

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[REDACTED]

[REDACTED]

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OPINION AND ORDER

[REDACTED] in the above-captioned matter, the Court issued an order
[REDACTED] Order”) requiring the government to submit a report on specified matters
and holding in abeyance the government’s motion, [REDACTED] to
authorize electronic surveillance, pursuant to the Foreign Intelligence Surveillance Act, 50
U.S.C. §§ 1801-1812 (FISA), by the National Security Agency (NSA) [REDACTED]
[REDACTED] the
government submitted a Verified Response to the [REDACTED] Order (“Response”). After
reviewing the Response, the Court has granted the Motion.

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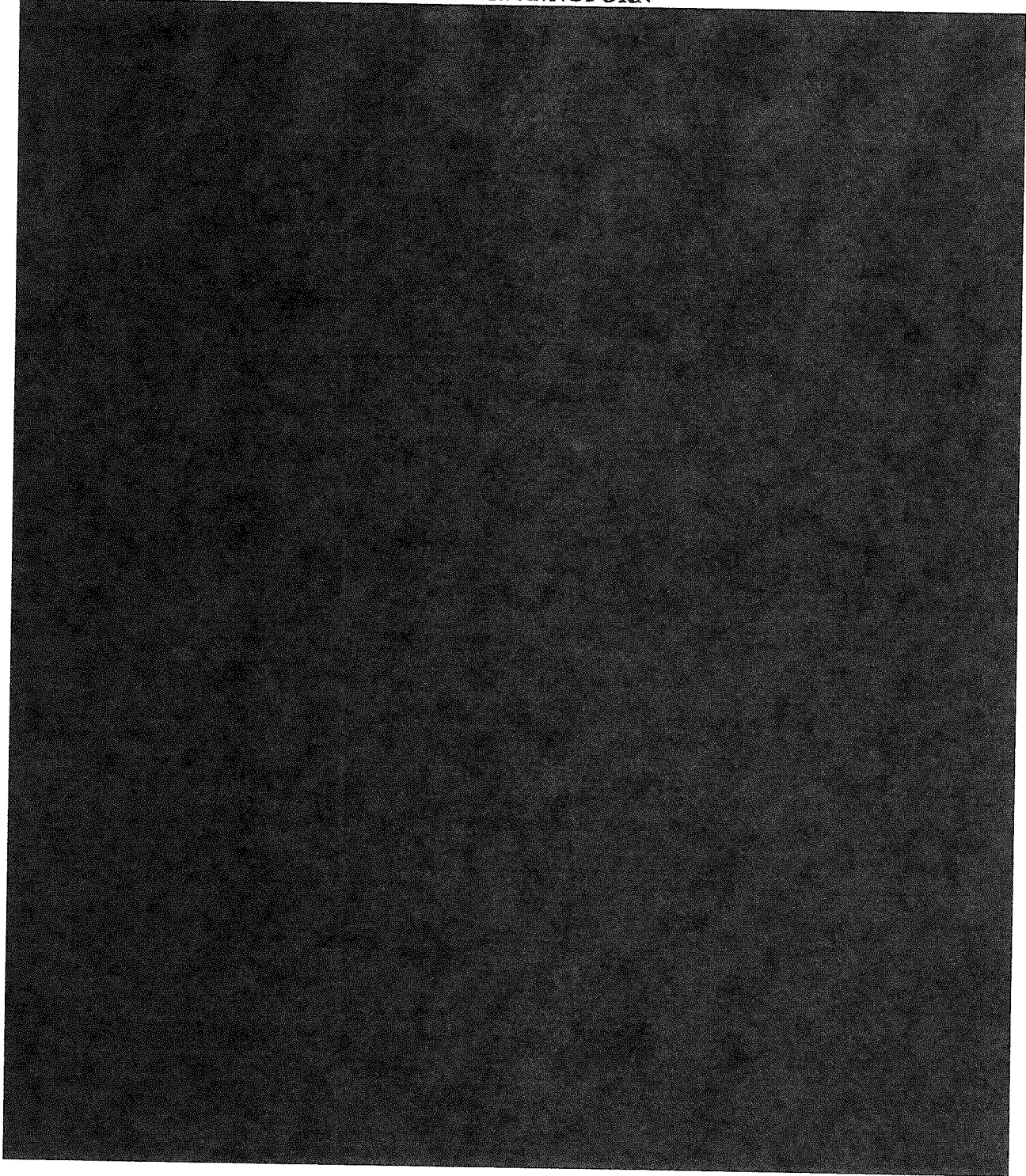
This Opinion and Order addresses the scope of NSA’s acquisition [REDACTED]
[REDACTED] which was more extensive than previously described. [REDACTED]
[REDACTED]

