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FILED
KAREN E. SUTTON, CLERK

JUN 26 2008

No. 08-01 (S)
IN THE UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW (U)

U.S. Foreign Intelligence
Surveillance Court of Review

IN RE DIRECTIVES TO YAHOO INC.
PURSUANT TO SECTION 105B OF THE
FOREIGN INTELLIGENCE SURVEILLANCE ACT (S)

ON PETITION FOR REVIEW OF A DECISION OF THE
UNITED STATES FOREIGN INTELLIGENCE SURVEILLANCE COURT (U)

EX PARTE SUPPLEMENTAL BRIEF FOR RESPONDENT (S)

Gregory G. Garre
Acting Solicitor General

Matthew G. Olsen
John C. Demers
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John A. Eisenberg
Office of the Deputy Attorney General
Civil Division

United States Department of Justice

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Classified by: Matthew G. Olsen, Deputy Assistant
Attorney General, NSD, DOJ
Reason: 1.4 (c)
Declassify on: 26 June 2033

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This brief responds to the Court's June 20, 2008 order, providing the Government with an opportunity to respond to Yahoo's argument—raised for the first time in this case during rebuttal at oral argument—that the directives are unlawful because “the surveillance at issue includes [REDACTED]

[REDACTED] See Order, Docket No. 08-01 (June 20, 2008). For several reasons, that argument should be rejected. (S)

At the outset, this argument fails because Yahoo did not properly raise the argument below or in its briefs on appeal, and thus has waived it. In addition, even if the argument had been properly raised, it should be rejected because the Government has not sought to acquire under the Protect America Act the [REDACTED] [REDACTED] of any U.S. person from Yahoo. Under settled standing and ripeness principles, the hypothetical possibility that the Government may do so in the future provides no basis for invalidating the Yahoo directives here. (S)

In all events, the Government's acquisition of [REDACTED] U.S. persons outside the United States is reasonable under the Fourth Amendment. In addition to the many safeguards described in the Government's merits brief, the Government has taken further steps to ensure that its acquisition of [REDACTED] [REDACTED] is closely monitored and not used as a means to avoid the normal FISA process. Moreover, where the Government does acquire [REDACTED]

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[REDACTED] the minimization procedures require that NSA purge (with only limited exceptions) any domestic communications from its collection. These protections—along with the numerous other safeguards discussed in the Government’s merits brief—ensure that acquisitions under the directives are reasonable and thus lawful under the Fourth Amendment. ~~(S//SI//NF)~~

**I. Petitioner’s Belated Challenge to the Acquisition of [REDACTED]
[REDACTED] Of U.S. Persons Is Not Properly Before the Court (U)**

Yahoo’s rebuttal argument—that the directives are unlawful because they permit the Government to acquire [REDACTED]
[REDACTED]
[REDACTED]—should be rejected at the outset. Since this litigation began, Yahoo has known that [REDACTED] were subject to acquisition under the directives. See Joint Appx. (“J.A.”) at 22, 24, 26 (directives to Yahoo expressly identifying [REDACTED]). Yet, Yahoo did not make the argument before the Foreign Intelligence Surveillance Court, and did not raise it in either of its briefs before this Court. The argument has thus been waived. See United States v. Godines, 433 F.3d 68, 70 (D.C. Cir. 2006); Sheinkopf v. Stone, 927 F.2d 1259, 1263 (1st Cir. 1991). ~~(S)~~

In addition, even if the argument had been properly raised, Yahoo may not press it here. The Government has not sought to acquire any U.S. person’s [REDACTED]
[REDACTED] from Yahoo, and on only one occasion has the Government

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sought such information with respect to a U.S. person under the Protect America Act. See Declaration of [REDACTED] (“[REDACTED] Decl.”) at 4-5 (attached as Ex. 1). As a result, this challenge is not ripe, and Yahoo lacks standing to press it. See New York v. Ferber, 458 U.S. 747, 767 (1982) (“a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court”); accord Warth v. Seldin, 422 U.S. 490, 499 (1975). Yahoo may not raise an as-applied challenge to the directives based on conduct that it has not experienced. And any facial challenge must be rejected as long as the directives are capable of constitutional application in some situation, which, as the court below held and Yahoo itself concedes, they clearly are. (S)

II. The Government’s Acquisition of [REDACTED] of U.S. Persons Abroad Pursuant to the Directives is Constitutional (U)

In any event, the acquisition of foreign intelligence information from the [REDACTED] of a U.S. person outside the United States is reasonable in these circumstances and therefore constitutional. (S)

To begin with, the acquisition of such information with respect to U.S. persons abroad is the exception rather than the rule. Since the Government began acquiring information pursuant to the Protect America Act, [REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (~~S//SI~~)

Moreover, as set forth in its merits brief and at oral argument, the Government has adopted numerous procedures to tailor its foreign intelligence collection and to protect the privacy of U.S. persons. See Gov't Br. at 34-53.² With respect to [REDACTED], there are additional factors that further establish the reasonableness of the Government's acquisition. In particular: (1) the Government requires an additional, independent level of review and approval before it acquires [REDACTED]; (2) the Government's minimization procedures limit the retention, use, and dissemination of [REDACTED] and (3) the privacy interests of

¹ [REDACTED]
[REDACTED] (~~TS//SI/NF~~)

² The FISC recently approved the FBI's supplemental targeting procedures [REDACTED], which [REDACTED]. See Mem. Op. and Order, [REDACTED] (FISC June 18, 2008) (attached as Ex. 2). (~~TS//SI//OC,NF~~)

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U.S. persons in communications [REDACTED]

[REDACTED] (S)

Additional Protections for [REDACTED] Because [REDACTED]

[REDACTED]

[REDACTED] the Government has sought to ensure that the Protect America Act is not used to circumvent the traditional FISA process. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] FBI OGC then determines whether the acquisition should take place and what, if any, additional measures should be adopted. *Id.* In addition, the FBI is required to give notice of the collection to NSA, the Department of Justice's National Security Division, and the Office of the Director of National Intelligence. See [REDACTED] Decl., Ex. A at 6. (S)

Since the acquisition of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See id. at 5-6. ~~(S//SI)~~

As the Supreme Court has recognized, that such decisions are reviewed by an independent official within the Executive Branch (in the one instance referenced above, the FBI General Counsel herself approved the collection, id.), is an important safeguard establishing the reasonableness of the surveillance. See Griffin v. Wisconsin, 483 U.S. 868, 879-80 (1987). Moreover, that only one U.S. person has been subject to the acquisition of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ~~(S)~~

Minimization Procedures. Even where the Government acquires the [REDACTED] [REDACTED], any privacy interests of U.S. persons in such [REDACTED] are further protected by the minimization procedures

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the Government employs. In particular, the NSA's minimization procedures provide that NSA must destroy all domestic communications unless they contain foreign intelligence information, are evidence of a crime, or contain certain technical database information. See E.A. 475-76; see also id., at 465-66. Where such communications contain foreign intelligence information, the communications [REDACTED]

[REDACTED]

[REDACTED] Id. at 475. ~~(S//SI)~~

Limited Expectation of Privacy. Finally, the reasonableness of these procedures must be gauged in light of the limited privacy interests that a U.S. person outside the United States retains in information [REDACTED]

[REDACTED] Even outside the foreign intelligence surveillance context, many courts have held that particular user policies or disclaimers may reduce or even eliminate the reasonable expectation of privacy of individuals using such computer networks. See United States v. Simons, 206 F.3d 392, 398 (4th Cir. 2000); Muick v. Glanayre Electronics, 280 F.3d 741, 743 (7th Cir. 2002); see generally United States v. Miller, 425 U.S. 435, 443 (1976). But see Warshak v. United States, 490 F.3d 455, 469-75 (6th Cir. 2007), vacated and reh'g en banc granted by 2007 U.S. App. LEXIS 23741 (Oct. 9, 2007). (U)

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Furthermore, context matters. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

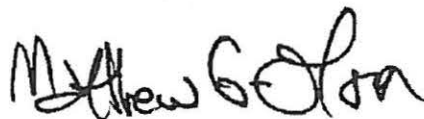
[REDACTED] Any legitimate expectation of privacy that a target of foreign intelligence surveillance has [REDACTED] [REDACTED] is therefore further diminished when the person goes abroad.

