FBI INFO.
CLASSIFIED BY NSICG J37J85T94
REASON: 1.4 (C)
DECLASSIFY ON: 07-21-2039
DATE: 07-21-2014

~~SECRET~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

IN RE [redacted], A.K.A [redacted], A U.S. PERSON,	:	Docket No.: [redacted]
IN RE [redacted], A.K.A. [redacted] A U.S. PERSON,	:	Docket No.:
IN RE [redacted] A.K.A. [redacted], A U.S. PERSON	:	Docket No.:

b7E

VERIFIED MEMORANDUM OF LAW IN RESPONSE TO THE COURT'S [redacted] SUPPLEMENTAL ORDER

b7E

~~SECRET~~

Classified by: David S. Kris, Assistant Attorney General, NSD, DOJ
Reason: 1.4(c)
Declassify on: 17 August 2034

TABLE OF CONTENTS

I. BACKGROUND: THE 2006 MEMORANDA AND REPORT (U) 2

II. STATEMENT OF FACTS CONCERNING [redacted] (U) 7 b7E

A. [redacted] 7 b7E

1. [redacted] 9 b7E

2. 17

3. 20

B. [redacted] 23 b7E

III. ANALYSIS OF LAW (U) 30

A. [redacted] 32 b7E

1. [redacted] b7E

2. [redacted] b7E . 34

3. [redacted] b7E 38

B. The Legislative History of the Criminal Pen Register Statute Confirms that Congress Intended [redacted] b7E 43

1. [redacted] b7E 43

2. 48

3. 52

C. [redacted] b7E 59

D. 61

1. No Clause or Word Should be Rendered Superfluous. (U) 62

2. The Doctrine Against Implied Repeals (U). . . . 65

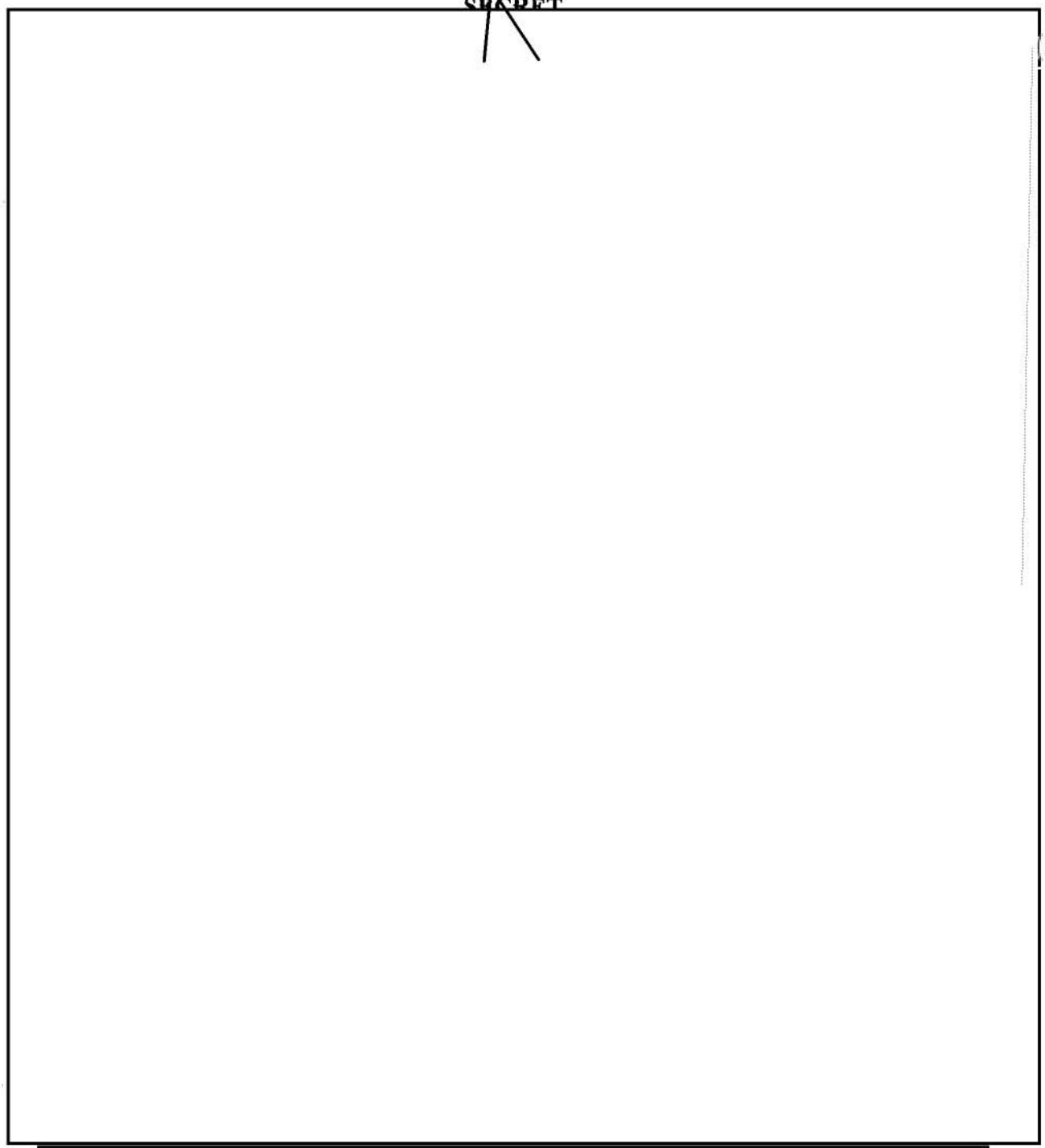
3. The Canon of Constitutional Avoidance (U) . . . 67