¹ [REDACTED]

² [REDACTED]

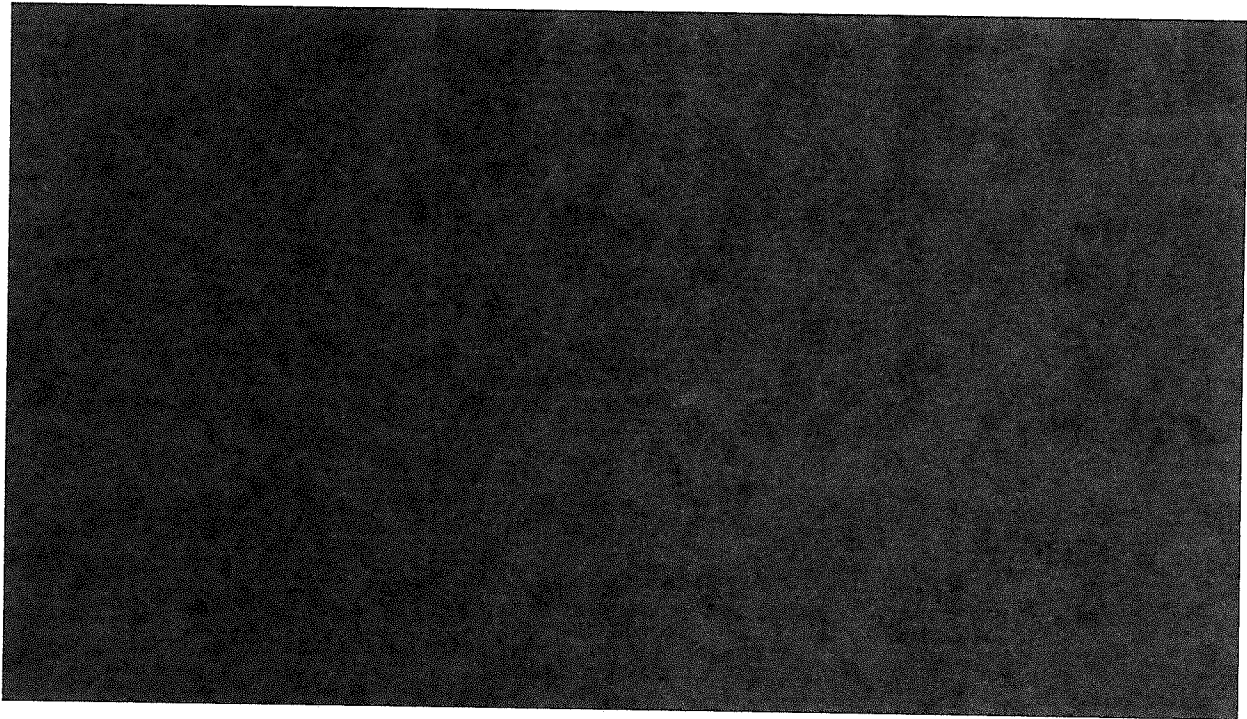
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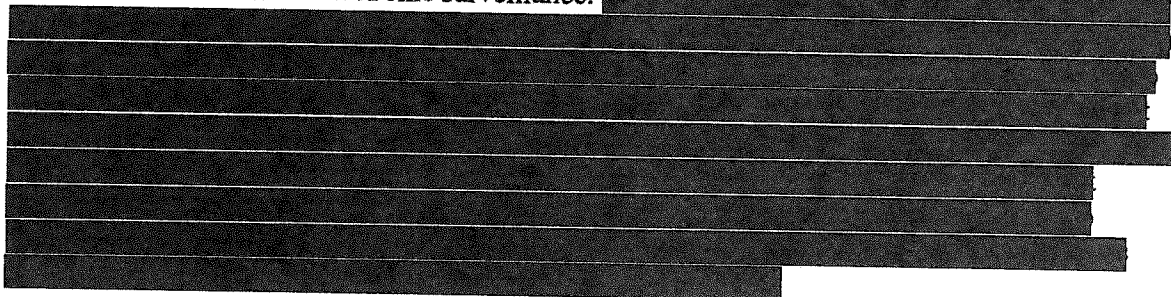