In any event, the Court need not decide what privacy interest (if any) a target has in [REDACTED] in the circumstances here. For the purposes of this appeal, the Government allows that an individual may have some expectation of privacy in certain [REDACTED] depending on the particular factual circumstances. But that expectation, at a minimum, would be highly diminished by, for example, the terms of any user agreement and the fact that the target is outside the United States. See Yahoo! Inc.'s Supplemental Briefing on Fourth Amendment Issues at 10 n.16 (filed Feb. 15, 2008) (stating Yahoo's terms of service). And when that diminished privacy interest is balanced against the many protections employed by the Government, and the Government's compelling interest in acquiring foreign intelligence information, the Government's acquisition [REDACTED] is reasonable under the Fourth Amendment. (S)

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Respectfully submitted,



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Office of the Deputy Attorney General

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TAB

1

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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT OF REVIEW
WASHINGTON, DC

IN RE DIRECTIVES TO YAHOO
INC. PURSUANT TO SECTION
105B OF THE FOREIGN
INTELLIGENCE SURVEILLANCE
ACT. (S)

Court of Review Docket: 08-01

DECLARATION OF [REDACTED]
FEDERAL BUREAU OF INVESTIGATION (U)

1. I am [REDACTED] of the Communications Exploitation
Section, Federal Bureau of Investigation ("FBI"). I have held this position since
[REDACTED]. I have been employed by the FBI in a variety of capacities since
[REDACTED]. My primary responsibility with respect to the Protect America
Act is to oversee the FBI's implementation of the Protect America Act, including
[REDACTED]
[REDACTED]. I am personally aware of the facts
contained in this declaration or have been made aware of them through briefings

Classified by: Matthew G. Olsen, Deputy Assistant
Attorney General, NSD, DOJ
Reason: 1.4 (c)
Declassify on: 25 June 2033

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and information provided by FBI and NSA personnel in the course of drafting this declaration. ~~(S)~~

2. On [REDACTED], the FBI began [REDACTED] as authorized under DNI/AG 105B Certifications [REDACTED] among others. As of [REDACTED], FBI has [REDACTED] d

[REDACTED]
reasonably believed to be used by persons located outside the United States. Of these [REDACTED]

[REDACTED] ~~(S//SI)~~

3. Pursuant to a Memorandum of Understanding among the FBI, NSA, and the Central Intelligence Agency ("CIA"), [REDACTED] [REDACTED], NSA must obtain Attorney General authorization, pursuant to the procedures under Executive Order 12333, section 2.5, [REDACTED]. A true and correct copy of this Memorandum of Understanding is attached as Exhibit A to this Declaration. ~~(S)~~

4. Prior to [REDACTED] [REDACTED], FBI conducts due diligence to determine whether the [REDACTED]

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[REDACTED] user of that account is reasonably believed to be located within the United States or is a United States person. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (S)

5. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] (S)

6. To the best of my knowledge, the FBI procedures set forth in paragraphs 4 and 5 have been substantially followed with respect to all FBI requests [REDACTED] pursuant to the Protect America Act. Under the procedures used by the FBI [REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED] A review conducted on May 27, 2008, revealed an error rate of about 3.5 percent, and indicated that none of the errors resulted [REDACTED]

by a person located within the United States [REDACTED]

[REDACTED]. ~~(S)~~

7. The FBI has sought to [REDACTED] pursuant to the Protect America Act from [REDACTED] United States person, [REDACTED] from [REDACTED]

[REDACTED] is not maintained by Yahoo but is

[REDACTED]

[REDACTED]

[REDACTED]. In addition, FBI

assessed, [REDACTED]

[REDACTED] NSA indicates that [REDACTED]

[REDACTED] from outside the United States. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The most recent authorization under Section 2.5

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of Executive Order 12333 for the NSA to conduct electronic surveillance of [REDACTED]
[REDACTED] while he is outside the United States was executed by Deputy Attorney
General Mark Filip on [REDACTED], and is valid for a period of 90 days from
that date. (~~TS//SI//NF~~)

8. The FBI began [REDACTED]
[REDACTED] pursuant to the Protect America Act on [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (S)

I declare under penalty of perjury that to the best of my knowledge the foregoing facts are true and correct. (U)

Signed this 25th day of June, 2008. (U)

[REDACTED]

