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

IN RE APPLICATION OF THE FEDERAL BUREAU  
OF INVESTIGATION FOR AN ORDER REQUIRING  
THE PRODUCTION OF TANGIBLE THINGS FROM

Docket Number: BR 08-07

SUPPLEMENTAL OPINION REGARDING THE USE OF CERTAIN  
TELEPHONE IDENTIFIERS IN SEARCHING RECORDS OBTAINED  
PURUSANT TO ORDERS IN DOCKET NUMBER BR 06-05 AND SUBSEQUENT  
ORDERS THROUGH DOCKET NUMBER BR 08-04 ~~(TS)~~

The United States brought a potential instance of non-compliance to my attention in a report that it filed in conjunction with an application to renew the authorities granted by the Foreign Intelligence Surveillance Court (FISC) in Docket Number BR 08-04.

NSA Report to the Foreign Intelligence Surveillance Court (BR 08-04) at 15, No. BR 08-07 (F.I.S.C. filed June 26, 2008).<sup>1</sup> The report notified me that, since the initial authorization of this acquisition by the FISC, the National Security Agency (NSA) has

<sup>1</sup> In addition, in accordance with FISC Rule 10(c), the United States filed a preliminary notice with the Court on June 9, 2008. Letter from [REDACTED] National Security Division, U.S. Dept. of Justice to Hon. Colleen Kollar-Kotelly, No. BR 08-04 (F.I.S.C. filed June 9, 2008).

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Derived from: Application in the above-referenced docket  
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used International Mobile Equipment Identifier (IMEI) numbers and International Mobile Subscriber Identifier (IMSI) numbers to initiate contact chaining [REDACTED] the call-detail records or “telephony meta data”<sup>2</sup> obtained by the NSA pursuant to FISC orders. *Id.* at 16. The report indicated that, because the relevant FISC orders authorized the NSA to conduct contact chaining [REDACTED] “known telephone number[s]” for which NSA has determined that a reasonable articulable suspicion exists that a number is associated with a member or agent of one of the targeted organizations, the Department of Justice raised a concern that the NSA’s practice of using IMEI and IMSI numbers “may go beyond the terms of the Court’s authorization.” *Id.* at 17. The report noted that [REDACTED]

[REDACTED]

On June 26, 2008, I held a hearing at which the NSA declarant testified that NSA [REDACTED]

[REDACTED] the declarant noted that such searches were performed due to the configuration of the various NSA databases. In light of the significant national security interests at stake, and the minimal risk posed to United States Persons’s privacy interests by this practice, I expressly authorized the NSA to use IMEI and IMSI numbers until my next sitting on this Court in August, 2008. Primary Order at 5, No. BR 08-07 (F.I.S.C. entered Jun. 26, 2008). In addition, I directed the

<sup>2</sup> The Court’s most recent orders defined “telephony meta data” as including “comprehensive communications routing information, including but not limited to session identifying information (e.g., originating and terminating telephone number, communications device identifier, etc.), trunk identifier, telephone calling card numbers, and time and duration of call,” but not to include “the substantive content of any communication, as defined by 18 U.S.C. §2510(8), or the name address, or financial information of a subscriber or customer.” *See, e.g.,* Primary Order at 2, No. BR 08-04 (F.I.S.C. entered Apr. 3, 2008).

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United States to file a brief at that time addressing whether IMEI and IMSI numbers could constitute “known telephone number[s]” for purposes of the Court’s prior orders.

The United States’ brief was timely filed, in conjunction with an application seeking to renew the relevant authorities. I held a hearing on August 19, 2008 at which I signed orders extending the authorities for 120 days, and notified the government that I found that IMEI and IMSI numbers constituted “known telephone number[s]” for purposes of the Court’s prior orders and, therefore, NSA’s use of IMEI and IMSI numbers to initiate contact chaining [REDACTED] the call-detail records did not violate the terms of those orders. My reasons for making this finding are as follows.

The phrase “telephone number” includes as a matter of law, though not as a matter of common parlance,<sup>3</sup> all of the numbers automatically invoked by use of that number, as suggested by the United States’ citations from Newton’s Telecom Dictionary. Memorandum of United States Regarding the Use of Certain Telephone Identifiers in Searching Records Obtained Pursuant to Orders in Docket Number BR 06-05 and Subsequent Orders Through Docket Number BR 08-04 (Memorandum) at 13, No. BR 08-07 (F.I.S.C. filed Aug. 18, 2008). Even the ordinary non-expert individual would, if the issue were raised, conclude that when he or she punches a phone number on a cell phone or even a land line phone that other numbers automatically come into play.<sup>4</sup> The precise nature of those numbers may not be known, but the need for additional numbers

<sup>3</sup> Part of the common parlance is the concept that a “telephone number” is attached to a specific telephone and thus has some specific location. This has never been true, well before anyone thought of a cell phone. Individuals have transferred phone numbers from residence to residence and office to office, at least since (if not before) the demise of human operators making all connections through their switchboards.