E. [redacted] 70

IV. CONCLUSION (U) 75

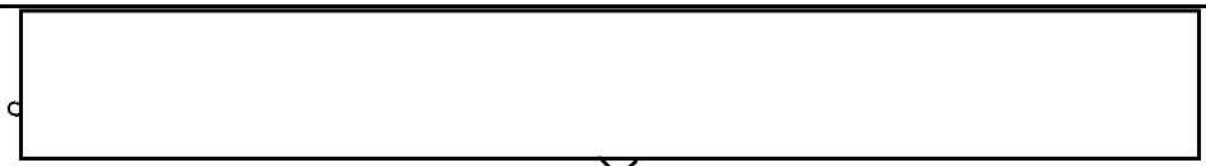
VERIFICATION (U) 76

b7E



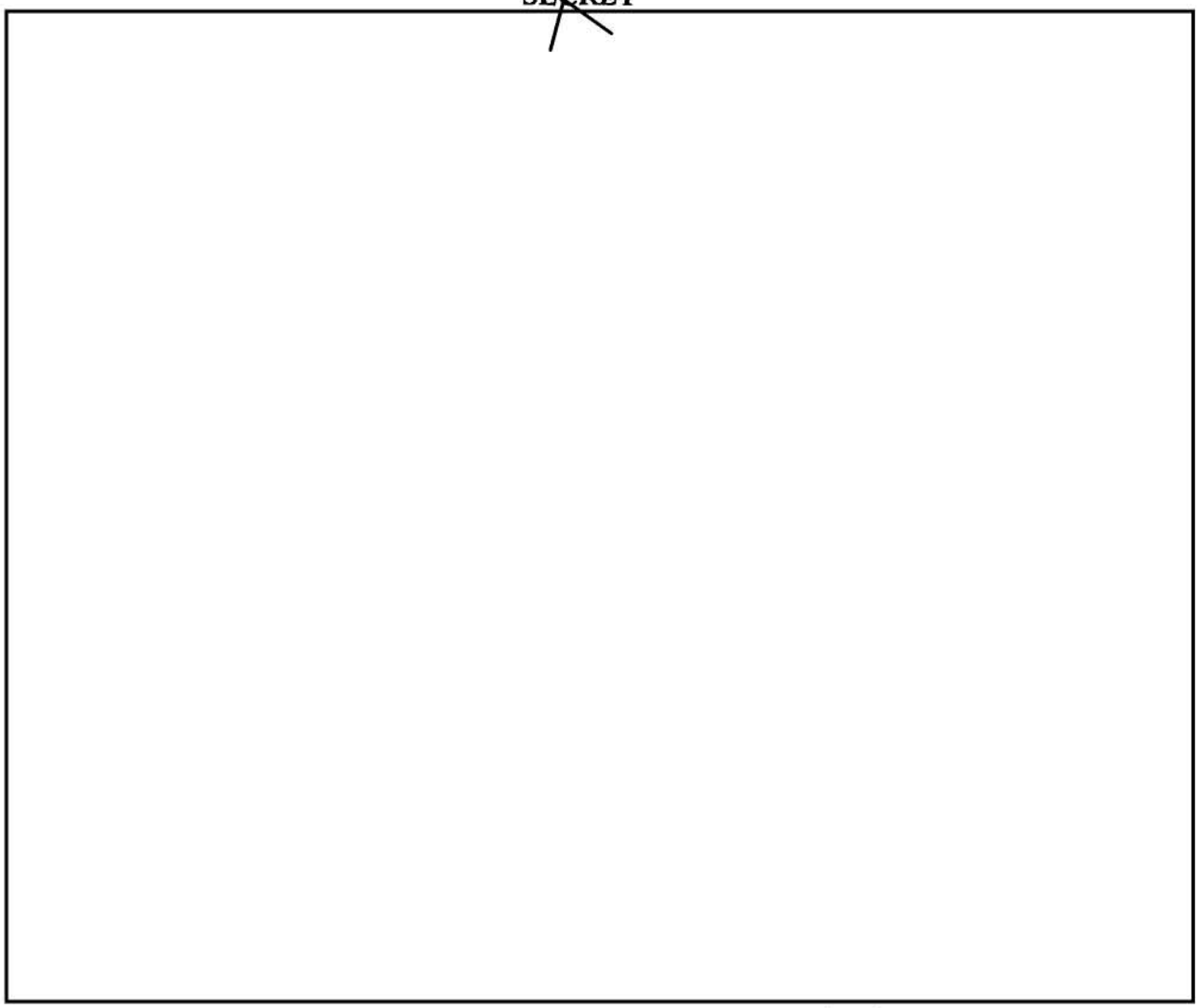
(S)