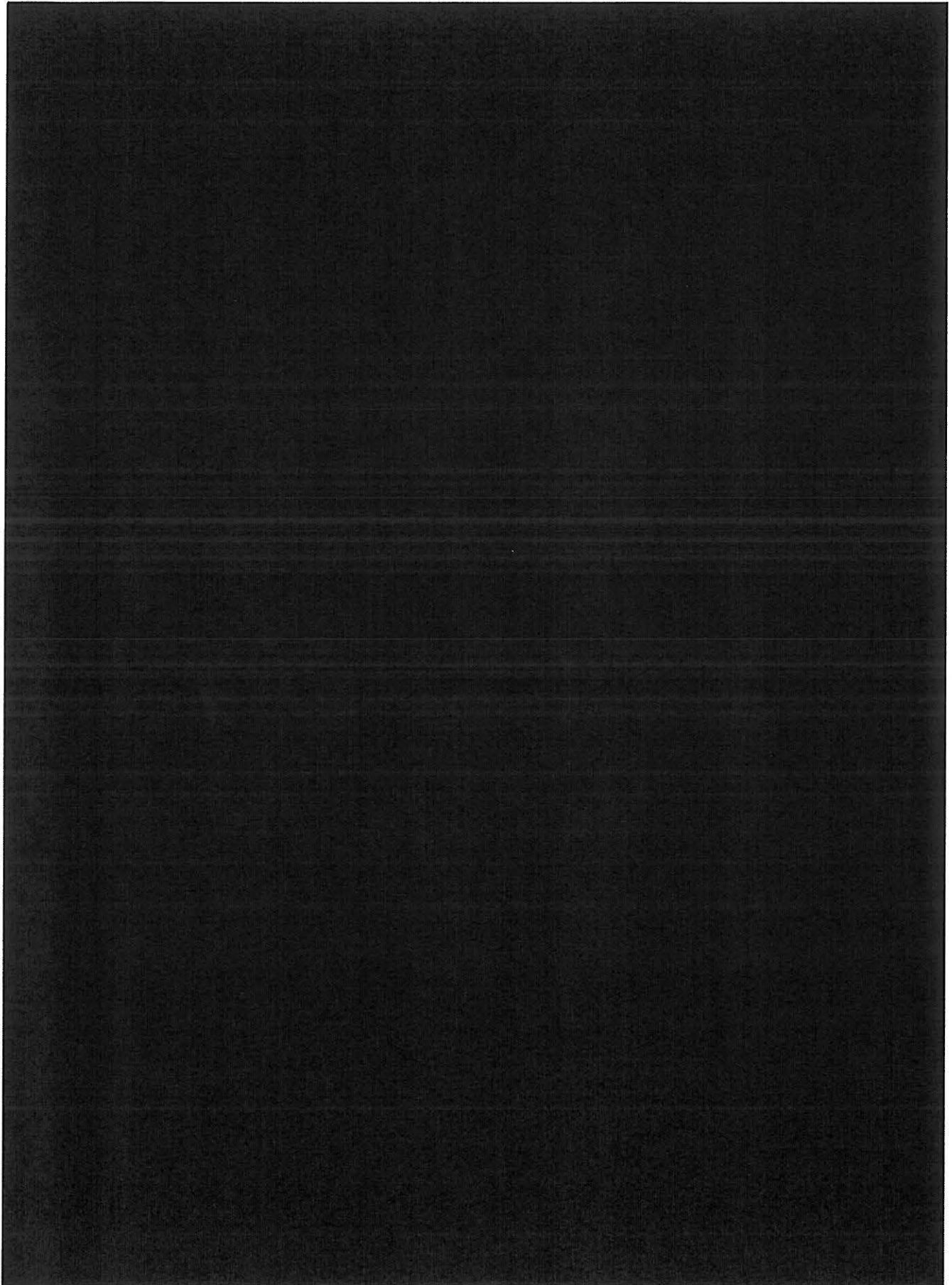
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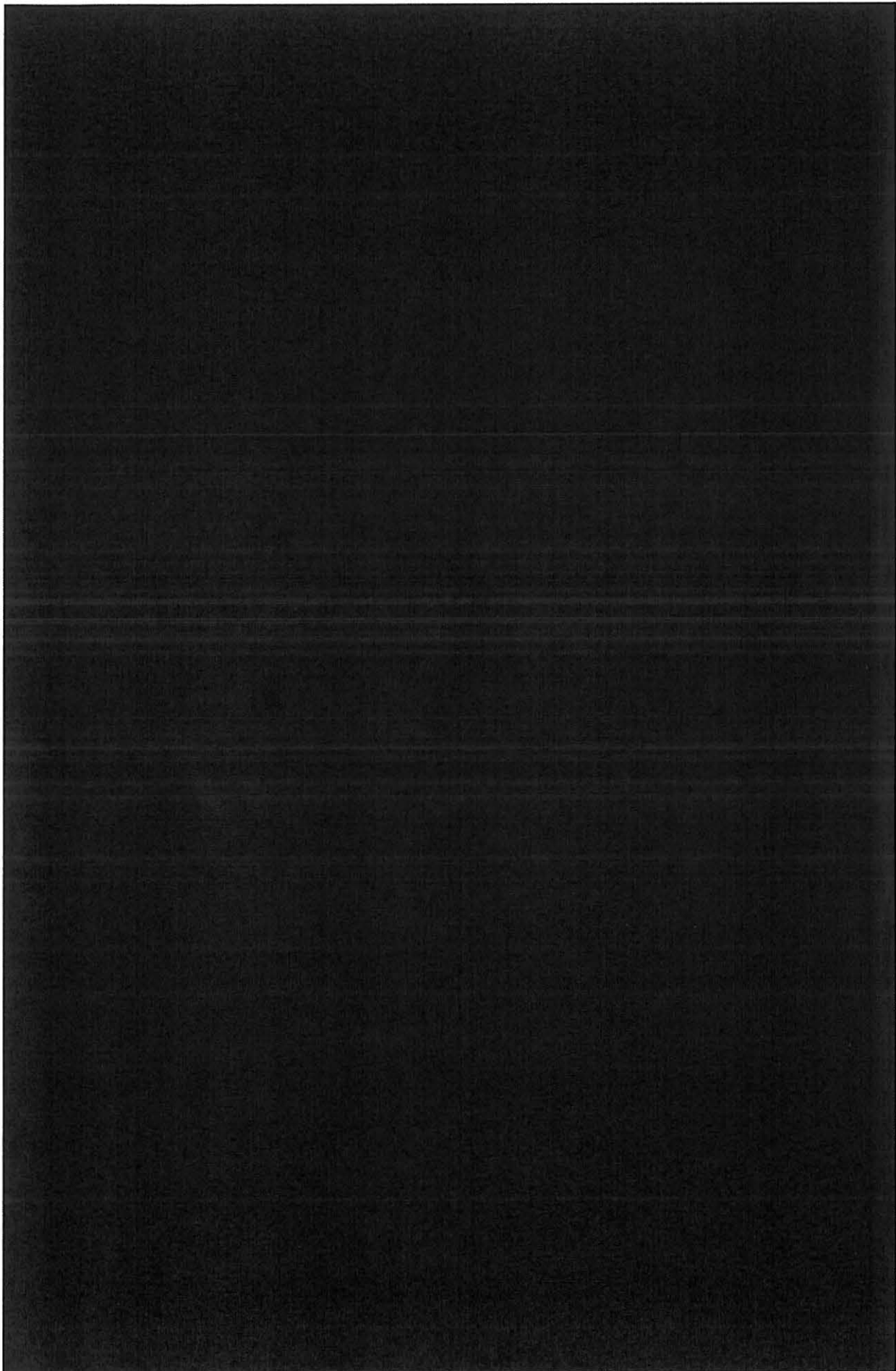
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Federal Bureau of Investigation**