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The [redacted] Order stated that the government “acknowledges that the interception of [redacted] . . . exceeded the scope of surveillance authorized” by the Court, and characterized this over-collection as “unauthorized electronic surveillance.” [redacted] In its Response, however, the Government contends that NSA’s acquisition [redacted] [redacted] involved a violation of applicable minimization procedures, but did not constitute unauthorized electronic surveillance. [redacted]

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When the [redacted] Order was issued, the Court understood the government to have acknowledged that at least some of NSA’s acquisition [redacted] had constituted unauthorized electronic surveillance. [redacted]



[REDACTED]

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In its Response, however, the Government argues that NSA's acquisition [REDACTED] did not involve unauthorized electronic surveillance. For reasons noted in the [REDACTED] Order and discussed herein, the Court concludes that there has been unauthorized electronic surveillance [REDACTED].⁶ [REDACTED]

⁵ [REDACTED]

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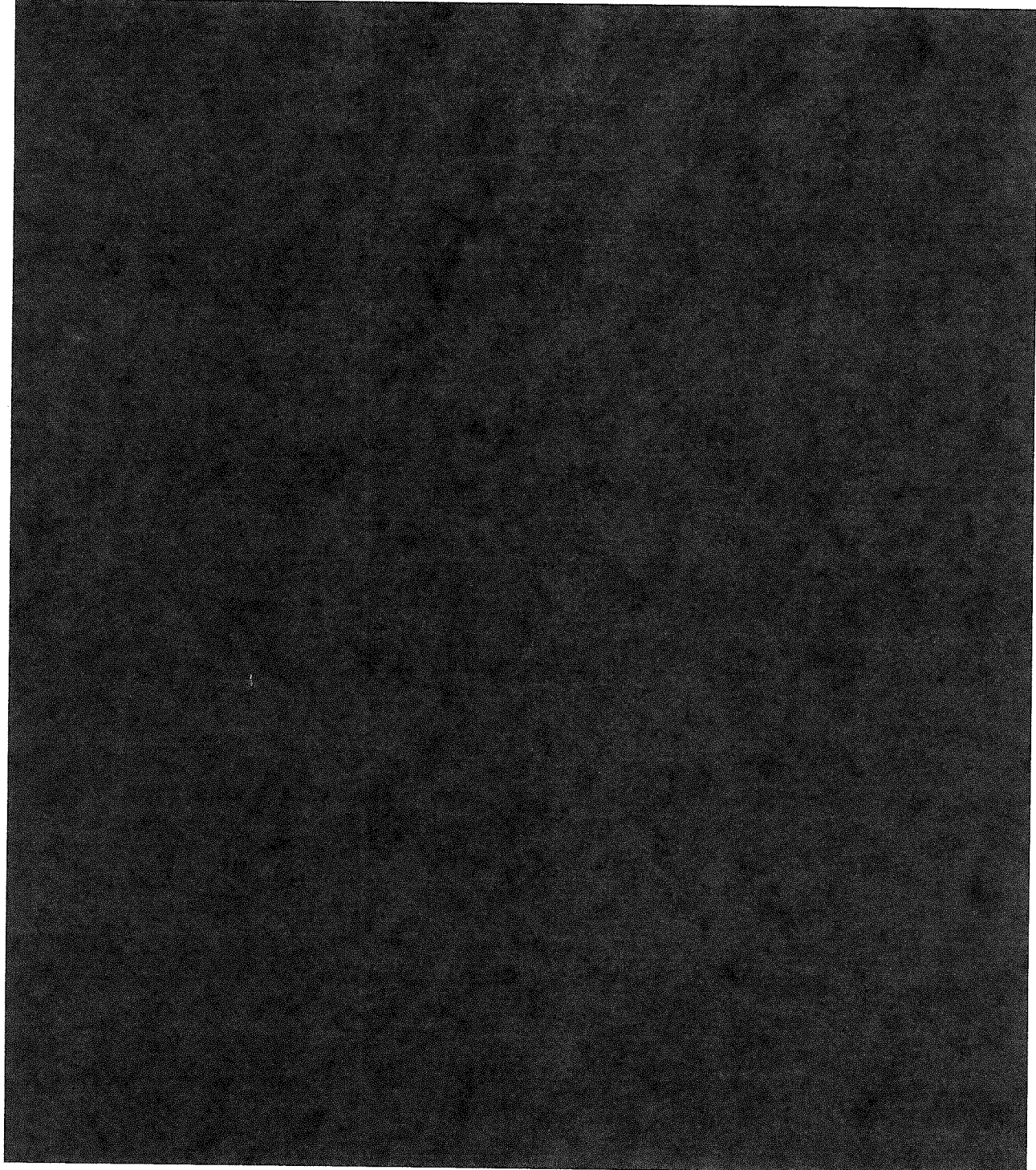
⁶ [REDACTED] this matter still presents a live controversy regarding whether and to what extent the acquisition [REDACTED] constituted unauthorized electronic surveillance. The government's voluntary cessation of allegedly unlawful conduct renders a case moot when "(1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (internal quotations and citations omitted). Both conditions must be satisfied for mootness to obtain. Id.