b1
b3
b7E



(S)

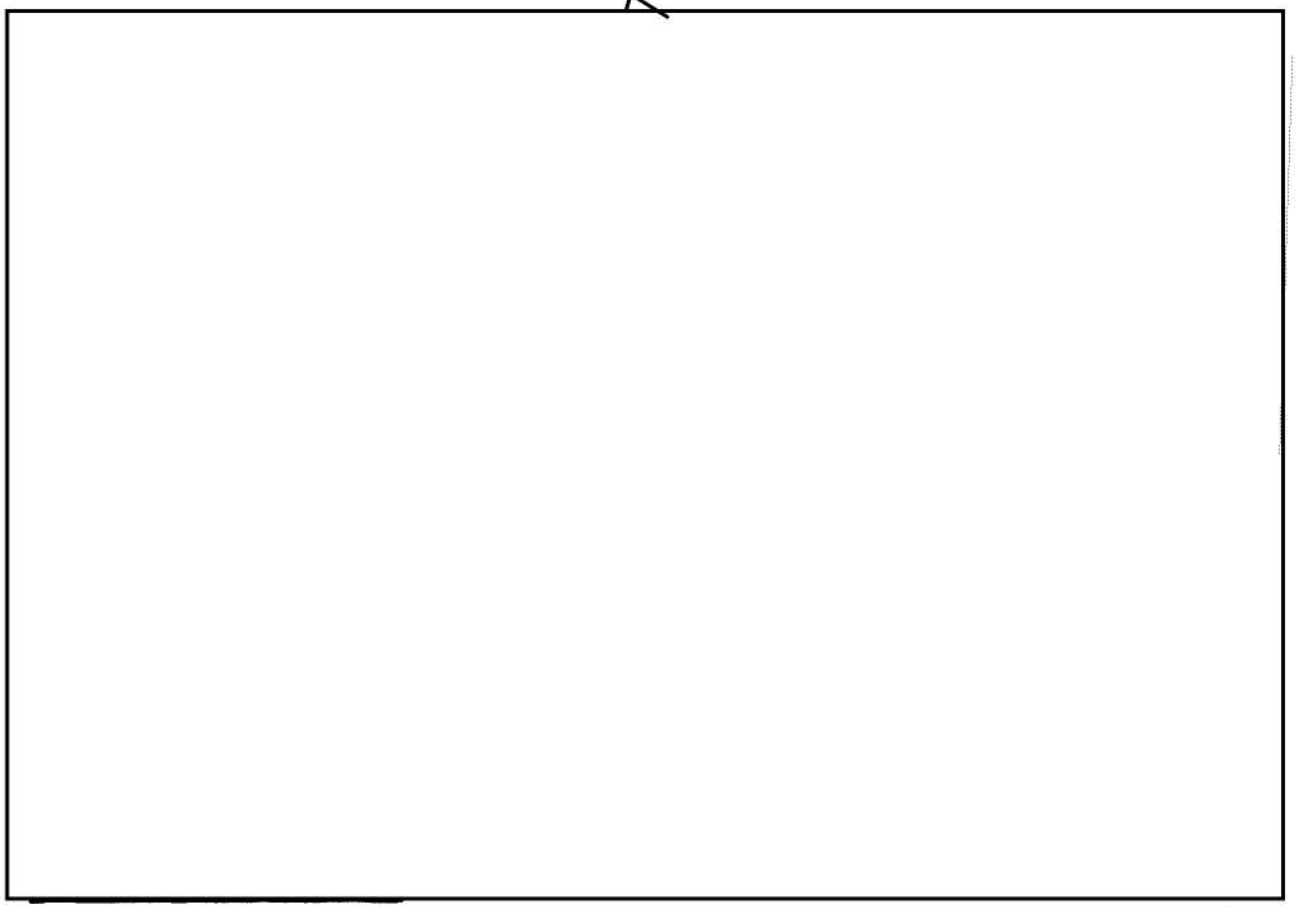
b1
b3
b7E



b1
b3
(S) b7E

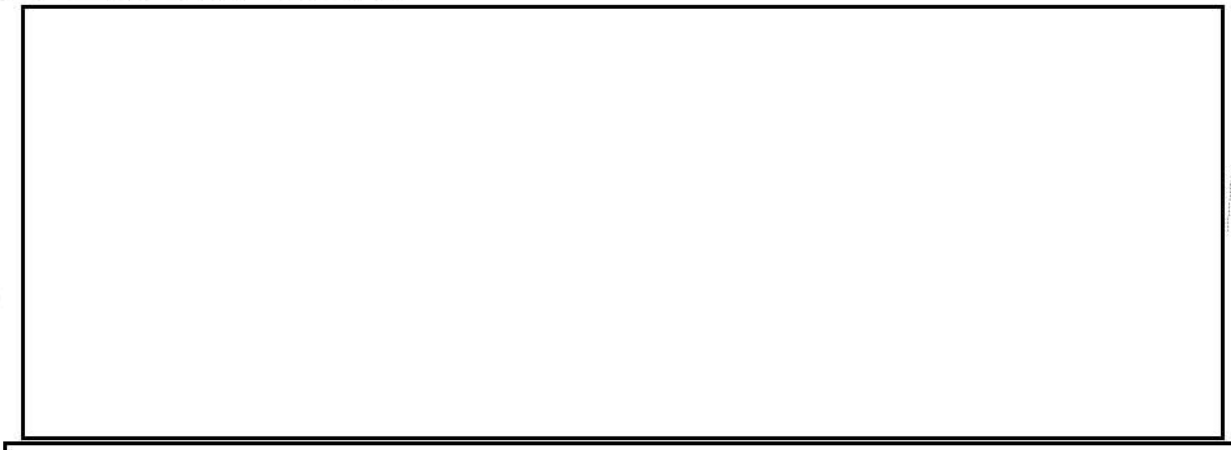
I. BACKGROUND: THE 2006 MEMORANDA AND REPORT ~~(S)~~

b1
b3
(S) b7E



(S)

b1
b3
b7E



(S)

