

¹⁶ *April 2025 Certification Opinion*, at 10–11.

¹⁷ *Id.* at 12.

¹⁸ *Id.* at 13.

¹⁹ *April 2025 Certification Opinion*, at 17; *March 2025 Certification Opinion*, at 49–50.

²⁰ *March 2025 Certification Opinion*, at 29.

²¹ *Id.*

²² *Id.* at 30.

²³ *Id.* at 31.

²⁴ *Id.* at 33; *April 2025 Certification Opinion*, at 16.

²⁵ *March 2025 Certification Opinion*, at 31.

security objectives delineated in § 1801(e), the Court finds that the amended procedures are also consistent with the Fourth Amendment.²⁶

Compliance with Procedures

As part of its review of the certifications and procedures, the FISC evaluated how the procedures are currently being implemented as an indicator of how the government will comply with them in the following year.²⁷ It analyzed the government’s response to instances of noncompliance and found that the 2025 procedures are likely to be implemented in a manner consistent with statutory and Fourth Amendment requirements.²⁸

FBI post-RISAA compliance with querying procedures. RISAA added a requirement for the Department of Justice to audit the FBI’s queries of U.S. person information.²⁹ The Court noted some improvements in the implementation of the FBI’s querying procedures after RISAA came into effect, with additional room for improvement.³⁰ First, the Court noted that the percentage of U.S. person queries that fail to meet the standard fell from 1.1% in September 2024 (pre-RISAA) to 0.66% in March 2025 (post-RISAA).³¹ Second, the Court stated that, although there were some improvements in the accuracy of the FBI’s records of U.S. person query terms—*i.e.*, errors in marking terms as relating to a U.S. person—the FBI still needs to improve its accuracy.³² Third, the Court noted that RISAA prohibited U.S. person queries conducted for the sole purpose of finding evidence of criminal activity.³³ However, there have been 471 such queries since RISAA was enacted.³⁴ “During September–November 2024, 348 queries were conducted solely for evidence of crime, and the user accessed unminimized contents retrieved by 62 such queries.”³⁵

Additional compliance areas. The Court evaluated additional aspects of the FBI and NSA’s compliance with procedures related to Section 702, including data management and retention, NSA compliance reporting delays, and the dissemination of reports that contain information that was required to be purged.³⁶

²⁶ *April 2025 Certification Opinion*, at 16.

²⁷ *March 2025 Certification Opinion*, at 33.

²⁸ *Id.* at 35, 49.

²⁹ *Id.*

³⁰ *Id.* at 33–34.

³¹ *Id.* at 35–36.

³² *Id.* at 36.

³³ *March 2025 Certification Opinion*, at 37 (citing § 702(f)(2)(A)).

³⁴ *Id.*

³⁵ *Id.* at 38.

³⁶ *Id.* at 43–48.

B. February 20, 2025 FISC Section 702 Certification D Opinion ([link](#))

Key issues: FISA Section 702 certifications; government procedures for targeting, minimization, and querying Section 702 data; foreign intelligence category D related to illicit drugs (50 U.S.C. § 1801(e)(1)(D)).

Citation: *In Re DNI/AG 702(h) Certification 2024-D*, No. 702(j)-24-04 (FISA Ct. Feb. 20, 2025).

Question(s) Presented

In this February 2025 opinion, the FISC reviewed whether the FBI, CIA, and NSA’s targeting, minimization, and querying procedures met statutory and Fourth Amendment requirements.³⁷ In 2024, RISAA added illicit drugs to FISA’s definition of foreign intelligence information. The FISC evaluated the government’s FISA Section 702 certification and procedures for obtaining foreign intelligence information concerning the international production, distribution, or financing of specific illicit drugs (“Certification D”).