In this case, it is clear that the second condition is not satisfied (the Court does not express an opinion on the first). The government has undertaken, but not completed, a process to identify and destroy [REDACTED], such that the effects of having acquired [REDACTED] have not been completely eradicated. [REDACTED]

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[REDACTED]

[REDACTED]

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[REDACTED] These unauthorized acquisitions were, by definition, unauthorized electronic surveillance.⁸

[REDACTED] U.S.

[REDACTED] It has been understood from the inception of FISA that minimization procedures could include limitations on what communications may be acquired from surveillance directed at an otherwise authorized facility.⁹ When the government disregards such a limitation, thereby acquiring communications in excess of what the order authorizes, those acquisitions constitute unauthorized electronic surveillance – even though other minimization rules may be directed solely at retention or dissemination, such that violation of those rules would not typically result in unauthorized electronic surveillance.

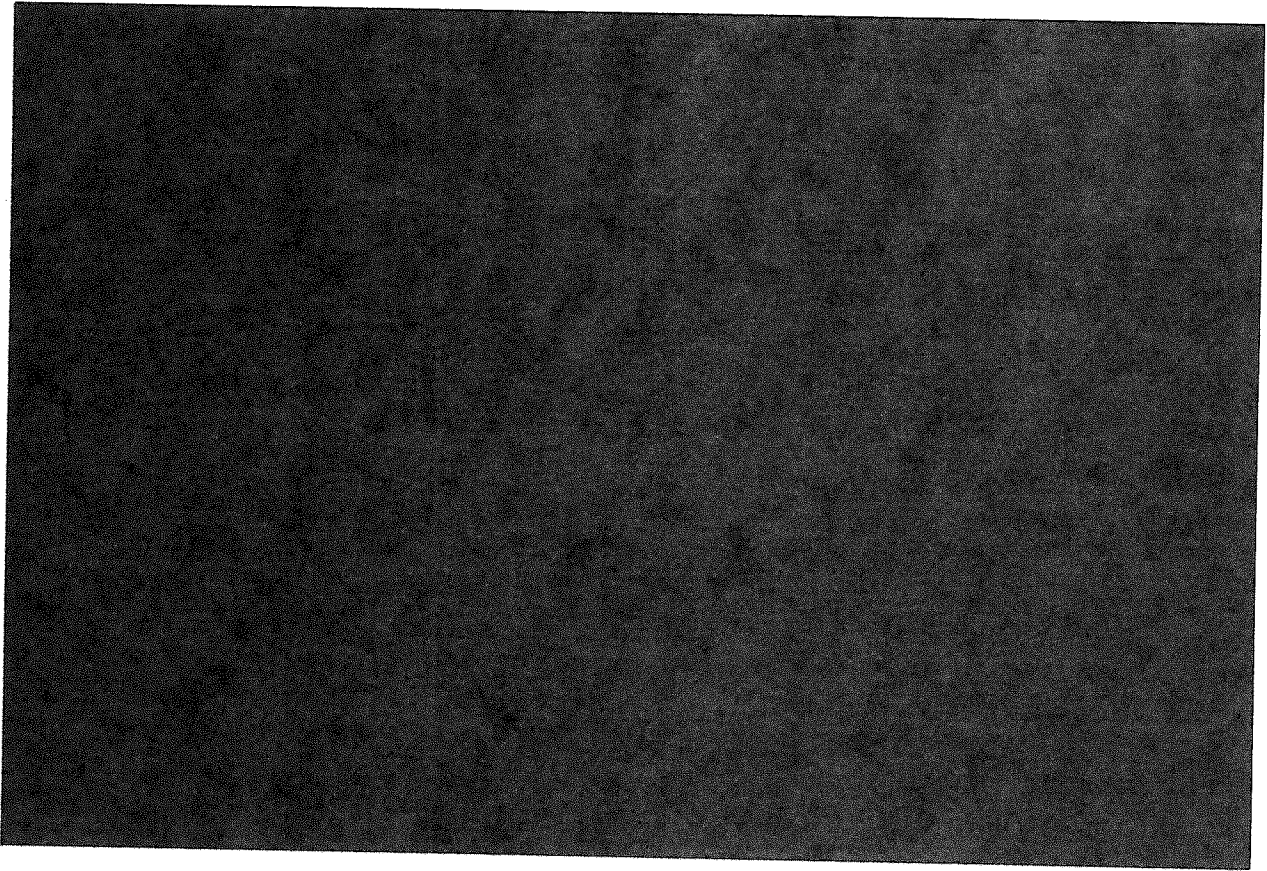
[REDACTED]

