



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*86 Chambers Street
New York, New York 10007*

July 31, 2015

By Electronic Mail

David E. McCraw, Esq.
Jeremy A. Kutner, Esq.
The New York Times Company
620 Eighth Avenue
New York, NY 10018
E-mail: mccrad@nytimes.com
jeremy.kutner@nytimes.com

Re: *The New York Times Co. v. U.S. Department of Justice*, 14 Civ. 3948 (VSB)

Dear David and Jeremy:

This Office represents the United States Department of Justice (“DOJ”), the defendant in the above-referenced matter. DOJ has completed its review and processing of the items described in paragraphs 4 and 5 of the Stipulation and Order Regarding Additional Processing and Briefing, dated March 30, 2015 (the “Stipulation”).

With respect to paragraph 4 of the Stipulation, DOJ is releasing 15 documents with redactions. Information has been redacted from these documents pursuant to 5 U.S.C. §§ 552(b)(1), (b)(3), (b)(6), and (b)(7)(E). Each redacted document being released has been marked with the applicable FOIA exemption or exemptions. Additional documents that were identified as responsive to categories 7 and 9 of Plaintiffs’ March 12, 2014, FOIA request, as narrowed by the parties’ joint submission of October 9, 2014 (the “Request”), have been withheld in full.

With respect to paragraph 5 of the Stipulation, DOJ can neither confirm nor deny the existence of any documents responsive to category 14 of the Request.

If you have any questions, please do not hesitate to contact us.

Sincerely,

PREET BHARARA
United States Attorney for the
Southern District of New York

By: /s/ John D. Clopper
JOHN D. CLOPPER
ANDREW E. KRAUSE
Assistant United States Attorneys
Telephone: (212) 637-2716/2769
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andrew.krause@usdoj.gov

Enclosures

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CERTIFICATION OF THE DIRECTOR OF NATIONAL INTELLIGENCE AND THE ATTORNEY GENERAL PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED

IN THE MATTER OF [REDACTED]

DNI/AG 105B CERTIFICATION [REDACTED]

The Director of National Intelligence and the Attorney General, based on the representations of Lieutenant General Keith B. Alexander, United States Army, Director of the National Security Agency (NSA), in his affidavit executed on [REDACTED] 2007, being duly sworn, hereby certify that: (S)

(1) there are reasonable procedures in place for determining that the acquisition of foreign intelligence information under section 105B of the Foreign Intelligence Surveillance Act of 1978, as amended ("the Act"), concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to review of the Foreign Intelligence Surveillance Court pursuant to section 105C of the Act; (S)

(2) the acquisition does not constitute electronic surveillance as defined in section 101(f) of the Act; (S)

(3) the acquisition involves obtaining the foreign intelligence information from or with the assistance of communications service providers, custodians, or other persons (including any officer, employee, agent, or other specified person of such service providers, custodians, or other persons) who have access to communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications; (S)

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Reason: 1.4(c)
Declassify on: [REDACTED] 2032

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(4) a significant purpose of the acquisition is to obtain foreign intelligence information;
and (S)

(5) the minimization procedures to be used with respect to such acquisition activity meet the definition of minimization procedures under section 101(h) of the Act. (S)

On the basis of the foregoing, the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States, as described above, is hereby authorized. Any time NSA seeks to acquire foreign intelligence information against a U.S. person abroad in the above-referenced matter, NSA must first obtain Attorney General authorization, using the procedures under Executive Order 12333, section 2.5. This authorization expires on [REDACTED] 2008. (S)

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VERIFICATION

I declare under penalty of perjury that the facts set forth in the foregoing Certification in the Matter of [REDACTED]

[REDACTED] DNI/AG 105B Certification [REDACTED] are true and correct to

the best of my knowledge and belief. Executed pursuant to 28 U.S.C. § 1746 on [REDACTED]

2007. (S)



Alberto R. Gonzales
Attorney General of the United States

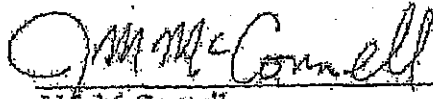
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VERIFICATION

(S) I declare under penalty of perjury that the facts set forth in the foregoing Certification in the matter of [REDACTED]

[REDACTED] DNI/AG 105B Certification [REDACTED] are true and correct to the best of my knowledge and belief. Executed pursuant to 28 U.S.C. § 1746 on [REDACTED] 2007.



J.M. McConnell
Director of National Intelligence

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**AFFIDAVIT OF LT GENERAL KEITH B. ALEXANDER, UNITED STATES
ARMY, DIRECTOR, NATIONAL SECURITY AGENCY**

IN THE MATTER OF [REDACTED]

(U//FOUO) Pursuant to section 105B of the Foreign Intelligence Surveillance Act (FISA) and in support of National Security Agency (NSA) request number [REDACTED] to the Attorney General of the United States and the Director of National Intelligence seeking authorization for the NSA to acquire foreign intelligence information concerning persons reasonably believed to be outside of the United States, and further requesting that the Attorney General and the Director of National Intelligence direct the persons specified herein to provide the assistance required to effect such acquisition, I affirm the following is true and accurate to the best of my knowledge and belief:

1. (U//FOUO) There are reasonable procedures in place that the NSA will use to determine that its acquisition of foreign intelligence information pursuant to the requested section 105B certification concerns persons reasonably believed to be located outside of the United States. These procedures are attached to this affidavit as Exhibit A. In addition, any time NSA seeks to acquire foreign intelligence information against a U.S. person abroad in the above referenced matter, NSA will first obtain Attorney General authorization, using the procedures under Executive Order 12333, Section 2.5.
2. (U//FOUO) The NSA's acquisition of foreign intelligence information pursuant to the requested Section 105B certification will not constitute electronic surveillance, as that term is defined in the FISA, because the NSA has determined that the surveillance will be directed at persons reasonably believed to be located outside the United States. As noted above, the procedures used to make such determinations are attached to this affidavit as Exhibit A.
3. (TS//SI//NF) The NSA's acquisition of foreign intelligence information pursuant to the requested Section 105B certification involves obtaining the foreign intelligence information from or with the assistance of [REDACTED] communications service providers and/or other persons who have access to the communications that constitute the foreign intelligence, and these communications service providers and/or other persons include the following: [REDACTED]

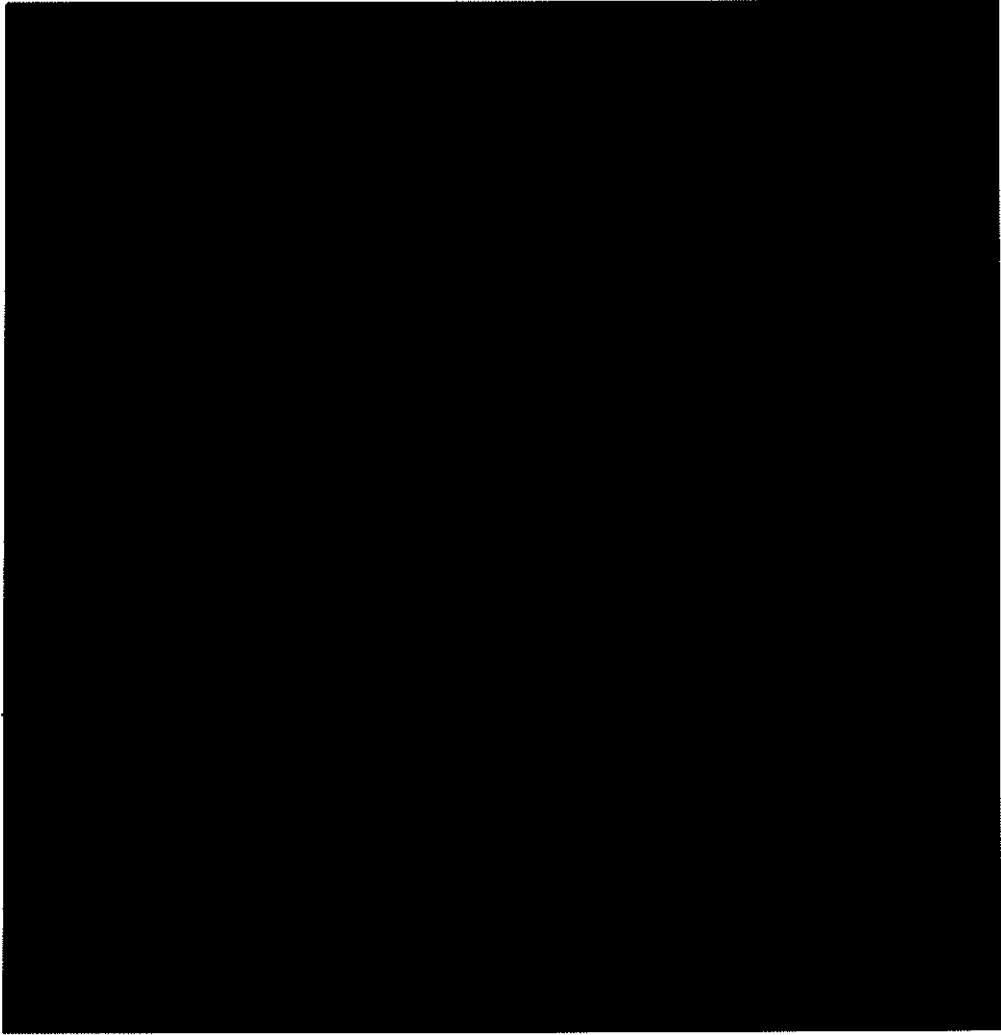
[REDACTED] These providers have and will in the future have in their possession and/or

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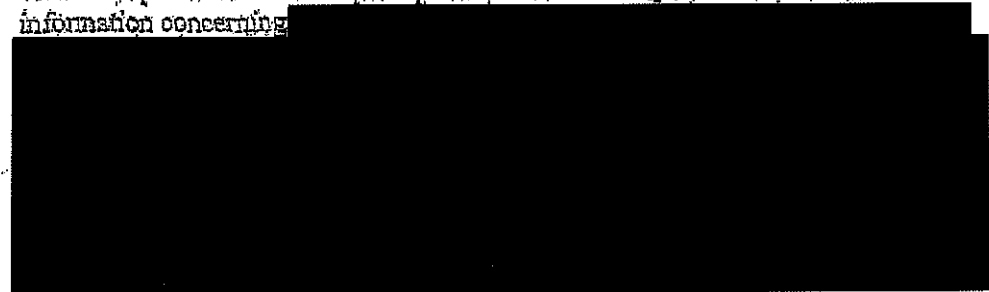
control foreign intelligence information in the form of communications to and/or from persons reasonably believed to be outside the United States, as determined in accordance with Exhibit A.

4.



5.

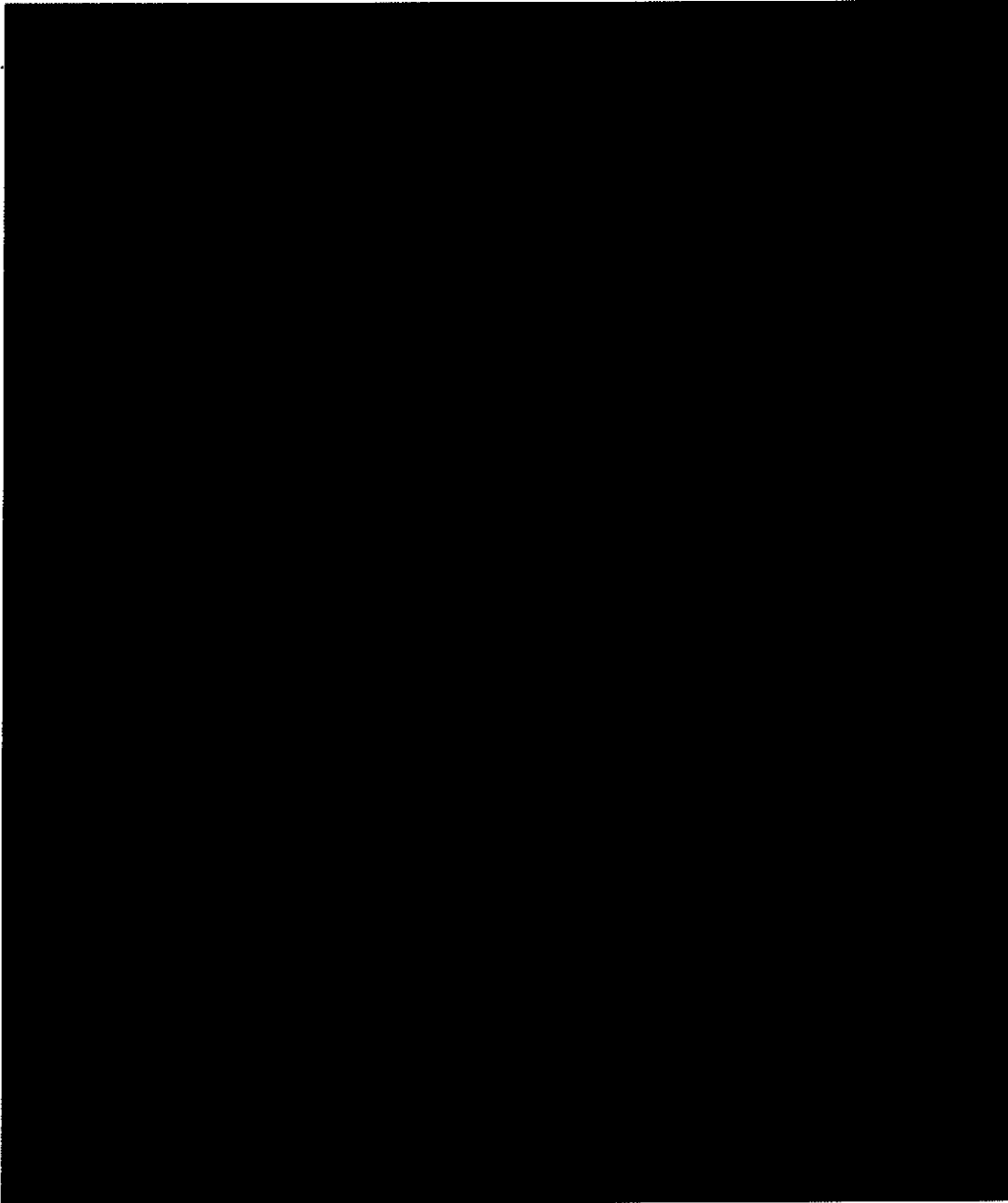
6. (TS//SI//NF) The NSA believes that each of the persons who will be targeted for collection pursuant to this request possesses and is likely to communicate information concerning



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7.

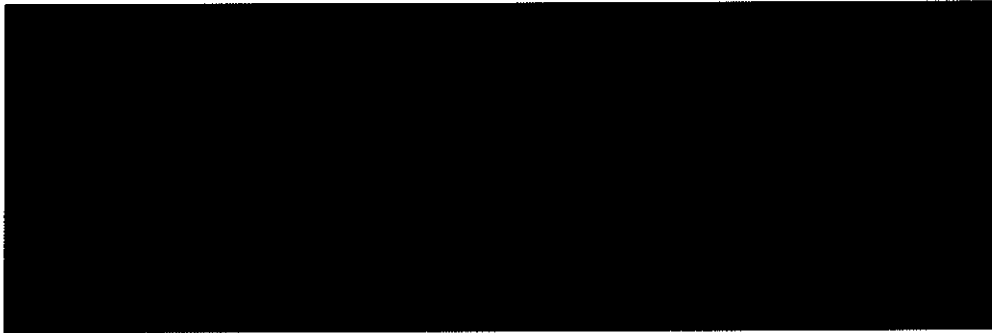


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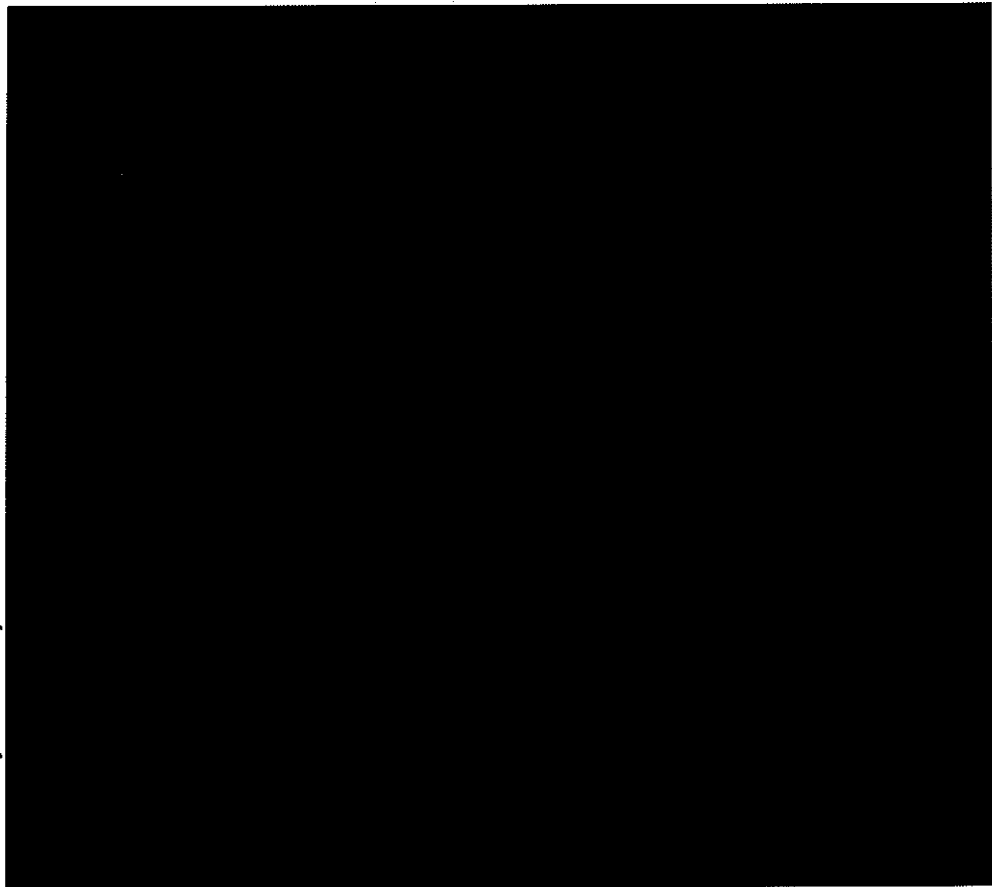


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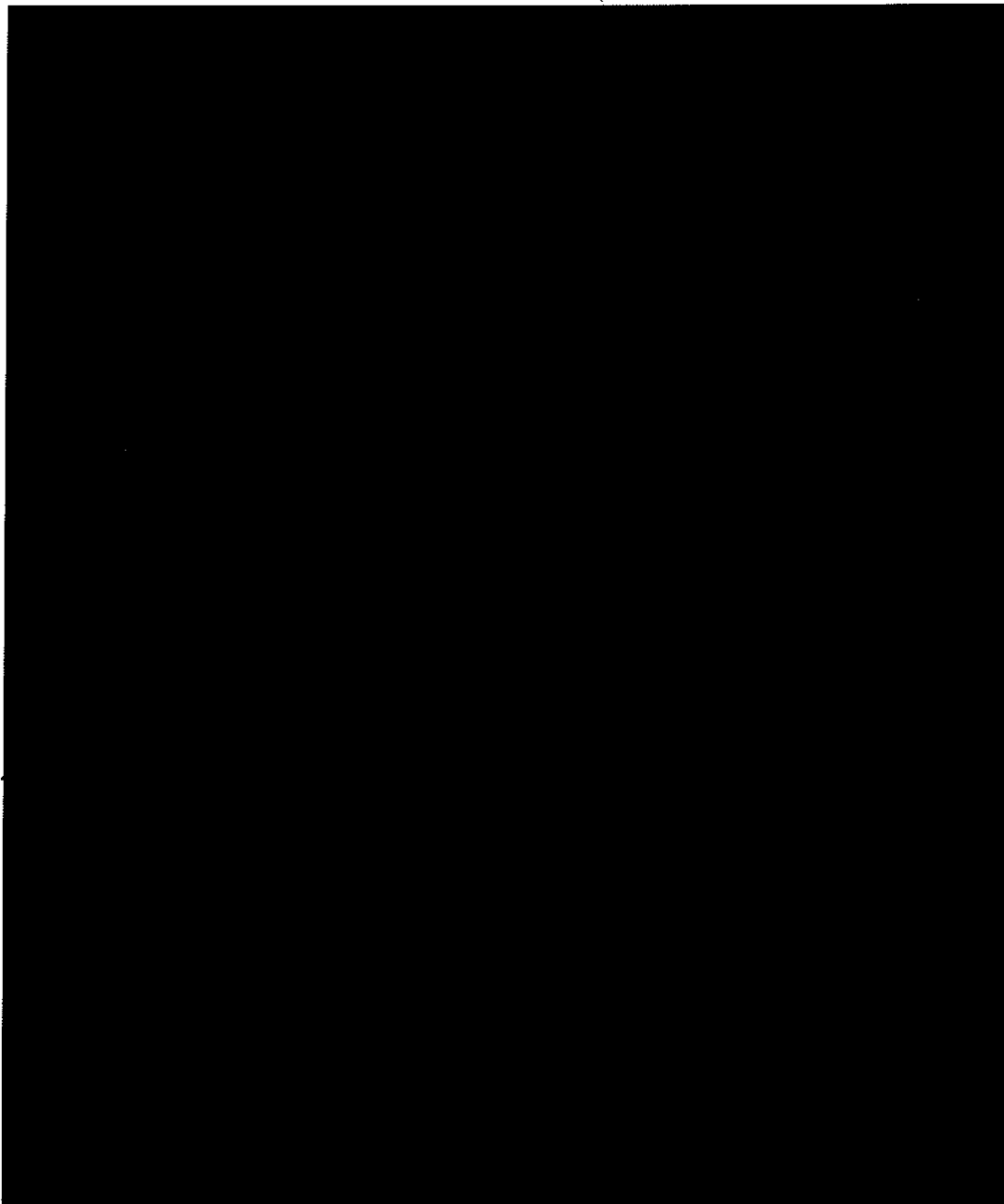


9. (TS//SI//NF) In determining whether each of the persons targeted for elicitation pursuant to this request possesses and is likely to communicate information concerning



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CLASSIFIED ANNEX

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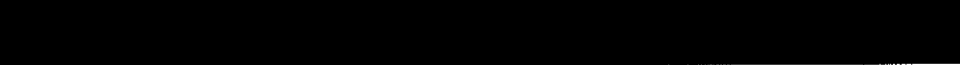
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10. (TS//SI//NF) Accordingly, a significant purpose of the acquisition is to obtain foreign intelligence information that relates to, and if concerning a United States person is necessary to, the ability of the United States to

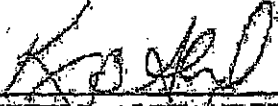


The NSA may also incidentally acquire other types of foreign intelligence information.

11. (U//FOUO) With respect to the information the NSA acquires pursuant to the requested Section 105B certification, the NSA will follow the Minimization Procedures attached at Exhibit B.

(U) I declare under penalty of perjury that the foregoing is true and correct.

Signed this [redacted] 2007.


KEITH B. ALEXANDER
Lieutenant General, U.S. Army
Director, National Security Agency

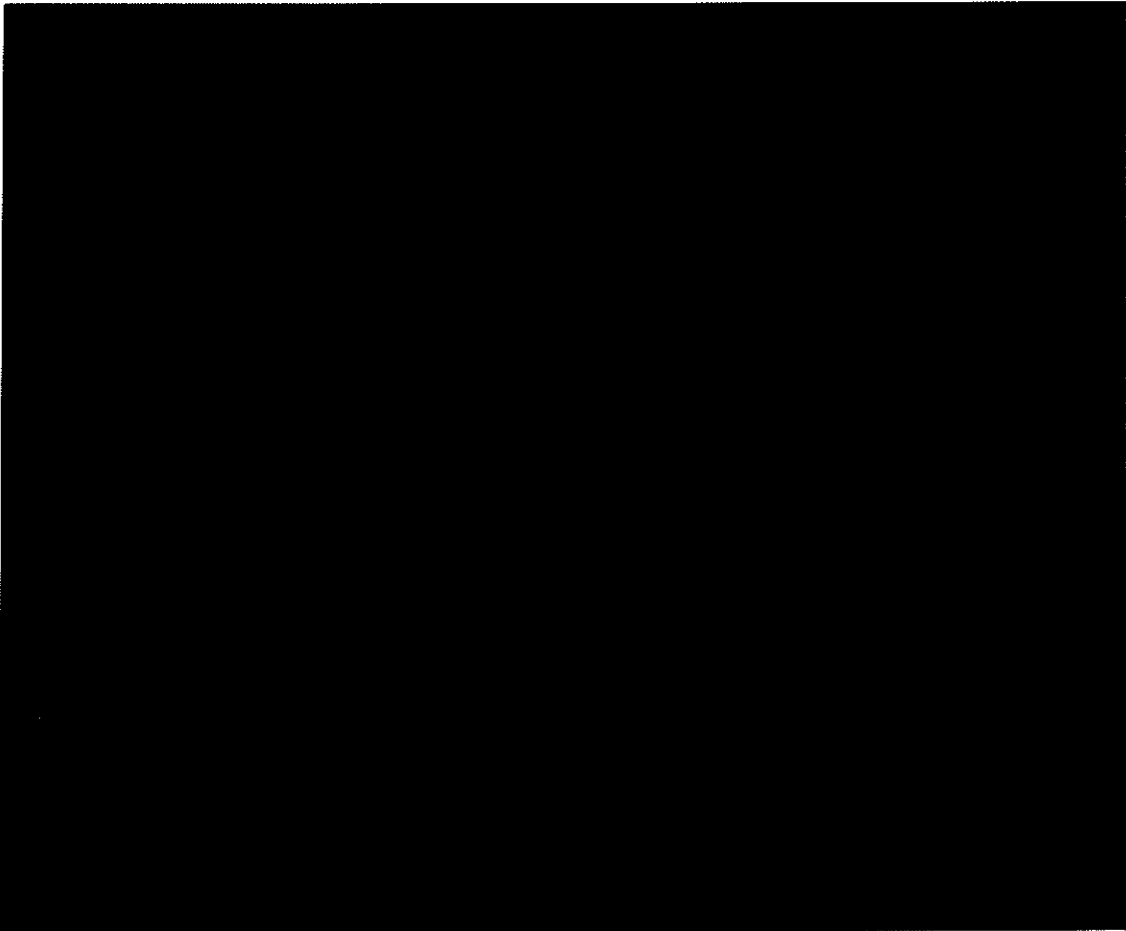
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EXHIBIT A

IN THE MATTER OF [REDACTED]

PROCEDURES USED BY NSA IN CONNECTION WITH NSA REQUEST
NUMBER [REDACTED] FOR AUTHORIZATION FROM THE ATTORNEY GENERAL
AND THE DIRECTOR OF NATIONAL INTELLIGENCE TO ACQUIRE
FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 105B
OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)