The Government’s Procedures

The Court found that the FBI’s procedures were consistent with the requirements.³⁸ However, it found that some aspects of the NSA and CIA’s minimization procedures failed to expressly acknowledge the heightened standard for foreign intelligence information as it relates to U.S. persons—which requires that the U.S. person information be “*necessary* to the ability of the United States to protect against [against international drug trafficking].”³⁹ As to the querying procedures, the Court encouraged the NSA and CIA to consider requiring a more specific fact-based showing of the need to query Section 702 data using U.S. person identifiers.⁴⁰ The FISC also advised that

The government should [] clarify the procedures governing dissemination. . . . [U]nder the proposed procedures, non-foreign intelligence information that concerns non-covered illicit drugs are subject to a heightened dissemination standard. While that standard still permits the use of non-foreign intelligence information for law enforcement purposes, the heightened quantity or potency requirement makes use of such information for ordinary crime control less likely. . . . [T]he higher dissemination standard should also apply to evidence of crime related to covered

³⁷ *In Re DNI/AG 702(h) Certification 2024-D*, No. 702(j)-24-04, at 2 (FISA Ct. Feb. 20, 2025) [hereinafter *February 2025 Certification D Opinion*].

³⁸ *Id.* at 65.

³⁹ *Id.* at 39, 65.

⁴⁰ *Id.* at 62.

illicit drugs that does not also constitute “foreign intelligence information.”⁴¹

Because of these deficiencies, the FISC declined to approve Certification D.⁴²

Fourth Amendment Analysis

The Court also evaluated whether the procedures were consistent with the Fourth Amendment. The Court considered whether the foreign intelligence exception to the Fourth Amendment’s warrant requirement applies to incidentally-acquired U.S. person information.⁴³ In doing so, it evaluated the government’s need to obtain foreign intelligence information related to illicit drugs.⁴⁴ It found that the foreign intelligence exception to the Fourth Amendment’s warrant requirement applies to Certification D because it has a “national security purpose beyond ordinary crime control” and concerns time-sensitive information.⁴⁵

However, the Court held that some aspects of the procedures failed to comply with the Fourth Amendment’s reasonableness requirement. Similar to its evaluation of statutory requirements, it found that the

murky line between what constitutes “foreign intelligence information” under § 1801(e)(1)(D) versus what might be evidence of ordinary drug crime means that, even when the government conducts queries reasonably likely to return “foreign intelligence information,” the queries might also be equally reasonably likely to return evidence of ordinary drug crime.⁴⁶

It suggested the same improvements to protect U.S. person privacy interests (*e.g.*, expressly addressing the necessity standard and clarifying the procedures regarding disseminating non-foreign intelligence information about U.S. persons that is evidence of a crime).⁴⁷ “[S]uch improvements would bring the warrantless intrusion necessitated by the foreign intelligence purpose of both the acquisition and subsequent querying using U.S.-person identifiers within the bounds of reasonableness under the Fourth Amendment.”⁴⁸

⁴¹ *Id.* at 63 (citation omitted).

⁴² *Id.* at 65.

⁴³ *February 2025 Certification D Opinion*, at 46.

⁴⁴ *Id.* at 49.

⁴⁵ *Id.* at 46–54.

⁴⁶ *Id.* at 60.

⁴⁷ *Id.* at 62–64.

⁴⁸ *Id.* at 64.

C. September 17, 2024 FISC Section 702 Certification Opinion ([link](#))

Key issues: FISA Section 702 certifications; government procedures for targeting, minimization, and querying Section 702 data; foreign intelligence category D related to illicit drugs (50 U.S.C. § 1801(e)(1)(D)); the government’s compliance with procedures after the 2024 Reforming Intelligence and Security America Act (RISAA).

Citation: *In re DNI/AG 702(h) Certification 2024-A-C*, No. 702(j)-24-01-03 (FISA Ct. Sept. 17, 2024).

Question(s) Presented

In this September 2024 opinion, the FISC evaluated whether the government’s post-RISAA certifications and procedures met statutory and Fourth Amendment requirements. It concluded that they did meet the requirements and approved the certifications.⁴⁹

In April 2024, Congress enacted RISAA, which extended FISA’s operation for two years.⁵⁰ Although the FISC had already accepted the pre-RISAA certifications for a period from January 2024 to April 2024, RISAA required the government to submit new procedures in light of the Act’s statutory changes.⁵¹ The government submitted new procedures in July 2024, and the FISC evaluated them in this opinion.⁵²

The Government’s Procedures

This opinion addressed “one or more novel or significant interpretations of law” that impacted the Court’s review of the procedures.⁵³ This included the following questions, taken from the ODNI’s press release:

(1) does Section 702(f) of FISA, as amended by RISAA, including but not limited to section 3(a) (which generally prohibits FBI from conducting evidence-of-crime-only (EOCO) queries), apply to querying or accessing information acquired under authorizations pursuant to Section 702(a) that were documented in certifications submitted to the FISC under Section 702(h) before January 1,

⁴⁹ *In re DNI/AG 702(h) Certification 2024-A-C*, No. 702(j)-24-01-03, at 107 (FISA Ct. Sept. 17, 2024) [hereinafter *September 2024 Certification Opinion*].