⁸ [REDACTED]

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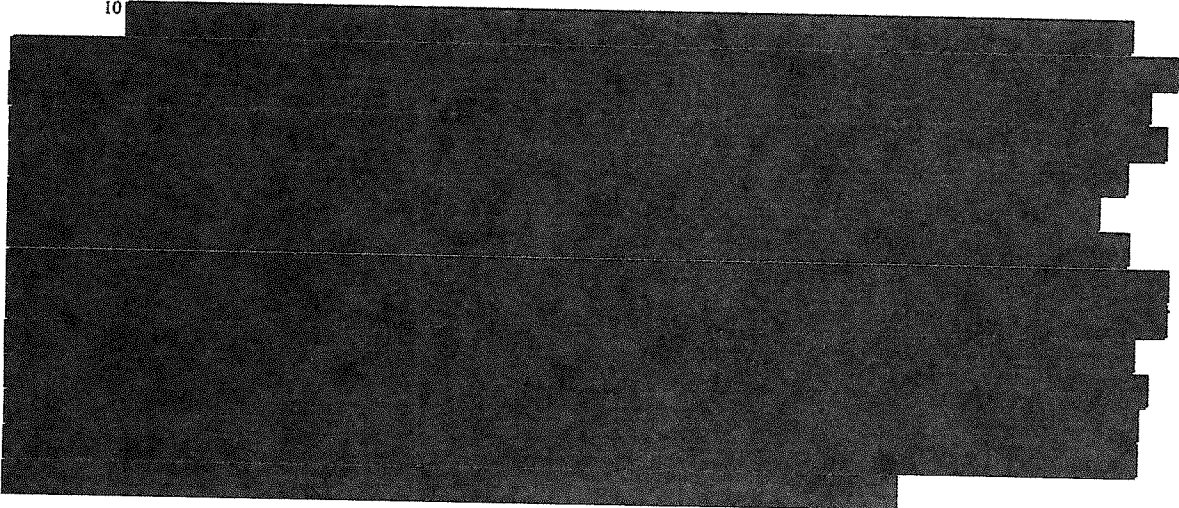
⁹ [REDACTED]