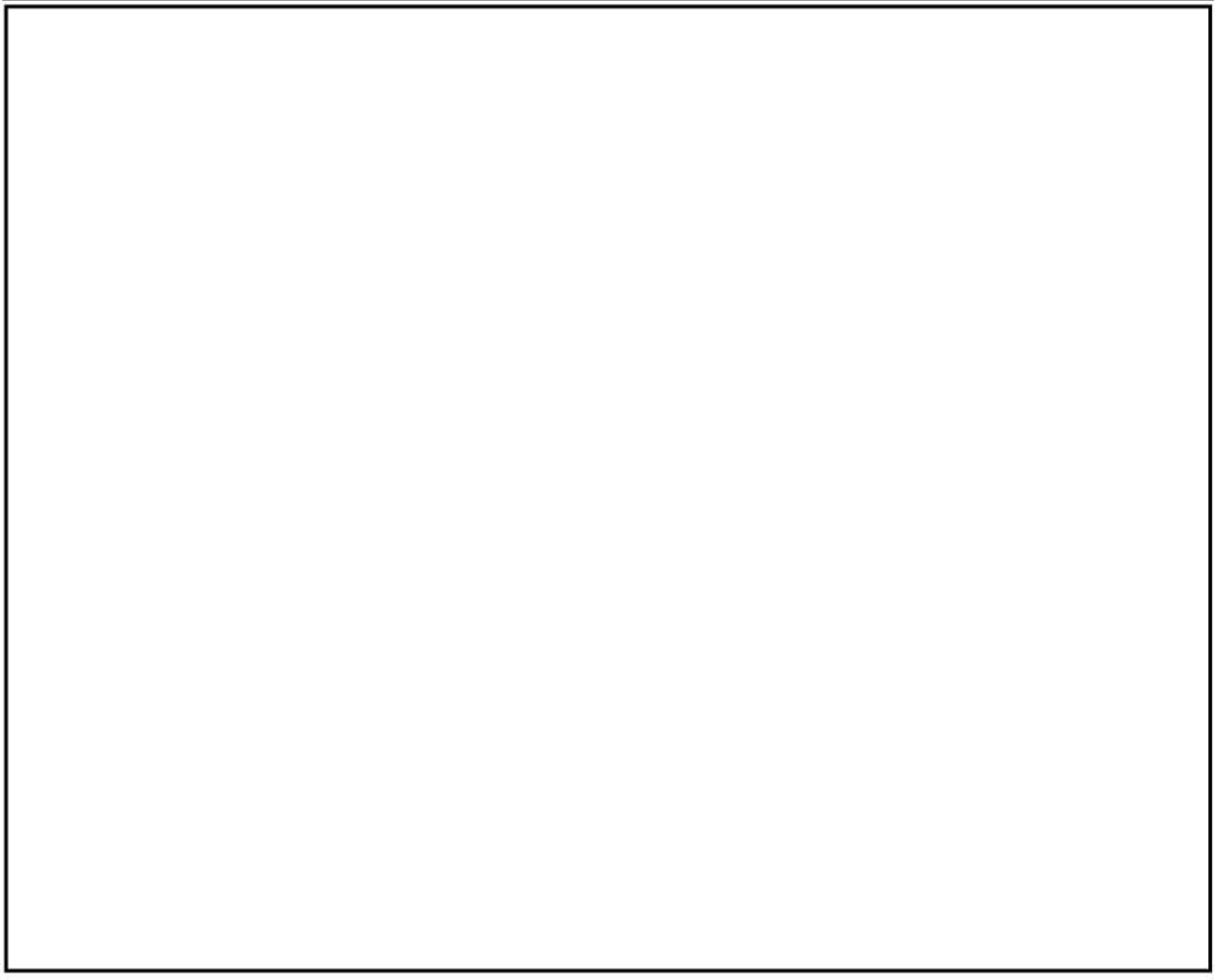
b1
b3
b7E

(S)

b1
b3
b7E

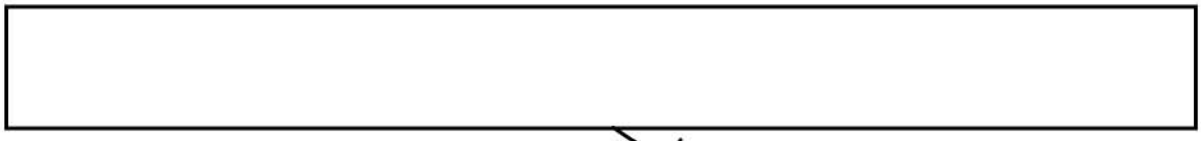
(S)

b1
b3
b7E



(S)

b1
b3
b7E



(S)

b1
b3
b7E

(S)

b1
b3
b7E

(S)

b1
b3
b7E

(S)

b1
b3
b7E

(S)

b1
b3
b7E

[redacted] (S)

b1
b3
b7E

II. STATEMENT OF FACTS CONCERNING [redacted] (U)

b7E

[redacted] (S)

b1
b3
b7E

A. [redacted]

b7E

[redacted]