<sup>4</sup> The fact that a phone number is a truncated version of the real telephone number became publicly apparent when state and federal authorities opened the door to competition among telephone networks [REDACTED]

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to route the call to the destination and convey the signal to the destination through satellites and various switches would surprise no one. Where numbers are automatically invoked (in computer language: automatically opened or used or started) by dialing, say, [REDACTED] these numbers are functional and essential elements of that phone number. These essential numbers are not the only numbers invoked to complete the call, but there are also those which are generated for the benefit of the carrier, i.e., billing information. Without billing information, telephony will not exist as a practical matter. It is commonly understood that the telephone numbers of both the caller and the called are transmitted to carriers who can thereby recover their costs; the proper transmission of these numbers requires the use of additional numbers, which, too, are automatically invoked when telephone numbers are dialed.

Internally, I gather, NSA refers to a number like [REDACTED] as a "seed" number from which other numbers sprout. The use of the concept "seed" may well have played a role in causing concern that an IMSI, for example, is something that grows from a seed, separate from and dependent upon other elements like water, earth and sunlight.

A better way to think of this is to think of a number like [REDACTED] as similar to a "computer icon." Clicking on an icon necessarily starts a series of operations all of which always occur if Word Perfect, say, is to open. If one operation fails, the program does not open. A "telephone number" which does not access a communication network is not, in any real or legal sense, a telephone number. It just looks like a telephone number. Things which serve a purpose are defined by that purpose and, if they do not achieve it, they are not pottery but broken shards.

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To NSA, a telephone number is like an icon because it comes with a series of numbers automatically and inevitably invoked every time it functions as a telephone number, just as an icon invokes a series of operations. Both clicking and dialing are unitary actions which include everything in the inevitable train of events that occurs when they serve their purpose. Like an icon whose click can be detected by looking at the events which follow the click, even if the click is not witnessed, a number like [REDACTED] can be found by discovering its component elements, the other essential numbers it invokes when it is used. It does not matter where in the chain of usage one begins to search. Starting with an IMSI is like starting the quest for the clicked icon by seeing which dynamic linked libraries have been opened.

The fact that some of these essential elements are stored by NSA in different "bins" than others is a choice about how the data is collected. This reveals something about how bits of information are organized. It does not obliterate the unitary nature of all the numbers that combine to effectuate a phone call from London Heathrow to Washington Dulles so that a wife or husband can tell the spouse that she or he will be late for dinner.

To allow NSA to look at telephone numbers is to allow NSA to look at each constituent part of the number so long as it has a reasonable, articulable suspicion that, for example, al Qaeda is associated with that part of the number.

I have considered the possibility that previous judges who authorized the data collected at issue here meant that NSA was not authorized to do what it has done. I am quite sure that this possibility is very unlikely. Judges, as a rule, do not consider what is not presented to them. It is not only an occupational preference of judges, and I have

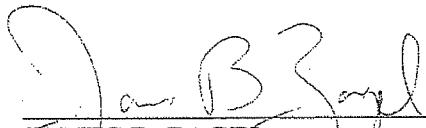
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been one for twenty-one years, it is reinforced by our constitutional mandate to confine ourselves to actual cases and controversies.


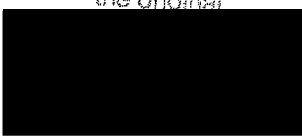
It may have saved time and effort if this had been considered at an earlier stage, but I would not conclude the NSA ever believed it was acting outside the scope of its authority. When someone deals with telephony and its methods on a sustained basis, I conclude that it is nearly inevitable that he or she would think, as I now do, that a telephone number consists of constituent parts only one of which is likely to appear in a real or electronic rolodex. I understand, too, how lawyers at the Department of Justice evinced concern when they learned how NSA addressed these issues. But those lawyers, too, understood, rather quickly, that the "telephone number" includes all of its latent, but essential, elements.

ENTERED this 20<sup>th</sup> day of August 2008, in Docket No. BR 08-07.


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**JAMES B. ZAGEL**  
 Judge, United States Foreign  
 Intelligence Surveillance Court

  
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