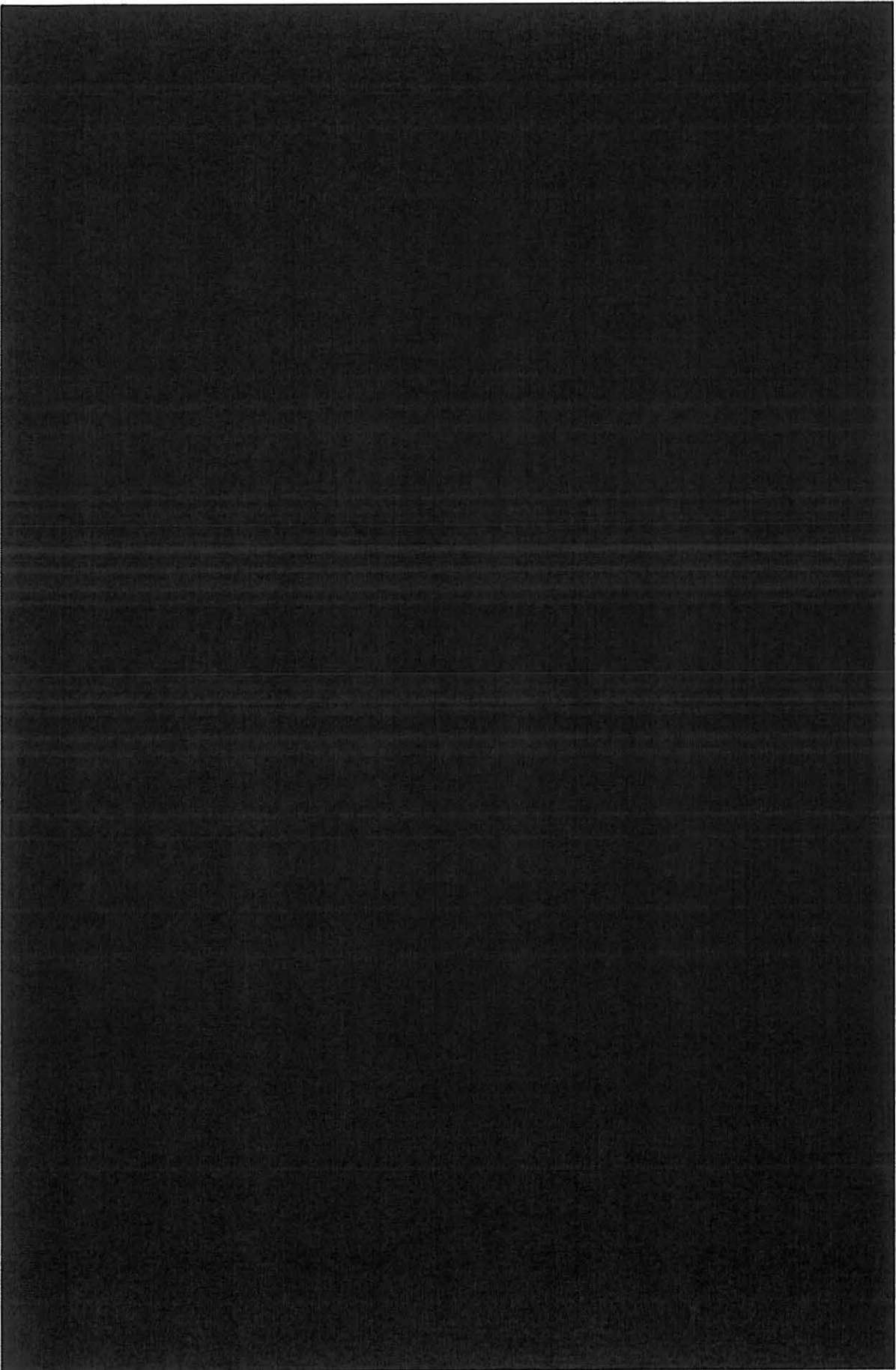
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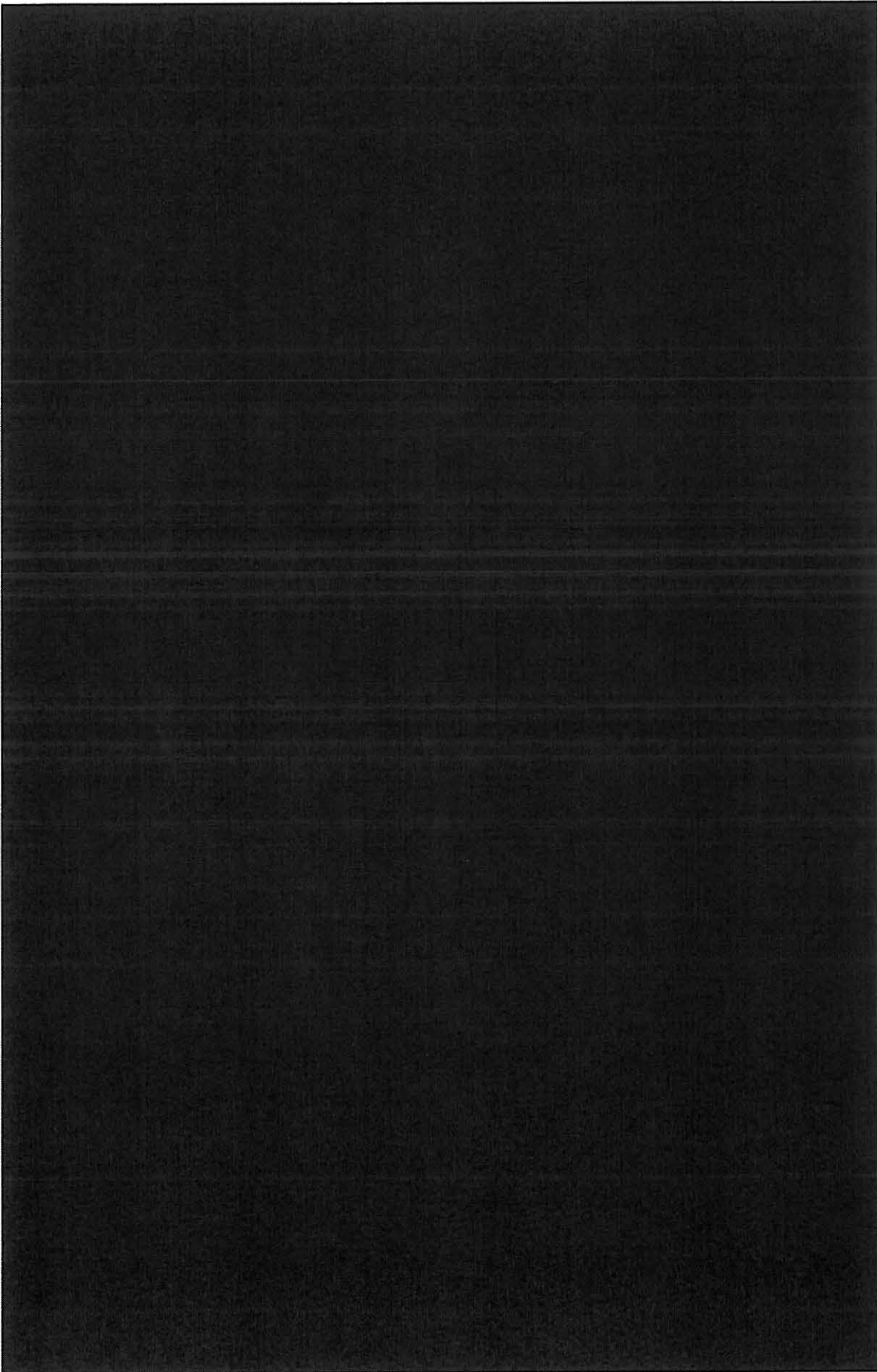
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