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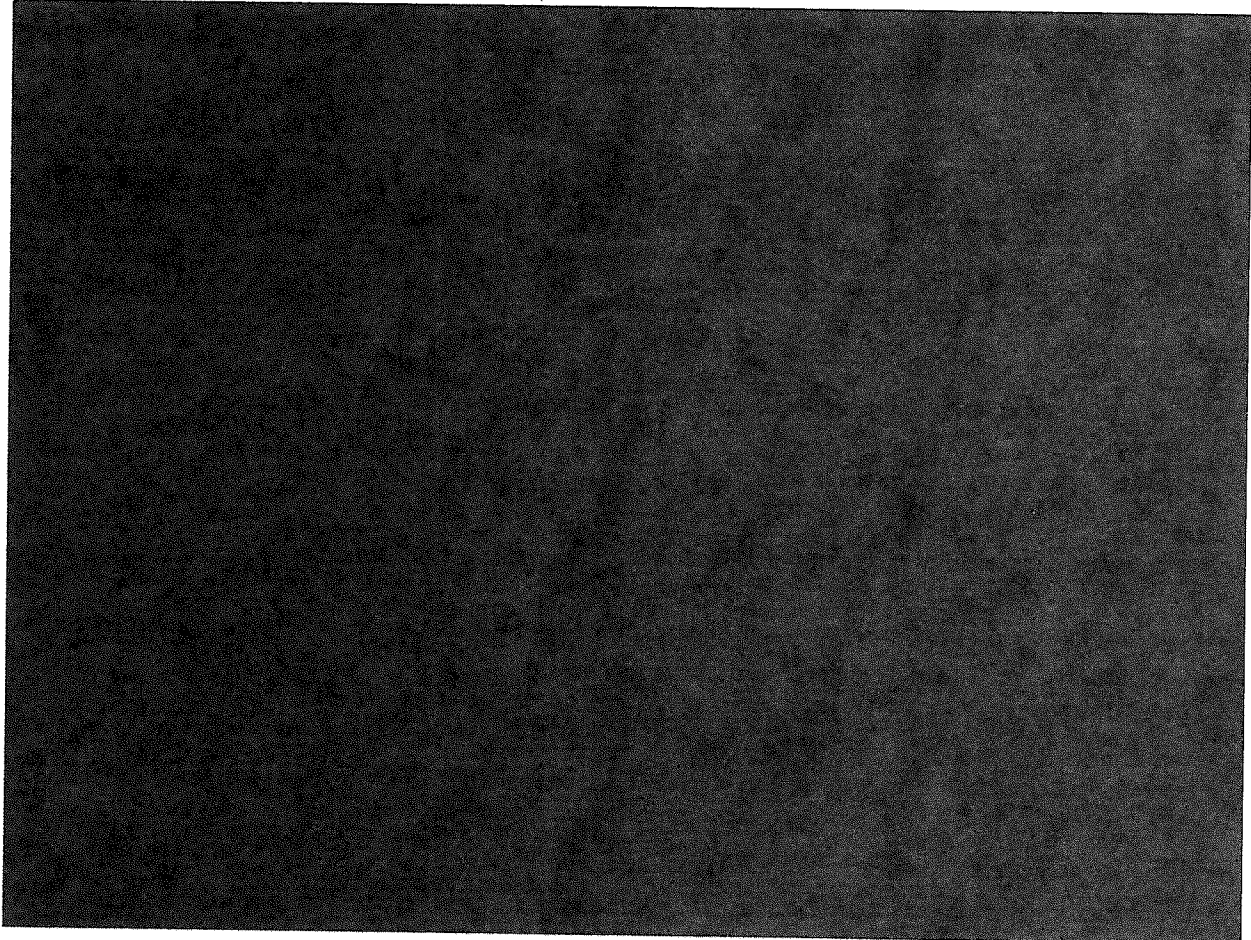
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11 [redacted]

[redacted]

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[REDACTED]

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[REDACTED]

[REDACTED]

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[REDACTED] were supposed to have contemplated electronic surveillance directed at [REDACTED] they failed (as shown below) to comply with several statutory requirements.

[REDACTED]

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[REDACTED]

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(continued...)