⁵⁰ *Id.* at 4.

⁵¹ *Id.*

⁵² *Id.* at 12.

⁵³ See *ODNI Releases September 2024 FISC Opinion on FISA 702 Certification Amendments*, INTEL.GOV: IC ON THE RECORD DATABASE (May 2, 2025), <https://www.intel.gov/ic-on-the-record-database/declassified/odni-releases-september-2024-fisc-opinion-on-fisa-702-certification-amendments>.

2024? If so, what effect should section 18(d)(2) of RISAA be understood to have; and

(2) with respect to travel vetting, do NSA’s revised querying procedures and minimization procedures comport with the definition of “minimization procedures” at 50 U.S.C. §§ 1801(h) and 1821(4) and the requirements of the Fourth Amendment?⁵⁴

As to the first issue, the FISC held that RISAA’s new requirements only apply to acquisitions beginning in 2024.⁵⁵ As to the second, the FISC held that the travel vetting procedures complied with statutory and Fourth Amendment requirements.⁵⁶

Targeting procedures. The NSA’s targeting procedures contained minimal revisions from the previous year. Most of the FBI’s revisions concerned “what particular checks the FBI must conduct of information in its possession in various circumstances.”⁵⁷ The FISC’s discussion of the FBI’s targeting procedures is heavily redacted.⁵⁸ Nonetheless, the unredacted portions reveal modifications concerning “foreignness determinations,” including removing certain required queries and streamlining the process.⁵⁹ The FISC found that the FBI’s targeting procedures met statutory requirements.⁶⁰

Minimization procedures. As for the minimization procedures, the FISC considered the impact of RISAA’s expanded definition of foreign intelligence information—which now includes information related to the distribution, production, or financing of illicit drugs.⁶¹ It noted that the expanded definition has consequences for minimization;

the broader statutory definition of ‘foreign intelligence information’ results in the procedures affording greater latitude in handling counternarcotics information described in § 1801(e)(1)(D), to the extent that such information is not also foreign intelligence information under one of the other subparagraphs of § 1801(e)(1) and is not evidence of crime being retained or disseminated for law enforcement purposes, per § 1801(h)(3).⁶²

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *September 2024 Certification Opinion*, at 21.

⁵⁸ *Id.* at 21–29.

⁵⁹ *Id.* at 21–28.

⁶⁰ *Id.* at 29.

⁶¹ *Id.* at 33.

⁶² *Id.* at 35–36.

Fourth Amendment Analysis

The Court found that the “the expanded definition of foreign intelligence information [in RISAA] does not materially alter the Court’s evaluation of the overall reasonableness of acquisitions under the certifications in question.”⁶³

Compliance with Procedures

The FISC noted that “[t]he FBI seems to be continuing to improve its implementation of the querying standard.”⁶⁴ Additionally, RISAA imposed a requirement on the Department of Justice to audit FBI Section 702 queries, and, according to the government, “preliminary results of those first several such reviews demonstrate strong compliance with the query standard.”⁶⁵

D. April 11, 2023 FISC Section 702 Certification Opinion ([link](#))

Key issues: FISA Section 702 certifications; government procedures for targeting, minimization, and querying Section 702 data; NSA travel vetting procedures; NSA distinction between “querying” and “processing” Section 702 data; FBI compliance with querying procedures.

Citation: *In re DNI/AG 702(h) Certification 2025-A-C*, No. 702(j)-23-01-03 (FISA Ct. Apr. 11, 2023).

Question(s) Presented

In this April 2023 opinion, the FISC reviewed the government’s Section 702 certifications and its targeting, minimization, and querying procedures. As required under FISA, the Court sought to “ensure that FISA Section 702 is used only to acquire foreign intelligence information from foreign persons located outside the United States; safeguard any U.S. person information incidentally acquired; and govern the querying of unminimized information that is lawfully collected, respectively.”⁶⁶

The government’s certification and procedures covered the three pre-RISAA foreign intelligence categories; it did not include the later-added subsection (D) for illicit drugs.⁶⁷

⁶³ *September 2024 Certification Opinion*, at 73.