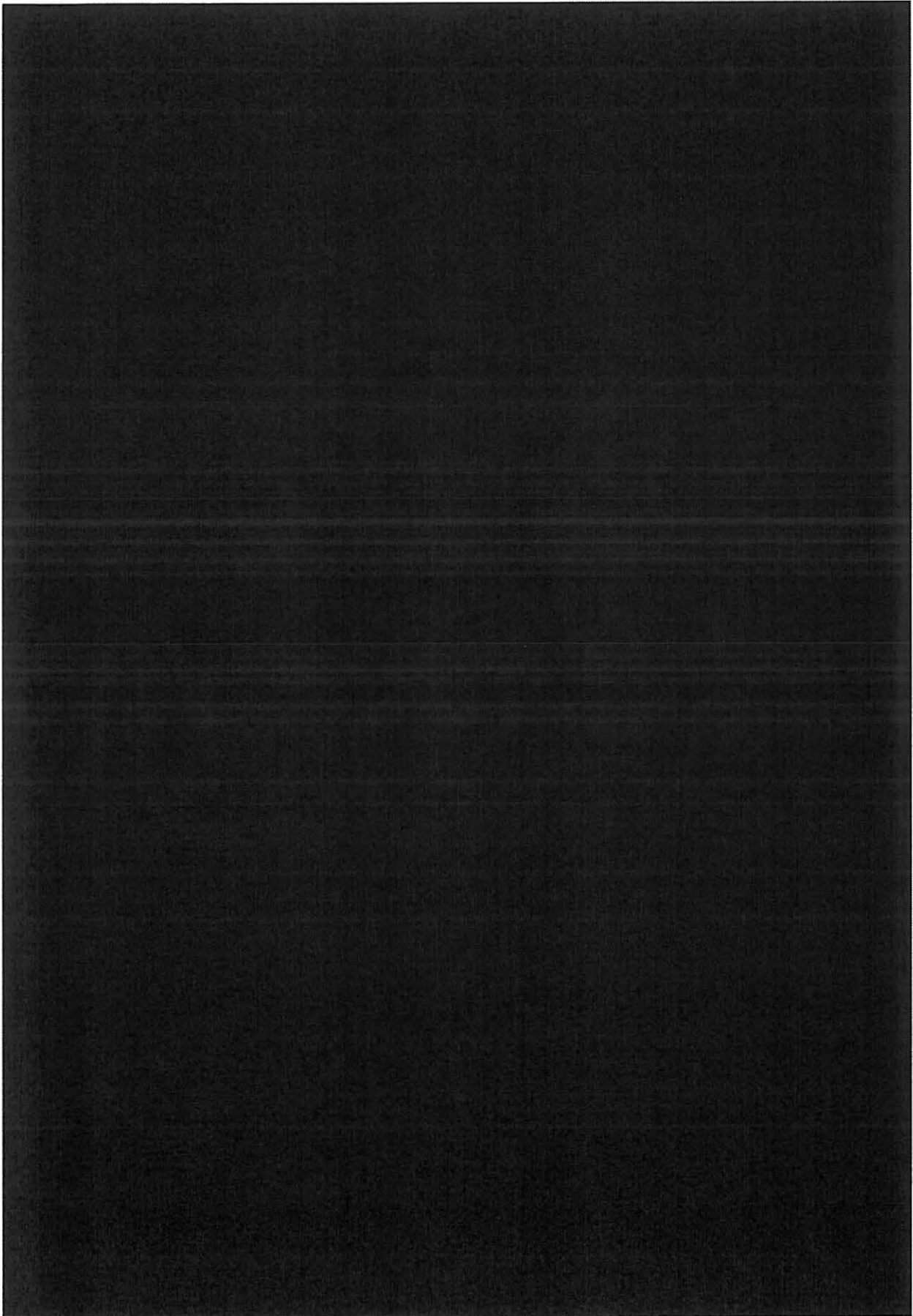
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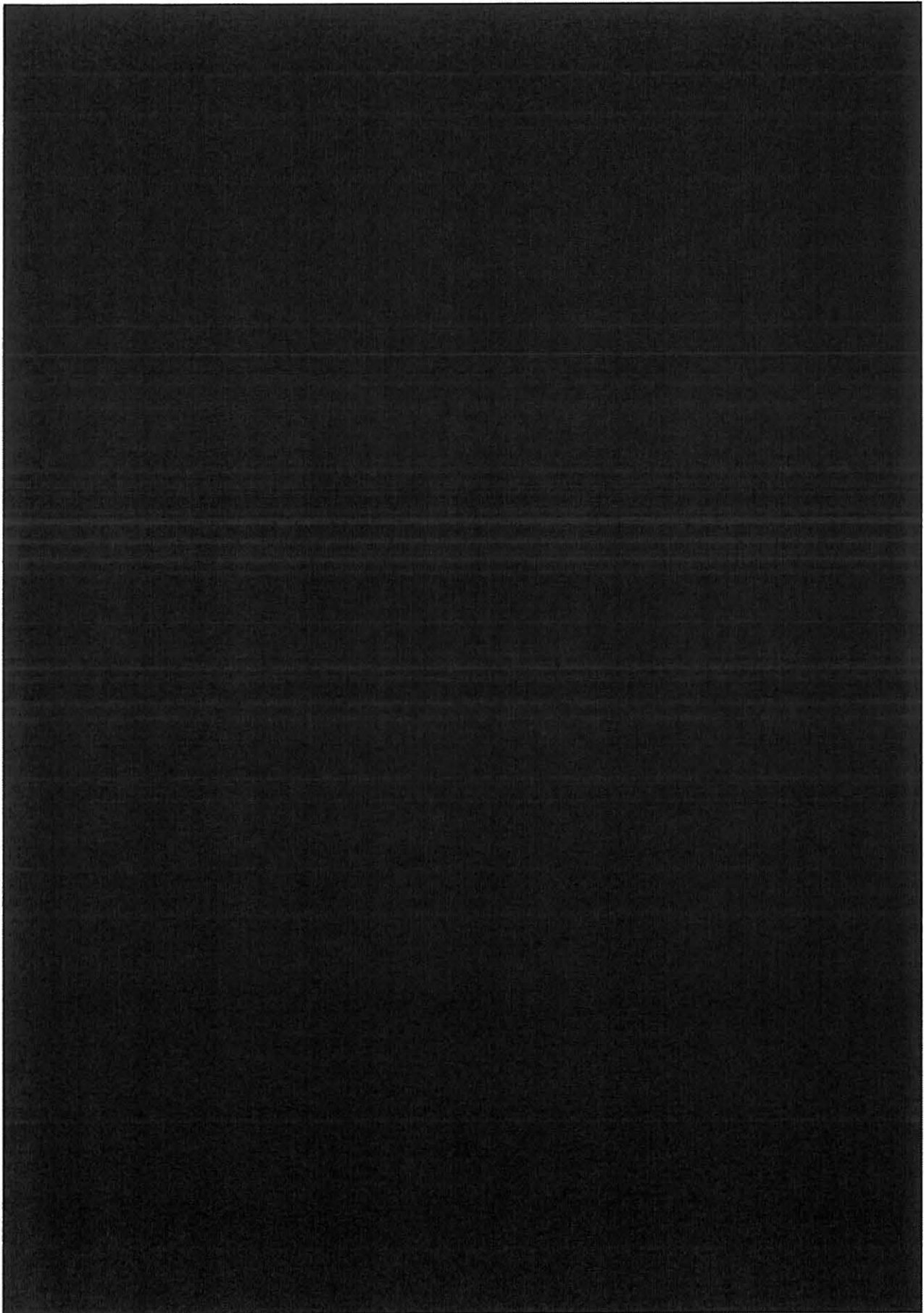