Derived From: NSA/CSSM 1-53

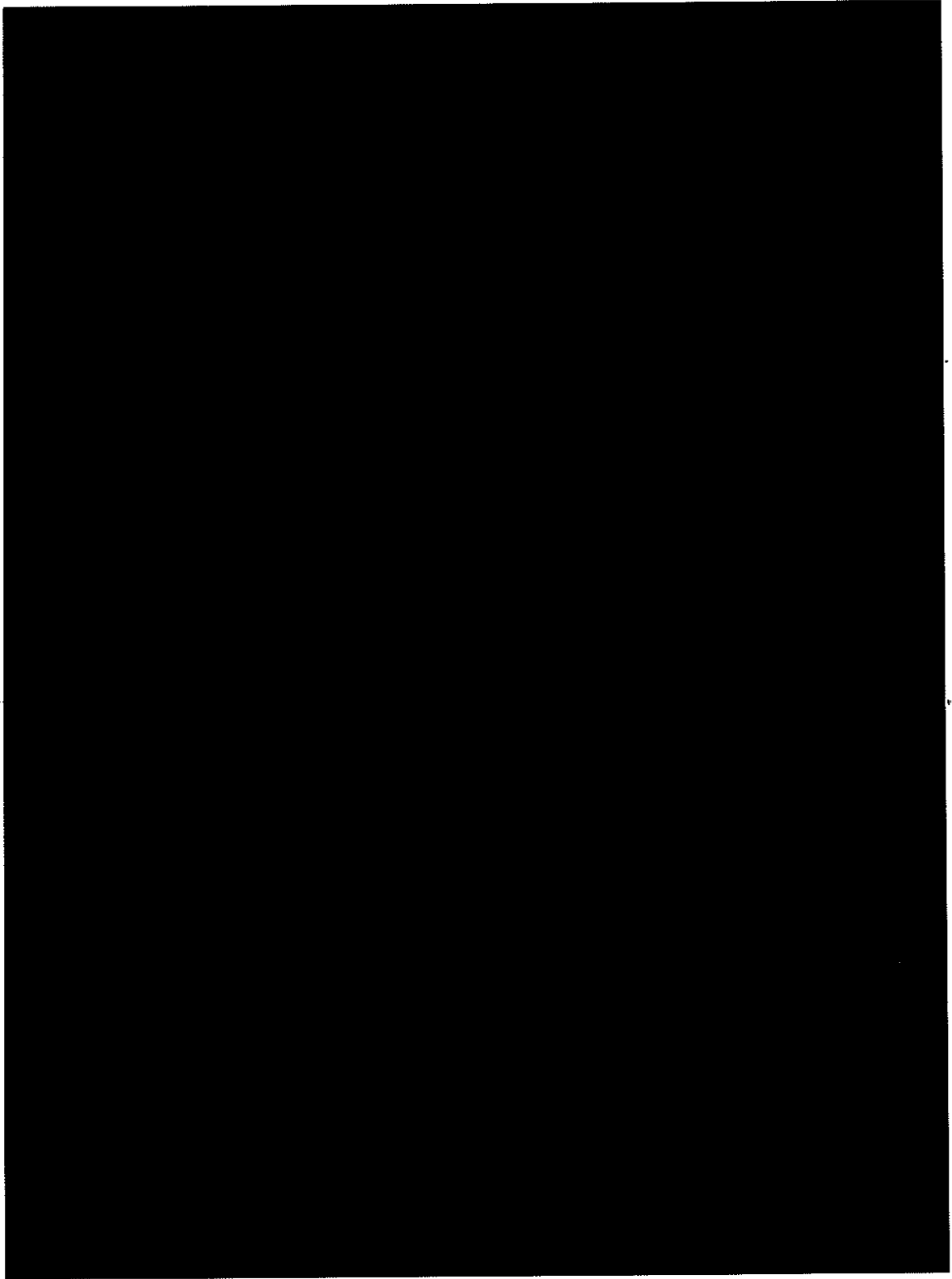
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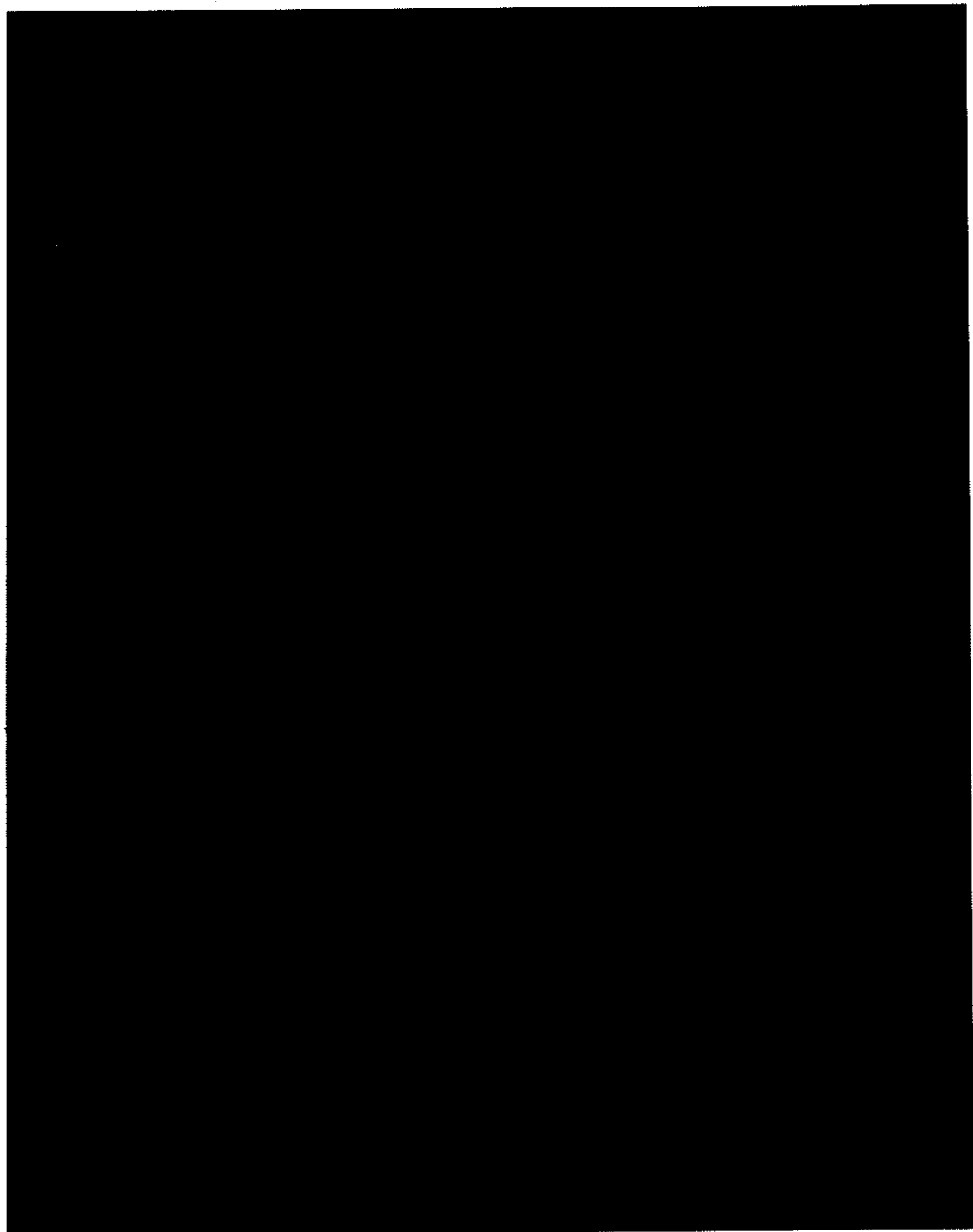
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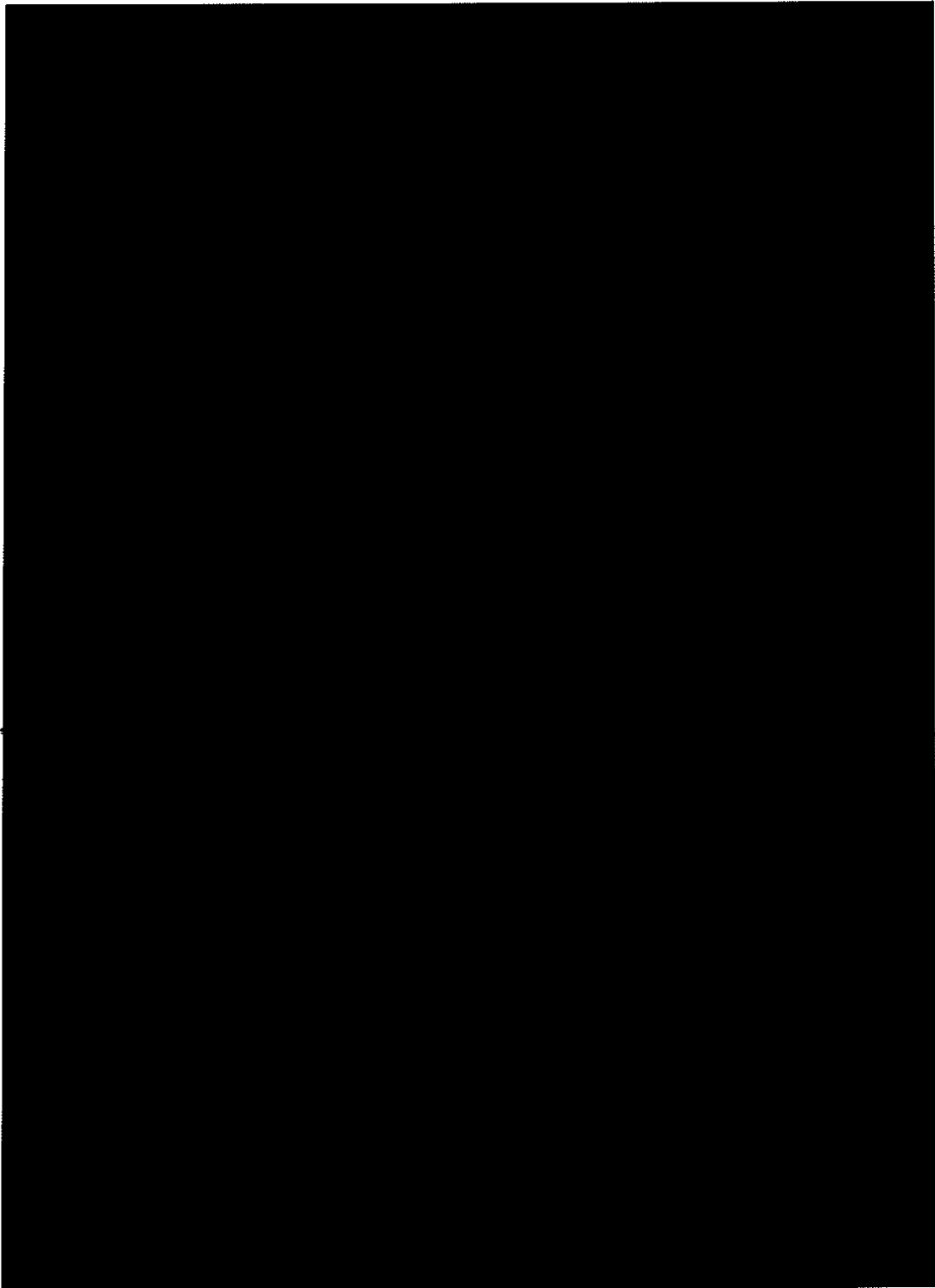
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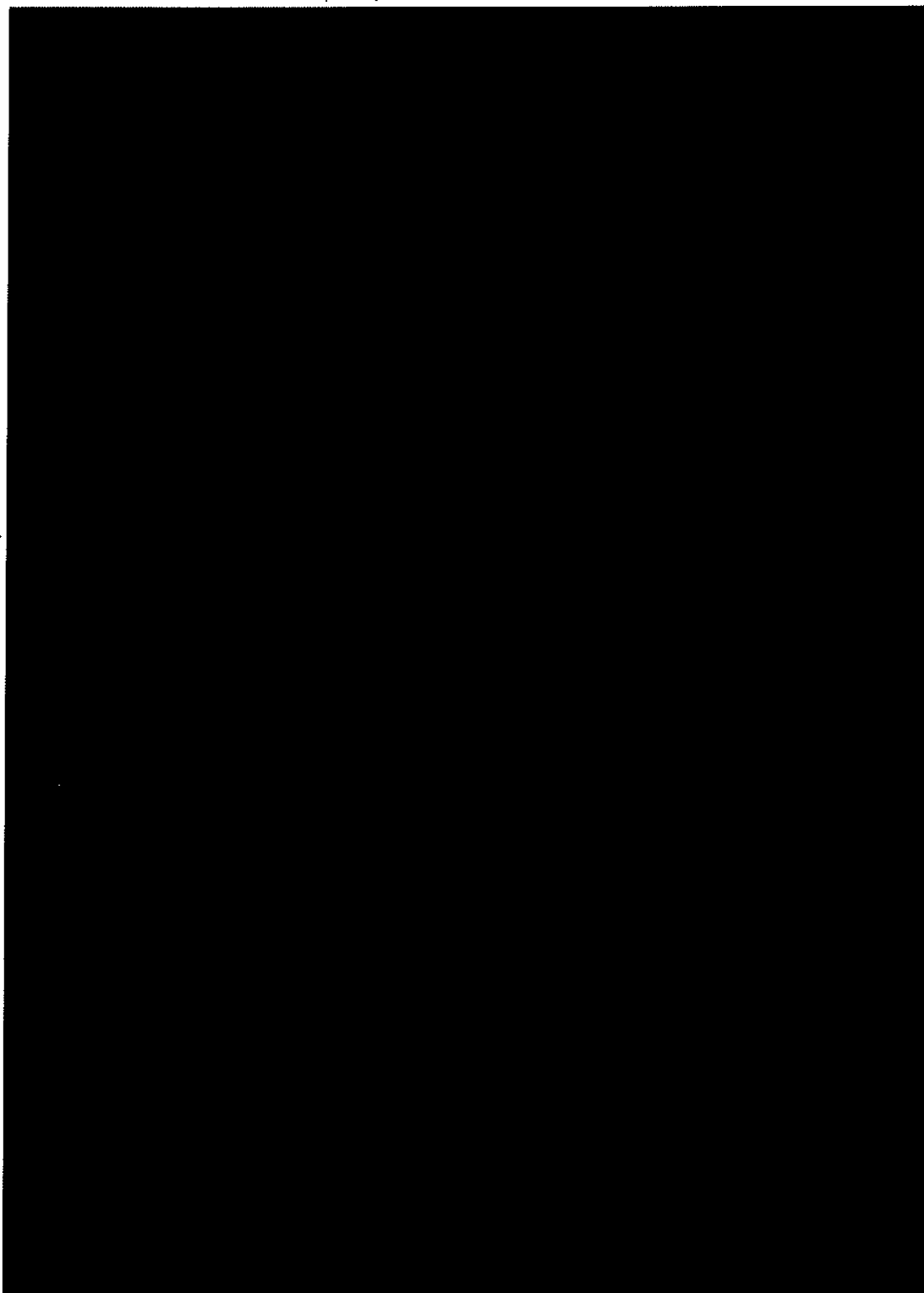
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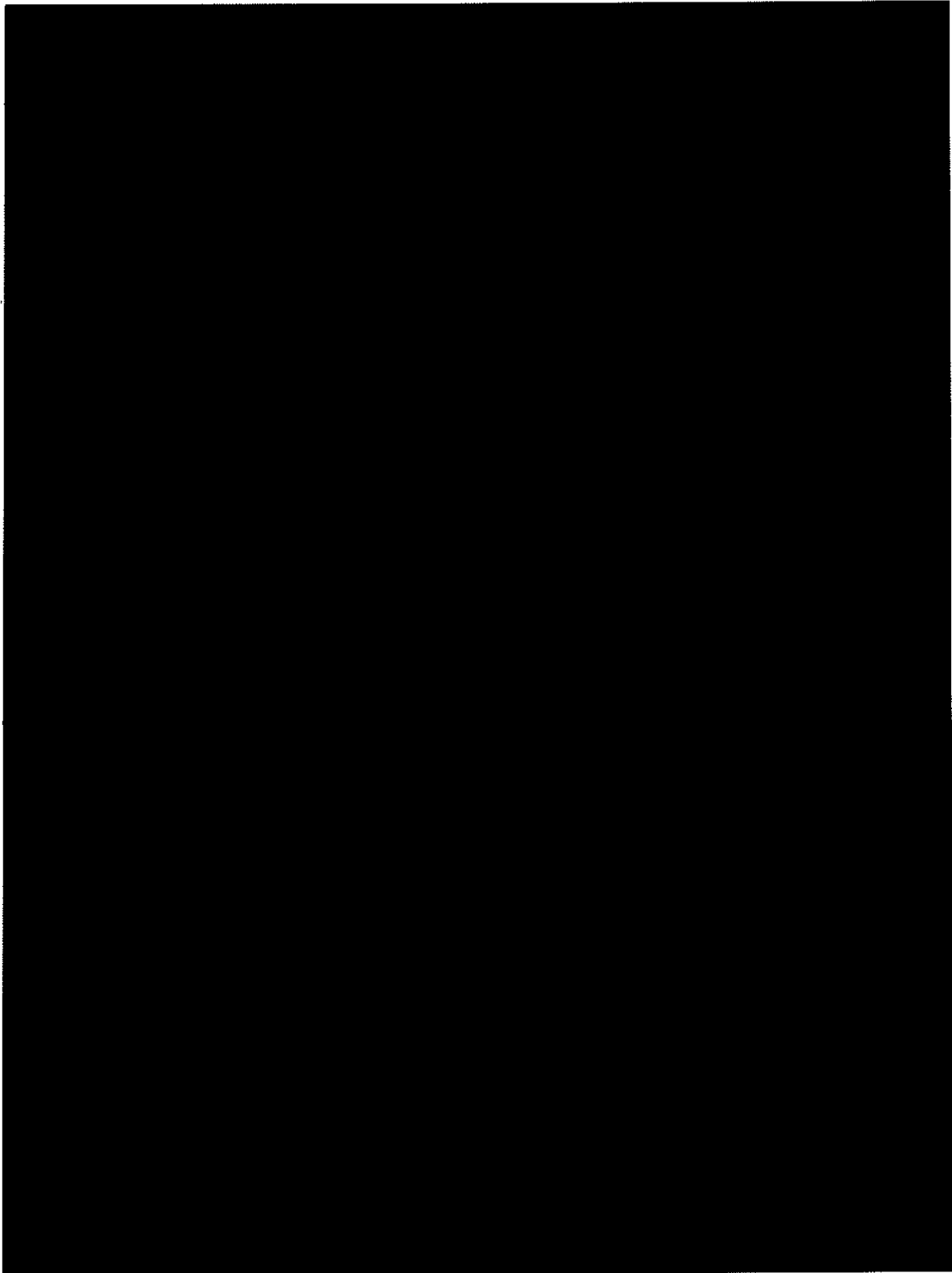


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EXHIBIT B

IN THE MATTER OF [REDACTED]

MINIMIZATION PROCEDURES USED BY NSA IN CONNECTION WITH NSA REQUEST NUMBER [REDACTED] FOR AUTHORIZATION FROM THE ATTORNEY GENERAL AND THE DIRECTOR OF NATIONAL INTELLIGENCE TO ACQUIRE FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

1. With respect to the information the NSA acquires pursuant to the certification of the Attorney General of the United States and the Director of National Intelligence, the NSA will follow:

(a) the Standard Minimization Procedures for Electronic Surveillance Conducted by the National Security Agency (also known as Annex A to United States Signals Intelligence Directive 18), which have been adopted by the Attorney General and are on file with the Foreign Intelligence Surveillance Court,

(b) Certain of the modifications to the standard NSA FISA minimization procedures for electronic surveillance adopted by the Foreign Intelligence Surveillance Court in *In re Electronic Surveillance and Physical Search of International Terrorist Groups, Their Agents, and Related Targets*, [REDACTED] ("Raw Take Motion"), which modifications are set forth below:

1. The following shall be added to the end of Section 3(f) of these standard NSA FISA procedures:

(7) The National Security Division of the Department of Justice shall periodically determine that information concerning communications of or concerning United States persons that is retained meets the requirements of these procedures and the Foreign Intelligence Surveillance Act.

2. The following shall be added to the end of Section 4(b) of these standard NSA FISA procedures:

With respect to any other communication, where it is apparent to NSA processing personnel that the communication is between a person and the person's attorney (or someone acting on behalf of the attorney) concerning legal advice being sought by the former from the latter, such communications relating to foreign intelligence information may be retained and disseminated within

Derived From: NSA/CSSM 1-52

Dated: 20070108

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the U.S. Intelligence Community if the communications are specifically labeled as being privileged. However, such communications may not be disseminated outside of the U.S. Intelligence Community without the prior approval of the Assistant Attorney General for the National Security Division or his designee.

3. The following shall replace subsections (a), (b), and (c) of Section 8 of these standard NSA FISA procedures:

NSA may disseminate nonpublicly-available identity or personally identifiable information concerning United States persons to foreign governments provided that such information is foreign intelligence information and either (i) the Attorney General approves the dissemination; or (ii) NSA disseminates the information under procedures approved by the Attorney General. In addition, NSA may disseminate such foreign intelligence information, to the extent authorized by the Director of National Intelligence (DNI) and in accordance with DNI directives, subject to the following procedures:

(1) Disseminations to the Governments of the [REDACTED] may be made upon the approval of any person designated for such purpose by the Director of NSA.

(2) Disseminations to other foreign governments may be made upon the approval of the NSA's Office of General Counsel, upon consideration of the following factors: the national security benefit the United States may reasonably expect to obtain from making the dissemination; the anticipated uses to which the foreign government will put the information; and any potential for economic injury, physical harm, or other restriction of movement to be reasonably expected from providing the information to the foreign government. If the proposed recipient(s) of the dissemination have a history of human rights abuses, that history should be considered in assessing the potential for economic injury, physical harm, or other restriction of movement, and whether the dissemination should be made. In cases where there is a reasonable basis to anticipate that the dissemination will result in economic injury, physical harm, or other restriction of movement: (i) the approval of the NSA's Signals Intelligence Director will also be required; and (ii) if dissemination is approved, NSA will undertake reasonable steps to ensure that the disseminated information will be used in a manner consistent with United

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States law, including Executive Order No. 12,333 and applicable federal criminal statutes.

- (3) NSA will make a written record of each dissemination approved pursuant to these procedures, and information regarding such disseminations and approvals shall be made available for review by the National Security Division, United States Department of Justice, on at least an annual basis.

4. Regarding dissemination of evidence of a crime, Sections 5(A)(2) and 6(b)(2) of these standard NSA FISA procedures shall be superseded by the following:

Information that is not foreign intelligence information, but reasonably appears to be evidence of a crime that has been, is being, or is about to be committed, may be disseminated (including United States person identities) to the FBI and other appropriate federal law enforcement authorities, in accordance with 50 U.S.C. § 1806(b), Executive Order No. 12,333, and, where applicable, the crimes reporting procedures set out in the August 1995 Memorandum of Understanding: Reporting of Information Concerning Federal Crimes, or any successor document.

5. The following shall be added to end of Section 5 of these standard NSA FISA procedures:

NSA may disseminate all communications acquired to the CIA, which shall process any such communications in accordance with minimization procedures approved by the Attorney General.

(c) The following additional modifications to the standard NSA FISA minimization procedures for electronic surveillance:

1. Notwithstanding sections 3(a)(2) and (e), 5(b), and 6(a) of the standard NSA FISA procedures, communications acquired under this Certification may be retained for five years. The communications that may be retained under this Certification include [REDACTED]

2. Section 3(c)(6) of these standard NSA FISA minimization procedures is deleted and replaced with:

To the extent reasonably possible, NSA personnel with access to the data acquired pursuant to this authority shall query the data in a manner designed to minimize the review of communications of or concerning U.S. persons that do not contain foreign intelligence information or evidence of a crime.

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3. Section 3(g)(1) of these standard NSA FISA minimization procedures, relating to absences "from premises under surveillance" by agents of a foreign power, shall not apply to this surveillance.

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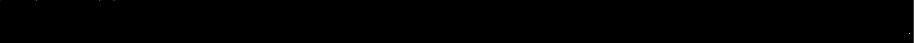
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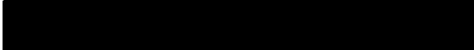
UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT


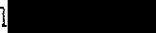


ORDER

On August 17, 2007, the government filed a set of procedures with this Court pursuant to 50 U.S.C. § 1805C. Those procedures pertain to a certification by the Attorney General and the Director of National Intelligence, styled DNI/AG 105B Certification 07-01, filed under seal on August 10, 2007, pursuant to § 1805B(c). Under that certification, and following those procedures ("07-01 procedures"), the National Security Agency (NSA) acquires foreign intelligence information regarding 



These submissions provide the first occasion for Court review of such procedures under 50 U.S.C. § 1805C(b). Under that provision, the Court "shall assess the Government's determination . . . that [such] procedures are reasonably designed to ensure that acquisitions conducted pursuant to section 1805B do not constitute electronic surveillance. The court's review shall be limited to whether the Government's determination is clearly erroneous." Evidently, it is the government's view that acquisitions under the above-referenced procedures will not constitute electronic surveillance because they will be "directed at a person reasonably believed to be located outside of the United States," and therefore will be excluded from the definition of electronic surveillance by § 1805A.

Because  procedures are similar in many respects, the Court intends to consider all  procedures jointly for purposes of review under § 1805C(b).

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In furtherance of that consideration, it is hereby ORDERED as follows:

1. The government shall file supplemental briefing and information on the following questions, which the Court has identified as the principal issues for purposes of its review of these procedures under § 1805C(b):

(a) Under what circumstances is it envisioned that, under Part IV. of all [REDACTED] procedures, an "immediate threat to the national security" would require departure from the procedures? What provisions of the procedures would have to be disregarded in such circumstances in order to respond to such a threat? Is a delegation to NSA of authority to decide when it is justified to "depart" from these procedures consistent with statutory requirements?

(b) Footnote 1, page 1, of the 07-01 procedures appears to exempt from those procedures facilities "properly tasked for collection" under certain prior authorities from the 07-01 procedures. To what extent did that prior tasking involve a determination of the user's location under procedures comparable to those now before the Court? Are such facilities permanently exempted from all requirements of the 07-01 procedures? Or, for example, are they exempted from requirements for the initiation of collection, but are subject to post-initiation procedures (see subparagraph (c) below) designed to verify that the user of a facility is still outside of the United States?

(c) The procedures state that NSA will "routinely" undertake certain activities that together will constitute an "analysis designed to detect those occasions when a person who when targeted was reasonably believed to be located overseas has since entered the United States."
[REDACTED]

(i) At what time intervals will each of the various steps be taken?

(ii) It appears that NSA may continue to regard a facility - [REDACTED] - as being used by a person outside of the United States, even after it becomes aware of indications that it may be used by someone in the United States. To what extent do these procedures embody a presumption that a user who is initially assessed to be outside of the United States remains outside of the United States, even if there are later indications to the contrary? If there is such a presumption, why is it reasonable?

(d) The procedures describe circumstances "where NSA seeks to acquire communications about the target," but "not to or from the target." [REDACTED] Does this acquisition involve the interception of one or more types of "about communications," as described at pages 12-14 of the Primary Order issued on May 31, 2007, in Docket No. [REDACTED]? Who is the "person from whom [NSA] seeks to obtain

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foreign intelligence information" in this context? [REDACTED]

May NSA acquire such communications, as long as it is reasonably believed that at least one party (sender or recipient) to the communication is outside of the United States? Or should the location of the sender be determinative?

(e) The procedures state that "information acquired by directing surveillance at a person not reasonably believed to be outside of the United States in a manner that constitutes electronic surveillance . . . shall be purged from NSA databases." [REDACTED]

Does this mean that all records or copies of such information, in any form, shall be destroyed?

2. Some of the differences between the [REDACTED] procedures require no explanation (for example, [REDACTED])

However, there are other differences in wording, the effect of which is uncertain. To the extent that these differences in wording are intended to reflect a substantive difference in how the procedures are implemented, the government is directed to explain in its submission the differences in implementation and reasons therefor. To the extent that these differences in wording are not intended to reflect a substantive difference, but rather, e.g., reflect drafting refinements that took place after the submission of the 07-01 procedures, the government's submission shall so state, and shall include revised versions of the procedures to the extent necessary to make each set of procedures fully accurate and current.

3. The government shall make its submission, in conformance with paragraphs 1. and 2. above, on or before October 26, 2007.

SO ORDERED this th 11 day of October, 2007, regarding [REDACTED]
[REDACTED]

Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
Judge, United States Foreign
Intelligence Surveillance Court

[REDACTED]

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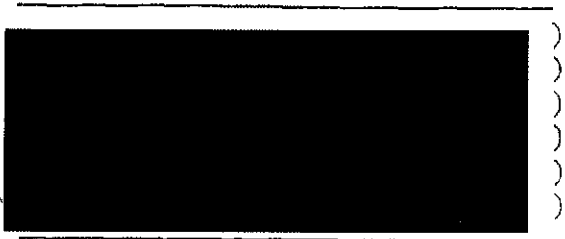
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UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

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GOVERNMENT'S RESPONSE TO
THE COURT'S ORDER OF OCTOBER 11, 2007

The United States of America, through the undersigned Department of Justice attorney, respectfully submits this response to the questions the Court posed in its Order dated October 11, 2007, in the above-captioned matter. (S)

Pursuant to 50 U.S.C. § 1805C, the Government has filed [redacted] procedures used to determine that certain acquisitions of foreign intelligence information concern persons reasonably believed to be located outside of the United States and, therefore, do not constitute electronic surveillance. See 50 U.S.C. § 1805A ("Nothing in the definition of electronic surveillance under section 101(f) shall be construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States.") These [redacted] procedures correspond to [redacted] certifications - captioned [redacted] respectively - authorizing the National Security Agency (NSA) to acquire foreign

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Classified by: Margaret A. Skelly-Nolen, Acting Counsel for
Intelligence Policy, NSD, DOJ

Reason: 1.4(c)

Declassify on: 26 October 2032

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intelligence information regarding various targets. In accordance with 50 U.S.C. § 1805C(b), the Court "shall assess the Government's determination . . . that [such] procedures are reasonably designed to ensure that acquisitions conducted pursuant to section 105B do not constitute electronic surveillance." This review is limited to whether the Government's determination is "clearly erroneous." Id. The following responses to the Court's questions are based primarily on information provided by NSA. (S)

Question 1(a) Under what circumstances is it envisioned that, under Part IV of all [redacted] procedures, an "immediate threat to the national security" would require departure from the procedures? What provisions of the procedures would have to be disregarded in such circumstances in order to respond to such a threat? Is a delegation to NSA of authority to decide when it is justified to "depart" from these procedures consistent with statutory requirements? (TS//SI//OC,NF)

Answer 1(a) Part IV of each set of procedures was inserted to allow for an emergency situation in which the Government must acquire foreign intelligence information on an emergency basis in order to protect against an immediate threat to the national security, but is unable to comply with the procedures at the time of the acquisition. For example, due to an emergency situation, the NSA analyst requesting that a facility be tasked may not [redacted]

[redacted] due to the emergency situation and the need for immediate collection of information. Under such circumstances, the Government would continue to adhere to the statutory limitation that it could only direct surveillance at a target reasonably believed to be located outside of the United States. (TS//SI//OC,NF)

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The Government believes this provision is consistent with statutory requirements because, as noted above, the Government will adhere to the statutory limitation in the Protect America Act of 2007 (PAA) in any case in which it departs from the procedures to protect against an immediate threat. Further, Part IV of the procedures requires that action under this provision only be taken in the event that obtaining a timely modification of the procedures from the Director of National Intelligence (DNI) and the Attorney General (AG) is not feasible. In addition, Part IV of the procedures requires prompt notification of NSA's departure from the procedures to the representatives of the DNI and AG. Accordingly, to the extent NSA has been delegated the authority to decide if a departure from the procedures is necessary, there will be an opportunity for the DNI and AG to review any such decision by NSA.

(TS//SI//OC,NF)

Question 1(b) Footnote 1, page 1, of the 07-01 procedures appears to exempt from those procedures facilities "properly tasked for collection" under certain prior authorities from the 07-01 procedures. To what extent did that prior tasking involve a determination of the user's location under procedures comparable to those now before the Court? Are such facilities permanently exempted from all requirements of the 07-01 procedures? Or, for example, are they exempted from requirements for the initiation of collection, but are subject to post-initiation procedures (see subparagraph (c) below) designed to verify that the user of a facility is still outside of the United States? (TS//SI//OC,NF)

Answer 1(b) NSA determined that the users of facilities tasked for collection under docket numbers [REDACTED] and [REDACTED] were reasonably believed to be located outside the United States based on the same categories of information (i.e., [REDACTED])

[REDACTED] described in the 07-01 procedures. However, at the time the foreignness

¹ In docket number [REDACTED] telephone numbers and e-mail accounts tasked for collection were referred to as "selectors" rather than facilities. For ease of reference, telephone numbers and e-mail accounts tasked for collection under [REDACTED] are referred to herein as "facilities." (TS//SI//OC,NF)

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determination was made for each of those facilities tasked for collection under docket numbers [REDACTED] and [REDACTED] every database that is mentioned in the 07-01 procedures did not necessarily exist, or contain the same types of information. The fact that each of the facilities was presented to the Court in docket numbers [REDACTED] and [REDACTED] means that NSA reasonably believed that the facilities were being used outside the United States and that NSA had discovered no information indicating that the facilities were being used in the United States. However, NSA did not have in place, prior to the PAA, the formalized and repeatable pre-tasking procedures it has in place now with respect to such determinations. Most significantly, NSA had no requirement that such determinations be documented or that the information which formed the basis for the determinations be maintained at NSA in a way that could be retrieved and provided to those conducting oversight. Nor did NSA have any systematic post-tasking procedures to ensure that NSA became aware of any discrepancies between NSA's pre-tasking foreignness determination for a target and the target's actual location. (TS//SI//OC,NF)

Facilities that had been tasked for collection under docket numbers [REDACTED] and [REDACTED] and are now tasked under the PAA are not permanently exempted from all requirements of the 07-01 procedures. Specifically, facilities initially tasked pursuant to footnote 1 of the 07-01 procedures are subjected to the same post-tasking procedures designed to verify that their location is outside of the United States and to notify NSA of any changes to their location as are other facilities. (TS//SI//OC,NF)

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Question 1(c) The procedures state that NSA will "routinely" undertake certain activities that together will constitute an "analysis designed to detect those occasions when a person who when targeted was reasonably believed to be located overseas has since entered the United States." [REDACTED]

[REDACTED] (TS//SI//OC,NF)

Question 1(c)(i) At what time intervals will each of the various steps be taken?
(TS//SI//OC,NF)

Answer 1(c)(i) Electronic communications accounts/addresses/identifiers tasked pursuant to the procedures are all checked against the [REDACTED] database (as described in the procedures, [REDACTED]

[REDACTED] in order to try to detect whether a tasked electronic communications account/address/identifier has been used from a location inside the United States. The results of these checks are reviewed [REDACTED]

(TS//SI//OC,NF)

Telephone selectors are likewise processed [REDACTED] and the results are reviewed [REDACTED] for the purpose of attempting to verify the user's location.

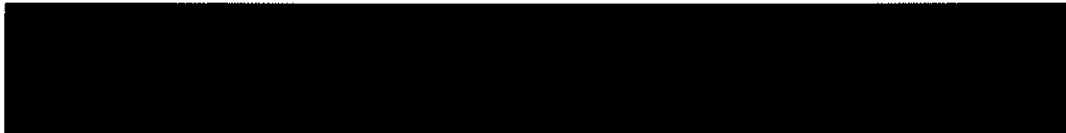
[REDACTED]

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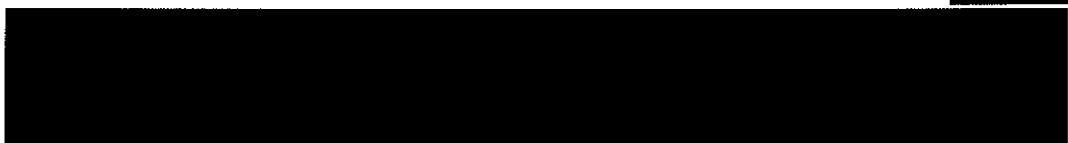
(TS//SI//OC,NF)



(TS//SI//OC,NF)

Question 1(c)(ii) It appears that NSA may continue to regard a facility - [redacted] as being used by a person outside of the United States, even after it becomes aware of indications that it may be used by someone in the United States. To what extent do these procedures embody a presumption that a user who is initially assessed to be outside of the United States remains outside of the United States, even if there are later indications to the contrary? If there is such a presumption, why is it reasonable? (TS//SI//OC,NF)

Answer 1(c)(ii) Once NSA determines that the user of a facility is reasonably believed to be outside the United States, it will presume that the user remains outside the United States, unless it becomes aware of indications to the contrary. The post-tasking procedures contained in Part I of the procedures, and also described in response to the Court's question 1(c)(i), are designed to alert NSA to any indications that the user is no longer outside the United States. However, there are cases in which information NSA receives may indicate a user is in the United States, but NSA may still reasonably believe, based on analysis of additional information in NSA's possession, that the user is located outside of the United States. For example, [redacted]



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Question 1(d) The procedures describe circumstances "where NSA seeks to acquire communications about the target" but "not to or from the target."