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[REDACTED]

[REDACTED] was required to include "the identity, if known, or a description of the specific target of the electronic surveillance." 50 U.S.C. § 1804(a)(2)

[REDACTED]

[REDACTED] was required to include "a statement of the facts and circumstances relied upon by the applicant to justify his belief that . . . each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power." § 1804(a)(3)(B). [REDACTED]

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[REDACTED]

13 [REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

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[REDACTED] In the instant case, the above-noted deficiencies substantially impeded those interests: the Court was deprived of an adequate understanding of the facts known to NSA and, even if the government were correct that acquisition [REDACTED] was authorized, a clear and express record of that authorization is lacking.

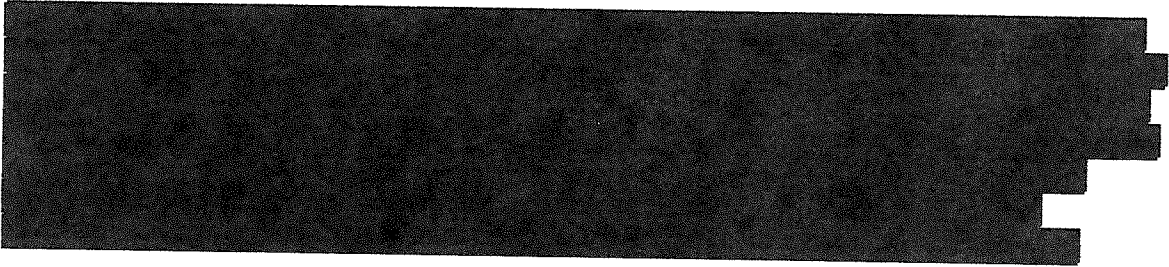
[REDACTED]

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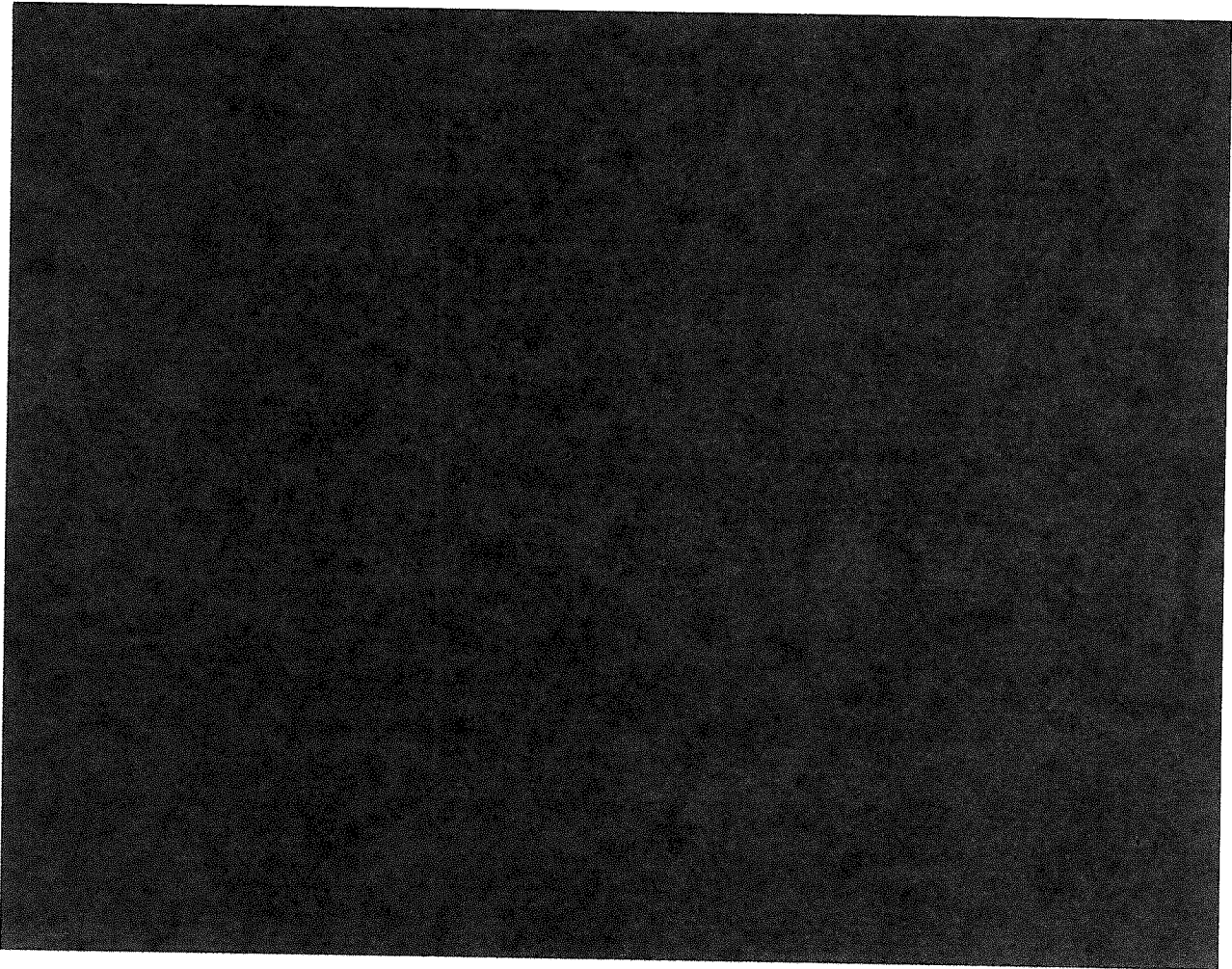
14 [REDACTED]