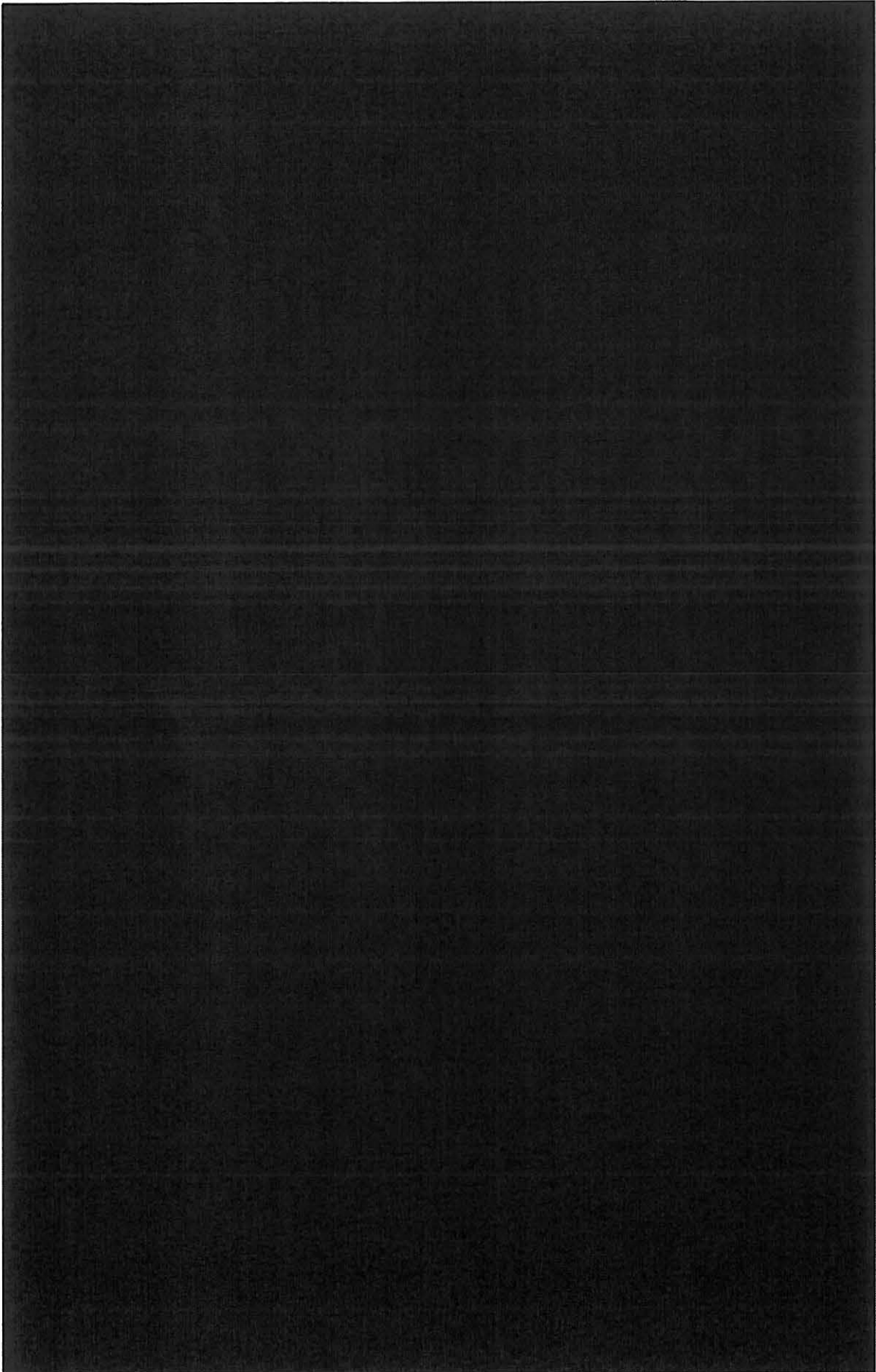


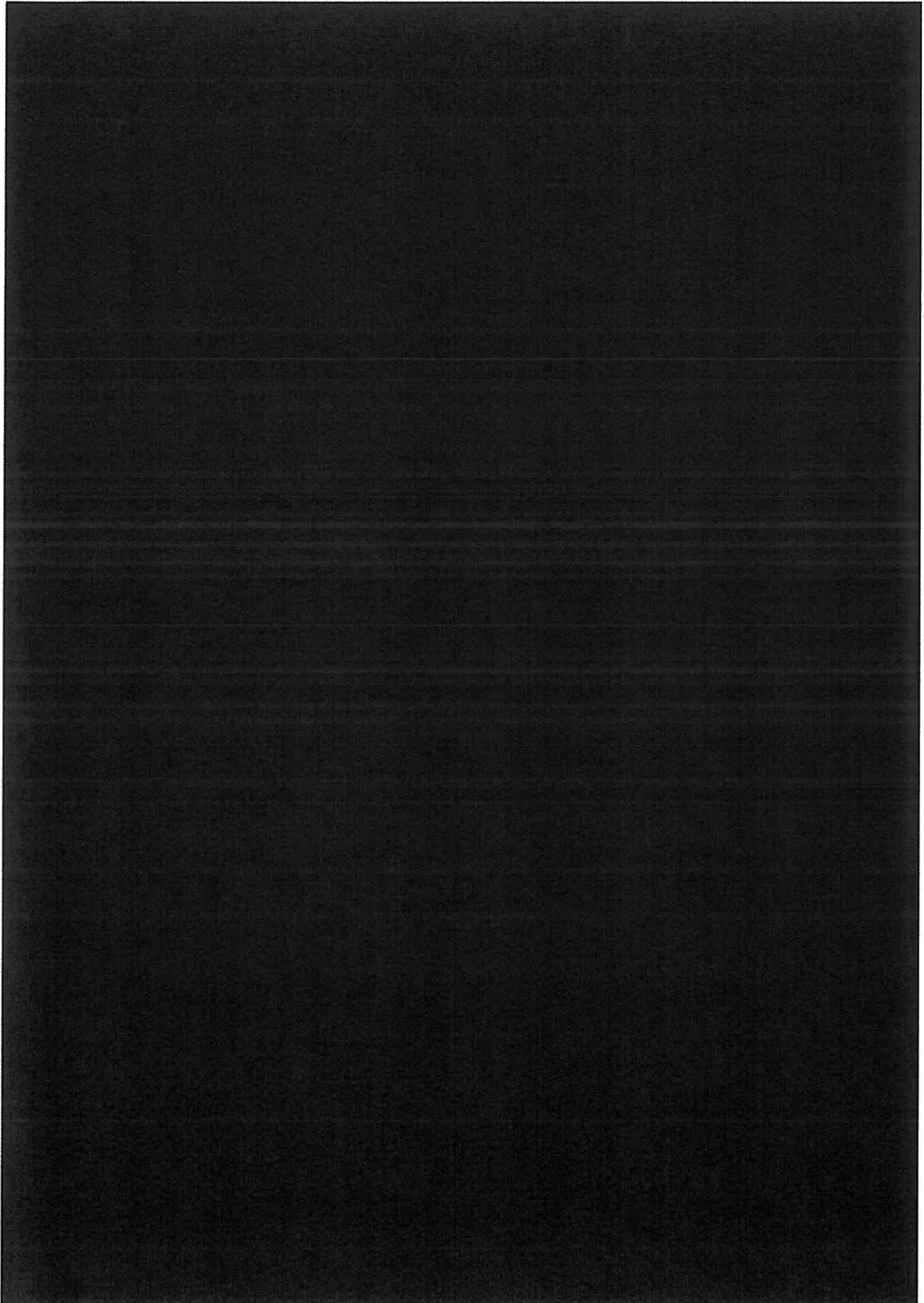


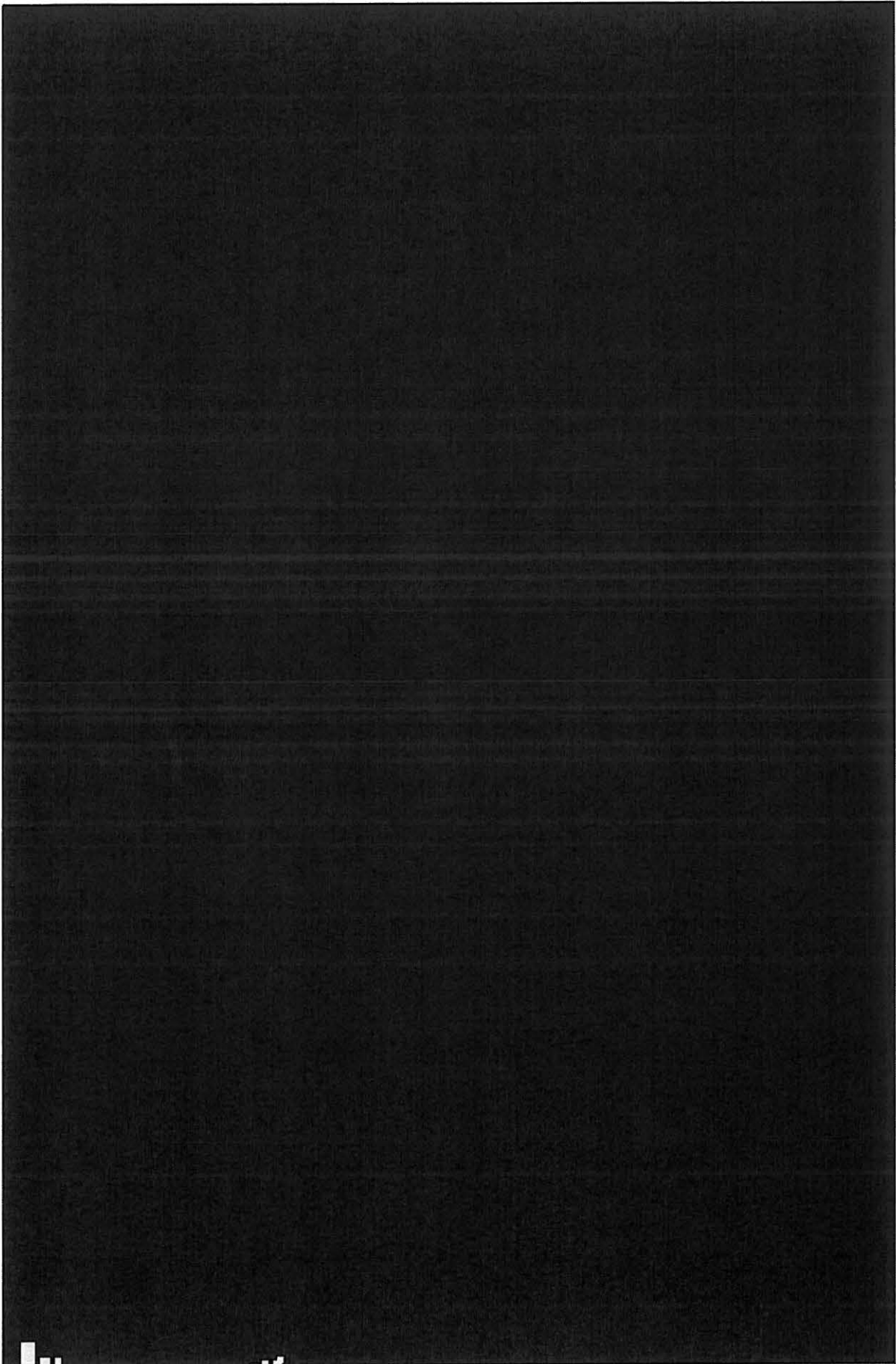


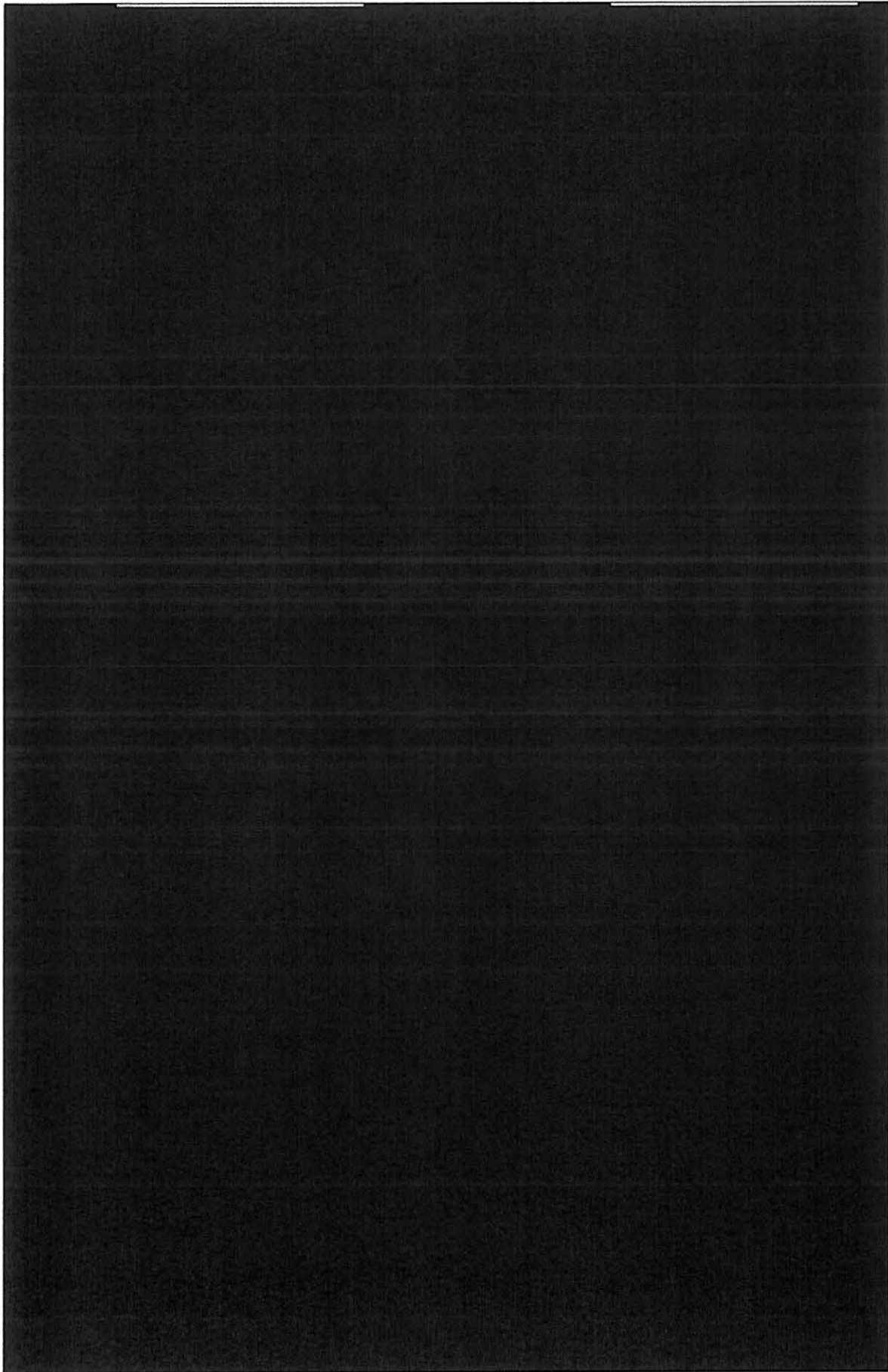


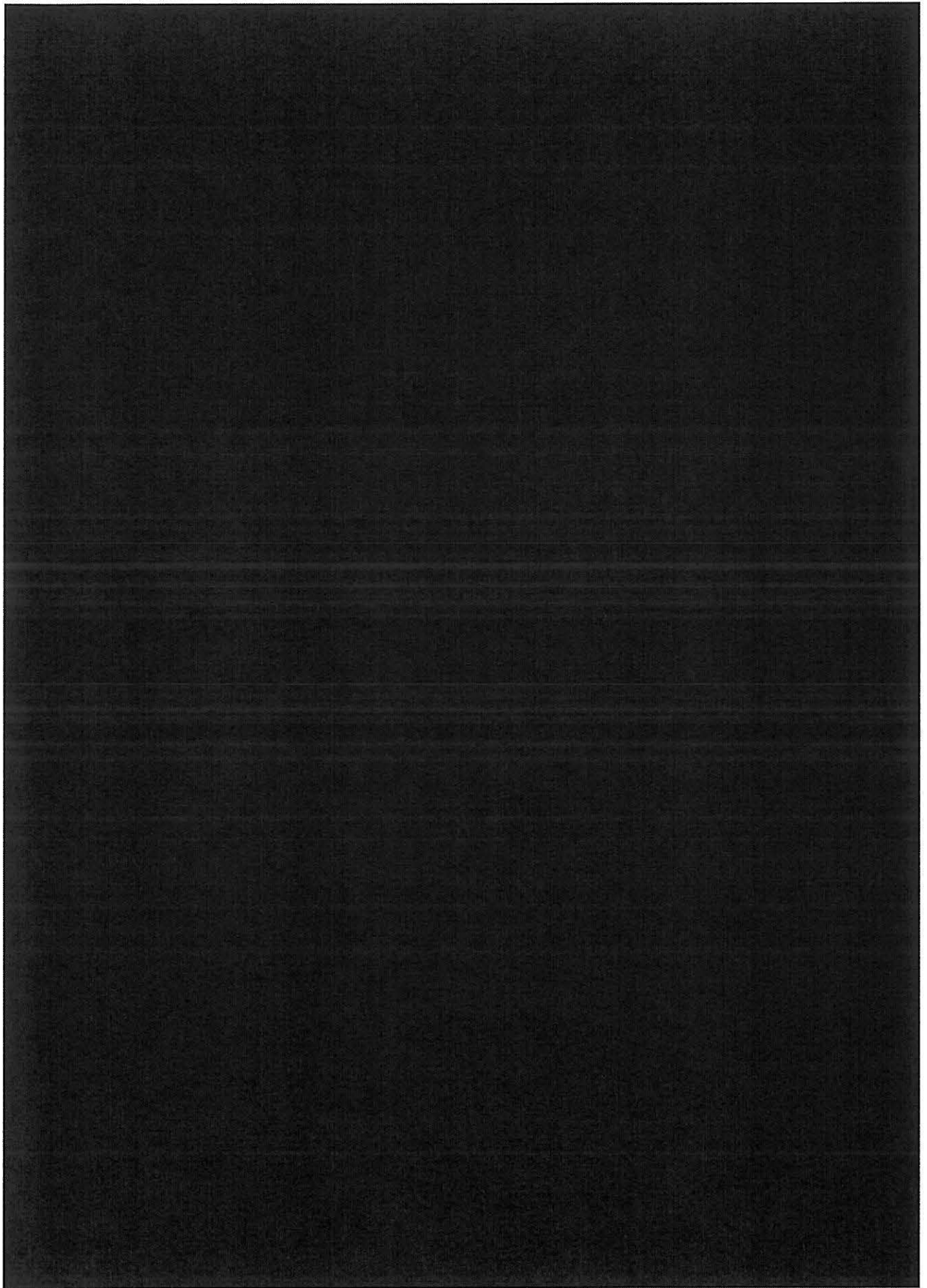












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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.



MEMORANDUM OPINION AND ORDER

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



(collectively the "*07 Dockets*"). 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 February 12, 2008, the government filed in each of the *07 Dockets* 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 [REDACTED]. 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 January 31, 2008, to the certifications in the *07 Dockets*.

On March 3, 2008, the government submitted NSA and FBI procedures in a new matter: [REDACTED]

[REDACTED] This matter involves the acquisition of foreign intelligence information regarding [REDACTED]

[REDACTED]

Because the FBI and NSA procedures submitted in Docket No. [REDACTED] are quite similar to the procedures submitted in the *07 Dockets*, the Court has consolidated these matters for purposes of its review under 50 U.S.C. § 1805c.

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 each of the *07 Dockets*, and the NSA and FBI procedures submitted in Docket No. [REDACTED]

[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. [REDACTED] *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] of 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 in the *07 Dockets* 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.⁵ 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 the [REDACTED] docket and the FBI procedures submitted in all [REDACTED] of the above-captioned dockets. Each set of procedures is discussed below.

A. The NSA Procedures in the [REDACTED] Docket

The NSA procedures in the [REDACTED] docket are similar in most respects to the NSA procedures in the *07 Dockets*, which are discussed in the *January 15 Opinion*. Most of the differences in the

⁵ See Docket Nos. [REDACTED] Transcript of Proceedings held December 12, 2007, at 56-57; see also Docket No. [REDACTED] 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 the [REDACTED] docket and the NSA procedures in the *07 Dockets* is that the [REDACTED] procedures state:

If NSA inadvertently acquires a communication sent to or from the target while the target is or was located inside the United States, such communication will ordinarily be destroyed upon recognition. However, the Director of NSA may authorize retention and use of such inadvertently acquired communications if he determines in writing that they contain significant foreign intelligence.

⁷ Compare Docket No. [REDACTED] NSA Procedures at 4 (referring to [REDACTED] with Docket No. [REDACTED] NSA Procedures at 4 (referring in otherwise identical text to [REDACTED]. In addition, the NSA procedures in the [REDACTED] docket state that, [REDACTED]. See Docket No. [REDACTED] NSA Procedures at 7. The NSA procedures discussed in the *January 15 Opinion* do not include such a statement; however, the government has represented that it would adhere to the same limitation in implementing the corresponding [REDACTED] provisions of those procedures. See *January 15 Opinion* at 22 n.20.

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Docket No. [REDACTED] NSA Procedures at 6. The NSA procedures in the *07 Dockets* 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 the [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(e)(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 the [REDACTED] docket "clearly erroneous" for purposes of review under § 1805c.

⁹ All [REDACTED] sets of NSA procedures provide that, upon learning that a targeted person is inside the United States, NSA will "[i]nminate the acquisition from that person without delay and determine whether to seek authorization to conduct electronic surveillance under applicable provisions of [the Foreign Intelligence Surveillance Act]." [REDACTED]

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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 [REDACTED] by the FBI.¹⁰ These [REDACTED] sets of 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 the *07 Dockets* 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 See Docket No. [REDACTED] Procedures Used by FBI to Acquire Foreign Intelligence Information [REDACTED] at 1 [REDACTED]

[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.

¹² See [REDACTED]

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explained above, the Court also finds that the NSA procedures in the [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 "provide the FBI . . . with an explanation of NSA's conclusion that the user of the Designated Account is a person reasonably believed to be located outside the United States," *FBI Procedures* at 1, which the FBI reviews "in consultation with NSA." *FBI Procedures* in Docket Nos. [REDACTED] at 1; *FBI Procedures* in Docket Nos. [REDACTED] at 1-2. If NSA's explanation is "sufficient," the FBI will [REDACTED]