Does this acquisition involve the interception of one or more types of "about communications," as described at pages 12-14 of the Primary Order issued on May 31, 2007, in Docket No. [redacted] Who is the "person from whom [NSA] seeks to obtain foreign intelligence information" in this context? [redacted] May NSA acquire such communications, as long as it is reasonably believed that at least one party (sender or recipient) to the communication is outside of the United States? Or should the location of the sender be determinative? (TS//SI//OC,NF)

Answer 1(d) The acquisition "where NSA seeks to acquire communications about the target," but "not to or from the target" involves the interception of "about" communications as described at pages 12-14 of the Primary Order issued on May 31, 2007, in Docket No. [redacted] (TS//SI//OC,NF)

The person from whom NSA seeks to acquire communications in such cases is the party to the communication who is reasonably believed to be located outside the United States. NSA may acquire such communications as long as it reasonably believes at least one party (sender or recipient) is outside of the United States, and the location of the sender of the communication should not be determinative. As noted in the procedures, in those cases where NSA seeks to acquire communications about the target that are not to or from the target, NSA will [redacted]

[redacted] in order to ensure that

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the person from whom it seeks to obtain foreign intelligence information is located outside of the United States. (TS//SI//OC,NF)

Question 1(e) The procedures state that "information acquired by directing surveillance at a person not reasonably believed to be outside of the United States in a manner that constitutes electronic surveillance... shall be purged from NSA databases." [REDACTED] Does this mean that all records or copies of such information, in any form, shall be destroyed? (TS//SI//OC,NF)

Answer 1(e) In the event NSA determined that it had "information acquired by directing surveillance at a person not reasonably believed to be outside of the United States in a manner that constitutes electronic surveillance," NSA would purge the information from its databases and take steps designed to ensure that all other records or copies of such information, in any form, were destroyed. Data collected by NSA under PAA authority is precisely labeled and controlled, and it is stored in a limited number of known, established electronic repositories. If required to purge the data, NSA analysts would provide the system administrators of these repositories with the precise identifying information for the data to be purged in order to pinpoint the specific data that resulted from the inappropriate collection, and would continue to follow up until the purge was completed. (TS//SI//OC,NF)

In addition, NSA would determine whether anything from this collection had been disseminated and would take steps to delete intelligence reports from NSA databases, subsequently issuing a report cancellation notice to all customers who would have received the original report, requesting that they delete it from their own holdings. NSA analysts are trained and tested on the handling requirements for data collected pursuant to the PAA, including the conditions under which the data must be purged, and the requirement to destroy any hard copies that they have retained. NSA relies on

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local managers, intelligence oversight officers, and the analysts who discover the problem selectors to ensure, to the extent possible, that these hard copies are destroyed. (TS//SI//OC,NF)

Question 2 Some of the differences between the [redacted] procedures require no explanation (for example, [redacted])

[redacted] However, there are other differences in wording, the effect of which is uncertain.² To the extent that these differences in wording are intended to reflect a substantive difference in how the procedures are implemented, the government is directed to explain in its submission the differences in implementation and reasons therefor. To the extent that these differences in wording are not intended to reflect a substantive difference, but rather, e.g., reflect drafting refinements that took place after the submission of the 07-01 procedures, the government's submission shall so state, and shall include revised versions of the procedures to the extent necessary to make each set of procedures fully accurate and current. (TS//SI//OC,NF)

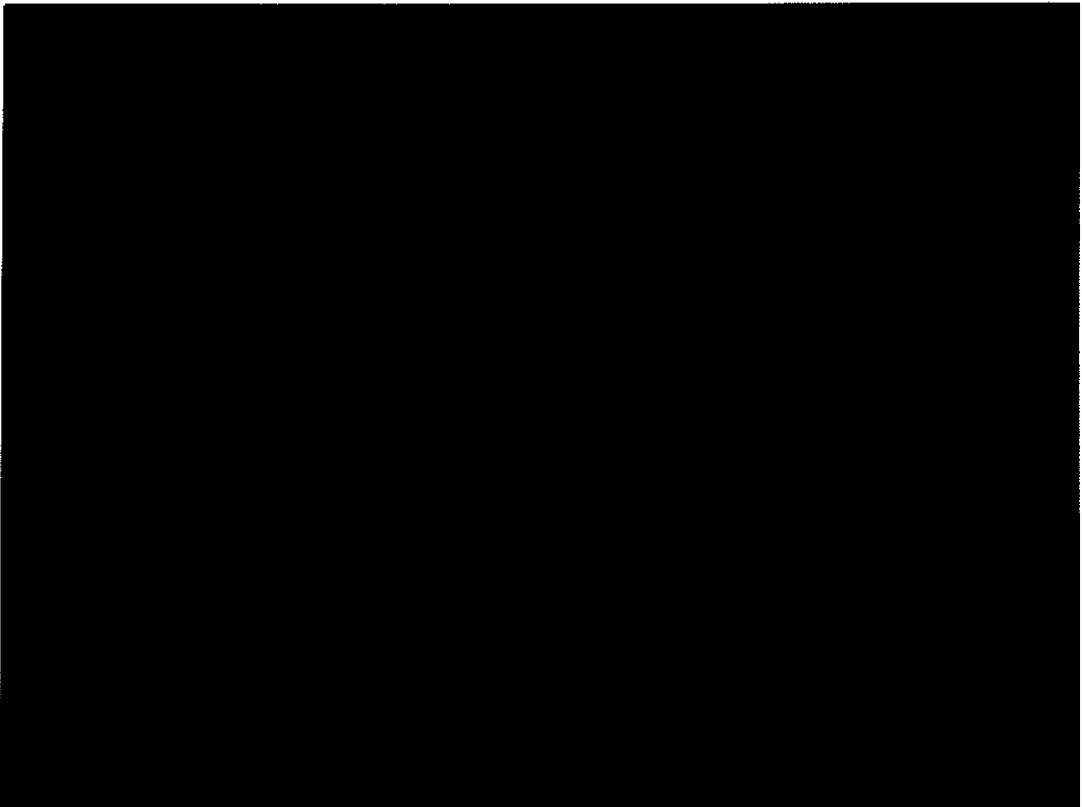
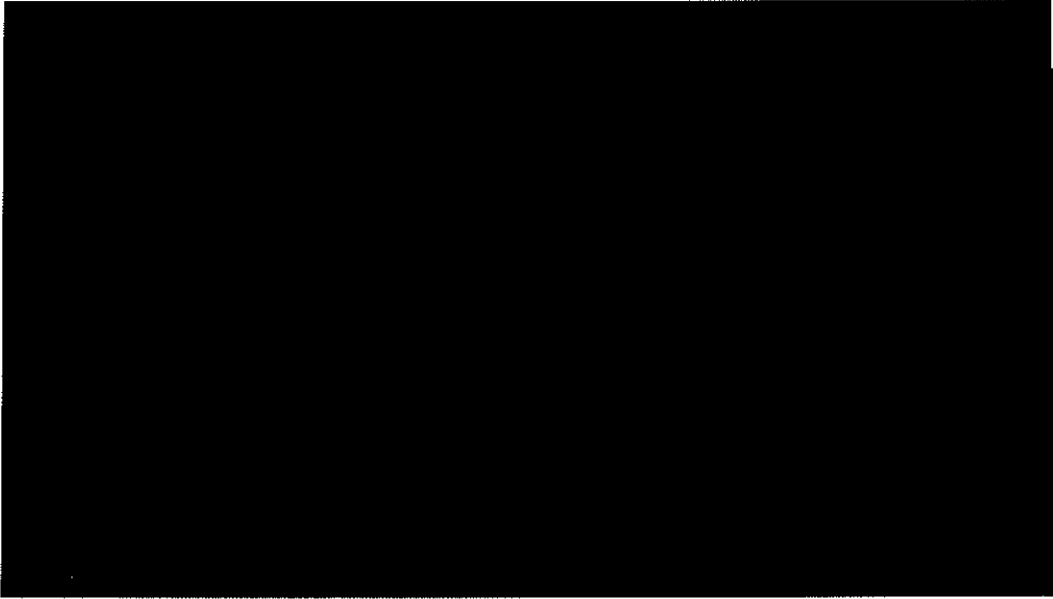
Answer 2 No substantive differences were intended among the procedures. The differences identified by the Court reflect subtle refinements that took place as the procedures for each certification were drafted and finalized. [redacted]

[redacted]

² [redacted]

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As explained above, none of the differences in wording identified by the Court resulted from changes that were made to correct an inaccuracy or to make current

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information that had become outdated. Therefore, the Government has not provided revised versions of the procedures because the procedures presented to the Court, as approved by the DNI and the AG, are accurate and current, notwithstanding these minor differences. (TS//SI//OC,NF)

Respectfully submitted,



MATTHEW G. OLSEN
Deputy Assistant Attorney General

 (b)(6)
Associate Counsel

 (b)(6)
Attorney-Advisor

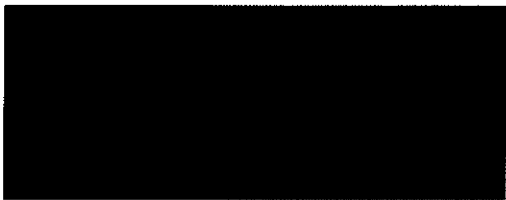
National Security Division
U.S. Department of Justice

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FOREIGN INTELLIGENCE SURVEILLANCE COURT

IN RE:



December 12, 2007

Washington, D.C.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY
UNITED STATES FISC JUDGE

APPEARANCES:

Department of Justice:

(b)(6)
MATTHEW OLSEN
(b)(6)

National Security Agency:

(b)(6)

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P R O C E E D I N G S

1
2 THE COURT: Okay. We'll go ahead and formally start
3 this. This is In Re: [REDACTED]
4 [REDACTED] and if we could go around so that we have on the
5 record both your names and the agency you represent and what
6 position you're in.

7 MR. (b)(6) [REDACTED] deputy general
8 counsel at the National Security Agency.

9 MR. (b)(6) [REDACTED] I'm an
10 intelligence analyst at the National Security Agency, and I work
11 in the Signals Intelligence Directorate.

12 MS. (b)(6) [REDACTED] I'm an associate counsel at
13 the Office of Intelligence Policy and Review in the National
14 Security Division of the Department of Justice.

15 MS. OLSEN: Matt Olsen. I'm in the National Security
16 Division, Department of Justice, deputy assistant attorney
17 general.

18 MR. (b)(6) [REDACTED] I'm an attorney at
19 the Office of General Counsel at NSA. I'm working in support of
20 the Operations Division.

21 MR. (b)(6) [REDACTED] attorney advisor,
22 National Security Division, Department of Justice.

23 THE COURT: All right. Indicate who else is present.

24 MR. (b)(6) [REDACTED] (b)(6) [REDACTED] FISC legal counsel.

25 MR. (b)(6) [REDACTED] (b)(6) [REDACTED] FISC legal counsel.

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1 THE COURT: All right. I think, since he has the
2 chart, you don't have to identify yourself by name each time.
3 I would ask that you do it one at a time, not to speak at the
4 same time, so he can actually get a record.

5 All right. I requested this hearing to consider the
6 procedures that have been filed with the Court pursuant to
7 50 U.S.C. 1805c, and they pertain to the certification by the
8 attorney general and the director of national security. They
9 were filed under seal.

10 There was a group filed on [REDACTED]
11 [REDACTED] and I indicated that I would handle
12 them all together since in general, with a few variations,
13 they're pretty much the same, or the issues will raise the same
14 issues.

15 And under those certifications and the procedures, the
16 National Security Agency, NSA, acquires foreign intelligence
17 information regarding [REDACTED]
18 [REDACTED]
19 [REDACTED] and the Court is expected to review
20 them and would be passing the review for clear error is the way
21 it's been set out.

22 I had indicated, I believe, that there were approximately
23 three areas that I was interested in having addressed. One is
24 I know that pursuant to the legislation that was passed in
25 August -- Protect America Act, which is what this is out of --

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1 that reviews were required to see whether the procedures were in
2 compliance -- well, whether NSA was in compliance with the
3 procedures and whether the procedures matched up with what the
4 expectation was in terms of what the legislation said.

5 So let me start with whomever can speak to this as to what
6 has been shown in terms of the procedures, whether you've found
7 any issues, any problems, and also I'm particularly interested
8 to know whether as part of these reviews whether you've
9 actually -- the emergency departure, whether that has actually
10 been exercised and whether there was a review of that.

11 That's one of the questions that I had, and the next area
12 was to discuss a little bit more about the emergency departure
13 and how that would operate. Then I did have some questions
14 relating to the acquisition of "about e-mail communications."

15 Those are sort of the areas that I wanted some additional
16 information, so whoever wants to address how many reviews you've
17 conducted and what it generally had shown.

18 (b)(6) MS. (b)(6) Certainly. I'll respond to that,
19 Your Honor. We have done a total of 12 reviews since August.
20 These were covered in seven separate trips out to NSA. (b)(6)

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24 We are conducting those reviews, as required by the
25 procedures, once within the first 14 days in which NSA begins

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1 implementing that certification, and then the procedures say
2 that we're going to do a review at least once every 60 days
3 thereafter. We've actually been doing one at least once every
4 30 days thereafter, which is how we come up with the number that
5 we have.

6 THE COURT: Can you describe what the review process
7 actually consists of?

8 MS. ^{(b)(6)} Yes. Typically, myself, ^{(b)(6)} who
9 is here today, will go out to NSA along with -- we brought one
10 program specialist from our office and sometimes maybe one or
11 two other attorneys, depending on scheduling needs. Prior to
12 going out, NSA will supply us with their tasking sheet -- a
13 database entry sheet, basically -- and there will be one sheet
14 for each facility, be it a phone number or an e-mail address.

15 We review those primarily to see that the two items that
16 are required to be documented are there: (1) the foreign power
17 which NSA seeks to acquire foreign intelligence information
18 about pursuant to that tasking, and (2) a citation to the source
19 upon which NSA based their foreignness determination.

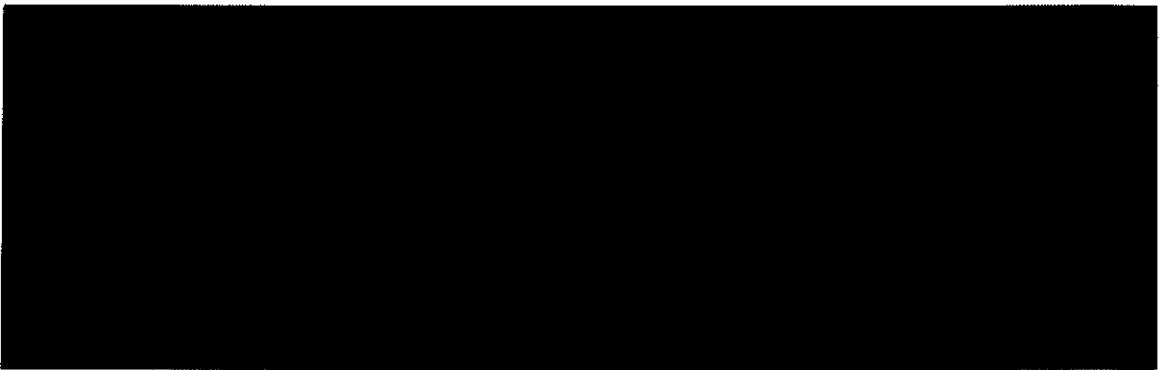
20 So we review these sheets, and I can give you approximate
21 numbers in terms of what we've looked at. We've ended up
22 reviewing every sheet for every facility that's been tasked
23 under 

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On a couple of other occasions, we thought that the number tasked was going to be over [REDACTED] so instead we picked like a sampling of five random days and asked NSA to provide us with the sheets for those days, and we looked at all the sheets for things that were tasked on those days.

So that resulted in about [REDACTED] facilities for our September review and over [REDACTED] in October. We look at all the sheets. We've been able to confirm that the vast majority of them do have the appropriate citations in those two fields.

In some cases, I would say NSA, we know, had the information in their database; it just was sort of a production error in which it was not noted on the sheet that was provided to us, but NSA then corrected that and provided us with the correct version. And then in a very limited number of cases, a required notation was just missing, and NSA subsequently corrected those sheets.

THE COURT: So has everything that you've indicated was missing been corrected since then?

MS. (b)(6): I would say the last two reviews the

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1 foreign power citation was missing, and we've informed NSA of
2 that problem, so they're aware of it. I cannot confirm, though,
3 that we've seen a corrected sheet, but it appears to have been a
4 training issue with certain analysts that were doing those
5 taskings.

6 THE COURT: Do they then provide you the sheets so you
7 can look at it, or do they just come and tell you that they've
8 now put the information in? In other words --

9 (b)(6) MS. [REDACTED] For most of them we did get the corrected
10 sheet back, and that would show the foreign power in the field
11 corrected.

12 THE COURT: Okay. [REDACTED]

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16 (b)(6) MS. [REDACTED] [REDACTED]

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22 THE COURT: Okay. And so were things -- in terms of
23 what you indicated was missing, was it in the group that they
24 already had from before, or was it the newer tasking?

25 MS. (b)(6) The very first time it was missing was

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1 for part of [REDACTED] and again that was where I think it
2 was just a problem of the production of the actual sheets. It
3 was not that NSA had not recorded it, and they did in fact
4 subsequently give us corrected sheets for those.

5 More recently, though, those are for new facilities, and
6 those related, I believe, to tasking of telephone numbers where
7 the foreign powers --

8 (b)(6) MR. (b)(6) It was sheets for telephone numbers tasked
9 for collection under certification [REDACTED].

10 MR. (b)(6) In that case, I believe that the analyst
11 had put in the actual user of the telephone number, and they
12 hadn't specifically identified it to [REDACTED]

13 [REDACTED] Is that the case?

14 MS. (b)(6) Correct. Right. The entry said
15 Cert. [REDACTED] as opposed to saying whether it was [REDACTED]

16 [REDACTED] So we viewed that while technically not
17 compliant with the requirement of the procedures that the
18 foreign power be noted, it was nonetheless clear that the
19 analyst was tasking it pursuant to that certification.

20 THE COURT: Does NSA do a review of its own before NSD
21 comes out and does this review? In other words, is there
22 someone, a supervisor or somebody, who takes a look at it before
23 NSD looks at it, or is NSD the first one that's actually going
24 to be looking and picking up on these things?

25 (b)(6) MR. (b)(6) We actually physically look at the sheets,

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1 but we felt that we could not make any correction to the sheets,
2 so we had to provide them to DOJ as they were when we pulled
3 those back from the database.

4 THE COURT: And the reason for that is?

5 MR. (b)(6) Our oversight and compliance office
6 directed us not to make corrections.

7 MR. (b)(6) I think, Judge, the reason for that is
8 because of the required DOJ view of the information that was in
9 the database at the time, we didn't want to change that database
10 before the review.

11 THE COURT: Okay. So going forward, as this continues
12 and your reviews continue, whatever's in there is what is looked
13 at by NSD, and there will not be corrections then.

14 MR. (b)(6) I would say there would be additions.
15 The vast majority of the sheets that we provide, I believe that
16 there is very strong (b)(6) evidence which supports the
17 reasonable belief that the target is foreign.

18 In some instances our analysts have chosen (b)(6)
19 (b)(6)
20 (b)(6) but I believe there
21 is (b)(6) evidence that we could submit for each one of the
22 selectors which would make it easier for the reviewers at
23 Department of Justice and ODNI to look at that and make a
24 determination that there was a reasonable belief that the target
25 was foreign.

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1 So as we work through these procedures and we refine those,
2 we are doing, I would say, additional training with the analyst
3 to ensure that the citations are put forward in the clearest
4 manner for the reviewers to subsequently look at.

5 THE COURT: Because I'm assuming that what you want to
6 do or the purpose of the review from NSD is to make sure that
7 when they actually went up or were tasked that the information
8 was there and accurate, not going back.

9 (b)(6) MS. [REDACTED] That's right. That's right, Your Honor.
10 We focus on what information did the analyst have and document
11 at the time of the tasking, and that's what should appear in the
12 source field, is what it's known as.

13 The next step we take after just looking at what types
14 of -- that actually a citation is there is we then request NSA
15 to pull the underlying documentations so we can actually review
16 what the analysts had at their disposal when they made the
17 tasking. For a good number of these and for some of the
18 reviews, it actually amounted to nearly half or more of the
19 taskings.

20 The citation itself sort of on its face showed the
21 foreignness, and by that I mean it indicated that [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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[REDACTED]

If those notations are there, there simply really isn't any underlying documentation for us to review. So we've been satisfied with that citation and focused on ones where on their face you can't tell what the foreignness really is based on.

For example, an NSA report, we'll either be able to pull those ourselves from our access to [REDACTED] or we'll ask NSA to pull them for us, and we'll review the report to see that there's some indication in that report that the user of the facility was foreign.

Other examples would be a cite to NSA's [REDACTED] database. NSA will then pull that for us. We'll review it, and within that [REDACTED] record it might be [REDACTED]

[REDACTED]

[REDACTED]

It's been, I'd say, a process of refinement as we've been working with NSA, and we've made suggestions in terms of what does make for an easier review. So our last review out there on December 7, they were able to, in response to our suggestions,

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1 actually capture on one piece of paper the fact that that [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 THE COURT: Okay. And anything else that you found in
5 your review?

6 MS. (b)(6) Overall, our general finding is that a
7 strong majority of the sheets have contained appropriate source
8 citations, meaning that using that site, NSA was able to
9 retrieve the documentation, we were able to review it and
10 confirm the basis for their foreignness determination.

11 In some areas in which the citations could be improved --
12 and we've discussed these with NSA -- would be where perhaps the
13 foreignness determination was based on a number of sources and
14 what appeared in the source field was a citation to just one,
15 which might have been just part of the story, and upon further
16 discussion NSA was able to then kind of pull together
17 information. But a citation to every document was not actually
18 in the database entry sheet.

19 And then some sources cited were to NSA's memorializations
20 of previously made foreignness determinations where what
21 originally led them to conclude that it was foreign is not
22 evident from the document they cited. Again, that really is
23 more of a problem, I'd say, with [REDACTED]
24 [REDACTED] and not something that we really observed in our more
25 recent reviews.

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1 THE COURT: In terms of the foreignness determination,
2 did you disagree with them in any of these? It sounds like
3 there's some missing information, they have provided you the
4 information, and there's an indication -- you seem to be calling
5 foreignness determination --

6 (b)(6) MS. (b)(6) Yes. That's our shorthand.

7 THE COURT: -- so I'll use that shorthand as well.
8 Did you find any that you didn't think the determination was
9 accurate?

10 (b)(6) MS. (b)(6) I'd say -- I think there's only been a
11 handful. What we're doing is we're having NSA report what we've
12 been calling incidents, PAA incidents, to us. Basically, if NSA
13 comes across some reason why they realize they shouldn't have
14 tasked that facility pursuant to the PAA, or if they receive
15 some indication pursuant to their post-tasking procedures that
16 the phone number or the e-mail address might be being used
17 inside the United States, they inform us of that, and we've been
18 tracking those incidents. We've only been informed of (b)(6) of
19 them, so that's sort of the universe that we're dealing with
20 right now.

21 THE COURT: Since August?

22 MS. (b)(6) Correct. Since August. And of those,
23 there are a (b)(6) where I think we might be not certain that
24 NSA's original determination that the user was located overseas
25 was in fact a reasonable one, but I would say that's in the

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1 category of maybe [REDACTED]. Some of them it was quite clear
2 that the tasking error was really a human error; the account
3 that they intended to task they did have a reasonable basis for,
4 but it was entered being at [REDACTED] or an
5 "L" was transposed with a "T", something along those lines.

6 That accounts for some of them, and others might be more
7 the instance where NSA had a reasonable belief the person was
8 located overseas at the time of tasking and that person simply
9 moved locations.

10 Now, we can't confirm for every one that the person was
11 in fact originally located overseas and then traveled, but as
12 long as they had a reasonable belief that they were first
13 located overseas, we would not consider that a compliance
14 incident per se. But we haven't made a final determination with
15 respect to every one of those facts as we start gathering
16 information on it.

17 THE COURT: So if you did make a determination that
18 there was a compliance error, noncompliance, what would happen
19 with the information that had been collected?

20 (b)(6) MS. [REDACTED] Well, NSA currently, what they're doing
21 I think regardless of whether it's a compliance incident is any
22 information that's collected from that facility's -- while it's
23 being used inside the United States is being purged, and (b)(6)
24 can confirm that for me.

25 MR. [REDACTED] Yes. We make a determination that

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1 there's -- well, first we would report it to our general
2 counsel, and then they report it to the Department of Justice.
3 As soon as we make that recognition, anything that we collected
4 from the time that we tasked would go into multiple locations,
5 and we'll remove the data.

6 THE COURT: And if you'd explain again, you're talking
7 about anything where it's collected within the United States?
8 Is that what you're saying?

9 (b)(6) MR. (b)(6) Yes, ma'am.

10 THE COURT: In other words, there is not the foreign
11 link out there.

12 MR. (b)(6) If there was an indication that the
13 telephone number had roamed into the United States or there was
14 an indication that [REDACTED]

15 [REDACTED] then from that period forward
16 we went back into the database and removed the information.

17 MR. (b)(6) [REDACTED]

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[REDACTED]

THE COURT: [REDACTED]

MR. (b)(6) [REDACTED]

[REDACTED]

THE COURT: [REDACTED]

[REDACTED]

MR. (b)(6) [REDACTED]

[REDACTED]

THE COURT: So if there's a typo or it's [REDACTED]

[REDACTED] or something like that --

MR. (b)(6) [REDACTED] The data would be destroyed.

THE COURT: We can't talk at the same time or he won't be able to get it down.

That would be purged.

MR. (b)(6) [REDACTED] Yes.

THE COURT: So what you're talking about is where

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there's a determine --

[REDACTED]

[REDACTED]

(b)(6) MR.

(b)(6)

[REDACTED]

THE COURT:

[REDACTED]

[REDACTED]

(b)(6) MR.

(b)(6)

[REDACTED]

[REDACTED]

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[REDACTED]

THE COURT:

[REDACTED]

MS. (b)(6)

[REDACTED]

[REDACTED]

MR. (b)(6)

[REDACTED]

MS. (b)(6)

[REDACTED]

[REDACTED]

MR. (b)(6)

[REDACTED]

(b)(6)

MS.

[REDACTED]

[REDACTED]

THE COURT: So leaving out the [REDACTED] where there's no collection, for the rest have you actually purged it at this point? He's nodding yes.

MS. (b)(6) Yes, right. For ones that -- yes.

MR. (b)(6) Yes. Am I right, [REDACTED]

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1 MR. (b)(6) Yes.

2 MS. (b)(6) The determination about whether it should
3 be called merely like a tasking error or a roaming incident,
4 which in fact is contemplated by the procedures, as opposed to a
5 compliance incident, will matter for us in terms of the attorney
6 general's obligation to report to Congress on a semiannual basis
7 incidents of noncompliance.

8 So that's where -- at that point we'll have to determine
9 which we officially consider to be incidents where NSA did not
10 have a reasonable belief in order to do the tasking.

11 THE COURT: And you called it "compliance errors"
12 versus what?

13 MS. (b)(6): A "tasking error", which would be a
14 typographical mistake, or a "roaming incident" is where NSA had
15 a reasonable belief that the person was located overseas at the
16 time of tasking but then later evidence shows that the person
17 has either moved or was always in the United States, and while
18 termination collection would stop and that facility will be
19 detasked, they were in fact complying with the procedures when
20 they made that tasking.

21 THE COURT: So at the point that you figured out that
22 they've moved into the United States, then collection would stop.

23 MS. (b)(6) Correct.

24 THE COURT: And if you collected anything once they
25 had in that interim thing, that it would be at this point purged?

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1 MS. (b)(6) Collection from once the person was in
2 the United States would be purged, yes, because that would be
3 collection that would constitute electronic surveillance as
4 defined under FISA, and that is something that the procedures
5 also indicate should be purged.

6 MR. (b)(6) May I ask a question, Judge?

7 THE COURT: Sure.

8 MR. (b)(6) When you say that -- what you just
9 described, the point after which the material would be purged,
10 is that from the point at which NSA learns that the user is in
11 the United States so that they no longer have a reasonable
12 belief that the person's outside, or does that begin from the
13 point where NSA determines that he actually entered the
14 United States?

15 MS. (b)(6) [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 THE COURT: [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

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1 (b)(6) MS. (b)(6) That's correct. That's my understanding.

2 THE COURT: Okay. If I could get back to the -- I
3 have a little bit of a concern that if the minimization
4 procedures now are silent about this issue that it not be
5 started up without making some changes [REDACTED]

6 [REDACTED]

7 [REDACTED]
8 [REDACTED] let's put it that
9 way, which is what you seem to be talking about, I have some
10 concerns about -- because the procedures don't seem to -- in
11 terms of the procedures the Court is reviewing don't seem to
12 contemplate that, at least reading the two sections on page 6,
13 which I think is the first set which talks about oversight and
14 compliance.

15 There's a paragraph that talks about -- one that I just
16 read and the other above that -- [REDACTED]

17 [REDACTED]

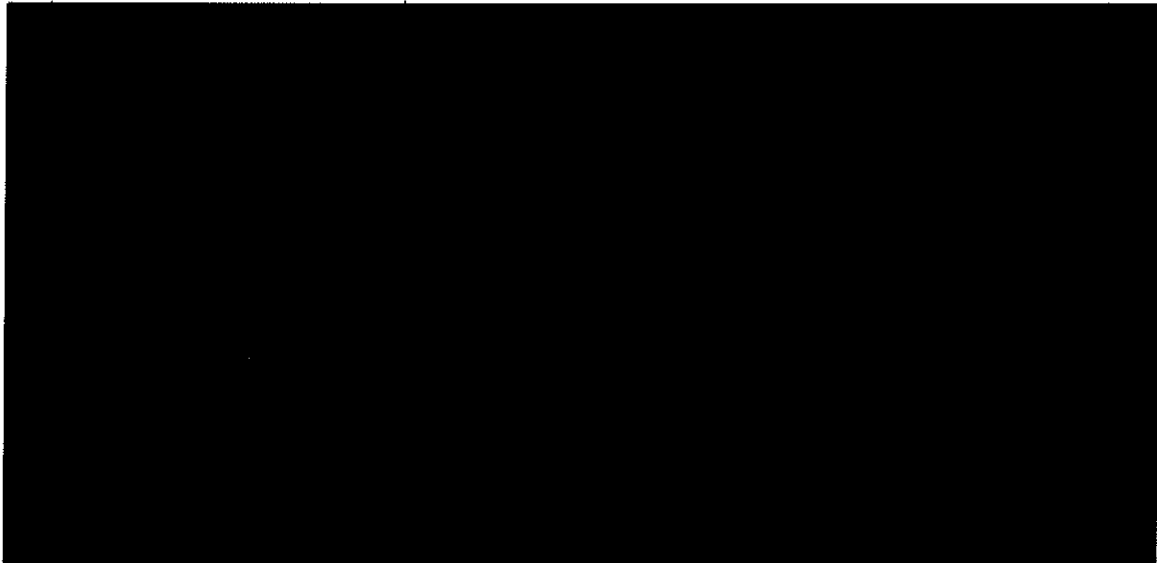
18 [REDACTED]
19 [REDACTED]
20 [REDACTED] So you've got two sort of purges.

21 (b)(6) MR. (b)(6) Right. [REDACTED]

22 [REDACTED]

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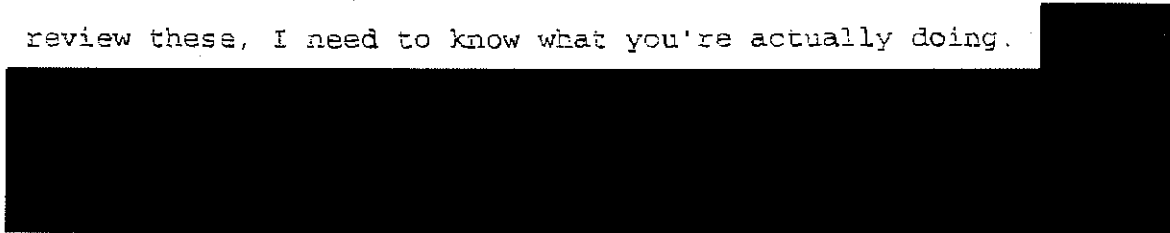
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THE COURT: And I guess the concern I have is that there's nothing in these procedures that I'm reviewing that contemplates that. You're talking about an exception which I understand you have not implemented. I'm just saying that if you do, I think there needs to be something in these procedures that the Court is reviewing that addresses that.

At this point, leaving aside the minimization procedures, reading this, you would never contemplate, frankly, what you have indicated might be the position of NSA at some later point. And if it was included in the minimization procedures, it's clearly an exception to what's been set out here.

So you're not doing it now. I would just strongly suggest that -- more than strongly suggest, and I think if I'm going to review these, I need to know what you're actually doing.



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1 [REDACTED] then I think at some point this
2 needs to be amended and reflected so that the Court has an
3 opportunity to look at it.

4 MR. OLSEN: We need to obviously discuss this further,
5 Your Honor.

6 THE COURT: I understand. (b)(6)

7 MR. OLSEN: Because this, as Ms. (b)(6) pointed out,
8 is an instance that hasn't occurred, so it hasn't really been
9 something that's been in some sense ripe for us to review it.
10 As I've looked at these procedures over time, and as this
11 discussion indicates, we've looked at the -- on page 6 those two
12 provisions as being able to operate in concert with one another
13 so that if in the first instance where there was not a
14 reasonable belief that the person was outside the United States
15 and therefore was electronic surveillance, that would have to be
16 purged.

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1 THE COURT: But I think the minimization procedures
2 that you're doing are minimization procedures that the AG and
3 the DNI have to look at and you have to file them with the Court
4 so that the Court would be on notice that you decided in this
5 area to carve out an exception.