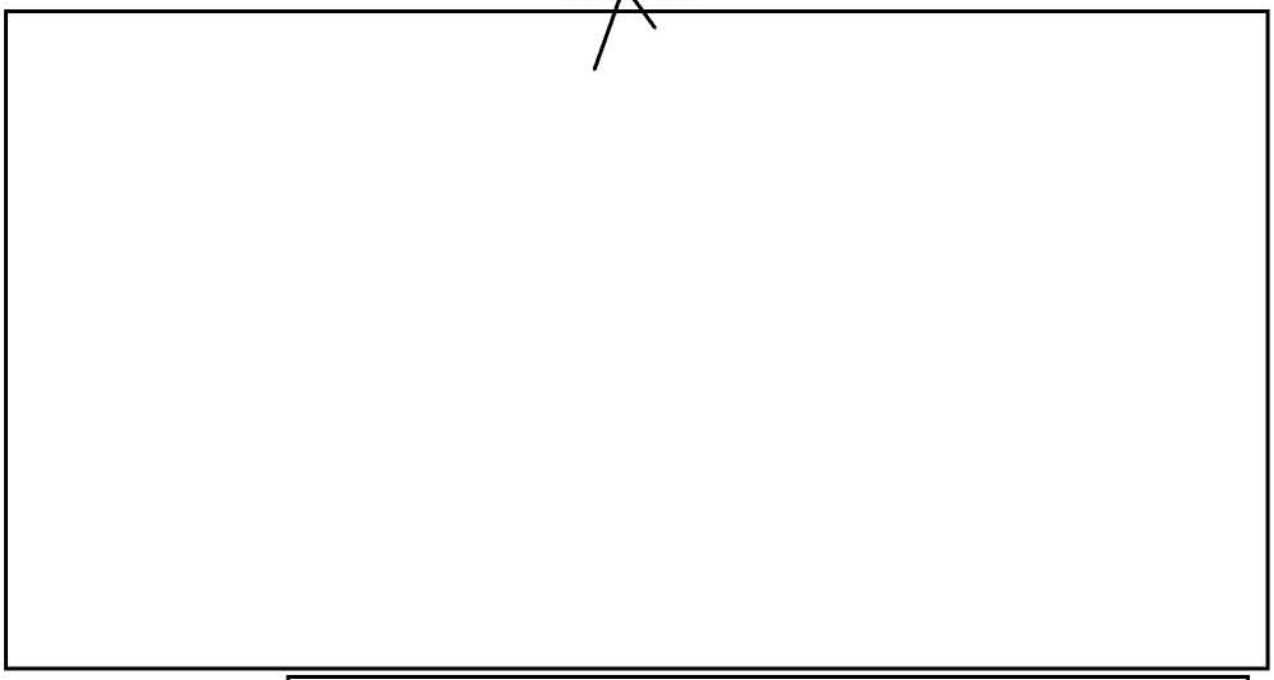
b7E

b7E

[redacted]

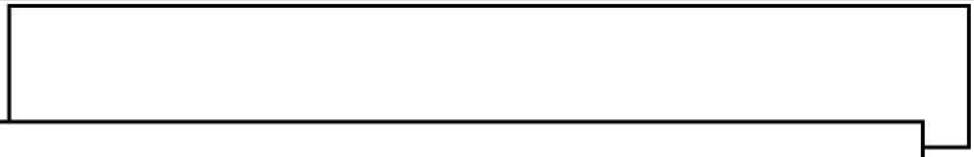
[4] Call-identifying information is defined as "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier." 47 U.S.C. § 1001(2). (U)

[5] The Communications Assistance for Law Enforcement Act of 1994, Pub.L. No. 103-414, 108 Stat. 4279 (1994) (hereinafter CALEA) was enacted to ensure that law enforcement maintained its interception capabilities in light of emerging technologies and the changing competitive telecommunications market. Overall, CALEA sought to balance three key policies: (1) to preserve a capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies. See H.R. Rep. No. 103-827(I) (1994), reprinted in 1994 U.S.C.C.A.N. 3489. (U)