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[REDACTED]

Nothing in the record provides any reason why the Court would or should have taken such liberties with statutory requirements or imposed greater restrictions on surveillance directed at [REDACTED]

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[REDACTED] These anomalies and inconsistencies can all be avoided by adopting the more reasonable interpretation that the Primary Order (pre-amendment) did not authorize the acquisition [REDACTED] The Court is persuaded that this is the better interpretation, [REDACTED]

[REDACTED] The government's conduct provides additional reason to reject the expansive interpretation [REDACTED] advanced by the government.

To put it mildly, the government is in no position to claim unfair surprise at the interpretation [REDACTED] There is every reason to think that the Court's authorization would have spoken more clearly and explicitly to the acquisition of [REDACTED]

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[REDACTED]
Inexcusably, the government did not disclose those facts [REDACTED]

Moreover, the government's failures in this case are not isolated ones. The government has exhibited a chronic tendency to mis-describe the actual scope of NSA acquisitions in its [REDACTED]

16 [REDACTED]

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17 [REDACTED]

submissions to this Court.¹⁸ These inaccuracies have previously contributed to unauthorized electronic surveillance and other forms of statutory and constitutional deficiency.¹⁹ It is evident that the government needs every incentive to provide accurate and complete information to the Court about NSA operations, whenever such information is material to the case. Resolving in the government's favor an ambiguity that resulted from the government's failure to disclose known material facts about the scope of ongoing NSA surveillance would only diminish such incentives, to the detriment of the Court's ability to discharge its statutory responsibilities in an ex parte process.

Reporting Requirement

FISA criminally prohibits "intentionally . . . disclos[ing] or us[ing] information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized" by FISA or another "express statutory authorization." 50 U.S.C. § 1809(a)(2). [REDACTED]

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The government reports that NSA is in the process of identifying and purging information obtained from the acquisition [REDACTED]. In view of the fact that such information is within the purview of Section 1809(a)(2)'s prohibitions, it is **HEREBY ORDERED** that the government shall submit a report providing an update on the status of these efforts no later than [REDACTED] and at thirty-day intervals thereafter until it reports that such process has been completed.

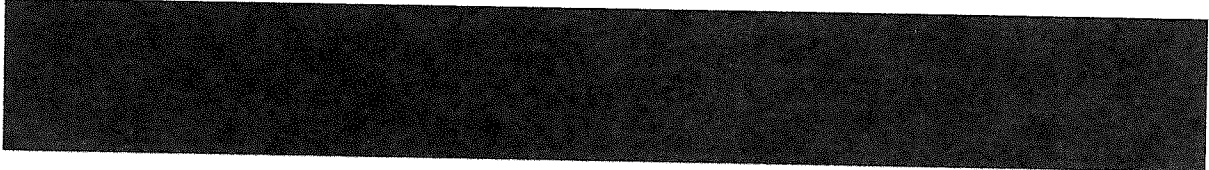
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¹⁹ [REDACTED]

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

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

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