6 So when you talk about what you're doing now, which is that
7 you learn December -- you learn December 12 that as of December
8 8 somebody went into the United States, at this point you're
9 purging it if you made some -- if the catch-all is to look at
10 the minimization procedures and you change those, I assume we
11 all get notified and that they get reviewed and approved and we
12 all get some notice that that's actually what you're doing.

13 MS. (b)(6) Yes. Absolutely.

14 MR. OLSEN: And that's the part I don't know what the
15 minimization procedures say.

16 THE COURT: They are silent at this point, according
17 to counsel.

18 MR. (b)(6) But we agree, Your Honor, with your
19 observation that we should stay in the exception in the
20 procedures themselves that the Court's reviewing.

21 THE COURT: Okay. Either one or the other, but I
22 think -- if it's silent, then I don't think you should do
23 without putting it in one of the others so that it's clear cut.

24 MR. OLSEN: Right.

25 THE COURT: And the Court, whether it's the

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1 minimization procedures or whether it's these procedures, would
2 be reviewed by the Court.

3 MR. OLSEN: Then we can change the procedures and
4 amend them to reflect that.

5 THE COURT: Well, assuming that's what you want to do.
6 I don't have -- it doesn't sound like you've discussed it, so
7 I'll leave it to you to discuss.

8 MR. OLSEN: Right.

9 THE COURT: And certainly -- I have some concerns
10 about it, frankly, in terms of every time you do [REDACTED]
11 [REDACTED] that there are issues relating
12 to it. I won't opine about it since I don't have it in front of
13 me, but I do think it needs to be put in writing so there's
14 transparency as to what's being actually done. So it's either
15 the procedures or the minimization procedures, one or the other,
16 since they're silent at this point.

17 Okay. We talked about these -- so at this point, if I
18 understand it, they've been about [REDACTED] we'll call them,
19 compliance errors because you haven't broken them down into
20 tasking errors. [REDACTED] probably were tasking errors because
21 you didn't collect anything, roughly.

22 MS. (b)(6) Even if nothing was collected, it might
23 be that it was a compliance error to task it to begin with, Your
24 Honor.

25 THE COURT: Is the [REDACTED] that you've given me, does that

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1 include what you now have broken down into compliance errors,
2 tasking errors, typographical kind of thing and this roaming?

3 MS. (b)(6): Yeah, but [REDACTED] is the universe of what NSA
4 has reported to us as being a facility which it believed it
5 should not have tasked initially or it received some indication
6 that it's now being used inside the United States and has
7 detasked.

8 THE COURT: Okay. And at this point, for [REDACTED] there's
9 no collection, so there's nothing to purge. Out of the rest,
10 everything has been purged.

11 MS. (b)(6) I think on terms of how many where there
12 was not collection, Your Honor, I want to confirm that with NSA,
13 because I think for a few of them they did not have that
14 information available at the time it was reported to us.

15 THE COURT: Let me put it a slightly different way.
16 For those where there was collection, whether it fits into any
17 of these three categories, at the present time, out of the [REDACTED]
18 whatever number that is, the information has been purged.

19 (b)(6) MS. (b)(6) Well, there was one reported to us just
20 last night, and at that point we don't know if information was
21 collected. And the information we were given was if information
22 was collected, it will be purged.

23 THE COURT: So the purging is, frankly, ongoing. It's
24 not something where there's a wait of months before something
25 happens.

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(b)(6)

1 MR. (b)(6) No. (b)(6) you made a statement about of
2 the (b)(6) that we didn't have reason to believe that they were
3 foreign from beginning, I thought, a second ago. For all the
4 roamers, we are very confident they were foreign when we tasked
5 those.

6 MS. (b)(6) (b)(6)

7 (b)(6)

8 (b)(6)

9 (b)(6)

10 (b)(6)

11 (b)(6)

12 But I think there's probably about on the order of maybe (b)(6)
13 that we think ultimately will identify as compliance incident,
14 but for many others it does appear that there was a reasonable
15 basis for NSA's original tasking, and the later evidence showed
16 the user was in the United States so they detasked.

17 THE COURT: Okay. Anything else that you gleaned from
18 this review?

19 MS. (b)(6) (b)(6) One other aspect of our review is NSA's
20 minimization practices with respect to reports that they issue
21 as a result of the Protect America Act collection. There's been
22 a total of (b)(6) reports issued that were based at least in part
23 or totally on PAA collection, and we've reviewed each of the
24 reports. NSA provides them to us, and we go out for the reviews
25 and can say that to the extent any have contained U.S. person

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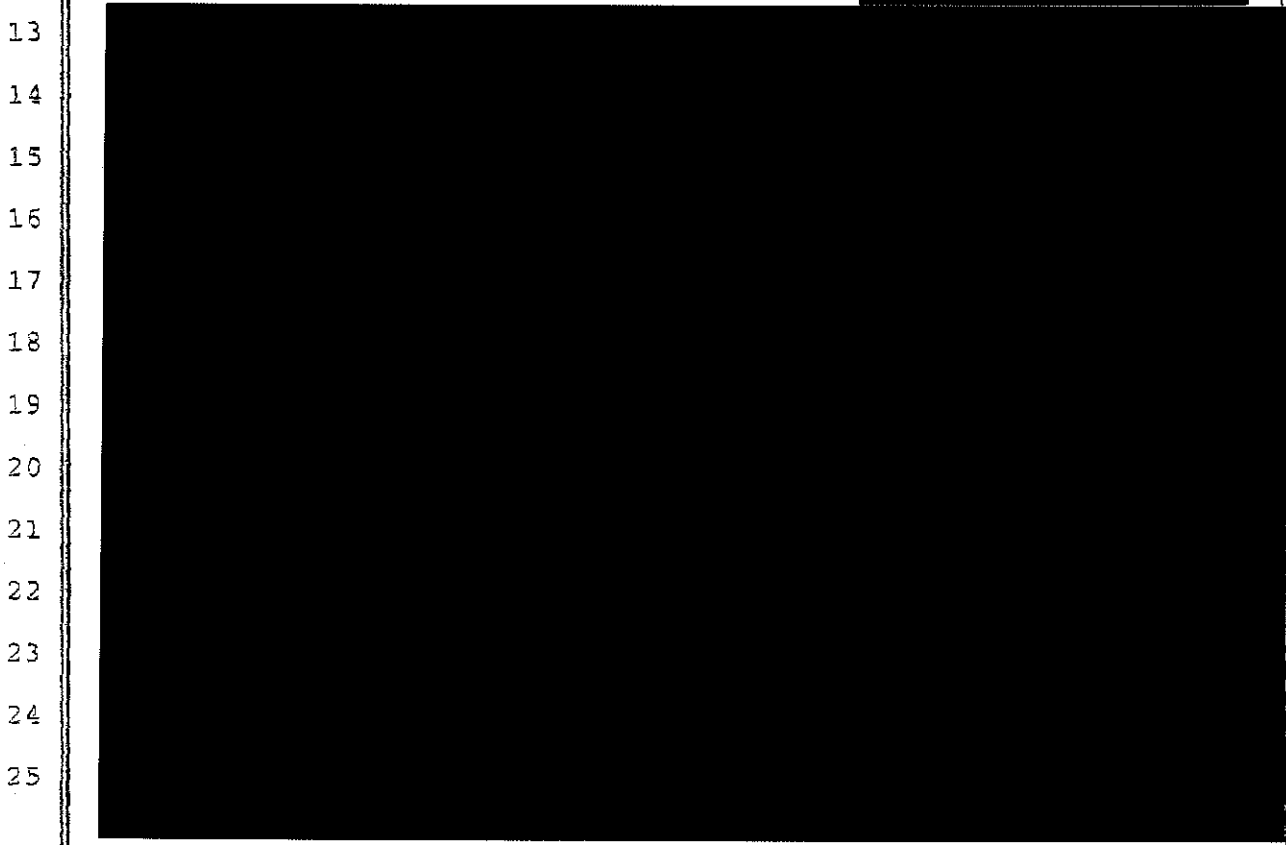
1 information, they have properly minimized that information in
2 accordance with the procedures.

3 THE COURT: Okay. Since you've gone over this review,
4 have there been any instances where -- I think it's, again, page
5 6 of the first set of procedures, which is the departure from
6 procedures of immediate threat, has that been exercised?

7 MS. (b)(6) No, Your Honor, it has not. (b)(6) if
8 you can confirm that?

9 (b)(6) MR. (b)(6) I confirm that.

10 MS. (b)(6) Yes. This was included in the
11 procedures, Your Honor, really in anticipation of what we were
12 not anticipating, frankly, a situation --



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[REDACTED]

Another possible scenario might be if [REDACTED]

[REDACTED] it

would technically be veering from the procedures, but this paragraph would basically permit that.

Again, we have not employed it and very well may never, but that was the sort of circumstance we're envisioning, not something more like NSA would be permitted to task facilities of people inside the United States in violation of the overall authority of the PAA.

THE COURT: Let me just make sure we've covered all of the review before we sort of segue into this. Anything else that's of note that you have found from the reviews that the Court should be aware of?

MS. (b)(6) One thing, Your Honor, that comes to mind, and I believe this is a situation that has been corrected, but since we were talking about their post-tasking procedures, NSA has experienced -- there was a time in November where there was a delay in [REDACTED]

[REDACTED]

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[REDACTED]

That [REDACTED] problem has been solved, and NSA has informed us that they have a procedure in place now to alert someone if [REDACTED] so they can take immediate action to correct it.

THE COURT: Anything else?

MR. (b)(6) Could I just -- as an intelligence analyst at NSA that's been involved in the procedures, if I look at the number of e-mail addresses and telephone numbers that we have tasked under the authorization, there's a high degree of percentage of ones that I believe meet every procedure and we have total reasonable belief that the targets were foreign, and I think it's in the 99 percent range -- but I'm basing that on my intelligence analysis experience -- compared with the [REDACTED] that there are possible incidents on.

THE COURT: Okay. Let me move, then, into what I've called the emergency departure. I had a couple of questions on this one. In my order I had asked how this worked, because the way it's written it's quite broad, and there was -- in looking at it how it would actually be applied was a question that I had. An example was given that indicated that if there wasn't time, basically, to do some documentation. I had a couple of questions, and the examples you've given have been all in the context of documentation.

Is the documentation then done after the fact? I mean, it

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1 doesn't address the issue if you don't -- the way it's set up is
2 if there's an immediate threat and NSA determines it must take
3 action and apparent departure from the procedures, it's not
4 feasible to obtain a timely modification of the procedures from
5 the AG and the DNI, then they can take the action and report
6 this promptly to DOJ and the office of the DNI.

7 Since it's fairly broad, frankly, in terms of the
8 procedures and what you're able to do, it wasn't clear to me
9 initially what it is that you would be modifying that you
10 couldn't do -- that you wouldn't have discretion to some degree
11 already, what kind of modifications you're talking about.

12 You, in writing, gave us the documentation one, and you've
13 also just given this one. Is that generally what you're
14 thinking of in terms of something coming up, they're moving
15 quickly, not dotting the I's and crossing the T's?

16 MS. (b)(6) Yes, Your Honor, and I think you actually
17 described the procedures in that they describe categories of
18 information NSA may be looking at and making its foreignness
19 determination depending on the particular situation. Really,
20 the one area of the procedures where specific steps are required
21 is in the documentation section and in the subsequent
22 verification before something is released from tasking.

23 That's why our answer focused on that, given that that will
24 be an area that we can envision NSA doing something that was not
25 provided for in the procedures, because otherwise their

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1 foreignness determination is already based on sort of a totality
2 of the circumstances as opposed to a mandatory checklist that
3 they have to follow. If we had something like that in there,
4 you could see that provision maybe would apply there, but we
5 don't have that. So it really is the documentation section that
6 I think is the one, at least in all of our thinking, the one
7 place where we see that this could come into play.

8 THE COURT: So, would you see that as -- for instance,
9 some of the errors that have occurred you've gone back and
10 fixed. Is that what you're thinking of in terms of the
11 modification, or are you thinking of something else?

12 MS. (b)(6): No. We would not view any of -- in any
13 instance that we've heard of so far as being one that NSA
14 departed from the procedures in order to respond to an immediate
15 threat to national security.

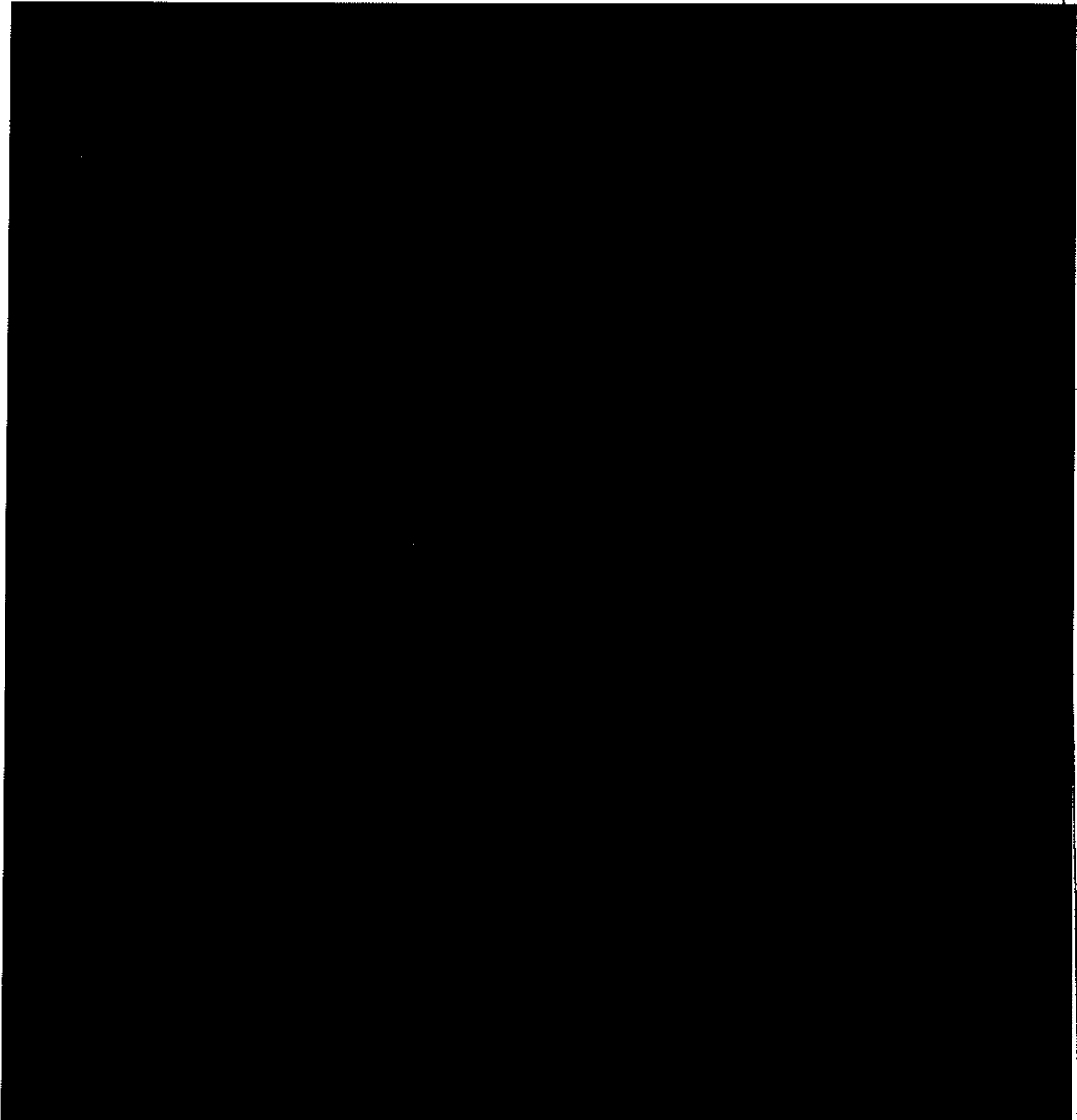
16 THE COURT: "An immediate threat" is sort of broad.
17 I mean, we're in two wars. We have, in addition, a global war
18 on terrorism in terms of broadly. There are enough -- if I look
19 at enough applications, there's enough plots going on around the
20 world that you could always view it as an immediate threat.

21 Was it something that -- I guess, is it a timing issue, not
22 a timing issue in terms of what's -- you can't make the
23 modification. Is it a permanent modification, or is it just a
24 small modification for that particular threat? Maybe you can
25 explain a little better.

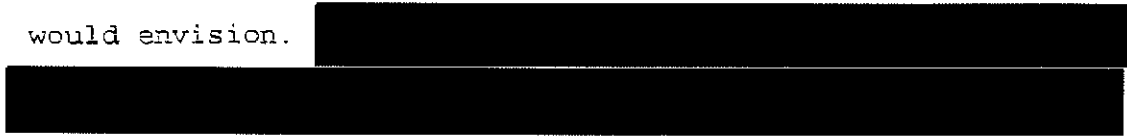
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MS. (b)(6)



THE COURT: Can you give me -- let's assume there's
some threat -- let's take a hypothetical threat and what you
would envision.



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[REDACTED]

AM I correct?

(b)(6) MS. (b)(6) That's correct, Your Honor.

THE COURT: So what would it be that you'd be modifying? That's what I'm having trouble figuring out.

MR. (b)(6) [REDACTED]

[REDACTED]

[REDACTED]

THE COURT: So are you indicating you wouldn't see that there would be any need to modify? Or did I miss the

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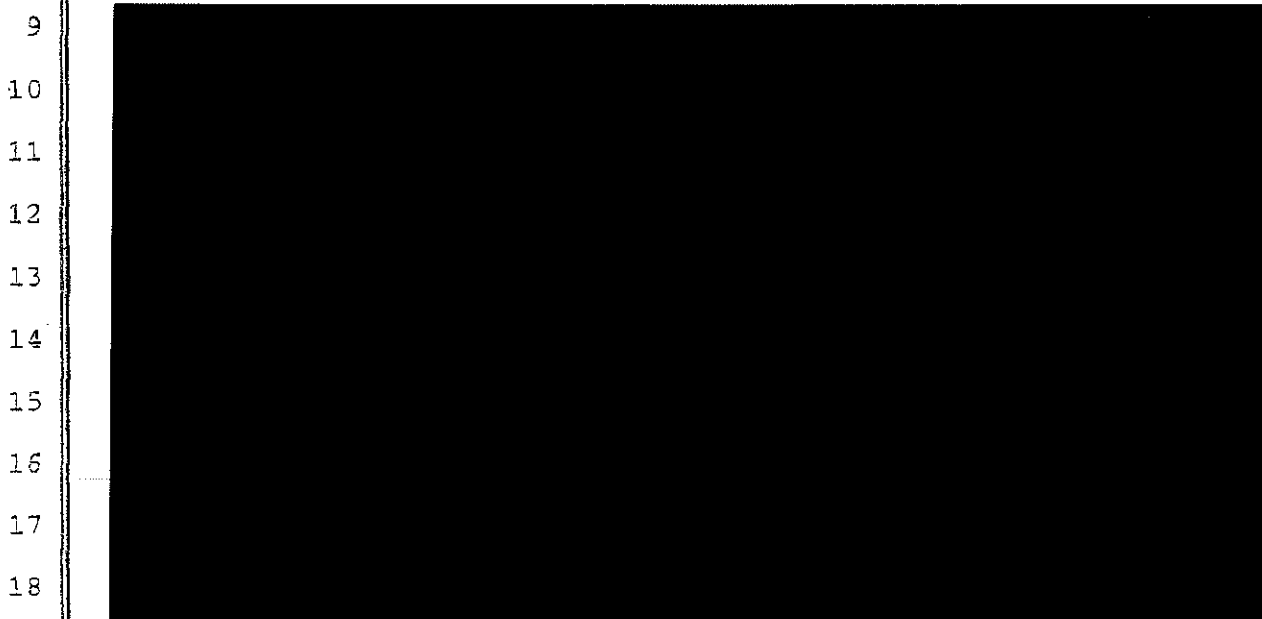
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1 point?

2 MR. (b)(6) My point was that the example that is
3 cited as far as [REDACTED] that will
4 not happen.

5 THE COURT: So what is an example of something --

6 MS. (b)(6) I think we were trying to contemplate if
7 there were such an immediate threat, it might be that we permit
8 NSA -- or NSA would take actions under these procedures to



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19 THE COURT: The procedures are silent, after you
20 report the activity, as to what happens. In other words, does
21 anybody go back and do anything with this so that there's some,
22 if nothing else, post-tasking, post-review to figure out whether
23 what you concluded was correct and there would be some record
24 such that there would be some oversight of it at a later point?

25 That doesn't say anything about that, and that obviously is

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1 some concern, since you don't know precisely what this
2 modification would be, to make sure whatever's modified and not
3 only orally gets informed, but there's some written
4 documentation that you go back.

5 For instance, if you eliminated the [REDACTED] at
6 some point, you would go back, [REDACTED] and make sure you're
7 right. You've made some conclusion about, say, a foreignness
8 determination, if you went back and looked at it, to make a
9 determination whether you're correct or not.

10 It doesn't say that, and that concerns me; I must be frank.
11 It doesn't say what happens. Do you orally tell them? Do you
12 do anything else, or do you not have to do any other
13 documentation of what's involved here?

14 MS. (b)(6) [REDACTED] We certainly contemplated, Your Honor,
15 that it would be -- while we might be orally informed, it would
16 also be followed up in some written fashion, probably e-mail is
17 typically the way we've been communicating about all sorts of
18 incidents connected to this collection and that it would not
19 [REDACTED] but something
20 that, again, was done to resolve the immediate threat.

21 So since the procedure talks about protecting against the
22 immediate threat, it was not viewed as a permanent relief from
23 the procedures but more that they might take immediate action to
24 gather the foreign intelligence information. But then we would
25 revert -- the rest of the procedures would stay in effect and be

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1 in effect with respect to those facilities after that immediate
2 threat had passed.

3 THE COURT: So you're not seeing sort of a permanent
4 modification or a definite modification.

5 MS. (b)(6): Correct.

6 THE COURT: You're seeing a modification in response
7 to an immediate threat. You would document it, and then you
8 would revert back to whatever the procedures were unless you
9 actually wanted to amend them.

10 MS. (b)(6): That's correct, Your Honor. If this was
11 something that NSA was identifying as a more of a permanent
12 problem with the procedures that was impacting their collection,
13 the appropriate course then would be for us to amend the
14 procedures and have the attorney general and the DNI once again
15 certify that they in fact are reasonable.

16 MR. OLSEN: That certainly is how I've looked at
17 these, that the modification in the procedures was tied directly
18 to the threat and the immediate threat which would prevent the
19 ability of NSA to obtain a timely modification of the
20 procedures. So to the extent that there was the availability of
21 making appropriate modification because the threat was not
22 immediate, then that's what we would do.

23 THE COURT: Okay. For instance, with this [REDACTED]
24 [REDACTED] that he's talked about, if you had made a decision that
25 you didn't want to use this system anymore, then you would

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1 actually do an amendment, something that would be done before
2 you actually moved forward. You're talking about something that
3 a threat comes up and in response to this you feel that
4 something needs to be done more quickly or some other reason for
5 doing it, you would eliminate the [REDACTED]

6 You would then go back, however, at some point -- and I
7 guess this is all amorphous, but you would go back at some
8 point, revert back to your original way of operating unless you
9 actually asked for something on a more permanent basis and would
10 document the modification and what the results of it were so
11 that you could figure out whether modifying it actually did --
12 it still met the requirements of the act as it's set out in
13 terms of this foreignness determination as opposed to finding
14 out that they're all in the United States.

15 MS. (b)(6) [REDACTED] Correct. That's right, Your Honor.

16 THE COURT: Is there a reason for not -- you know, I
17 realize you don't know when it's going to come up, but why
18 something wouldn't be added as you move along here that
19 indicates that there will be some documentation or something to
20 indicate that if there's a departure at some point you'll be
21 taking -- there will be some documentation of it?

22 Otherwise, it leaves it sort of an oral -- report the
23 activity, and that's that. It doesn't say what happens after
24 that in terms of the timely modification, or can we agree today
25 that you would do it so I can consider that, although not

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1 written, this is what you're planning on doing, how you're
2 operating?

3 MR. OLSEN: When you say, Your Honor, that the
4 procedures would allow an oral notification because it's
5 silent --

6 THE COURT: That's what it says. Well, it doesn't go
7 back -- I mean, the questions that I've asked, looking at it you
8 can't tell -- let me backtrack. We have an emergency procedure
9 now. All of it's done -- a lot of it's done orally, and then
10 it's followed up with documentation, et cetera, and there are
11 procedures that set that out.

12 This just says you will notify them -- as I said, there's a
13 fair amount of discretion already in terms of being able to do
14 it, so I had trouble figuring out why you wouldn't be able to
15 timely discuss doing it.

16 You've talked about it mostly in terms of [REDACTED]
17 [REDACTED] that would be made would be
18 skipped in some way, at least temporarily, that it sort of
19 leaves it -- it's not clear to me why this would be needed as
20 opposed -- you know, as I said, in the usual emergency there are
21 procedures about writing it up, why this one doesn't have that
22 kind of same indication of what happens once this occurs,
23 because the modification could be a permanent one, reading this.
24 That's why I asked the question.

25 (b)(6) MS. [REDACTED] That's right, Your Honor. I think the

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1 absence of it specifically saying that the notification shall be
2 in writing or what steps will happen after that was not
3 intentional, other than that very nature of the paragraph meant
4 to account for an unanticipated -- or an event that's unlikely
5 to occur meant we were trying to, I think, keep some degree of
6 flexibility, given we don't know what the immediate threat to
7 the national security threat would end up constituting.

8 I think we can agree, certainly, that this paragraph, by
9 that, we are interpreting it to mean that we would get written
10 notification of a deviation from the procedures, and it would
11 not be a permanent deviation but instead something that was
12 happening only to protect against that immediate threat.

13 We would then, after that immediate threat was -- the
14 intelligence was gathered or the steps were initiated to collect
15 that intelligence, then the other requirements of the procedures
16 would then remain in effect.

17 THE COURT: And you'd have a way, then, of seeing
18 whether it was an appropriate collection during that period.

19 (b)(6) MS. [REDACTED] Correct. The idea of having NSA then
20 report it promptly to us and to the ODNI was to make sure there
21 was an opportunity then for the attorney general and the DNI to
22 assess whether the departure itself was in fact something that
23 was reasonable given the overall procedures and an assessment of
24 the threat.

25 THE COURT: The other thing is that it talks about it

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1 as being an approval after the fact. Since in the -- back to
 2 the one I'm most familiar with, the present emergency that we
 3 have, the procedures where there's the oral notification
 4 preapproval and you move forward, it wasn't clear to me why you
 5 wouldn't be able to just let them know and so they would
 6 preapprove it. How long does that take to do?

7 Because this is telling them after the fact as opposed to
 8 telling them upfront orally and their saying, yes, this is fine,
 9 you then do it, you get the paperwork afterwards. Is there a
 10 particular reason why there was a concern that they couldn't be
 11 notified upfront as opposed to after the fact?

12 MR. OLSEN: Notified up front that the --

13 THE COURT: That they wanted to modify it so there's
 14 some preapproval. If they said, no, no, you can't do this, I
 15 mean it's after the fact that you get this.

16 MS. (b)(6): Well, Your Honor, I think given what
 17 we're anticipating the possible scenario that would result here,

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 So we're not -- the step that you're talking about them
 23 taking in order to get the approval to depart from the
 24 procedures would be, while not a significant matter of several
 25 days, given the threat that we're talking about, it would be

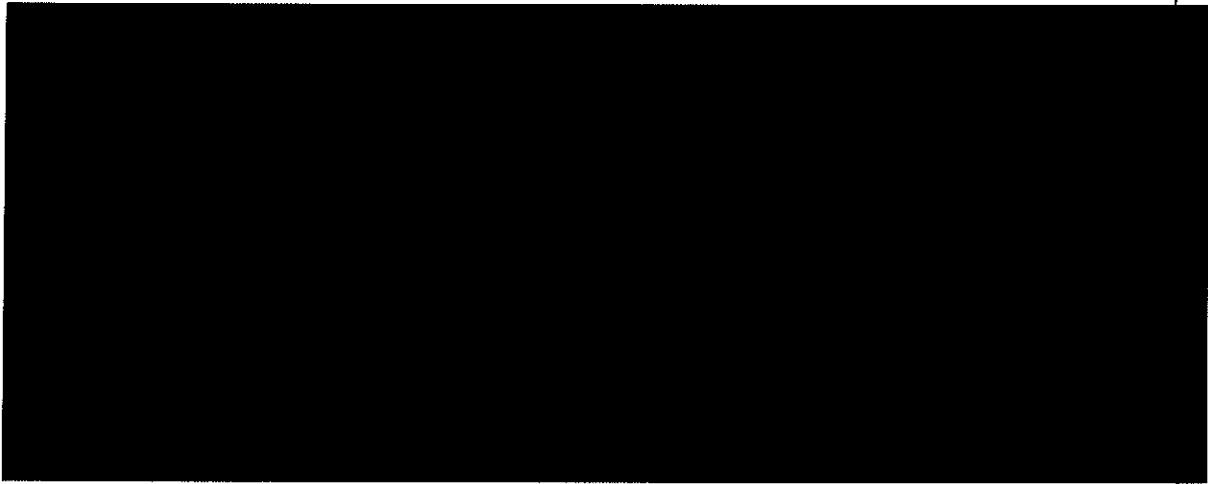
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1 enough time that it might prevent the collection of the
2 information which is the reason for the paragraph to begin with.

3 THE COURT: Are you thinking of the -- if I understood
4 you correctly, the immediate threat we should think of as
5 defined the way it's defined in the FBI minimization procedures,
6 the new ones or the old ones?

7 MS. (b)(6) The new ones is what I was envisioning.



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16 THE COURT: That's the way you were thinking of it.

17 (b)(6) MS. (b)(6)



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23 THE COURT:



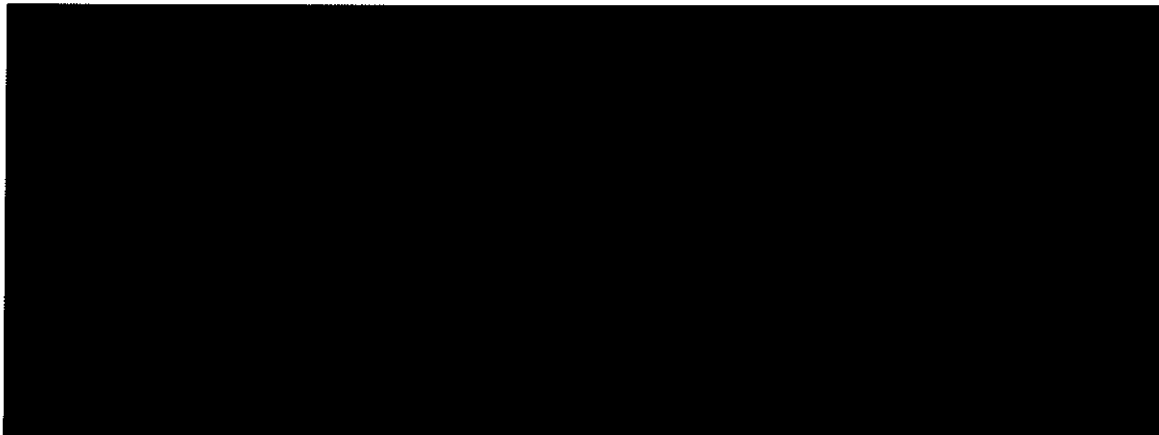
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25 (b)(6) MS. (b)(6)

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THE COURT: Can I also assume that you report the activity promptly to DOJ and the office of DNI so that they get post approval? In other words, after-the-fact approval for what it's doing. So if they were notified and disagreed with what was being proposed, presumably they could say, someone stop this. That's the point of it.

MS. (b)(6): Correct. Yes.

THE COURT: What if the NSA emergency and the AG and the DNI disagree among themselves? What happens? I mean, it doesn't address it in a couple of areas.

MS. (b)(6): No, it doesn't.

THE COURT: It's like the procedures. We have the procedures, and they both agree. So the issue hasn't come up.

MS. (b)(6): Correct..

THE COURT: Any thought of it?

MR. OLSEN: Just with respect to the emergency provisions or generally --

THE COURT: Well, there's a couple of places that have

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1 the two groups, the AG and the DNI, who obviously come from
2 different perspectives. One has a legal look at it, and the
3 other is going to look at it in a national security perspective,
4 and there could be disagreements.

5 Now, obviously the procedures you proposed to me, there
6 isn't one because you're presenting them, but in this context it
7 hasn't come up. Any thought as to what would happen?

8 MR. OLSEN: We've talked about this a bit. It's hard
9 to contemplate, but I imagine if there was a disagreement
10 between the DNI and the attorney general, who are jointly
11 responsible for this authority, it would have to be resolved by
12 the president at that level, and that would be where any
13 disagreement between the two would have to go.