⁶⁴ *Id.* at 80.

⁶⁵ *Id.* at 83.

⁶⁶ *See Release of Documents Related to the 2023 FISA Section 702 Certifications*, INTEL.GOV: IC ON THE RECORD DATABASE (July 21, 2023), <https://www.intelligence.gov/ic-on-the-record-database/declassified/release-of-documents-related-to-the-2023-fisa-section-702-certifications>.

⁶⁷ *Id.* (“[T]he DNI has declassified that there are three Certifications under Section 702, covering the following categories of foreign intelligence: (1) foreign governments and related entities, (2) counterterrorism, and (3) combatting proliferation.”).

The Government's Procedures

The FISC approved the government's certifications and procedures.⁶⁸ As for the statutory requirements, the Court found that

the NSA Targeting Procedures and the FBI Targeting Procedures, as written, are reasonably designed to: (1) ensure that any acquisition authorized under the 2023 Certifications is limited to targeting persons reasonably believed to be located outside the United States, (2) prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of acquisition to be located in the United States, and (3) prevent targeting U.S. persons for acquisition. The first two of these findings are required by Section 702(d)(l). The third is relevant to the Court's analysis of whether these procedures are consistent with the requirements of the Fourth Amendment.⁶⁹

Querying and minimization procedures. The FISC noted some modifications to the NSA's querying and minimization procedures. These included provisions concerning "vetting of non-U.S. persons seeking to enter the United States or receive a benefit under U.S. immigration law ('travel vetting')" and clarifying the difference between "processing" and "querying" data.⁷⁰ The Court found that the procedures were consistent with statutory requirements.⁷¹

Fourth Amendment Analysis

The FISC held that the government's procedures were consistent with the Fourth Amendment.⁷² It stated,

After carefully considering how in combination the targeting, minimization, and querying procedures protect private U.S.-person information, the Court finds that the procedures as written adequately guard against error and abuse, taking into account the individual and governmental interests at stake. The Court accordingly finds that the procedures, as written, are consistent with the requirements of the Fourth Amendment.⁷³

⁶⁸ *In re DNI/AG 702(h) Certification 2025-A-C*, No. 702(j)-23-01-03, at 111 (FISA Ct. Apr. 11, 2023) [hereinafter *April 2023 FISC Certification Opinion*].

⁶⁹ *Id.* at 21.

⁷⁰ *Id.* at 6; *Release of Documents Related to the 2023 FISA Section 702 Certifications*, *supra* note 68.

⁷¹ *April 2023 FISC Certification Opinion*, at 67.

⁷² *Id.* at 74.

⁷³ *Id.* at 74.

Compliance with Procedures

The Court noted some errors in the government’s Section 702 procedures during the preceding year.⁷⁴ However, as the ODNI press release notes, the FISC highlighted the steps that the FBI was taking to improve its querying practices, including “updated training, guidance, and clarifications to FBI’s querying procedures.”⁷⁵ The court remarked that “there is reason to believe that the FBI has been doing a better job in applying the querying standard.”⁷⁶

The Court ordered the government to report to the FISC regarding the agencies’ compliance with procedures and notify the Court about certain uses of Section 702 (e.g., “tasking for upstream collection” and accessing unminimized Section 702 information only for evidence of a crime).⁷⁷

E. April 21, 2022 FISC Section 702 Certification Opinion ([link](#))

Key issues: FISA Section 702 certifications; government procedures for targeting, minimization, and querying Section 702 data; new NSA “highly sensitive” surveillance technique using Section 702; FBI compliance with querying procedures.

Citation: *FISC Memorandum Opinion and Order* (FISA Ct. Apr. 21, 2022).⁷⁸

Question(s) Presented

In this April 2022 opinion, the FISC reviewed the government’s procedures under Section 702.⁷⁹ Notably, the court considered a new NSA “highly sensitive” surveillance technique using Section 702, which is largely redacted from the opinion.⁸⁰

The Government’s Procedures

“After considering the overall state of implementation of the current targeting, querying, and minimization procedures, the Court finds that the proposed procedures, as

⁷⁴ *Release of Documents Related to the 2023 FISA Section 702 Certifications*, *supra* note 68.