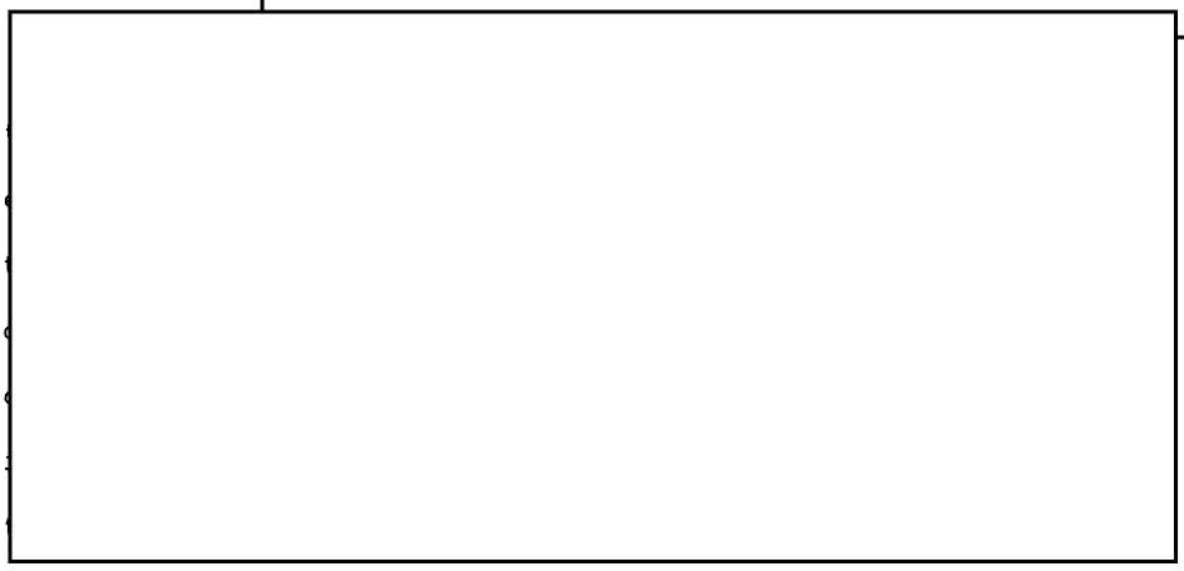


b7E

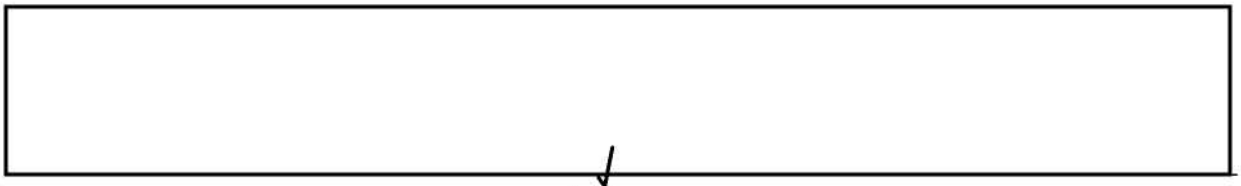
1.