14 THE COURT: Okay. So just to make sure that we're all
15 on the same page on this, in my reviewing the procedures, the
16 clear-error standard, you don't have a problem with my building
17 into this the understanding that you have presented what your
18 intention is. In other words, can I rely on this is the way you
19 would plan on operating as part of my decision that there's no
20 clear error?

21 MR. OLSEN: That we would obtain written notification
22 as opposed to just oral notification and that we would have --

23 THE COURT: Ms. (b)(6) had mentioned a couple of
24 things.

25 MR. OLSEN: Right.

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1 MS. (b)(6) Yes, Your Honor. I think that would be
2 fine. We're basically saying that we've written notification
3 and that --

4 THE COURT: And not permanent change.

5 MS. (b)(6) And it's not a permanent change.

6 MR. OLSEN: Exactly. That's the other one.

7 THE COURT: So it would be for the time frame of this
8 immediate threat, and we would look to the -- akin to the draft
9 that we have about immediate threat, what the FBI has of their
10 proposed procedures.

11 MR. OLSEN: Yes.

12 MS. (b)(6) That's correct, Your Honor. Right.
13 We're not envisioning this part 4 of the procedures as the
14 mechanism by which the procedures would then be modified. Sort
15 of on an *ad hoc* basis they would put in new rules.

16 It was meant to be for an isolated purpose for the period
17 of time responding to that immediate threat, and anything that
18 was going to be changed on a permanent, ongoing basis with
19 respect to all of the targeting under that certification we
20 would have to modify the procedures and get a new certification.

21 THE COURT: Anything else I should know about what
22 your thinking was on the emergency departure?

23 MS. (b)(6) No. I don't believe so, Your Honor.

24 THE COURT: Okay.

25 MR. OLSEN: Your Honor, I have to step out. I have

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1 something I have to attend to.

2 THE COURT: That's fine.

3 (Mr. Olsen exits the proceedings.)

4 THE COURT: Let me move to the acquisition of e-mail
5 communications. Hopefully, I understand all this. Let me go
6 through a couple of scenarios as I sort of understand what would
7 happen. I'll give examples is the only way I can figure this
8 out, and we'll do A and B as the parties, and C is the user of
9 the tasked account.

10 On one scenario, A could be a party, say, [REDACTED] and he
11 sends an e-mail to B, who's in the United States. And in the
12 e-mail they talk about C in some way, and C is outside the
13 United States. There's an indication that C is foreign and in
14 the language of user that it would be C that would be the tasked
15 account and the user in the discussion. Am I correct?

16 MS. (b)(6) [REDACTED] Correct.

17 THE COURT: Then the second scenario, as I understand
18 it, is that again C is outside, but you could have either A or
19 B. One of them has to be outside the United States, but it
20 doesn't necessarily have to be A sending the e-mail to B; it
21 could be A is in the United States sending the e-mail to B, and
22 B is the one that's outside. Is that correct?

23 So in other words, my first example had A sending it
24 outside to somebody here about C, and you're tasking C. The
25 second example is either way, either A or B, but one of them has

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1 to be outside the United States, and C has to be outside. Is
2 that accurate?

3 MS. (b)(6) That's right.

4 THE COURT: That's another scenario. Okay. Three was
5 the one that -- my third example. C is still outside, but A and
6 B, no matter who's the sender and who's the receiver of the
7 e-mail, are both in the United States. That is a no-no. Am I
8 accurate?

9 MR. (b)(6) Correct.

10 THE COURT: Now, let's suppose that [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 Is this the type of situation that when you find out,
20 getting back to sort of our earlier procedure thing, where once
21 you find this out then you would be purging it at least
22 presently, once you learn that that's actually happened?

23 MR. (b)(6) Yes.

24 MR. (b)(6) If I may, Judge, just to be as clear as
25 possible, this is a situation where [REDACTED]

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 [REDACTED] So that would be, under current practice,
8 information that post acquisition would be purged once NSA
9 apprehended the fact that they were all inside the U.S.

10 MR. (b)(6) Yes.

11 MR. (b)(6) In the event that happened, that is
12 correct. I will say for the record, and I'll let (b)(6) speak
13 about this, but the reality is that people in the U.S. [REDACTED]

14 [REDACTED]

15 [REDACTED] So in practice, we wouldn't expect to see
16 that, but the answer to your question is yes.

17 MR. (b)(6) Okay.

18 THE COURT: Okay. The other thing is that it looked
19 as if -- so in all instances -- I've broken it down. I forgot
20 what section in the procedures. There's sort of two prongs.
21 The user of the tasked e-mail is outside the United States, and
22 at least one party of the acquired communication is outside the
23 United States. I've broken it down into two prongs, but I think
24 you have them together. You have to have both, so if you have
25 one but not the other, then it would not be an appropriate

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1 tasking.

2 MR. (b)(6) That's correct, if it satisfied both of
3 those conditions.

4 THE COURT: All right. I think that's it. Let me
5 take a short break and look through -- I think (b)(6) could
6 probably use one, and let me make sure I've covered everything
7 that I actually had wanted to ask you. I think I have, but let
8 me make sure.

9 (Recess from 1:00 p.m. to 1:17 p.m.)

10 THE COURT: There were two issues of clarification.
11 When we talked about -- and this gets to page 6 where we had
12 discussed the purging. On the top it talked about that if [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 Then the paragraph that we had a fair amount of discussion
17 about related to in the event that NSA concludes that a person
18 is reasonably believed to be located outside the United States,
19 and after targeting this person learns that the person is inside
20 the United States, it would take the following steps. And we
21 talked about the two steps.

22 The one step has -- number one, it has [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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1 The second sentence, which we got into a discussion about,
2 was [REDACTED]

3 [REDACTED]
4 [REDACTED]

5 Mr. (b)(6) you indicated that at this point the
6 minimization procedures were silent about something that's, at
7 least as been discussed, as putting in some exception relating
8 to keeping the information. I'll put it that way. I wanted to
9 clarify that the minimization procedures that you're talking
10 about there are the ones under the PAA that are not actually
11 submitted to the Court for review.

12 . . . Because I think the way the record -- in discussing it, and
13 it may have been me. In discussing it, it's not the ones that
14 do get submitted to the Court and that actually appear in each
15 of the applications. This is something that you've developed that
16 the AG and DNI have looked at. The Court does not review it.

17 Am I accurate that that's the minimization procedures that
18 are at issue when you were talking about potentially changing
19 them?

20 (b)(6) MR. (b)(6): Yes. That's accurate. May I say this?
21 Mr. (b)(6), who is more expert on the procedures than I am,
22 (b)(6) reminds me that the minimization procedures do discuss three
23 circumstances under which we can retain wholly domestic
24 communication. And it's not on point exactly, because the
25 concern here is, is this a person in the U.S. or not.

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1 So I don't want to make too much of this, but he reminds me
2 that there are three circumstances in which our minimization
3 procedures, which the Court has reviewed and approved for
4 different surveillance, allows for that. I'm just going to ask
5 him to recite those. Again, I don't want to rely on it too
6 much --

7 THE COURT: That's what I'm trying to figure out.
8 Which minimization are you talking about? There are those that
9 we presently have. There are those that have been submitted
10 that are going to be changed at the FBI, et cetera, et cetera,
11 that we have and that appear in each of our applications that
12 the Court in essence is agreeing that they're in compliance with
13 in that nature. That's one set.

14 This to my mind meant minimization procedures that you as a
15 courtesy have given us a copy of it but that it's actually not
16 something that the Court reviews.

17 MS. (b)(6) You're correct, Your Honor.

18 THE COURT: So there's two sets of minimization. Am I
19 accurate?

20 MS. (b)(6) Yes. And this is meant to refer to the
21 ones that are part of the -- those procedures the attorney
22 general and the DNI found to be minimization procedures as
23 defined by FISA for purposes of this collection in PAA, and that
24 is what minimization procedures is referring to on page 6 of the
25 procedures.

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1 THE COURT: Okay. Then let me get back to the three
2 caveats. Is that in the PAA minimization procedures or the
3 other, say, FBI procedures that are generally provided to the
4 Court that the Court, in each of the applications, in essence
5 approved?

6 (b)(6) MS. (b)(6): I think the confusion, Your Honor, is
7 that the minimization procedures referred to here are, in fact,
8 while they've not been submitted to the Court for its review
9 under PAA, they are in fact the same procedures that were
10 submitted to the Court pursuant to Docket No. (b)(6)

11 MR. (b)(6): Very slight modifications. Very, very
12 slight modifications, just to --

13 (b)(6) MS. (b)(6): It was language --

14 MR. (b)(6): -- basically to take it from the Court-
15 authorized electronic surveillance context into the PAA context.
16 So where one aspect was we could retain these records for five
17 years or longer if the Court authorizes us to, we'd remove that
18 particular provision from the PAA minimization procedures simply
19 because it wouldn't be applicable in the PAA context.

20 MR. (b)(6): So what we have done, Your Honor,
21 although the statute didn't require it, what we've done is, for
22 the (b)(6), picked up minimization procedures
23 that have been approved by the Court for the (b)(6) context
24 and for the (b)(6) picked up and used
25 minimization procedures with slight modifications that have been

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1 approved by the Court for the [REDACTED] context.

2 So I'm making reference to minimization procedures that the
3 Court has seen in the past but doesn't review in connection with
4 these certifications specifically.

5 THE COURT: Okay. So if you went ahead -- so let me
6 move to my next question. If you went ahead and made a
7 modification that you -- let's assume it's different than the
8 three caveats we already have -- you did a different
9 modification from it. Under the PAA system, the Court isn't
10 reviewing them. In other words, reviewing them in the sense of
11 approving them.

12 MR. (b)(6): That's correct.

13 THE COURT: So would you make this change strictly for
14 the PAA as opposed to the rest, assuming you did it? Or you may
15 not be able to answer this question.

16 MR. (b)(6): No, I think I can answer it, and I
17 think we would. So the question here is a different question
18 than arises in the normal collection of NSA: Has your target
19 moved into the United States?

20 I think we would modify -- if we're going to modify
21 procedures, we would modify the minimization procedures pursuant
22 to PAA exclusively, and I think actually a preferable way to go
23 about it is to modify procedures for determining foreignness.

24 We've already started to address this. In one sense, we've
25 said if we find that someone's not looking inside the

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1 United States, that we never had reason to believe that, we'll
2 purge. We've already addressed half the field here, I think.
3 So to me, particularly with the statute requiring court review
4 of this set of procedures, what we're calling the foreignness
5 procedures, that's where we would probably put that provision if
6 we agree that, yes, that is a provision we need to.

7 THE COURT: So you put it in these actual procedures
8 I'm reviewing? In other words, you'd indicate the caveat?

9 MR. (b)(6) That would be my preference. The
10 reality is that the question arose -- the hypothetical question
11 arose after we submitted procedures. So it's not something we
12 set out to avoid saying anything about. It's something that
13 arose in the abstract but after procedures had been developed.

14 But since the statute calls for the Court to review the
15 procedures for determining a person's locality outside the
16 United States, I think this is something that would be fairly
17 addressed in that set of procedures that the Court's reviewing.

18 THE COURT: Okay. So if I can recap then, in terms of
19 the -- if you decided to make a change that would allow you to

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however you do this, you're
contemplating -- you would change the minimization procedures of

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1 PAA which the Court does not have under the statutory scheme a
2 review and approval process, and you would also change the
3 procedures and at least note it so that the Court would be aware
4 of it in the procedures that are actually submitted to the
5 Court. Am I correct?

6 MR. (b)(6) With the caveat that I haven't talked
7 to Ms. (b)(6) about it, nor the Department of Justice, so this
8 is my inclination only. But I think given what the statute
9 requires the Court to examine and approve, there needs to be
10 some mention of that as the discussion is brought out.

11 I may have been wrong earlier when I said the minimization
12 procedures are silent, and that's what Mr. (b)(6) reminded
13 me of, that there are circumstances under which the minimization
14 procedures would allow us to retain those. And it might be
15 exactly what we've advised, but I'd like to go back and think
16 about that if I could.

17 But there ought to be some way to tell the Court, since
18 we've told you half the story, what the whole story is, and the
19 way that seems most appropriate is in what we call the
20 foreignness procedure since that's what the Court reviews. But
21 I'll also let Ms. (b)(6) speak, because those procedures have to
22 be approved -- all of these sets of procedures must be approved
23 by the attorney general, so it's not my decision solely,
24 certainly.

25 MS. (b)(6) I think it would be appropriate given the

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1 information we already include in the current set of procedures
2 that if we were to incorporate a change, as Mr. (b)(6) said,
3 that we should address that here as well, not strictly in the
4 minimization procedures, which would not be submitted to you --

5 THE COURT: So I wouldn't have any notice of it.

6 MS. (b)(6) Exactly. That does not seem that that
7 would be the appropriate way to go. So we would notify you and
8 make a change to these procedures as well as the minimization
9 procedures.

10 THE COURT: Well, thank you. I think that would be
11 very helpful in terms of reviewing it to have that information.
12 The other just a minor clarification. If there was -- unlike
13 the not being able to get a timely modification, if you do seek
14 a timely modification, unlike the departure one, from the AG and
15 the DNI, I would take it that you would submit that to the Court
16 and amend it in some form that would be presented to the Court.

17 So if you had time to make the change, it got approved by
18 then, then there would be an amendment, and it would be
19 presented to the Court.

20 (b)(6) MS. (b)(6) Yes, we would, Your Honor. For some
21 reason, the statute talks about the procedures being updated
22 annually and submitted to the Court, but the Department of
23 Justice interpretation has been that should we change these
24 procedures, we would file them with the Court since we filed the
25 first set of procedures. Any change to them we would update

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1 even if it was -- we would file with you even if it was on a
2 more frequently than annual basis.

3 THE COURT: Okay. All right. That certainly was very
4 helpful. I think that's it in terms of going over the
5 information and the questions that I had. Is there anything
6 else that I should know or you want to tell me since I've been
7 asking you questions? Any other information or anything you
8 want to bring to my attention?

9 (b)(6) MS. (b)(6) No, Your Honor.

10 THE COURT: Okay. This has been very helpful, and I
11 appreciate it. And I'll be moving forward.

12 MS. (b)(6) : I certainly appreciate your time and the
13 time of the legal advisors as well in poring over these and
14 working with us on this somewhat novel venture for all of us.

15 THE COURT: Yes, for all of us.

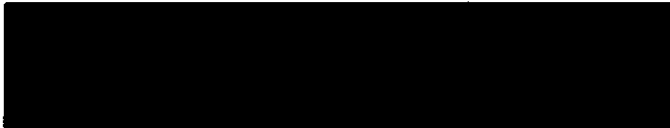
16 All right. Thank you very much. I appreciate your coming.
17 It's good seeing you.

18 (Proceedings adjourned.)
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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.



MEMORANDUM OPINION AND ORDER

This Memorandum Opinion and Order is issued pursuant to 50 U.S.C. § 1805c(b) & (c), which provide for the Foreign Intelligence Surveillance Court (FISC) to review, under a "clearly erroneous" standard, procedures adopted by the Attorney General and the Director of National Intelligence (DNI) under 50 U.S.C. § 1805b(a)(1). For the reasons stated herein, the Court finds that the procedures that have been submitted to the Court meet the applicable review for clear error with regard to the government's determinations that the collections appropriately concern persons reasonably believed to be outside of the United States.

I. Procedural History

On August 17, 2007, the government filed a set of procedures with this Court pursuant to 50 U.S.C. § 1805c(a). Those procedures pertain to a certification by the Attorney General and the Director of National Intelligence, styled DNI/AG 105B Certification 07-01, filed under seal on August 10, 2007, pursuant to § 1805b(c). Under that certification, and following those procedures ("07-01 procedures"), the National Security Agency (NSA) acquires foreign intelligence information regarding 



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In an order dated October 11, 2007, the Court stated that it would consider these [redacted] procedures jointly for purposes of the Court's review pursuant to 50 U.S.C. § 1805c, and directed the government to address specific questions about these procedures identified in the Court's initial review. That order ("*October 11 Order*") is incorporated herein by reference and made a part of this Opinion and Order. See attached Tab A. The government timely submitted its response on October 26, 2007, see Government's Response to the Court's Order of October 11, 2007 ("*Gov't Response*"), which is incorporated herein by reference and made a part of this Opinion and Order, as the Court has relied on its contents. See attached Tab B.

On December 12, 2007, a hearing in this matter was conducted on the record. The transcript of that hearing ("*Trans.*") is incorporated herein by reference and made a part of this Opinion and Order, as the Court has relied on its contents. See attached Tab C.

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II. Statutory Framework

In this matter, a judge of the FISC is for the first time exercising a responsibility assigned to it by the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (PAA). The PAA created a new framework, within the Foreign Intelligence Surveillance Act of 1978, codified as amended at 50 U.S.C. §§ 1801-1871 (FISA), under which the Executive Branch, pursuant to a "certification" by the Attorney General and the DNI, may conduct certain forms of foreign intelligence collection, and direct third parties to assist in such collection.

The PAA accomplished this in several steps. First, the PAA provided that FISA's definition of electronic surveillance, at 50 U.S.C. § 1801(f), shall not be "construed to encompass surveillance directed at a person reasonably believed to be located outside of the United States." 50 U.S.C. § 1805a.¹

¹ Prior to the PAA, the government had argued to the FISC that, in some contexts, surveillances of targets outside of the United States did constitute electronic surveillance as defined by FISA, such that the FISC had jurisdiction. The FISC judges concluded that they did have jurisdiction over certain types of such surveillances.

[REDACTED] At the request of the government, FISC judges have entertained [REDACTED] applications for authority to conduct such surveillances. Since the enactment of the PAA, the government has opted, pursuant to the "transition procedures" of the PAA, to continue to submit applications to the FISC for authority to conduct such surveillances, "under the provisions of [FISA] as in effect" prior to the effective date of the PAA. PAA § 6(b).

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Second, the PAA created a new "certification" mechanism.² Under this PAA mechanism, "the [DNI] and the Attorney General, may for periods of up to one year authorize the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States." 50 U.S.C. § 1805b(a). In order to grant such an authorization, the DNI and the Attorney General must make several specified determinations. Most pertinently, they must determine that

(1) there are reasonable procedures in place for determining that the acquisition of foreign intelligence information . . . concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to review of the Court pursuant to [50 U.S.C. § 1805c; and]

(2) the acquisition does not constitute electronic surveillance

Id.³ These determinations "shall be in the form of a written certification, under oath." § 1805b(a).

The Attorney General and the DNI may direct a person to assist in acquisitions pursuant to such a certification. § 1805b(e).

Third, the PAA provides for judicial review of certain aspects of the certification process.

The government is required to "transmit" to the FISC copies of each certification, § 1805b(a), and to

² The pre-PAA version of FISA provided a means for the Attorney General to authorize some forms of electronic surveillance, without benefit of a court order, by making a different type of "certification." 50 U.S.C. § 1802(a). Section 1802(a), which the PAA did not alter, is available only in narrowly drawn circumstances -- when the surveillance is "solely directed" at certain types of foreign powers (not including groups engaged in international terrorism) and "there is no substantial likelihood" that any U.S. person's communications will be acquired. § 1802(a)(1)(A) & (B). Although copies of such certifications are filed with the FISC under § 1802(a)(3), the FISC has no role in reviewing them.

³ The other required elements of the certification involve assistance from a third party who has access to communications or communications equipment; the "significant purpose" of obtaining foreign intelligence information; and the adequacy of the minimization procedures to be followed. 50 U.S.C. § 1805b(a)(3), (a)(4) & (a)(5).

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"submit" to the FISC "the procedures by which the Government determines that acquisitions conducted pursuant to [§ 1805b] do not constitute electronic surveillance." § 1805c(a). "No later than 180 days after the effective date" of the PAA, the FISC "shall assess the Government's determination under section 1805b(a)(1) that those procedures are reasonably designed to ensure that acquisitions conducted pursuant to section 1805b do not constitute electronic surveillance. The court's review shall be limited to whether the Government's determination is clearly erroneous." § 1805c(b).

If the court concludes that the determination is not clearly erroneous, it shall enter an order approving the continued use of such procedures. If the court concludes that the determination is clearly erroneous, it shall issue an order directing the Government to submit new procedures within 30 days or cease any acquisitions under section 1805b of this title that are implicated by the court's order.

§ 1805c(c).⁴

Three points about the FISC's role under § 1805c bear emphasis.⁵ First, the FISC is to apply a "clearly erroneous" standard of review. To apply this standard properly, the FISC looks to how a "clearly erroneous" standard of review is understood in other contexts.⁶ When an appellate court is

⁴ The PAA also provides a role for the FISC regarding directives issued pursuant to § 1805b(e): under § 1805b(h), the recipient of such a directive may file a petition with the FISC challenging its legality; and under § 1805b(g), the government "may invoke the aid" of the FISC "to compel compliance" with a directive.

⁵ In a separate, adversarial proceeding before another judge of this Court under § 1805b(g), the respondent has argued that the PAA is unconstitutional because it violates the Fourth Amendment and separation-of-powers principles. See Docket No. 105B(G) 07-01. In the instant, ex parte proceeding under § 1805c, the Court addresses only those issues commended to it by § 1805c, and does not reach those constitutional issues.

⁶ See Bradley v. United States, 410 U.S. 605, 609 (1973) (statute understood to use (continued...))

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reviewing a district court's findings of fact, see Fed. R. Civ. Proc. 52(a), it finds clear error only when "left with a definite and firm conviction that a mistake has been committed." McAllister v. United States, 348 U.S. 19, 20 (1954) (internal quotations omitted). The review is not de novo, because the "clearly erroneous" standard "plainly does not entitle a reviewing court to reverse the finding . . . simply because it is convinced that it would have decided the case differently." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985). And the "clearly erroneous" standard of review applied by this Court under different provisions of FISA⁷ "is not, of course, comparable to a probable cause finding by the judge." In re Sealed Case, 310 F.3d 717, 739 (FISC Rev. 2002) (quoting H.R. Rep. No. 95-1283, pt. 1 at 80).

Second, the scope of the Court's review under § 1805c is narrow. Executive branch determinations under § 1805b(a)(4) & (a)(5) regarding the purpose of the acquisition and the adequacy of minimization procedures are not subject to review under § 1805c. Nor, under § 1805c, does the Court make any assessment of probable cause, as it does pursuant to §§ 1805(a)(3) and 1824(a)(3) before issuing orders authorizing electronic surveillance and physical search.

Third, the statute describes the subject matter of the Court's review under § 1805c using varying and ambiguous language. Section 1805b(a)(1) sets out the relevant executive branch

⁶(...continued)

"familiar legal expressions in their familiar legal sense") (internal quotations omitted).

⁷ An application to the FISC for an order authorizing electronic surveillance or physical search must contain a certification from a designated senior executive branch official. See 50 U.S.C. § 1804(a)(7) (electronic surveillance) and § 1823(a)(7) (physical search). To grant such an application for a U.S. person target, the FISC judge must find that the certification is not clearly erroneous. See §§ 1805(a)(5) & § 1824(a)(5).

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“determination” as follows: that “there are reasonable procedures in place for determining that the acquisition of foreign intelligence information under this section concerns persons reasonably believed to be located outside the United States.” § 1805b(a)(1) (emphasis added).⁸ However, § 1805c(b) states that the Court “shall assess the Government’s determination under [§ 1805b(a)(1)] that those procedures are reasonably designed to ensure that acquisitions conducted pursuant to [§ 1805b] do not constitute electronic surveillance.” § 1805c(b) (emphasis added). One provision focuses on the location of persons implicated by the acquisitions of foreign intelligence information, while the other provision focuses on whether the acquisitions constitute electronic surveillance.

This seeming disconnect between the language of § 1805b(a)(1) and § 1805c(b) is bridged in part by the PAA’s amendment to the definition of “electronic surveillance” to exclude “surveillance directed at a person reasonably believed to be located outside of the United States.” § 1805a (emphasis added). Section 1805a arguably harmonizes § 1805b(a)(1) and § 1805c(b), to the extent that the acquisition of foreign intelligence information concerning persons reasonably believed to be outside of the United States (per § 1805b(a)(1)), will often, and perhaps usually, be accomplished through surveillance directed at persons reasonably believed to be outside of the United States. In that event, such surveillance will not constitute “electronic surveillance” by virtue of § 1805a.⁹ But

⁸ Section 1805b(a)(1) further provides that “such procedures will be subject to review of the Court pursuant to [§ 1805c].” *Id.*

⁹ For ease of reference, this Memorandum Opinion uses the term “surveillance” to refer to the means of acquisition under the procedures in question. However, to be fully precise, the Court notes that some acquisitions of foreign intelligence information could involve means that do not fall within the definition of “electronic surveillance” at 50 U.S.C. § 1801(f) for reasons other than, or in addition to, their being directed at persons reasonably believed to be outside of the United States;

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at first glance, at least, this harmonization is imperfect. For example, an acquisition of foreign intelligence information that concerns a person outside of the United States might not necessarily be understood to involve surveillance directed at a person outside of the United States. The concepts are related and overlapping, but not necessarily co-extensive under the terms of the statute.

Despite these interpretative difficulties, it seems clear that procedures will satisfy the relevant statutory requirements if they are reasonably designed to ensure both

- (1) that such acquisitions do not constitute "electronic surveillance," because they are surveillance directed at persons reasonably believed to be outside of the United States, and
- (2) that the acquisitions of foreign intelligence information concern persons reasonably believed to be outside of the United States.

Accordingly, the Court will review, under a "clearly erroneous" standard, whether the procedures satisfy each prong of this formulation. Where separate application of the two prongs may produce divergent results, the statutory language is further analyzed in the relevant factual context. See Parts III.B. and III.D. infra. In this review, the Court will both examine the written procedures themselves, and consider and rely on information provided by the government in its October 26, 2007 response and at the December 12, 2007 hearing regarding the implementation of the procedures and the intended effect of certain of their provisions.

⁹(...continued)

for example, the means of acquisition could constitute a "physical search" as defined at 50 U.S.C. § 1821(5). But as long as the means of acquisition is directed at persons reasonably believed to be outside of the United States, NSA is not conducting "electronic surveillance," and the Court need not inquire into any additional reasons that might support this conclusion.

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III. Consideration of the Procedures

A. Overview of Procedures

In most respects, the [REDACTED] procedures are quite similar. Because the procedures apply to the acquisition of foreign intelligence information about different entities, they include different descriptions of targets. There are other variations in wording, about which the Court inquired in its October 11 Order.¹⁰ The government has clarified that these variations do not reflect "substantive differences" among the procedures, but rather result from drafting refinements that took place after the adoption of the [REDACTED] procedures. *Gov't Response* at 9. Thus, while the most recently filed procedures provide more technical detail on some points, the descriptions in all the procedures remain "accurate and current." *Id.* at 9-11. Accordingly, the procedures are discussed jointly herein.¹¹

The procedures involve an assessment by NSA analysts, based on available information, that the user of a particular telephone number or electronic communications account/address/identifier ("e-mail account")¹² reasonably appears to be outside of the United States, before that telephone

¹⁰ *October 11 Order* at 3 n.1. These variations include: [REDACTED]

¹¹ There is one significant difference among them: only the [REDACTED] procedures include a type of "grandfathering" provision, which is discussed at Part III.C *infra*.

¹² The Court recognizes that many of these accounts/addresses/identifiers can be used for electronic communications other than e-mail, but will use the term "e-mail account" for ease of
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number or e-mail account is "tasked" for acquisition. [REDACTED]

[REDACTED] In making this assessment, NSA analysts examine "three categories of information, as appropriate under the circumstances." [REDACTED]

[REDACTED] First, they examine [REDACTED]

[REDACTED]

[REDACTED] Second, [REDACTED]

[REDACTED]

[REDACTED] Third, [REDACTED]

[REDACTED]

[REDACTED]³

For each tasking, analysts are required to provide a "citation" to information or reporting on which they rely in making this assessment, and NSA personnel verify that an appropriate citation

¹²(...continued)
reference.

¹³ [REDACTED]

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entry is made before a tasking is approved. [REDACTED]

[REDACTED]

After a telephone number or e-mail account has been tasked, NSA will routinely take specified steps designed to assess whether the user remains outside of the United States. [REDACTED]

[REDACTED]

In the event that information is "acquired by directing surveillance at a person not reasonably believed to be outside the United States in a manner that constitutes electronic surveillance, as defined under the FISA, [such information] shall be purged from NSA databases." [REDACTED]

[REDACTED] If the user of a tasked facility had been reasonably believed to be outside of the United States at the time of tasking, but later was determined to be within the United States, NSA will "[t]erminate the acquisition from that person without delay and determine whether to seek authorization to conduct electronic surveillance under applicable provisions of FISA." [REDACTED]

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The procedures also include oversight and compliance measures, including reviews, at intervals no greater than 60 days, by personnel from the Department of Justice and the Office of the DNI. [REDACTED] Twelve of these reviews had been conducted as of the hearing on December 12: [REDACTED]

[REDACTED] These reviews involve examination of the "citations" recorded by the NSA analysts in support of their pre-tasking assessment that the user of the facility is outside of the United States, and, where the significance of the citation is not apparent on its face, of the supporting materials referenced in the citations. *Id.* at 5, 10-11. The documentation for [REDACTED] taskings has been reviewed in this manner, *id.* at 5-6, and these reviews have found that "a strong majority" of taskings were properly documented by referencing materials that supported the analysts' determination that the user of the tasked facility was outside of the United States. *Id.* at 12. Most of the problems identified have concerned adequacy of documentation, *id.* at 6-8, 12, and training and technical improvements have been made in response to them. *Id.* at 10, 34-35. As to the actual location of the users of the tasked facilities, it appears that, in approximately [REDACTED] cases, the user of a tasked facility may have been within the United States. While examination of these cases by the government is not complete, the government expects that at least some of them may have involved a user reasonably believed to have been outside the United States at the time of tasking who, based upon later-obtained information, was subsequently determined to be within the United States. *Id.* at 13-14.

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~~TOP SECRET//COMINT//ORCON,NOFORN//X1~~B. Analysis of Procedures as Applied to Communications to or from Tasked Facilities

For the most part, NSA surveillance under the PAA acquires telephone communications that are placed to or from tasked telephone numbers, and electronic communications that are sent to or from tasked e-mail accounts.¹⁴ In order to apply the two-pronged formulation stated on page 8 supra, it is necessary to determine at which persons this form of NSA surveillance is "directed," and which persons the resulting acquisitions of foreign intelligence information "concern."

Under the first prong, which corresponds to the language of § 1805a, it is natural to think of the users of the tasked facilities as the persons at whom surveillance is "directed." A user of a tasked facility is a party to every communication acquired by this form of surveillance. It is true that other persons are subjected to the surveillance when they communicate with the users of the tasked facilities. But NSA is not targeting the communications of those other persons for general acquisition; rather, those persons come within the scope of the surveillance only when they are communicating with the users of the tasked facilities.¹⁵ In the plain meaning of the term, this form of surveillance is "directed" at the users of the tasked facilities, and not at other persons.¹⁶

¹⁴ NSA also acquires another category of electronic communications, which is discussed in Part III.D infra.

¹⁵ United States persons whose communications are acquired will be afforded the protection of FISA minimization procedures. See 50 U.S.C. § 1801(h) (defining "minimization procedures") and § 1805b(a)(5) (requiring Attorney General and DNI to determine that the minimization procedures to be used with respect to PAA acquisitions meet the definition at § 1801(h)).

¹⁶ This conclusion comports with the prevalent understanding, under a different provision of FISA, of the "facility" at which surveillance is "directed." The FISC has issued [REDACTED] orders authorizing the acquisition of communications to and from specified telephone numbers and e-mail accounts, and those orders identify such telephone numbers and e-mail accounts as the "facilities" at (continued...)

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Under the second prong, which corresponds to the language of § 1805b(a)(1), the acquisitions of foreign intelligence information resulting from this form of surveillance clearly “concern” the users of the tasked facilities, who are parties to each acquired communication. It could be argued that these acquisitions also “concern” persons who communicate with the users of the tasked facilities, and even third parties who are mentioned in such communications. However, there are sound reasons for concluding that the second prong is still satisfied. Section 1805b(a)(1), by its terms, does not require that the acquisition of foreign intelligence information exclusively concern persons reasonably believed to be outside of the United States. Moreover, so stringent a reading would put § 1805b(a)(1) at odds with § 1805a, which focuses on the location of persons at whom the surveillance is “directed,” not at the broader class of persons whose communications or information are acquired by the surveillance. Therefore, § 1805b(a)(1) should be interpreted in a manner that harmonizes its requirements with those of §§ 1805a and 1805c(b). See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (court must interpret statute “as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole”) (internal quotations and citations omitted).¹⁷ This may be done by interpreting § 1805b(a)(1) to permit procedures reasonably designed to ensure that each acquisition “concerns” a person reasonably believed to be outside of the United States, even if the acquisition also may

¹⁶(...continued)

which this form of “electronic surveillance is directed” for purposes of 50 U.S.C. § 1805(a)(3)(B).