⁷⁵ *Id.*

⁷⁶ *Id.*; *April 2023 FISC Certification Opinion*, at 85–87.

⁷⁷ *April 2023 FISC Certification Opinion*, at 112–117.

⁷⁸ The case name is redacted in the opinion.

⁷⁹ *Release of Two FISC Decisions Authorizing Novel Intelligence Collection*, INTEL.GOV: IC ON THE RECORD DATABASE (May 19, 2023), <https://www.intel.gov/ic-on-the-record-database/declassified/release-of-two-fisc-decisions-authorizing-novel-intelligence-collection#:~:text=The%20first%20decision%20being%20made,Certifications%20on%2021%20April%202022.>

⁸⁰ *Id.*

reasonably expected to be implemented, comply with applicable statutory and Fourth Amendment requirements.”⁸¹

The FISC considered arguments from amicus curiae regarding the new, sensitive surveillance technique.⁸² “The FISC specifically considered the form of the acquisition and whether the intelligence information could be obtained from or with the assistance of an electronic communication service provider, as required by the FISA statute.”⁸³ The Court applied a “deferential form of review” and found that the NSA technique involved ECSP assistance, as defined under FISA.⁸⁴

Fourth Amendment Analysis

The FISC held that the government procedures were consistent with the Fourth Amendment.⁸⁵

Compliance with Procedures

The FISC analyzed the FBI’s compliance with the querying procedures in the previous year and reported compliance incidents.⁸⁶ In the context of minimization, the Court noted the remedial measures that the FBI had undertaken in response to compliance issues.⁸⁷ In sum, it stated, “the Court is encouraged by the amendments to the FBI’s querying procedures and the substantial efforts to improve FBI querying practices, including heightened documentation requirements, several systems changes, and enhanced guidance, training, and oversight measures.”⁸⁸ It found that the FBI was likely to implement the procedures in a manner consistent with statutory requirements.⁸⁹ However, it qualified these findings by stating that

compliance problems with the FBI’s querying of Section 702 information have proven to be persistent and widespread. If they are not substantially mitigated by these recent measures, it may become necessary to consider other responses, such as substantially limiting the number of FBI personnel with access to unminimized Section 702 information.⁹⁰

⁸¹ *FISC Memorandum Opinion and Order*, at 81 (FISA Ct. Apr. 21, 2022) [hereinafter *April 2022 FISC Certification Opinion*].

⁸² *Release of Two FISC Decisions Authorizing Novel Intelligence Collection*, *supra* note 80.

⁸³ *Id.*

⁸⁴ *April 2022 FISC Certification Opinion*, at 109.

⁸⁵ *Id.* at 121.

⁸⁶ *Release of Two FISC Decisions Authorizing Novel Intelligence Collection*, *supra* note 80.

⁸⁷ *Id.*

⁸⁸ *April 2022 FISC Certification Opinion*, at 49.

⁸⁹ *Id.*

⁹⁰ *Id.*

The Court ordered the government to report to the FISC regarding the agencies' compliance with procedures and notify the Court about certain uses of Section 702.⁹¹

ECSP Opinions

A. 2022 FISC ECSP Opinion ([link](#))

Question(s) Presented

Under FISA Section 702, the AG and DNI may order electronic communications service providers (ECSPs) to assist in acquiring foreign intelligence information.⁹² Before RISAA, FISA defined an ECSP as: (A) a “telecommunications carrier,” (B) a “provider of an electronic communication service,” (C) a “provider of a remote computing service,” (D) “any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored,” and (E) “an officer, employee, custodian, or agent of an entity described in subparagraph (A), (B), (C), (D), or (E).”⁹³ RISAA expanded the ECSP definition to include “any other service provider who has access to equipment that is being or may be used to transmit or store wire or electronic communications.”⁹⁴

Prior to RISAA, in 2022, the FISC considered whether a provider met the definition of an ECSP.⁹⁵ The provider, which the Court anonymized, challenged an order for assistance in April 2022 by arguing that it was not an ECSP.⁹⁶ The court agreed with the provider, and held that it did not qualify as an ECSP.⁹⁷

Statutory Interpretation of ECSP Definition

The provider argued that it was not an ECSP with respect to definition (B) for an electronic communications service (ECS) and definition (D) for “any other communication service provider who has access to wire or electronic communications.” The FISC agreed.