[REDACTED]
concerning the Designated Account and its presumed user." [REDACTED]

[REDACTED] . . . [the user's] location inside or outside the United States."

[REDACTED] information indicating that the user is inside the United States (or otherwise indicating that the acquisition [REDACTED] would be inappropriate), then the FBI will [REDACTED] with the assistance of a communications service provider. *Id.* at 2. "If the FBI locates information indicating that . . . the user of the Designated Account . . . is located inside of the United States," the FBI will inform NSA [REDACTED]

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[REDACTED] will not be acquired (unless it is subsequently determined that the user is outside the United States). *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 Conversely, "[i]f NSA analysis . . . indicates that a user of a Designated Account . . . is actually located within the United States . . . , the NSA shall promptly advise the FBI, and FBI will terminate [REDACTED] with respect to the Designated Account." *Id.*

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

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, or information retained for cryptanalytic, traffic analytic, or signal exploitation purposes.

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 § 1805a(e), it is hereby ORDERED that the continued use of such procedures is approved.

ENTERED this th 18 day of June, 2008, regarding DNI/AG 105B Certifications


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

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KAREN E. SUTTON, CLERK

JUN 26

CERTIFICATE OF SERVICE (U)U.S. Foreign Intelligence
Surveillance Court of Review

I hereby certify that, on June 26, 2008, true and correct copies of the Government's Notice of Filing, the Ex Parte Supplemental Brief for Respondent, and this Certificate of Service were submitted, by hand delivery, to a Court Security Officer for delivery to the Court. True and correct copies of the Government's Notice of Filing, the Redacted Supplemental Brief for Respondent, and this Certificate of Service were submitted, by hand delivery, to a Court Security Officer for delivery to counsel of record for Yahoo!, Inc. (S)

Respectfully submitted,


Deputy Unit Chief
National Security Division
U.S. Department of Justice~~TOP SECRET//COMINT//ORCON, NOFORN~~