¹⁷ The government implicitly adopts a similar interpretative approach. See Gov't Response at 1 (“[T]he government has filed [redacted] procedures used to determine that certain acquisitions of foreign intelligence information concern persons reasonably believed to be located outside of the United States and, therefore, do not constitute electronic surveillance.”) (emphasis added).

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"concern" another person who is in the United States. The Court adopts this interpretation in its review of whether the procedures are clearly erroneous.

Thus, for the form of NSA surveillance that acquires communications that are to or from the tasked facilities, both prongs of the two-part formulation stated on page 8 supra will be satisfied if the procedures are reasonably designed to ensure that the users of the tasked facilities are reasonably believed to be outside of the United States.

The Court finds, under the applicable "clearly erroneous" standard, that the procedures as generally summarized in Part III.A. supra are reasonably designed to ensure that the users of tasked facilities are reasonably believed to be located outside of the United States. While the procedures leave it to the discretion of NSA analysts exactly which steps are appropriate to take prior to tasking a particular phone number or e-mail account, analysts are required to make a record of the basis for their assessment that the user is outside of the United States. After tasking, there are additional steps – some of which are taken as frequently as [REDACTED] – to verify that this assessment remains valid. The results of the reviews conducted by the Department of Justice and the Office of the DNI, as described at the hearing in this matter, support this finding. The Court anticipates that continuation of thorough reviews by the Department of Justice and the Office of the DNI will aid in the timely identification and resolution of future problems that may arise.

However, certain provisions of the procedures require further analysis, as discussed below.

C. "Grandfathering" of Previously Tasked Facilities

The 07-01 procedures for acquisitions regarding [REDACTED]

[REDACTED] exempt from certain

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requirements telephone numbers and e-mail accounts that had been "properly tasked for collection" under FISC orders in docket numbers [REDACTED] 07-01 procedures at 1 n.1. The orders in those dockets, which were in effect from January 10, 2007, through August 24, 2007, authorized NSA to conduct full-content surveillance of telephone numbers and e-mail accounts used overseas by [REDACTED]

[REDACTED] The government explains that tasking under these dockets "means that NSA reasonably believed that the facilities were being used outside the United States and that NSA had discovered no information indicating that the facilities were being used in the United States." *Gov't Response* at 4. NSA's prior determination that these users "were reasonably believed to be located outside the United States" was "based on the same categories of information (i.e., [REDACTED])

[REDACTED]) described in the 07-01 procedures." *Id.* at 3. However, in implementing those prior authorities, NSA did not have formalized processes for verification, documentation, and systematic re-checking of a target's location. *Id.* at 4.

Such previously tasked phone numbers and e-mail accounts are exempt from pre-tasking requirements under the 07-01 procedures, but "are subjected to the same post-tasking procedures designed to verify that their location is outside of the United States and to notify NSA of any changes to their location as are other facilities." *Id.* As noted above, these post-tasking procedures include [REDACTED]. On this understanding, the Court finds that the exemption of these facilities from pre-tasking requirements does not alter its

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general conclusion that the procedures satisfy the applicable review for clear error with regard to acquisition of communications to or from tasked telephone numbers and e-mail accounts.

D. Acquisition of "About" Communications

In addition to acquiring communications that are to or from a tasked facility, NSA also acquires electronic communications that are "about," i.e., contain a reference to, a tasked e-mail account.¹⁸ (There is no comparable acquisition of phone communications.) Because these "about"

¹⁸ These "about" communications consist of the following [redacted] categories (for ease of reference, the e-mail account tasked for acquisition is given the name "tasked@email.com"):



See Gov't Response at 7 (referencing description at pages 12-14 of the Primary Order issued on May (continued...))

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communications will not necessarily be to or from the user of a tasked e-mail account, it is necessary to analyze them separately under the two-pronged formulation previously discussed on page 8 *supra*. Under that formulation, the relevant statutory requirements will be met if the procedures are reasonably designed to ensure both (1) that the acquisitions do not constitute "electronic surveillance," because they are surveillance directed at persons reasonably believed to be outside of the United States, and (2) that the acquisitions of foreign intelligence information concern persons reasonably believed to be outside of the United States.

In each case, the user of the tasked e-mail account will have already been determined by NSA, in accordance with the procedures (to include the "grandfathering" provision in the 07-01 procedures), to reasonably appear to be outside of the United States. In addition, "NSA will either



¹⁹ For these reasons, the Court accepts, for purposes of its "clearly erroneous" review, that for each "about" communication that is acquired, there is reason to believe: (a) that the user of the tasked e-mail

¹⁸(...continued)

31, 2007, [REDACTED]. The proceedings [REDACTED] involved an application to the FISC for an order authorizing electronic surveillance under 50 U.S.C. §§ 1804-1805. In that case, the judge found that [REDACTED], the e-mail accounts used to send or receive the acquired e-mail communications were the facilities at which the electronic surveillance is directed for purposes of the FISC judge's probable cause findings under § 1805(a)(3)(B). See Primary Order issued on May 31, 2007, [REDACTED] at pages 12-15.

¹⁹ In the event that NSA determines that an "about" communication was acquired where all parties to the communication were within the United States, NSA would purge information about the communication from its databases. *Trans.* at 47-48.

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account, the name of which is referenced in the acquired communication, is outside of the United States; and (b) that at least one party to the acquired communication is outside of the United States. From these two conclusions, it follows that "about" communications satisfy the second prong of the above-described formulation because there is reason to believe that the acquired communications "concern" persons reasonably believed to be outside of the United States.

This is true for two reasons. First, there is reason to believe that such communications concern the users of the tasked e-mail accounts that are referenced in the communications, and those users are reasonably believed to be outside of the United States. Second, there is reason to believe that at least one party to an acquired communication is outside of the United States, such that the communication will "concern" that party also. In addition to these persons reasonably believed to be outside of the United States, the acquired communications might also "concern" other persons, including some persons in the United States. This fact, however, is not fatal to the procedures, because an acquisition may properly concern a person in the United States, provided that it also concerns one or more persons reasonably believed to be outside of the United States, under the interpretation adopted by the Court to harmonize § 1805b(a)(1) with §§ 1805a and 1805c(b). See Part III.B, *supra*. Accordingly, the Court finds, under the applicable "clearly erroneous" standard, that the second prong of this formulation, relating to the requirements of § 1805b(a)(1), is satisfied.

Under the first prong of the formulation, the analysis is not as simple, because it is less clear at whom this form of surveillance is "directed." In one sense, NSA directs the surveillance by tasking particular e-mail accounts for acquisition, and as a result of that tasking only communications that are to, from or "about" a tasked e-mail account are acquired. From this perspective, the users of the

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tasked e-mail accounts, who by virtue of the procedures are reasonably believed to be outside of the United States, could be regarded as the persons at whom the surveillance is directed. All the acquired communications relate in some fashion to the tasked e-mail accounts, and all persons other than the users of the tasked accounts have their communications acquired only to the extent that they communicate with, or "about," a tasked e-mail account. In less technical terms, NSA is trying to obtain information primarily about the users of the tasked e-mail accounts, and about other persons only insofar as their communications relate to those accounts.

However, there is another sense in which NSA could be said to "direct" this form of surveillance. NSA takes steps to ensure [REDACTED] that each communication acquired has at least one party outside of the United States. In this sense, NSA's surveillance can be said to be directed at parties outside of the United States who send or receive communications that contain a reference to the tasked e-mail account. The government appears to adhere to this understanding. See [REDACTED] ("NSA will direct [this form of] surveillance at a party to the communication reasonably believed to be outside the United States."); *Gov't Response* at 7 ("The person from whom NSA seeks to acquire communications in such cases is the party to the communication who is reasonably believed to be located outside of the United States.")

There is a third possibility: that the surveillance is instead or also directed at those persons inside the United States who send or receive communications that contain a reference to the tasked e-mail account, the user of which is reasonably believed to be outside of the United States. But against this view, it could be argued that NSA is not affirmatively directing the surveillance at these

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persons, either individually (e.g., by tasking e-mail accounts used by them) or collectively (e.g., by conducting the surveillance in a manner to ensure that at least one party to the communication is inside the United States).

Under the terms of §§ 1805a and 1805c(b), it is difficult to ascertain the class of persons at whom this form of surveillance is “directed.” However, the Court recognizes that, under the “clearly erroneous” standard of review applicable under § 1805c(b), the government’s determination regarding the procedures should be overturned only where there is “a definite and firm conviction that a mistake has been committed.” McAllister, 348 U.S. at 20. The Court is also mindful, as stated in Part III.B above, that where possible it should harmonize the requirements of §§ 1805a and 1805c(b) with those of § 1805b(a)(1). See Food & Drug Admin., 529 U.S. at 133. Having determined that the procedures satisfy the second prong of the formulation stated on page 8 supra, which follows the language of § 1805b(a)(1), the Court should adopt a reasonable interpretation of §§ 1805a and 1805c(b) that permits a finding that the first prong is satisfied, even if the statutory language is open to other reasonable interpretations.

Accordingly, in reviewing these procedures, the Court adopts the interpretation that, under §§ 1805a and 1805c(b), this form of surveillance is “directed” (i) at the users of the tasked e-mail accounts (each of whom, by implementation of the procedures, is reasonably believed to be outside of the United States); (ii) at those parties to the acquired communications who, by virtue of [REDACTED] [REDACTED] are reasonably believed to be outside of the United States; or (iii) at both these classes of persons. Because there is reason to believe that both classes of persons are outside of the United States, the Court finds, under the

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"clearly erroneous" standard applicable under § 1805c, that the first prong of the formulation stated on page 8 supra is satisfied. The Court expresses no opinion on whether such a finding could be made for procedures that did not provide reason to believe that both the user of the tasked e-mail accounts and at least one party to the acquired communications are outside of the United States.

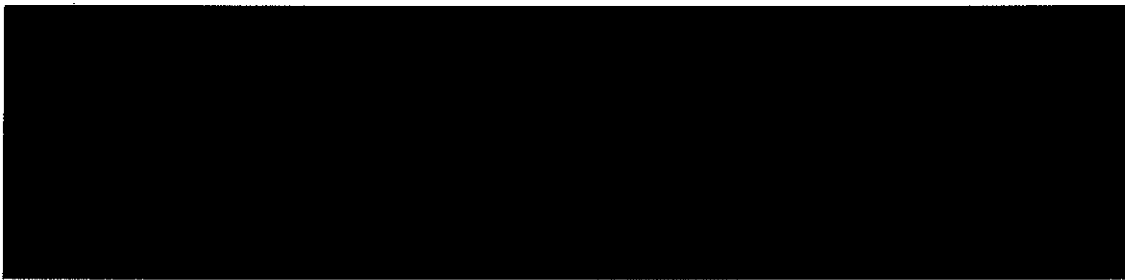
E. Emergency Departure Provision

The procedures state:

If, in order to protect against an immediate threat to the national security, the NSA determines that it must take action in apparent departure from these procedures and that it is not feasible to obtain a timely modification of these procedures from the Attorney General and Director of National Intelligence, NSA may take such action and shall report that activity promptly to [the Department of Justice and the Office of the DNI].



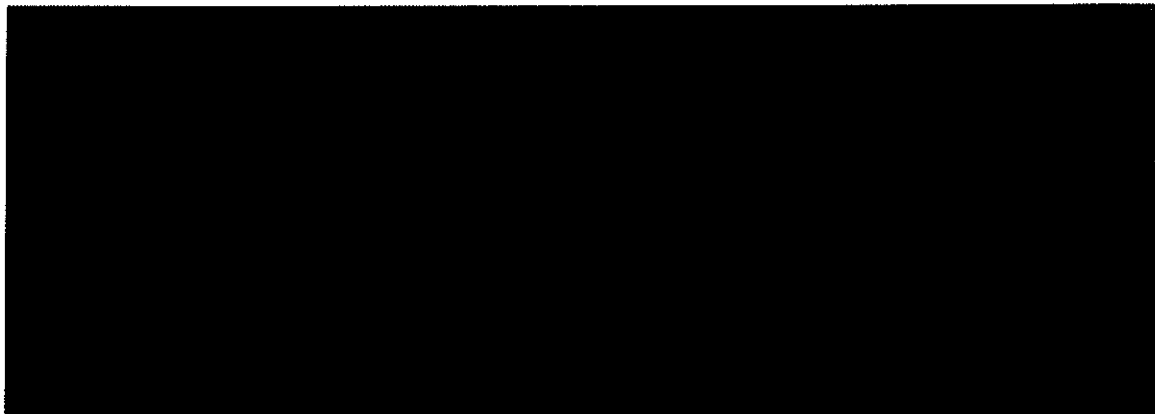
As of the hearing on December 12, this departure provision had not been invoked. *Trans.* at 28. By the terms of this provision, any requirement of the procedures could be the subject of a "departure."²⁰ However, the government has explained that it anticipates that an emergency departure might be invoked in one of three contexts:



²⁰ Even in emergency circumstances, though, NSA "would continue to adhere to the statutory limitation that it could only direct surveillance at a target reasonably believed to be located outside of the United States." *Gov't Response* at 2.

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The government intends that NSA's prompt notification of the activity conducted pursuant to an emergency departure would be in writing (either initially or following an oral notification), such that the propriety of such activity could be assessed in future reviews. *Id.* at 40. The departure from the procedures would be only as broad as necessary to respond to the immediate threat to national security, *id.* at 33-34, and would terminate once the immediate threat had receded. *Id.* at 36-37. If the government concluded that a broader or longer-lasting modification of the procedures was appropriate, it would revise the procedures accordingly and submit the revision to the FISC for review under § 1805c. *Id.* at 56-57.

The Court recognizes that it is difficult to anticipate in advance what steps would be most efficacious in responding to an emergency. The government has determined that a delegation to NSA of authority to depart from the procedures temporarily, when necessary to respond to an immediate threat to national security, and only when modification by the Attorney General and the DNI cannot be timely obtained, is a reasonable means of responding to emergencies. NSA is required to report such activity promptly to the Attorney General and the DNI, who may then take appropriate action if they do not believe that the departure is justified. Based on the government's

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explanation of the intended functioning of the emergency departure provision, the Court finds, in reliance on the government's explanation, that this provision does not alter its general conclusion that the procedures satisfy the applicable review for clear error.

IV. Conclusion

For the reasons stated herein, the Court finds, in the language of 50 U.S.C. § 1805c(b) and consistent with the Court's interpretation of that provision in view of 50 U.S.C. §§ 1805b(a)(1) and 1805a, that the Government's determination under 50 U.S.C. § 1805b(a)(1) that the [REDACTED] [REDACTED] procedures "are reasonably designed to ensure that acquisitions conducted pursuant to [§ 1805b] do not constitute electronic surveillance" is not "clearly erroneous." Accordingly, pursuant to § 1805c(c), it is hereby ORDERED that the continued use of such procedures is approved.

ENTERED this ¹⁵ day of January, 2008, regarding [REDACTED]

[REDACTED]

Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
Judge, United States Foreign
Intelligence Surveillance Court

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EXHIBIT A

IN THE MATTER OF [REDACTED]

PROCEDURES USED BY NSA IN CONNECTION WITH NSA REQUEST
NUMBER [REDACTED] FOR AUTHORIZATION FROM THE ATTORNEY GENERAL
AND THE DIRECTOR OF NATIONAL INTELLIGENCE TO ACQUIRE
FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 105B
OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)



Derived From: NSA/CSSM 1-52

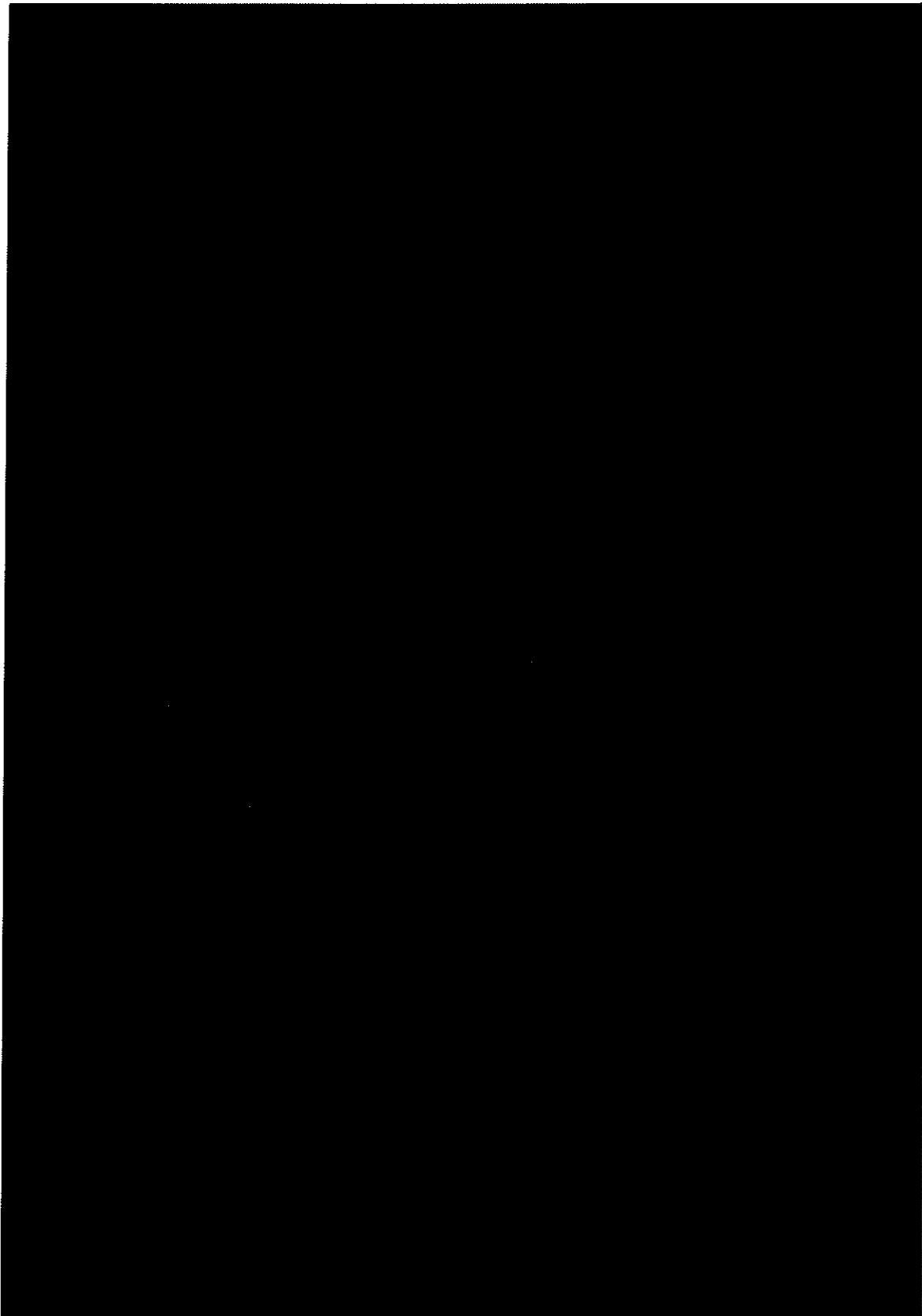
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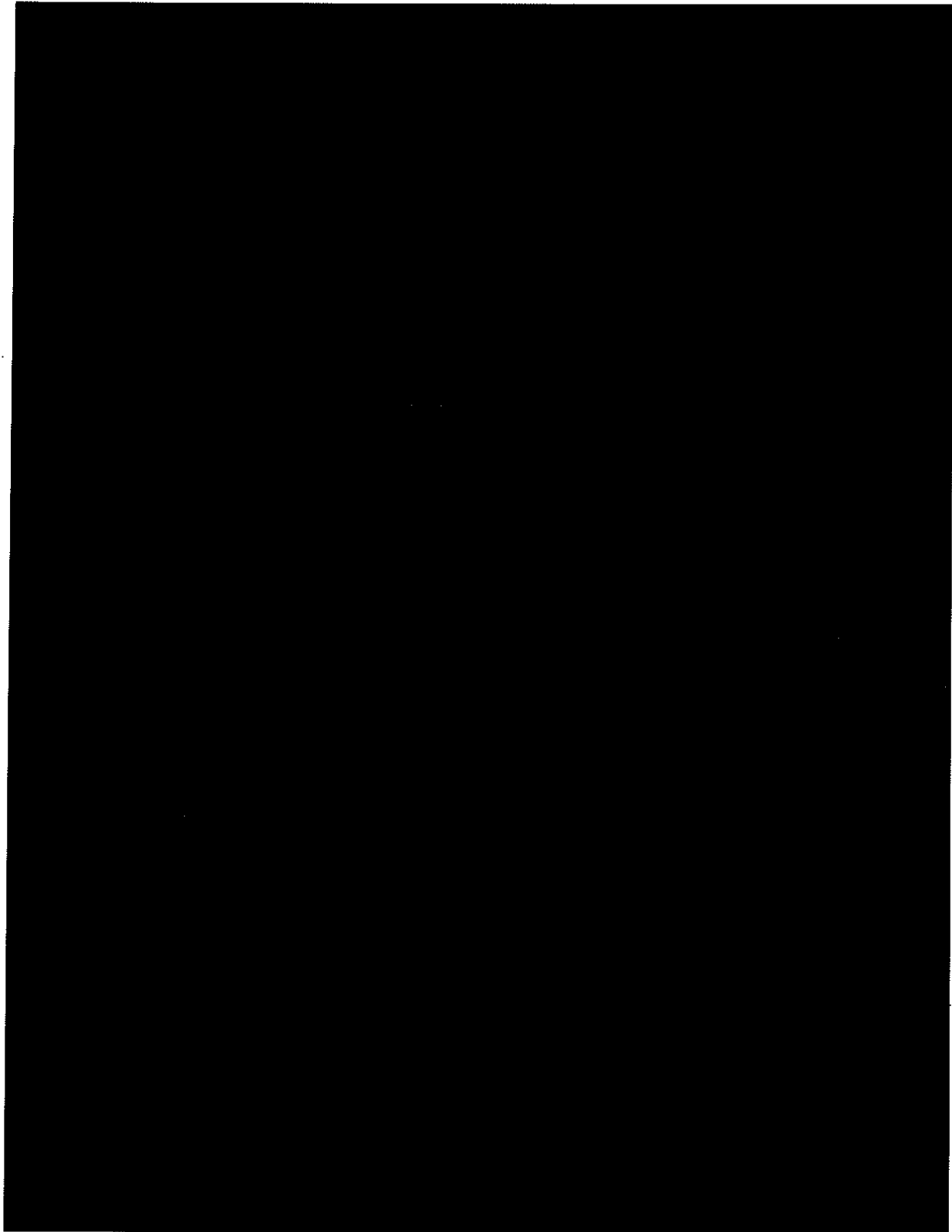
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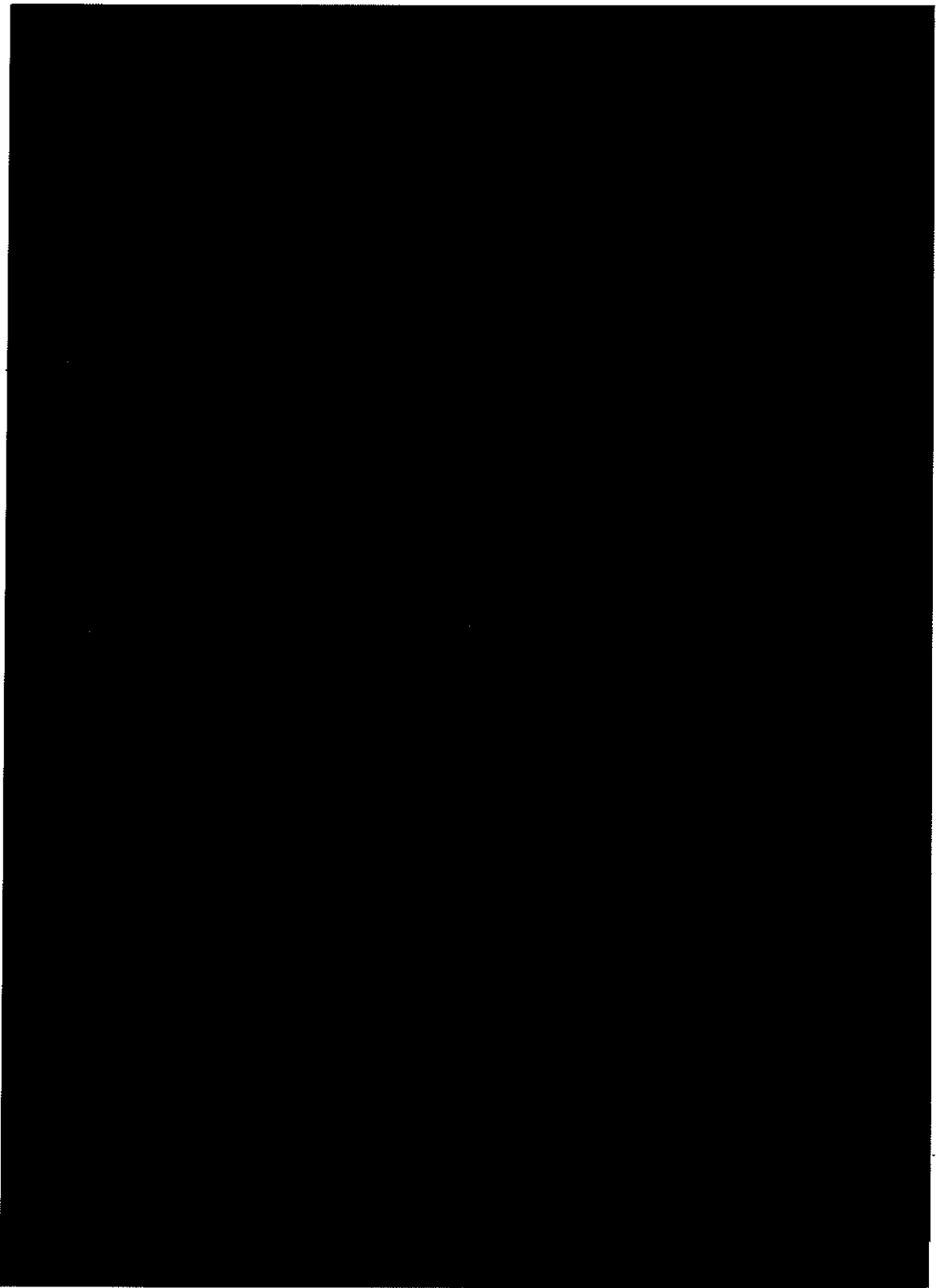
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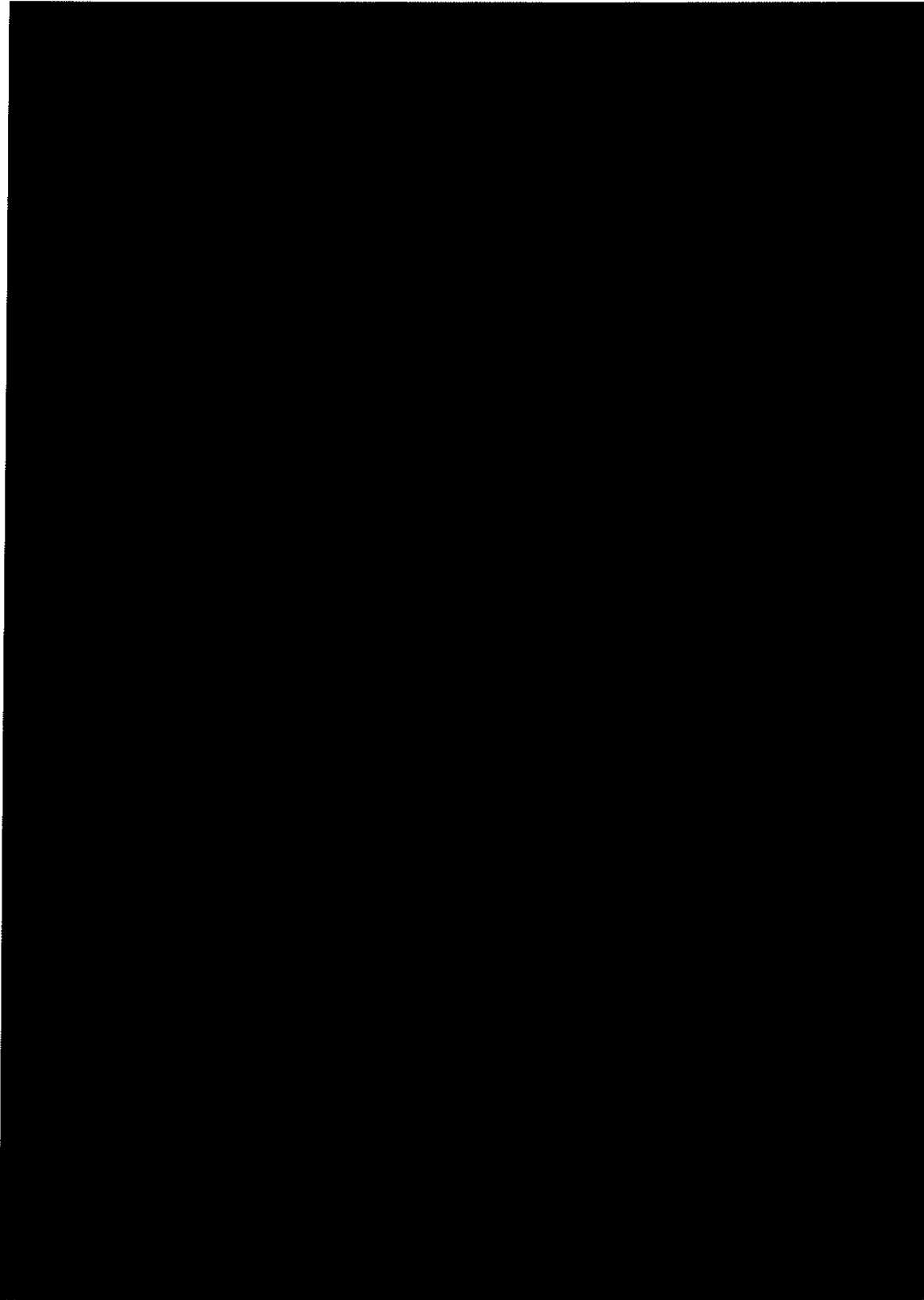
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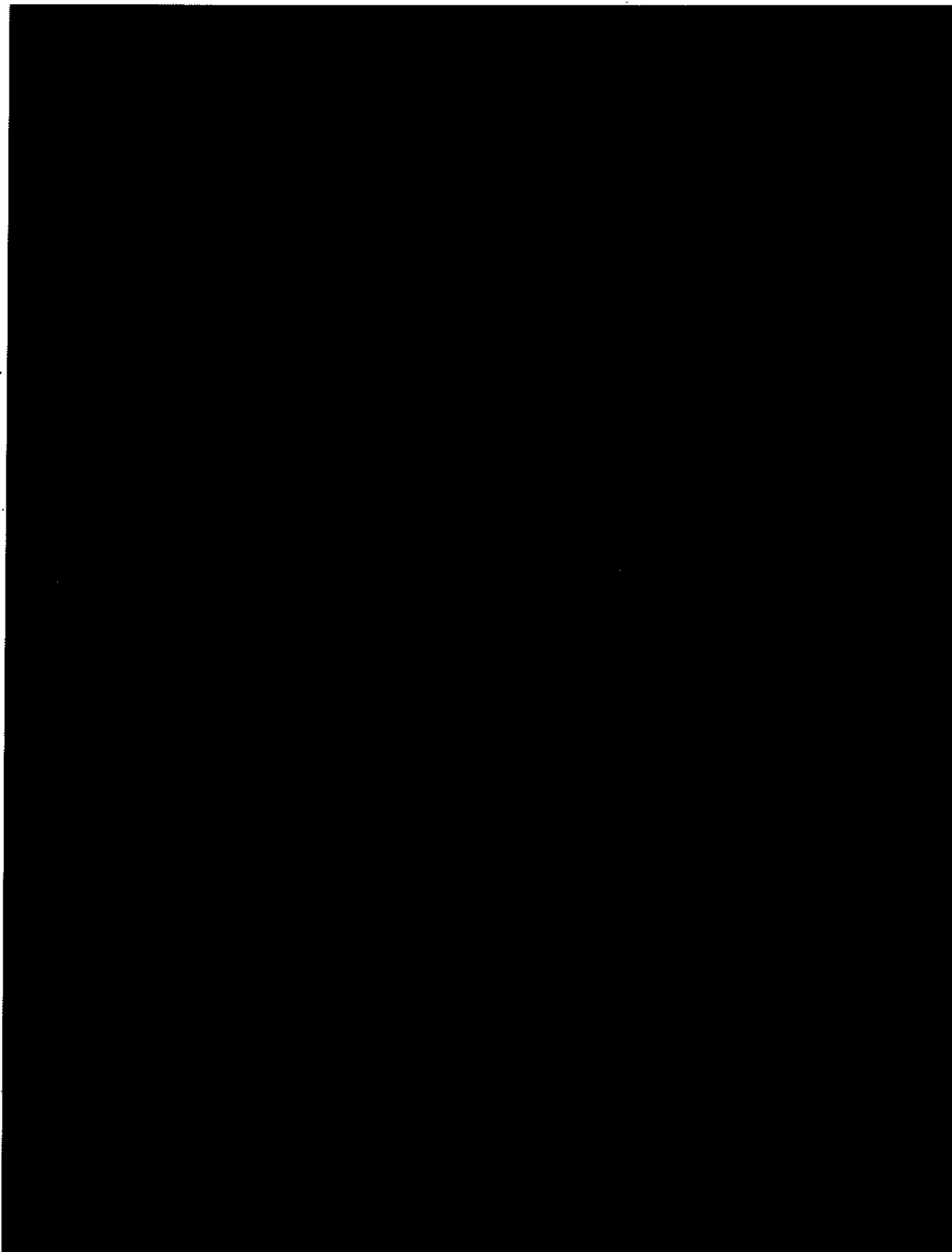
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EXHIBIT B

IN THE MATTER OF

**MINIMIZATION PROCEDURES USED BY NSA IN CONNECTION WITH NSA
REQUEST NUMBER [REDACTED] AMENDMENT 1**

**SEEKING AUTHORIZATION FROM THE ATTORNEY GENERAL AND THE
DIRECTOR OF NATIONAL INTELLIGENCE TO ACQUIRE FOREIGN
INTELLIGENCE INFORMATION PURSUANT TO SECTION 105B OF THE
FOREIGN INTELLIGENCE SURVEILLANCE ACT**

1. With respect to the information the NSA acquires pursuant to the certification of the Attorney General of the United States and the Director of National Intelligence, the NSA will follow:

(a) the Standard Minimization Procedures for Electronic Surveillance Conducted by the National Security Agency (also known as Annex A to United States Signals Intelligence Directive 13), which have been adopted by the Attorney General and are on file with the Foreign Intelligence Surveillance Court;

(b) Certain of the modifications to the standard NSA FISA minimization procedures for electronic surveillance adopted by the Foreign Intelligence Surveillance Court in *In re Electronic Surveillance and Physical Search of International Terrorist Groups, Their Agents, and Related Targets*, [REDACTED] [REDACTED] ("Raw Take Motion"), which modifications are set forth below:

1. The following shall be added to the end of Section 3(f) of these standard NSA FISA procedures:

(7) The National Security Division of the Department of Justice shall periodically determine that information concerning communications of or concerning United States persons that is retained meets the requirements of these procedures and the Foreign Intelligence Surveillance Act.