⁹¹ *April 2022 FISC Certification Opinion*, at 123–24.

⁹² 50 U.S.C. § 1881a(i)(1) (requiring ECSPs that receive an order to “immediately provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition in a manner that will protect the secrecy of the acquisition and produce a minimum of interference with the services that such [ECSP] is providing to the target of the acquisition”).

⁹³ 50 U.S.C. § 1881(b).

⁹⁴ See Reforming Intelligence and Securing America Act, H.R.7888, 118th Cong. §25(a) (2024); 50 U.S.C. § 1881(b)(4)(E) (codifying the new definition).

⁹⁵ *In Re Petition to Set Aside or Modify Directive Issued to [redacted]*, at 6 (FISA Ct. 2022).

⁹⁶ See Shanzay Pervaiz, *The IAA Attempts to Narrow Expanded ECSP Definition*, PRIV. ACROSS BORDERS (July 29, 2024), <https://privacyacrossborders.org/2024/07/29/the-iaa-attempts-to-narrow-expanded-ecsp-definition/>.

⁹⁷ *Id.*

For (B), the Court stated that the provider was not an ECS because it did not permit users to “send or receive electronic communications.”⁹⁸ It reasoned that ECS services have typically included companies that provide users with access to telephone, internet, and email communications, [that] store communications for users to retrieve, or [that] operate facilities “over which users’ communications are transmitted.”⁹⁹ Under the relevant case law, ECSs are typically services like phone, internet, email, or electronic bulletin boards.¹⁰⁰

For (D), the Court used statutory interpretation tools to determine the meaning of “any other communication service provider who has access to wire or electronic communications.”¹⁰¹ It found that ECSPs under definition (D) must still provide a communications service.¹⁰² Because the provider was not communications service, the FISC held that it was not an ECSP.¹⁰³ It left to Congress the task of changing the definition if it wished to include additional kinds of providers, which Congress later accomplished through RISAA.¹⁰⁴

B. 2023 FISC-R ECSP Opinion ([link](#))

In 2023, the FISC-R affirmed the FISC’s 2023 ECSP order and opinion.¹⁰⁵ The opinion is heavily redacted. However, the unredacted portions added to the lower court’s analysis in some instructive ways. For example, regarding definition (B) for ECSs, the FISC-R cited additional cases showing that a product or service that is related to communications, but does not provide a communication service for users, is not an ECSP:

The FISC-R discussed that the “reach of 2510(15)” included network service providers, web hosting, and social networking services, but it did not include certain services that may enable communications (e.g. a smartphone that can send or receive wire or electronic communications). It also analyzed cases involving in-car and cruise ship communication systems to maintain that providers, even if they do not rely on “cellular or Internet connectivity” to send or receive wire or electronic communications, can still qualify as an

⁹⁸ *Id.*

⁹⁹ *In Re Petition to Set Aside or Modify Directive Issued to [redacted]*, at 9–10 (FISA Ct. 2022) (citations omitted) (“Courts have found [the ECS definition] ‘to apply to providers of a *communication* service such as telephone companies, internet or e-mail service providers, and bulletin board services.’”).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 15.

¹⁰² *Id.* at 15 (“an entity that does not qualify as a telecommunications carrier, ECS provider, or provider or remote computing services must nonetheless provide some ‘communication service’ in a form or manner similar to those three specified types of entities in order to fall under [§ 1881(b)(4)(D)].”).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 20 (“If the government believes that the scope of Section 702 directives should be broadened as a matter of national security policy, its recourse is with Congress.”).

¹⁰⁵ *In Re Petition to Set Aside or Modify Directive Issued to [redacted]*, at 20 (FISA Ct. Rev. 2023).

ECSP. Additionally, the Court asserted that a provider can be an ECSP even if the service in question is not its “primary business function.”¹⁰⁶

¹⁰⁶ Shanzay Pervaiz, *The IAA Attempts to Narrow Expanded ECSP Definition*, PRIV. ACROSS BORDERS (July 29, 2024), <https://privacyacrossborders.org/2024/07/29/the-iaa-attempts-to-narrow-expanded-ecsp-definition/>; *Id.* at 10.