2. The following shall be added to the end of Section 4(b) of these standard NSA FISA procedures:

With respect to any other communication where it is apparent to NSA processing personnel that the communication is between a person and the person's attorney (or someone acting on behalf of the attorney) concerning legal advice being sought by the former from the latter, such communications relating to foreign

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intelligence information may be retained and disseminated within the U.S. Intelligence Community if the communications are specifically labeled as being privileged. However, such communications may not be disseminated outside of the U.S. Intelligence Community without the prior approval of the Assistant Attorney General for the National Security Division or his designee.

3. The following shall replace subsections (a), (b), and (c) of Section 3 of these standard NSA FISA procedures:

NSA may disseminate nonpublicly-available identity or personally identifiable information concerning United States persons to foreign governments provided that such information is foreign intelligence information and either (i) the Attorney General approves the dissemination; or (ii) NSA disseminates the information under procedures approved by the Attorney General. In addition, NSA may disseminate such foreign intelligence information, to the extent authorized by the Director of National Intelligence (DNI) and in accordance with DNI directives, subject to the following procedures:

- (1) Disseminations to the Governments of the [REDACTED] may be made upon the approval of any person designated for such purpose by the Director of NSA.
- (2) Disseminations to other foreign governments may be made upon the approval of the NSA's Office of General Counsel, upon consideration of the following factors: the national security benefit the United States may reasonably expect to obtain from making the dissemination; the anticipated uses to which the foreign government will put the information; and any potential for economic injury, physical harm, or other restriction of movement to be reasonably expected from providing the information to the foreign government. If the proposed recipient(s) of the dissemination have a history of human rights abuses, that history should be considered in assessing the potential for economic injury, physical harm, or other restriction of movement, and whether the dissemination should be made. In cases where there is a reasonable basis to anticipate that the dissemination will result in economic injury, physical harm, or other restriction of movement: (i) the approval of the NSA's Signals Intelligence Director will also be required; and (ii) if dissemination is approved, NSA will undertake reasonable steps to ensure that the disseminated information will be used in manner consistent with United

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States law, including Executive Order No. 12,333 and applicable federal criminal statutes.

(3) NSA will make a written record of each dissemination approved pursuant to these procedures, and information regarding such disseminations and approvals shall be made available for review by the National Security Division, United States Department of Justice, on at least an annual basis.

4. Regarding dissemination of evidence of a crime, Sections 5(a)(2) and 6(b)(3) of these standard NSA FISA procedures shall be superseded by the following:

Information that is not foreign intelligence information, but reasonably appears to be evidence of a crime that has been, is being, or is about to be committed, may be disseminated (including United States person identities) to the FBI and other appropriate federal law enforcement authorities, in accordance with 50 U.S.C. § 1806(b), Executive Order No. 12,333, and, where applicable, the crimes reporting procedures set out in the August 1995 'Memorandum of Understanding: Reporting of Information Concerning Federal Crimes,' or any successor document.

5. The following shall be added to end of Section 6 of these standard NSA FISA procedures:

NSA may disseminate all communications acquired to the CIA, which shall process any such communications in accordance with minimization procedures approved by the Attorney General.

(e) The following additional modifications to the standard NSA FISA minimization procedures for electronic surveillance:

1. Notwithstanding sections 3(c)(2) and (e), 5(b), and 6(a) of the standard NSA FISA procedures, communications acquired under this Certification may be retained for five years. The communications that may be retained under this Certification include [REDACTED]

2. Section 3(e)(5) of these standard NSA FISA minimization procedures is deleted and replaced with:

To the extent reasonably possible, NSA personnel with access to the data acquired pursuant to this authority shall query the data in a manner designed to minimize the review of communications of or concerning U.S. persons that do not contain foreign intelligence information or evidence of a crime.

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3. Section 3(g)(1) of these standard NSA FISA minimization procedures, relating to absences "from premises under surveillance" by agents of a foreign power, shall not apply to this surveillance.

4. All information [REDACTED] acquired pursuant to the certification of the Attorney General of the United States and the Director of National Intelligence shall be treated under these procedures in the same manner as information collected through electronic surveillance.

5. The following sentence shall be added at the end of subsection 3(g) of these standard NSA FISA minimization procedures for electronic surveillance, becoming now section 3(g)(3): "Any communications acquired through the targeting of a person who at the time of targeting is reasonably believed to be located outside the United States but is in fact located inside the United States at the time such communications are acquired shall be destroyed upon recognition. However, the Director of NSA may authorize retention, use, and dissemination of such communications if he determines in writing that they contain significant foreign intelligence information."

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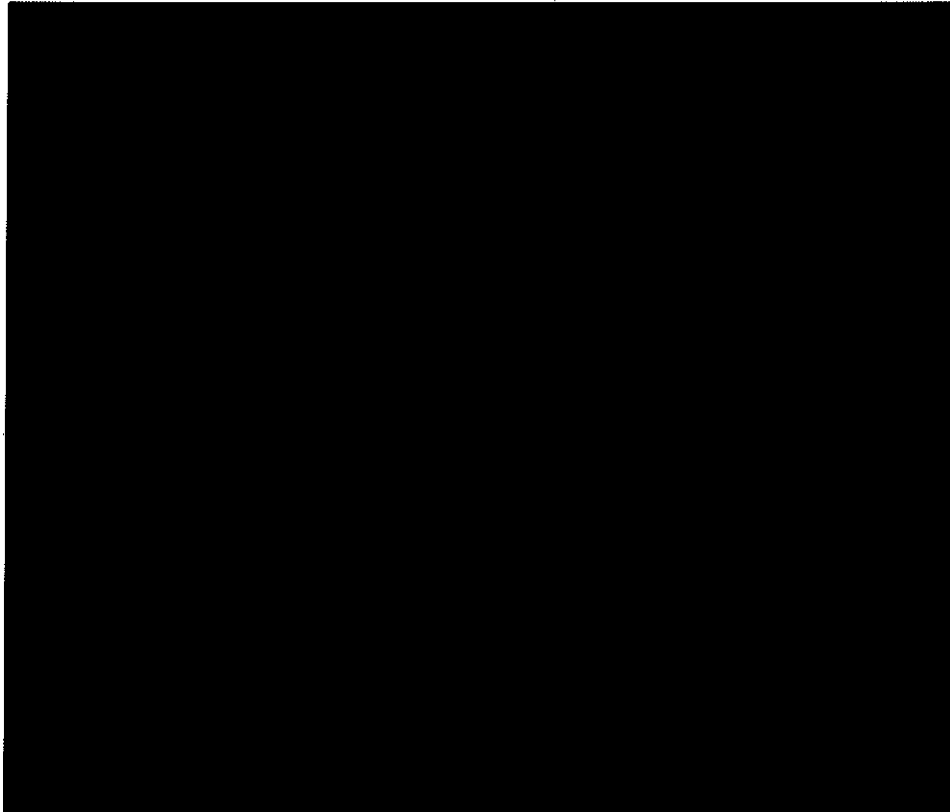
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EXHIBIT E

MINIMIZATION PROCEDURES USED BY THE CIA IN CONNECTION WITH ACQUISITIONS OF FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED.

With respect to unminimized communications the Central Intelligence Agency (CIA) receives from the National Security Agency (NSA) or the Federal Bureau of Investigation that is acquired pursuant to a certification of the Attorney General of the United States and the Director of National Intelligence (DNI) under Section 105B of the Foreign Intelligence Surveillance Act of 1978, as amended (FISA), the CIA will follow the "CIA Minimization Procedures for Information From FISA Electronic Surveillance Conducted by NSA" (hereinafter "CIA minimization procedures"), which have been adopted by the Attorney General and were filed with the Foreign Intelligence Surveillance Court in docket number [REDACTED] (attached hereto), with the following modifications:

1.

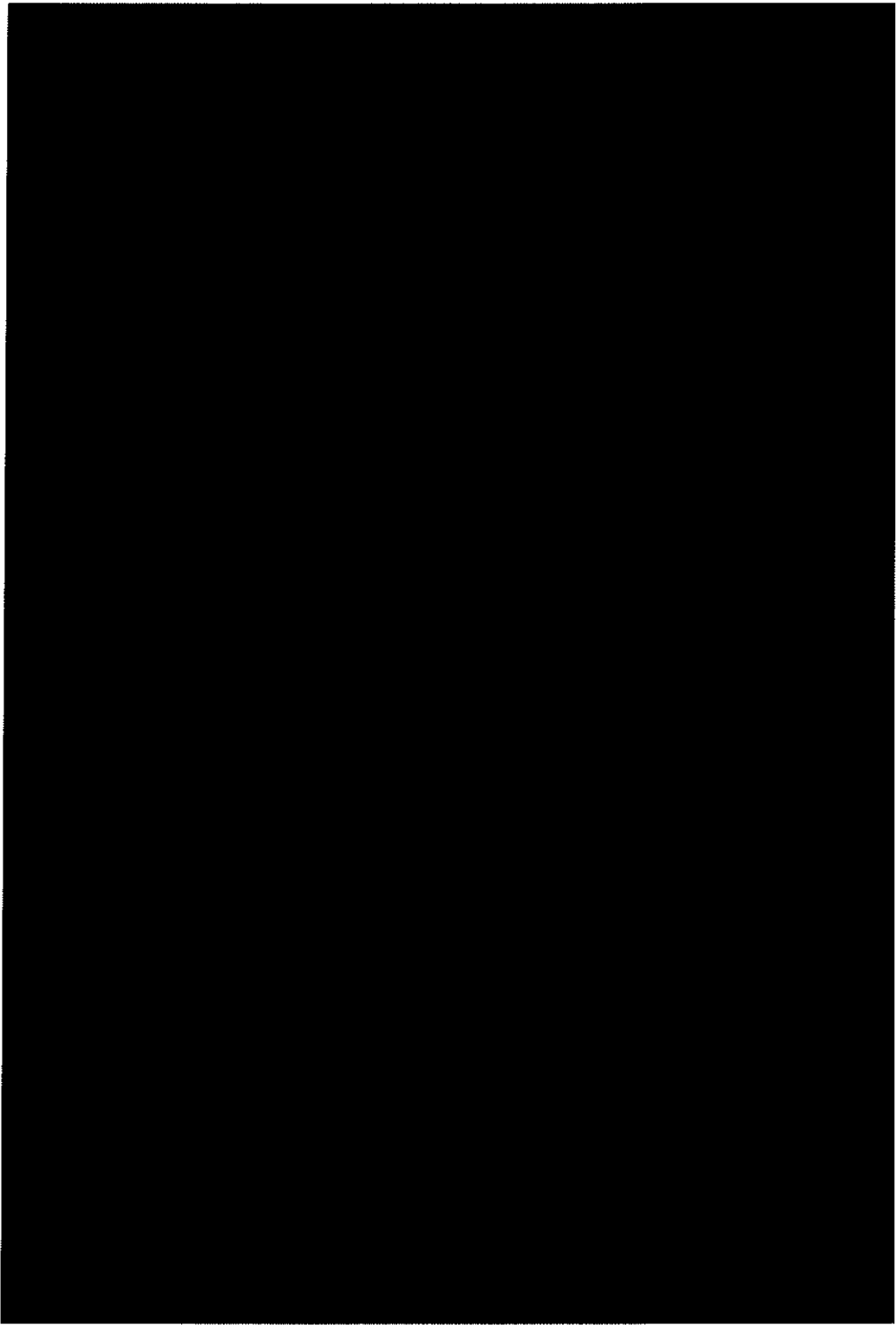


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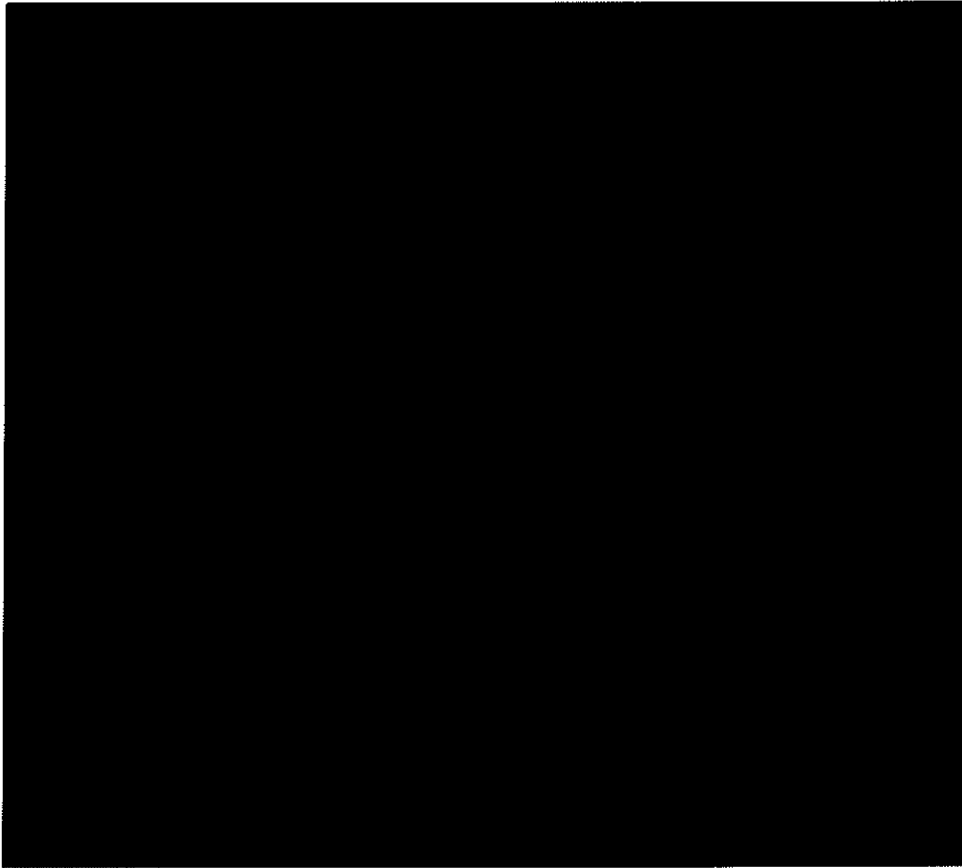


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KAREN E. SUTTON, CLERK

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U.S. Foreign Intelligence
Surveillance Court

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EXHIBIT A

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D. C.

IN RE ELECTRONIC SURVEILLANCE AND : Docket Numbers: Multiple
PHYSICAL SEARCH OF INTERNATIONAL :
TERRORIST GROUPS, THEIR AGENTS, :
AND RELATED TARGETS. (S) :



(b)(1)
(b)(3) NatSecAct

CIA MINIMIZATION PROCEDURES FOR INFORMATION
FROM FISA ELECTRONIC SURVEILLANCE
AND PHYSICAL SEARCH CONDUCTED BY THE FBI

The following procedures shall apply to processing and minimization by the Central Intelligence Agency (CIA) of the raw results of electronic surveillance and physical search conducted by the Federal Bureau of Investigation (FBI) pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811, 1821-1829 (FISA). These procedures shall be implemented as described in the Motion for Amended Orders Permitting Modified Minimization Procedures, filed with the Foreign Intelligence Surveillance Court (FISC) and captioned as above. (S)

1. As used herein, the terms "Attorney General," "foreign power," "agent of a foreign power," "United States person," "person," "foreign intelligence information," "international terrorism," and "sabotage" have the meanings specified in 50 U.S.C. § 1801. (U)

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Reason: 1.5(c)-(d)
Declassify on: X1

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2. Information about a United States person may be retained within CIA and disseminated to authorized recipients outside of CIA if the identity of the United States person and all personally identifiable information are deleted. A generic term may be substituted which does not identify the United States person in the context of the message. If the information cannot be sanitized in such a fashion because the identity is necessary, or it is reasonably believed that it may become necessary, to understand or assess the information, that identity may be retained or disseminated outside of CIA along with the information if:

a. The information falls within one or more of the following categories:

(1) The information indicates that the United States person has acted or may be acting as an agent of a foreign power, including information indicating that a United States person was in contact with a foreign power under facts and circumstances indicating that he intends to collaborate with a foreign power or become an agent of a foreign power;

(2) The information indicates that a United States person may be a target of intelligence activities of a foreign power;

(3) The information indicates that a United States person has engaged or may be engaging in the unauthorized disclosure of properly classified national security information;

(4) The information concerns corporations or other commercial organizations the deletion of which would hamper the correlation of foreign intelligence information on the same subject;

b. The information is enciphered or contains secret meaning;

c. The information is needed to protect the safety of any persons or organizations, including those who are targets, victims, or hostages of groups engaged in international terrorism;

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- d. The information concerns a United States person who is or reasonably appears to be, on the basis of that or other information, an agent of a foreign power;
- e. The information involves a United States person who has consented to the retention or dissemination of his communications or other information concerning him;
- f. The information indicates that a United States person is engaged or may be engaged in international terrorism or activities in preparation therefor;
- g. The information is needed and retained solely to identify individuals in contact with a foreign power or an agent of a foreign power (including for purposes of this subparagraph (g) any person, regardless of location, who engages in international terrorism or activities in preparation therefor; who aids, abets, or conspires with persons to engage in such activities; or who acts as a member of a group engaged in such activities);

(b)(1)
(b)(3) NatSecAct

h. 

- i. The information concerns a person or activity that poses a threat of sabotage, international terrorism, actual or potential attack or other grave hostile act, to any facility or personnel of any agency with the Intelligence Community, or any department containing such an agency;
- j. The personally identifiable information concerning the United States person is publicly available.

A communication to or from, or information about, a United States person which does not qualify for retention or dissemination in accordance with this paragraph must be destroyed. (S)

3. Nothing in paragraph 2 above shall prohibit:

- a. The retention or disclosure of information necessary for the purpose of determining whether the requirements of these procedures are satisfied, provided that the recipient under

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this paragraph does not retain or disclose the identity of a United States person where it is determined that the requirements of these procedures do not permit dissemination;

b. The retention of communications necessary for the maintenance of technical data bases, so long as only collection or technical personnel have access to such data bases;

c. The retention or dissemination of information concerning corporations or other commercial organizations which is limited to their identities as manufactures of equipment and related nomenclature or their locations; or

d. The retention or dissemination of information required by law to be retained or disseminated. (S)

4. CIA shall also follow the following procedures:

a. Privileged communications: As soon as it becomes apparent to CIA personnel processing a communication acquired by electronic surveillance or physical search conducted by the FBI that such communication is between a person who is known to be under criminal indictment and an attorney that represents that individual in the matter under indictment (or someone acting on behalf of the attorney), monitoring or processing of that communication will cease and the communication shall be identified as an attorney-client communication in a log maintained for that purpose. The relevant portion of the tape, document or other material containing the privileged communication will be placed under seal and the Department of Justice, Office of Intelligence Policy and Review (OIPR) shall be notified so that appropriate procedures may be established to protect such communications from review or use in any criminal prosecution, while preserving foreign intelligence information contained therein. With respect to any other communication where it is apparent to CIA processing personnel that the communication is between a person and the person's attorney (or someone acting on behalf of the attorney) concerning legal advice being sought by the former from the latter, such communications relating to foreign intelligence information may be retained and disseminated

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within the U.S. Intelligence Community if the communications are specifically labeled as being privileged. However, such communications may not be disseminated outside of the U.S. Intelligence Community without the prior approval of OIPR. (S)

b. Non-pertinent Communications and Particularized Minimization Procedures: (U)

- (1) Communications determined to fall within categories of non-pertinent communications provided by the FBI to CIA regarding a particular electronic surveillance or physical search should not be retained unless they contain information that may be retained or disseminated under paragraphs 2 and 3 above. (U)
- (2) CIA processing personnel may review all communications, including those that initially appear to fall within established categories until they can reasonably determine that the communication cannot be retained or disseminated under paragraphs 2 and 3 above. (S)
- (3) Information that appears to be foreign intelligence information may be retained even if it is acquired as a part of a communication falling within a category that is generally non-pertinent. (S)
- (4) CIA processing personnel shall adhere to any special or particularized minimization procedures provided to the CIA by the FBI regarding a particular electronic surveillance or physical search. (S)
- (5) OIPR shall periodically determine that information concerning communications of or concerning United States persons that is retained meets the requirements of these procedures and the Foreign Intelligence Surveillance Act. (S)

c. 

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(b)(1)
(b)(3) NatSecAct

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(b)(3) NatSecActd. 

e. Dissemination to Foreign Governments: Nonpublicly available identity or personally identifiable information concerning United States persons may be disseminated to foreign governments, provided that the information to be disseminated is foreign intelligence information, and the dissemination is approved by the Attorney General, or approved pursuant to such procedures as the Attorney General may establish for the dissemination of such information by CIA. (S) (b)(1)
(b)(3) NatSecAct

f. Compliance With Crimes Reporting Obligations: Notwithstanding any of the foregoing, information that is not foreign intelligence information, but reasonably appears to be evidence of a crime that has been, is being, or is about to be committed, may be disseminated (including United States person identities) to the FBI and other appropriate federal law enforcement authorities, in accordance with 50 U.S.C. §§ 1806(b) and 1825(c), Executive Order No. 12,333, and, where applicable, the crimes reporting procedures set out in the August 1995 "Memorandum of Understanding: Reporting of Information Concerning Federal Crimes," or any successor document. (S)

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EXHIBIT F

IN THE MATTER OF [REDACTED]

AMENDMENT 1

PROCEDURES USED BY FBI TO ACQUIRE FOREIGN INTELLIGENCE INFORMATION [REDACTED] REQUEST NUMBER [REDACTED] AS AUTHORIZED BY THE ATTORNEY GENERAL AND THE DIRECTOR OF NATIONAL INTELLIGENCE TO ACQUIRE FOREIGN INTELLIGENCE INFORMATION PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

(S) These procedures address (I) the process the Federal Bureau of Investigation (FBI) will use in acquiring foreign intelligence information, [REDACTED] electronic communications accounts/addresses/identifiers designated by the National Security Agency (NSA) ("Designated Accounts") as being used by persons reasonably believed to be outside the United States, (II) the FBI's documentation of that process, and (III) compliance and oversight.

I. (U) DETERMINATION OF WHETHER A PERSON IS REASONABLY BELIEVED TO BE OUTSIDE THE UNITED STATES.

1.

[REDACTED] NSA shall follow its procedures, attached herewith as Exhibit A, for determining that the user of the Designated Account is a person reasonably believed to be located outside the United States. NSA shall also be responsible for determining that a significant purpose of the acquisition is to obtain foreign intelligence information.

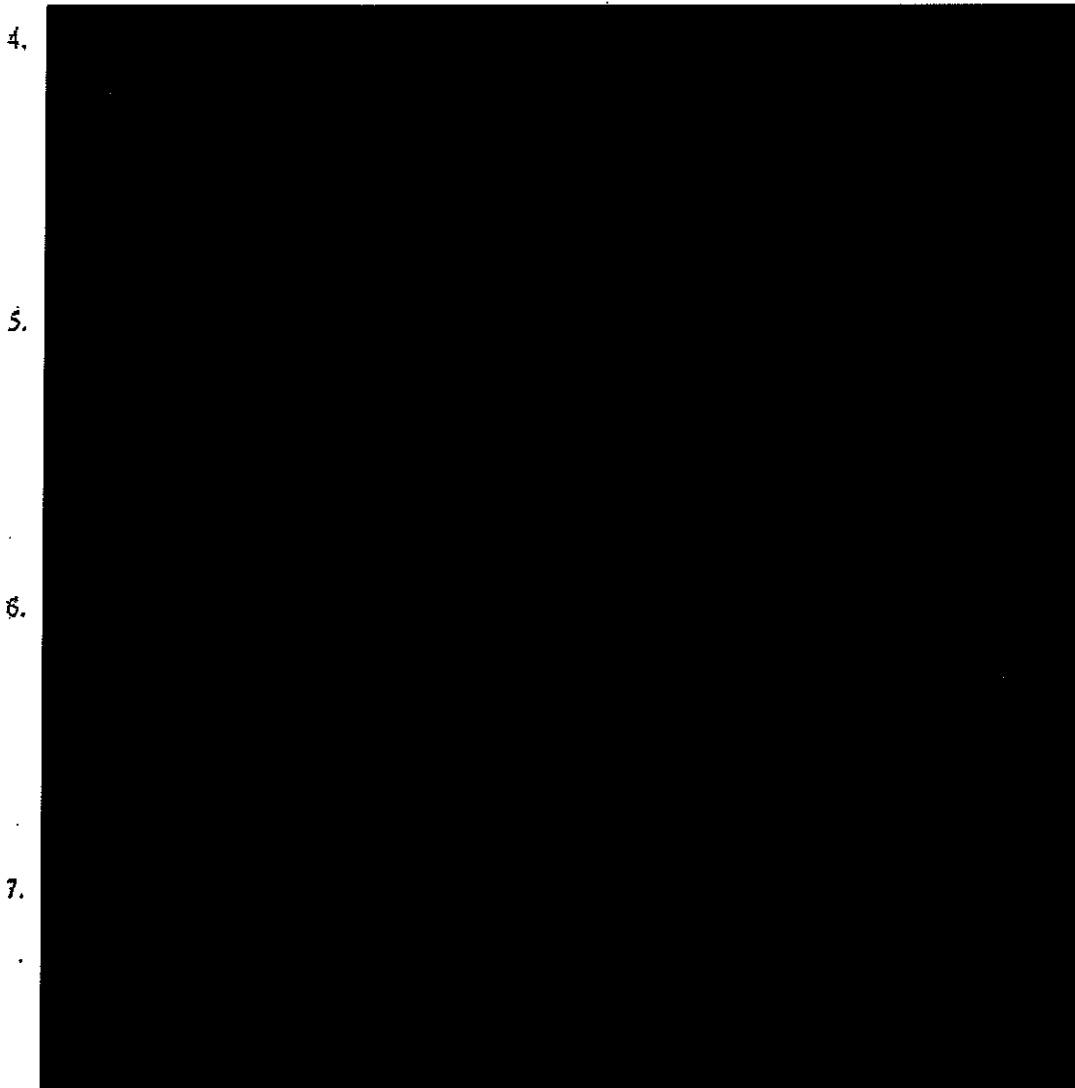
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Reason: E.O. 12958 Section 1.4(c)
Declassify On: OCTOBER 1, 2032
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- 3. (S) The FBI, in consultation with NSA, will review: (a) NSA's explanation for its reasonable belief that the user of the Designated Account is located outside of the United States; and (b) information provided by NSA concerning the user's U.S. Person status, if known.

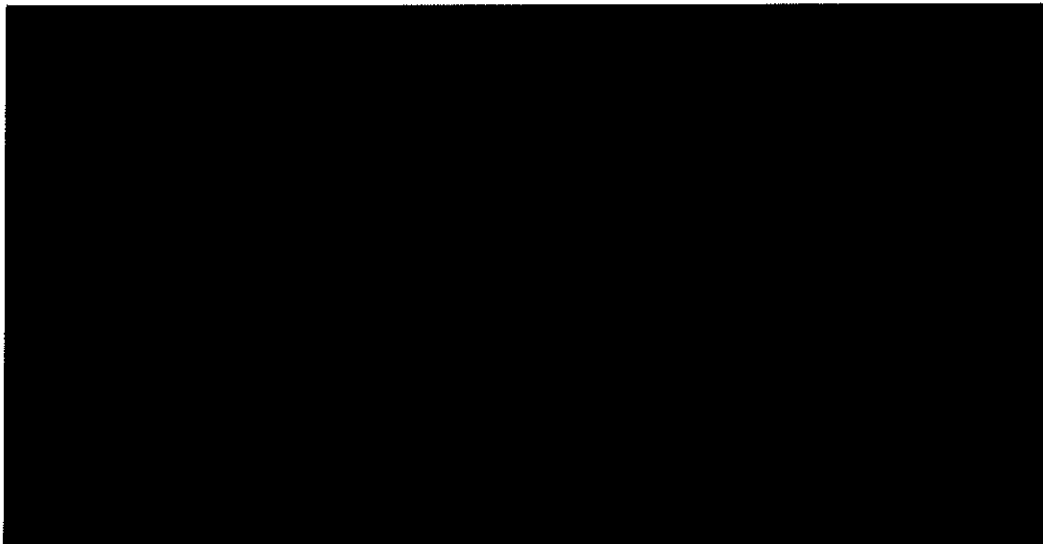


- 8. (S) If the FBI locates information indicating that the Designated Account is not appropriate for tasking under the certification (i.e., because the user of the Designated Account is a U.S. Person [redacted] and/or is located inside of the United States), the FBI will inform NSA, and the FBI will not acquire [redacted] of the Designated Account until FBI determines that the Designated Account is appropriate for tasking under the certification.

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9.



10. (S) The minimization procedures that the FBI will use with respect to [redacted] it acquires pursuant to the above-referenced Certification are the procedures set forth in the Government's Motion for Amended Orders Permitting Modified Minimization Procedures filed in Docket No. [redacted] as extended and modified by orders of the Foreign Intelligence Surveillance Court (hereinafter "FISC"), most recently on December 6, 2007, with the following modifications:

- a. All [redacted] acquired pursuant to the certification of the Attorney General of the United States and the Director of National Intelligence shall be treated under these procedures [redacted]
- b. References to "United States person agent of a foreign power" shall be understood to refer to United States persons reasonably believed to be located outside the United States against whom the Attorney General has authorized the acquisition of foreign intelligence information pursuant to section 2.5 of Executive Order 12958.
- c. References to "non-United States person agent of a foreign power" shall be understood to refer to non-United States persons reasonably believed to be located outside the United States.
- d. Any communication acquired through the targeting of a person who at the time of targeting was reasonably believed to be located outside the United States but is, in fact, located inside the United States at the time such communication is acquired shall be destroyed unless such communication is reasonably believed to contain foreign intelligence information, evidence of a crime that has been, is being, or is about to be committed, [redacted]

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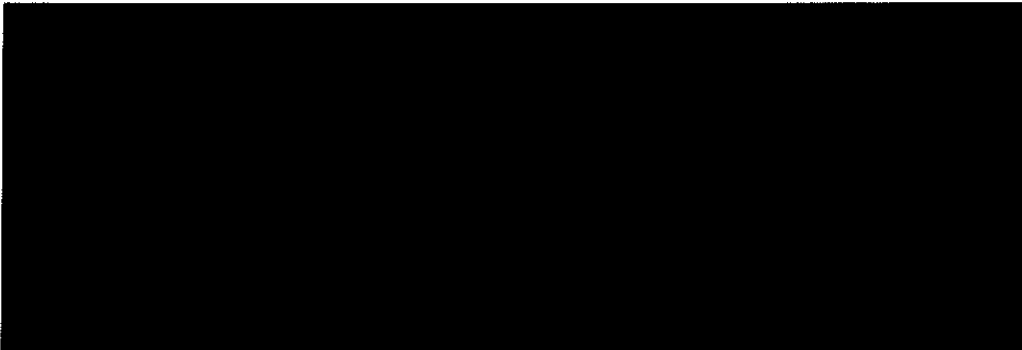
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- 11. (S) The NSA and CIA shall process any [redacted] received from FBI pursuant to these procedures in accordance with minimization procedures approved by the Attorney General.

II. (U) DOCUMENTATION

12.

13.



III. (U) COMPLIANCE AND OVERSIGHT

- 14. (S) FBI will develop and deliver training regarding the applicable procedures to ensure that all personnel responsible for processing [redacted] under these procedures understand their responsibilities with respect to this acquisition. FBI has established processes for determining [redacted] have been requested, received, and disseminated to the NSA and CIA, and for ensuring that Designated Accounts, and the related [redacted] are accessible only to those who are authorized and have had the proper training.

- 15. (S) The FBI Inspection Division will conduct oversight of FBI's exercise of these procedures. This oversight will include periodic reviews by FBI Inspection Division personnel to evaluate the implementation of the procedures and the training given to relevant personnel. The first such review shall take place within thirty days of the implementation of these procedures, and subsequent reviews shall occur on a quarterly basis.

- 16. (S) The Department of Justice (DOJ) and the Office of the Director of National Intelligence (ODNI) will conduct oversight of FBI's exercise of the authority under Section 105B of the FISA, which will include periodic reviews by DOJ and ODNI personnel to evaluate the implementation of these procedures. The first such review shall take place within fourteen days of the implementation of this acquisition, and subsequent visits shall occur at least once every sixty days.

- 17. (S) FBI will report to DOJ through the Deputy Assistant Attorney General in the National Security Division with responsibility for intelligence operations and oversight, to the ODNI Office of General Counsel, and to the ODNI Civil Liberties Protection Officer any incidents of noncompliance with these procedures by FBI personnel within 72 hours of learning of the incident.

~~SECRET// JANUARY 15, 2021~~

~~SECRET// JANUARY 25, 2033~~

**AFFIDAVIT OF ROBERT S. MUELLER, III
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION**

IN THE MATTER OF [REDACTED]

AMENDMENT 1

(S) Pursuant to Section 105B of the Foreign Intelligence Act of 1978, as amended ("FISA"), and in support of the Federal Bureau of Investigation's request to the Attorney General of the United States and the Director of National Intelligence seeking to amend DNI/AG 105B Certification 07-01 to authorize the Federal Bureau of Investigation (FBI) to acquire [REDACTED] concerning persons reasonably believed to be outside of the United States, and further requesting that the Attorney General and the Director of National Intelligence direct the persons specified herein to provide the assistance required to effect such acquisitions, I affirm the following is true and correct to the best of my knowledge and belief:

1. (S) The Director of National Intelligence and the Attorney General executed in writing and under oath the above-referenced Certification pursuant to section 105B of the FISA, thereby authorizing the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States. The above-referenced Certification was executed in writing and under oath by the Attorney General on [REDACTED] 2007, and by the Director of National Intelligence on [REDACTED] 2007. The above-referenced Certification was based on a supporting affidavit of Lieutenant General Keith B. Alexander, United States Army, Director of the National Security Agency (NSA), which was executed on [REDACTED] 2007.

2. (S) Attached as Exhibit A to the declaration that General Alexander executed on [REDACTED] 2007, were the procedures by which NSA determines that the acquisition of foreign intelligence information pursuant to the above-referenced Certification concerns persons reasonably believed to be located outside of the United States. These procedures are attached herewith as Exhibit A. In the above-referenced Certification, the Director of National Intelligence and Attorney General determined in writing and under oath that these procedures were reasonable.

3. [REDACTED]

Derived From: Multiple Sources
Declassify On: January 25, 2033

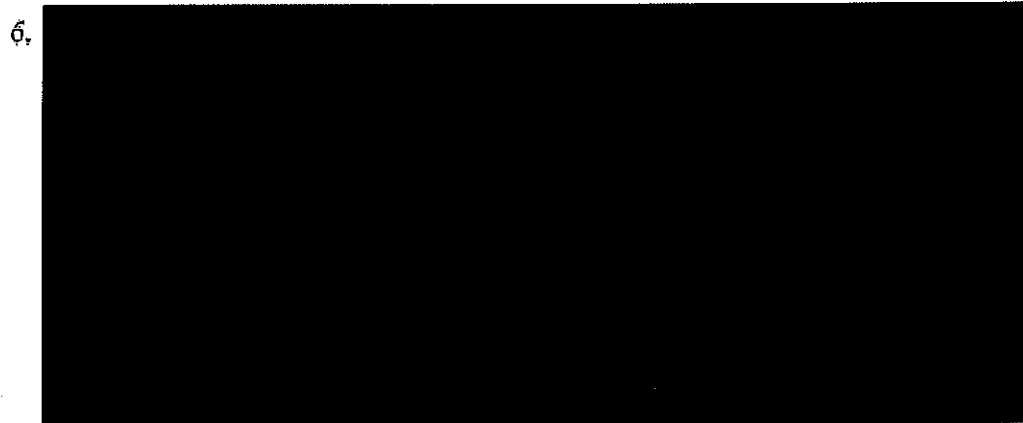
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4. (S) The FBI's acquisition of [redacted] is consistent with Section 105B of FISA because: the acquisition will not constitute electronic surveillance, as defined in FISA; the acquisition will involve obtaining foreign intelligence information from or with the assistance of the above-described communication service providers and/or other persons, who have access to such communications [redacted]; and a significant purpose of the acquisition is to obtain foreign intelligence information.

5. (S) In conducting the [redacted] the FBI will use the procedures attached herewith as Exhibit F to determine that the requested acquisition concerns persons reasonably believed to be located outside the United States.



7. (S) The minimization procedures that the FBI will use with respect to [redacted] it acquires pursuant to the above-referenced Certification are the procedures set forth in the Government's Motion for Amended Orders Permitting Modified Minimization Procedures filed in [redacted] as extended and modified by orders of the Foreign Intelligence Surveillance Court, most recently on December 6, 2007, with the following modifications:

a. All [redacted] acquired pursuant to the certification of the Attorney General of the United States and the Director of National Intelligence shall be treated under these procedures in the same manner as [redacted]

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~~SECRET// JANUARY 25, 2008~~

- b. References to "United States person agent of a foreign power" shall be understood to refer to United States persons reasonably believed to be located outside the United States against whom the Attorney General has authorized the acquisition of foreign intelligence information pursuant to section 2.5 of Executive Order 12333.
- c. References to "non-United States person agent of a foreign power" shall be understood to refer to non-United States persons reasonably believed to be located outside the United States.
- d. Any communication acquired through the targeting of a person who at the time of targeting was reasonably believed to be located outside the United States but is in fact located inside the United States at the time such communication is acquired shall be destroyed unless such communication is reasonably believed to contain foreign intelligence information, evidence of a crime that has been, is being, or is about to be committed.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 26th day of January 2008.


ROBERT S. MUELLER, III
Director, Federal Bureau of Investigation

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~~TOP SECRET//COMINT [REDACTED]//NOFORN//20320108~~

**AFFIDAVIT OF LT GENERAL KEITH S. ALEXANDER, UNITED STATES
ARMY, DIRECTOR, NATIONAL SECURITY AGENCY**

IN THE MATTER OF [REDACTED]

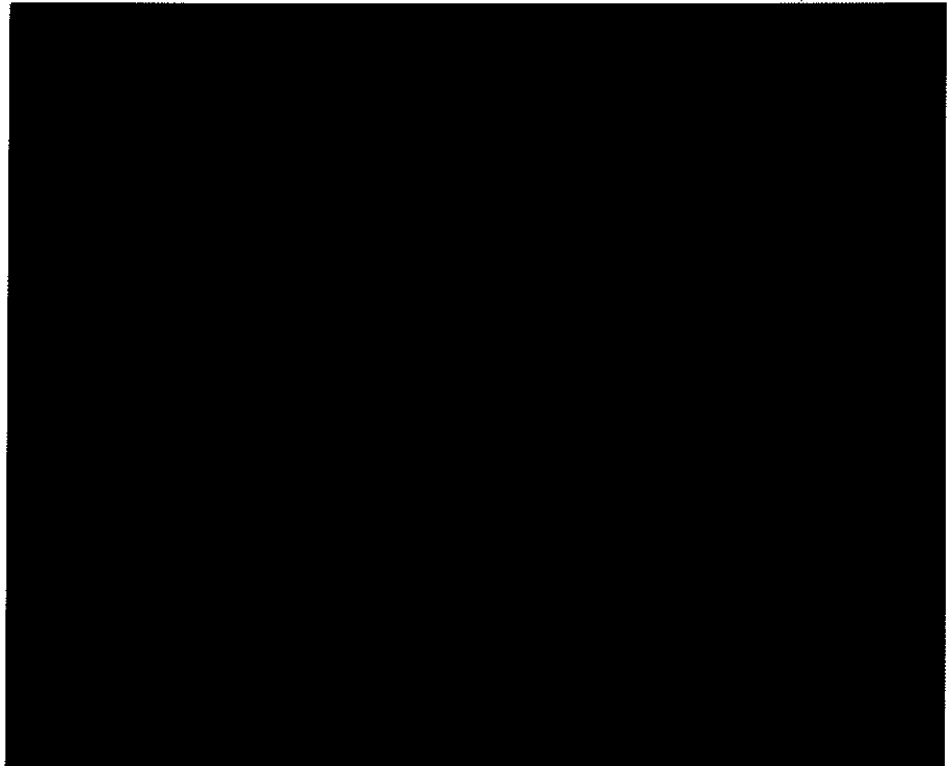
AMENDMENT 1

(TS//SI//NF) Pursuant to section 105B of the Foreign Intelligence Surveillance Act (FISA) and in support of the Federal Bureau of Investigation (FBI) request to the Attorney General of the United States and the Director of National Intelligence seeking to amend DNI/AG 105B Certification [REDACTED] to authorize the Federal Bureau of Investigation (FBI) to acquire [REDACTED] concerning persons reasonably believed to be outside of the United States, and in support of NSA's earlier request seeking authorization to acquire foreign intelligence information concerning persons reasonably believed to be outside the United States pursuant to the above-referenced Certification, I affirm the following is true and accurate to the best of my knowledge and belief:

1.

2.

3.



Derived From: NSA/CSSM 1-52

Dated: 20070108

Declassify On: 20320108

~~TOP SECRET//COMINT [REDACTED]//NOFORN//20320108~~

~~TOP SECRET//COMINT [REDACTED] //NOFORN//20320109~~

[REDACTED]

4.

[REDACTED]

5.

[REDACTED]

In either event, NSA will

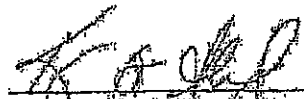
~~TOP SECRET//COMINT [REDACTED] //NOFORN//20320109~~

~~TOP SECRET//COMINT [REDACTED]//NOFORN//20320103~~

direct surveillance of a party to the communication reasonably believed to be outside the United States.

(U) I declare under penalty of perjury that the foregoing is true and correct.

Signed this 29 day of January 2008.


KENNETH S. ALEXANDER
Lieutenant General, U.S. Army
Director, National Security Agency

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AMENDMENT TO THE CERTIFICATION OF THE DIRECTOR OF NATIONAL INTELLIGENCE AND THE ATTORNEY GENERAL PURSUANT TO SECTION 105B OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978, AS AMENDED

IN THE MATTER OF [REDACTED]

DNI/AG 105B Certification [REDACTED]

Amendment 1

The Director of National Intelligence and the Attorney General executed in writing and under oath, based on a supporting affidavit, the above-referenced Certification pursuant to section 105B of the Foreign Intelligence Surveillance Act of 1978, as amended ("the Act"), thereby authorizing the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States. The Certification was executed by the Attorney General on [REDACTED] 2007, and by the Director of National Intelligence on [REDACTED] 2007. Specifically, the Director of National Intelligence and the Attorney General certified that

(S)

(1) there are reasonable procedures in place for determining that the acquisition of foreign intelligence information under section 105B of the Act concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to review of the Foreign Intelligence Surveillance Court pursuant to section 105C of the Act; (S)

(2) the acquisition does not constitute electronic surveillance as defined in section 101(f) of the Act; (S)

(3) the acquisition involves obtaining the foreign intelligence information from or with the assistance of communications service providers, custodians, or other persons

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Classified by: The Attorney General
Reason: 1.4(e)
Declassify on: 29 January 2033

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(including any officer, employee, agent, or other specified person of such service providers, custodians, or other persons) who have access to communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications; (S)

(4) a significant purpose of the acquisition is to obtain foreign intelligence information; and (S)

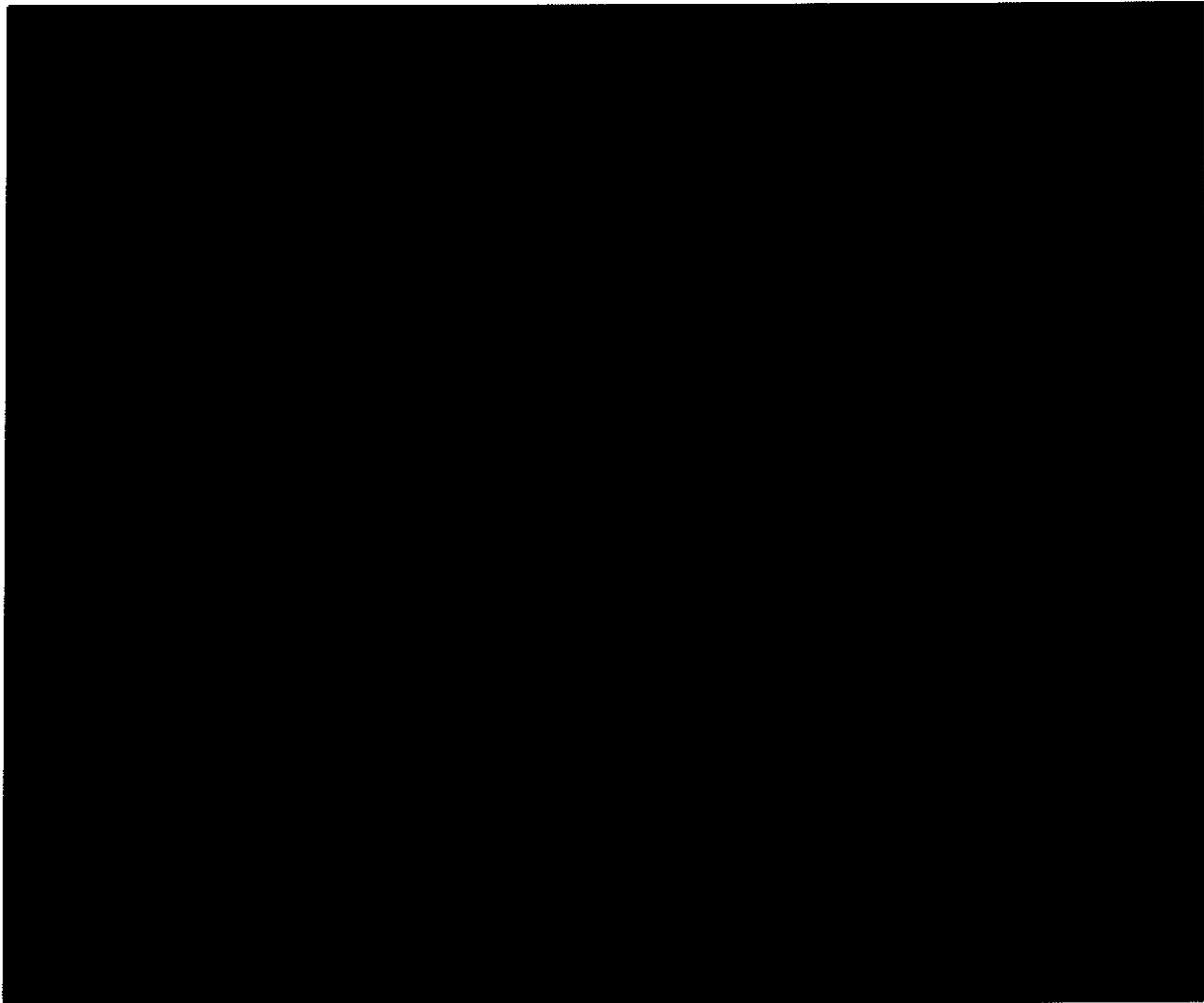
(5) the minimization procedures to be used with respect to such acquisition activity meet the definition of minimization procedures under section 101(h) of the Act. (S)

As explained in the affidavit of Robert S. Mueller, III, Director, Federal Bureau of Investigation (FBI) (hereinafter "Mueller affidavit"), the FBI seeks authorization to acquire pursuant to the above-referenced certification foreign intelligence information, [REDACTED] concerning persons reasonably believed to be outside the United States. Attached herewith as Exhibit F are the procedures that, as explained in the Mueller affidavit, the FBI will use to determine, in conducting the acquisition [REDACTED] that the requested acquisition concerns persons reasonably believed to be located outside the United States. The Mueller affidavit also sets forth the minimization procedures that the FBI will apply to the [REDACTED] communications it acquires pursuant to the requested authorization. (S)

[REDACTED]

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(S)

Accordingly, based on the representations made in the affidavits described herein, the Director of National Intelligence and the Attorney General hereby certify that: (S)

(1) there are reasonable procedures in place for determining that the acquisition of foreign intelligence information under section 105B of the Act concerns persons reasonably

¹ The affidavit that General Alexander executed on January 29, 2008, also contains information that supplements the affidavit that General Alexander executed on [REDACTED] 2007. This supplemental information concerns communications service providers and/or other persons who have access to the communications that constitute the foreign intelligence. (S)

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believed to be located outside the United States, and such procedures will be subject to review of the Foreign Intelligence Surveillance Court pursuant to section 105C of the Act. (S)

(2) the acquisition does not constitute electronic surveillance as defined in section 101(f) of the Act. (S)

(3) the acquisition involves obtaining the foreign intelligence information from or with the assistance of communications service providers, custodians, or other persons (including any officer, employee, agent, or other specified person of such service providers, custodians, or other persons) who have access to communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications. (S)

(4) a significant purpose of the acquisition is to obtain foreign intelligence information and (S)

(5) the minimization procedures to be used with respect to such acquisition activity meet the definition of minimization procedures under section 101(h) of the Act. (S)

On the basis of the foregoing, the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States, as described above, is hereby authorized. Any time the acquisition of foreign intelligence information against a U.S. person abroad is sought pursuant to the above-referenced certification, Attorney General authorization, pursuant to the procedures under Executive Order 12333, section 2.5, must first be obtained. This authorization expires on [REDACTED] 2008. (S)

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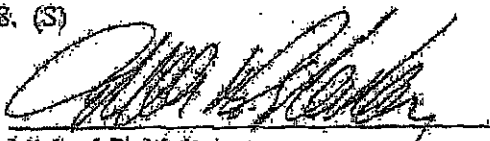
VERIFICATION

I declare under penalty of perjury that the facts set forth in the foregoing Amendment to the Certification in the Matter of [REDACTED]

[REDACTED] DNI/AG 105E Certification [REDACTED]

are true and correct to the best of my knowledge and belief. Executed pursuant to 28 U.S.C.

§ 1746 on January 31, 2008. (S)



Michael B. Mukasey
Attorney General of the United States

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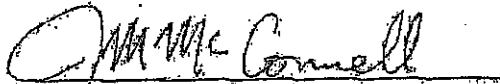
VERIFICATION

I declare under penalty of perjury that the facts set forth in the foregoing Amendment to the Certification in the matter of [REDACTED]

[REDACTED] DNVAG 105B Certification [REDACTED]

are true and correct to the best of my knowledge and belief, Executed pursuant to 28 U.S.C.

§ 1746 on January 30, 2008. (S)

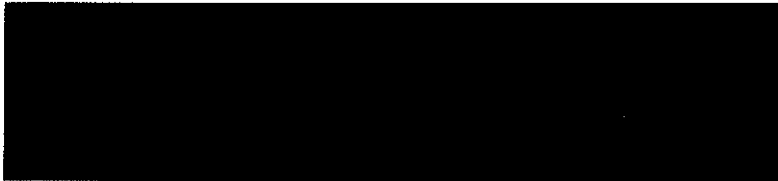


J.M. McConnell
Director of National Intelligence

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



MEMORANDUM OPINION AND ORDER

On January 15, 2008, this Court issued a Memorandum Opinion and Order ("*January 15 Opinion*") in [REDACTED] the above-captioned docket numbers: [REDACTED]



(collectively the [REDACTED]). The *January 15 Opinion* is incorporated herein by reference and made a part of this Opinion and Order. The *January 15 Opinion* approved, under the standard of review for clear error applicable under 50 U.S.C. § 1805c(b),¹ [REDACTED] procedures used by the National Security Agency (NSA) in implementing authorities to acquire foreign intelligence information under the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (PAA).

On [REDACTED], the government filed in [REDACTED] additional sets of procedures used by the Federal Bureau of Investigation (FBI) when that agency acquires foreign intelligence information under PAA authorities. These procedures were adopted pursuant to

¹ This standard of review under 50 U.S.C. § 1805c(b), and the meaning of other pertinent provisions at 50 U.S.C. §§ 1805a and 1805b(a)(1), are explicated in the *January 15 Opinion* at 5-8, 13-15, 17-22. The same understanding of these provisions is applied herein.

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amendments made by the Attorney General and the Director of National Intelligence (DNI) on

[redacted] to the certifications in the [redacted].

On [redacted] the government submitted NSA and FBI procedures in [redacted]

[redacted] This matter involves the acquisition of foreign intelligence

information regarding [redacted]

[redacted] Docket No. [redacted] NSA Procedures at 1 (capitalized in original), [redacted]

[redacted] made by the DNI and the Attorney General on [redacted]

[redacted]

For the reasons explained below, the Court concludes that it retains jurisdiction to review the above-described procedures under § 1805c. On the merits, the Court finds that the FBI procedures submitted in [redacted] and the NSA and FBI procedures submitted in [redacted] satisfy the applicable review for clear error under 50 U.S.C. § 1805c(b).

I. The Court Retains Jurisdiction to Review the Government's Procedures.²

Section 6(c) of the PAA, as originally enacted, provided that the substantive terms of the PAA were to "cease to have effect 180 days after the date of the enactment" of that statute, subject to exceptions provided in section 6(d) of the PAA and discussed below. PAA § 6(c). By a separate

² Similar issues were addressed by another judge of the Foreign Intelligence Surveillance Court (FISC) in Docket No. 105B(g): 07-01, *In re Directives*, Memorandum Opinion entered April 25, 2008, at 5-12, 39-43. The jurisdictional analysis herein is in accord with that opinion.

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enactment, Congress extended this period to "195 days after the date of the enactment of [the original PAA]." See Pub. L. 110-182, § 1, 122 Stat. 605. Each of the above-referenced procedures were adopted by the Attorney General and the DNI prior to the expiration of this 195-day period.

Section 6(d) of the PAA provides:

AUTHORIZATIONS IN EFFECT.—Authorizations for the acquisition of foreign intelligence information pursuant to the amendments made by this Act, and directives issued pursuant to such authorizations, shall remain in effect until their expiration. Such acquisitions shall be governed by the applicable provisions of such amendments and shall not be deemed to constitute electronic surveillance as that term is defined in [50 U.S.C. § 1801(f)].

PAA § 6(d) (emphasis added).

In all [REDACTED] the above-captioned dockets, the DNI and the Attorney General authorized acquisitions of foreign intelligence information by making or amending certifications prior to February 16, 2008,³ pursuant to provisions of the PAA codified at 50 U.S.C. § 1805b.⁴ Section 1805b requires the Attorney General and the DNI to certify, among other things, that "there are reasonable procedures in place for determining that the acquisition of foreign intelligence information under this section concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to review of the Court pursuant to [50 U.S.C. § 1805c]." § 1805b(a)(1) (emphasis added). Section 1805c, which is another provision enacted by

³ The Court concludes that these amendments were an effective means of adopting additional procedures under § 1805b(a)(1) for the reasons stated in In re Directives, Memorandum Opinion entered April 25, 2008, at 25-43.

⁴ Section 2 of the PAA provides: "The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended by inserting after [50 U.S.C. § 1805] the following: [the full text of 50 U.S.C. §§ 1805a and 1805b follows]." PAA § 2.

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the PAA,⁵ provides that the FISC “shall assess the Government’s determination under [§ 1805b(a)(1)] The court’s review shall be limited to whether the Government’s determination is clearly erroneous.” § 1805c(b). Under these provisions, if the Attorney General and the DNI authorize acquisitions of foreign intelligence information under § 1805b, the FISC must review the accompanying § 1805b(a)(1) procedures. Consequently, the judicial review provisions of §§ 1805b(a)(1) and 1805c are, in the language of section 6(d) of the PAA, “applicable provisions” of the PAA, pursuant to which the relevant authorizations were made. By the terms of section 6(d), these judicial review provisions remain in force as applied to the procedures now before the Court, despite the lapse of these provisions for other purposes by operation of section 6(c).

The Court also concludes that the timetable for review set out in § 1805c does not negate jurisdiction. Section 1805c provides that the government shall submit procedures to the FISC “[n]o later than 120 days after the effective date” of the PAA, § 1805c(a), and that the FISC “shall assess” those procedures “[n]o later than 180 days after the effective date” of the PAA. § 1805c(b). It further provides that “[t]he procedures submitted pursuant to this section shall be updated and submitted to the Court on an annual basis.” § 1805c(a).

The procedures now at issue were submitted to the FISC after the 120-day period specified for submission (and well in advance of the time for annual submission of updated procedures). The 180-day period specified for the FISC to “assess” the procedures has also passed. Indeed, the procedures in Docket No. [REDACTED] were submitted after the 180-day period specified for FISC action,

⁵ Section 3 of the PAA provides: “The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended by inserting after [50 U.S.C. § 1805b] the following: [the full text of 50 U.S.C. § 1805c follows].” PAA § 3.

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while the procedures now at issue [REDACTED] were submitted only a few days before the end of that 180-day period. However, the government would construe the 120-day and 180-day timetables specified in § 1805c(a)-(b) as applying only to the procedures initially submitted, so that thereafter the Attorney General and DNI could still adopt and submit, and the FISC could review, revised or additional procedures.⁶ The alternative reading of § 1805c(a)-(b) would artificially delay, until the time for an “annual” update, judicial review of procedures that the government is ready to submit and is already implementing. The Court agrees with the government’s suggested construction of § 1805c(a)-(b) because it avoids this anomalous result.

For these reasons, the Court finds that it continues to have jurisdiction to review the procedures at issue under § 1805c.

II. The Government’s Procedures Satisfy the Applicable Review for Clear Error.

The procedures now before the Court are the NSA procedures submitted in [REDACTED] docket and the FBI procedures submitted in [REDACTED] the above-captioned dockets. Each set of procedures is discussed below.

A. The NSA Procedures in [REDACTED] Docket

The NSA procedures in [REDACTED] docket are similar in most respects to the NSA procedures in [REDACTED] which are discussed in the *January 15 Opinion*. Most of the differences in the

⁶ See Docket Nos. [REDACTED] Transcript of Proceedings held December 12, 2007, at 56-57; see also Docket No. 105B(g) 07-01, Government’s Response to the Court’s Order of February 29, 2008, at 24-28 (filed March 7, 2008).

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NSA procedures are in the nature of clarifications⁷ or follow directly from the differing classes of targets in each case.⁸

The only substantive difference between the NSA procedures in [redacted] docket and the NSA procedures in [redacted] is that [redacted] procedures state:

[redacted]

[redacted]

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Docket No. [REDACTED] NSA Procedures at 6. The NSA procedures in [REDACTED] do not contain such a statement.⁹

The above-quoted provision does not provide grounds for the Court to find that the NSA procedures in [REDACTED] docket do not satisfy the applicable review for clear error under § 1805c. Under the relevant statutory provisions, the government's procedures are required to provide a reasonable belief that a person targeted for acquisition is located outside of the United States. See January 15 Opinion at 7-8, 14-15 (construing 50 U.S.C. §§ 1805a, 1805b(a)(1), & 1805c).

Absolute certainty is not required. It follows that, pursuant to procedures that satisfy these statutory provisions, the government may from time to time acquire information about persons who are reasonably believed to be outside of the United States, but are later learned to have been within the United States at the time of acquisition. Another provision of the PAA regulates the retention of information by requiring the government to adopt and follow "minimization procedures." See 50 U.S.C. § 1805b(a)(5). But those procedures are not subject to FISC review under § 1805c. See January 15 Opinion at 6. The statutory provisions that are relevant to this proceeding – §§ 1805a, 1805b(a)(1), and 1805c – do not restrict what the government may do with information once acquired. For these reasons, the above-quoted provision does not render the NSA procedures in [REDACTED] docket "clearly erroneous" for purposes of review under § 1805c.

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B. The FBI Procedures in All of the Above-Captioned Dockets

Additional procedures submitted in each of the above-captioned dockets apply to acquisitions of [REDACTED] by the FBI.¹⁰ These [REDACTED] procedures are identical in substance.¹¹ The fundamental point about these procedures, for purposes of judicial review under § 1805c, is that they apply in addition to the NSA procedures; that is, [REDACTED] are acquired only for “Designated Accounts” that the NSA, pursuant to its own procedures, has already determined “are being used by persons reasonably believed to be outside of the United States.” *FBI Procedures* at 1. The Court previously found that the NSA procedures in [REDACTED] satisfy the applicable review for clear error, see January 15 Opinion at 13-24, and the government represents that the subsequent adoption of the FBI procedures “did not alter those NSA procedures.”¹² As

10

[REDACTED]

Hereinafter, these procedures are collectively referred to as “*FBI Procedures*” and separate citations to these procedures as submitted in individual dockets are provided only when required by differences in pagination.

¹¹ The same documents in each docket also contain “minimization procedures” for [REDACTED] obtained by the FBI. See *FBI Procedures* at 3-4. As stated above, these minimization procedures are not subject to judicial review under § 1805c. They are discussed herein only insofar as they relate to the procedures adopted pursuant to § 1805b(a)(1), which of course are subject to review in this proceeding.


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explained above, the Court also finds that the NSA procedures in [REDACTED] docket satisfy the applicable review for clear error.

It would seem to follow a fortiori that FBI procedures affording additional assurance that the user of an electronic communications account is reasonably believed to be outside of the United States would also survive review under the same "clear error" standard. And in fact, nothing in the FBI procedures suggests otherwise. NSA is required to [REDACTED]



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[Redacted]

Id.¹³ The FBI's implementation of these procedures is subject to "periodic reviews" by the FBI Inspection Division ("on a quarterly basis"), and by the Department of Justice and the Office of the Director of National Intelligence ("at least once every sixty days").

Id. at 4.¹⁴

The FBI procedures provide measures to verify that persons targeted for acquisition are outside the United States, over and above the steps taken pursuant to the NSA procedures. Accordingly, the Court finds that the FBI procedures, as supplementary to the NSA procedures in the above-captioned dockets, satisfy the applicable review for clear error.

III. Conclusion

For the reasons stated herein, the Court finds, in the language of 50 U.S.C. § 1805c(b) and consistent with the Court's interpretation of that provision in view of 50 U.S.C. §§ 1805b(a)(1) and

¹³ [Redacted]

¹⁴ The FBI procedures contain the following provision under the rubric of minimization:

[Redacted]


FBI Procedures at 3. Retention of information under these circumstances does not render the FBI procedures "clearly erroneous" for purposes of review under § 1805c. See Part II.A. supra.

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1805a, that the Government's determination under 50 U.S.C. § 1805b(a)(1) – that the procedures discussed herein “are reasonably designed to ensure that acquisitions conducted pursuant to [§ 1805b] do not constitute electronic surveillance” – is not “clearly erroneous.” Accordingly, pursuant to § 1805c(c), it is hereby ORDERED that the continued use of such procedures is approved.

ENTERED this [REDACTED], regarding DNI/AG 105B Certifications [REDACTED]


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

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