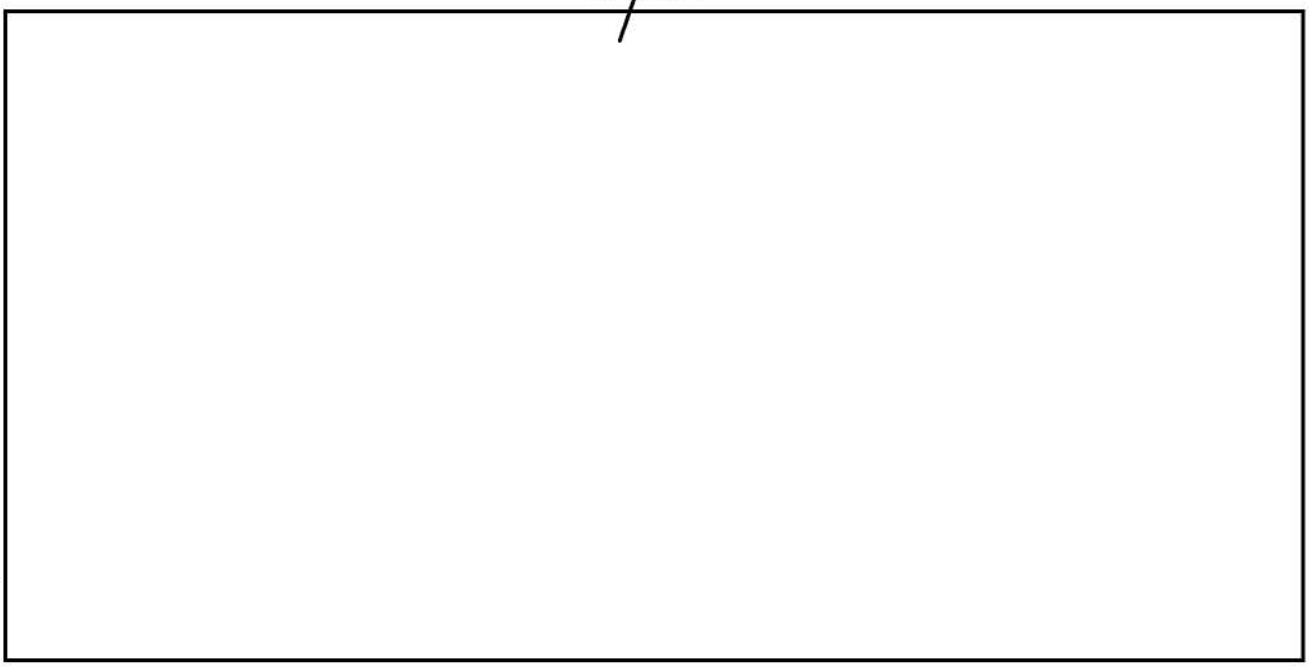
b7E



b7E



b7E

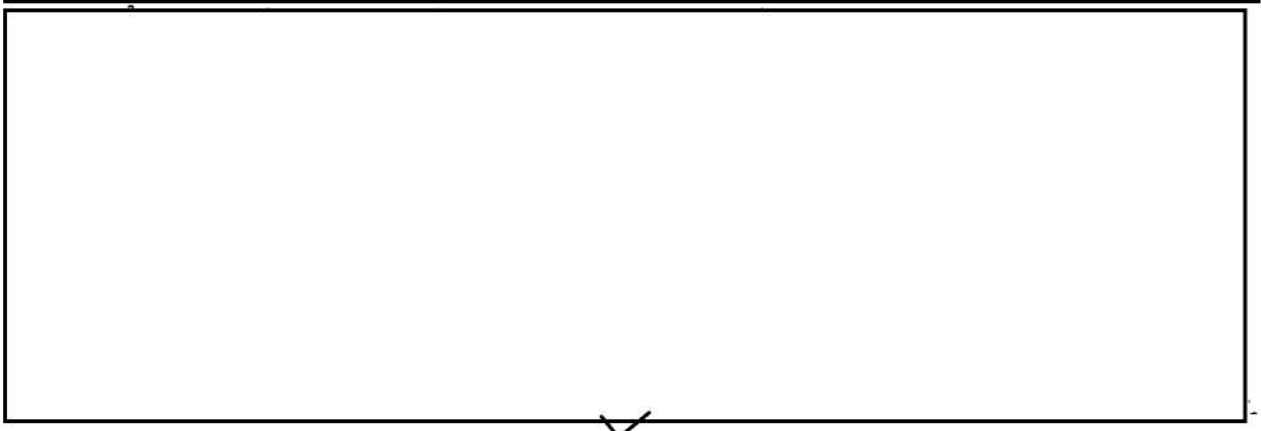


b7E

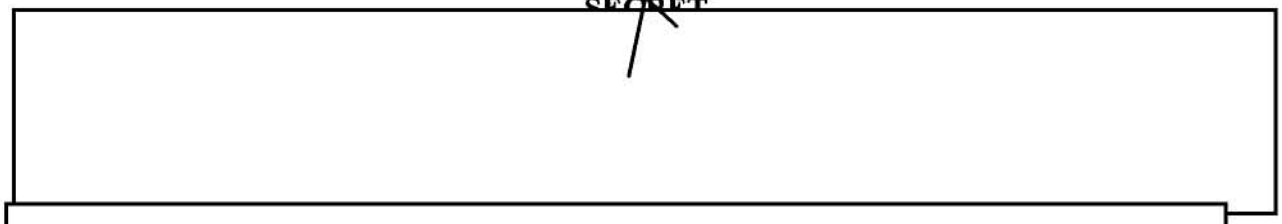
(U)

b7E

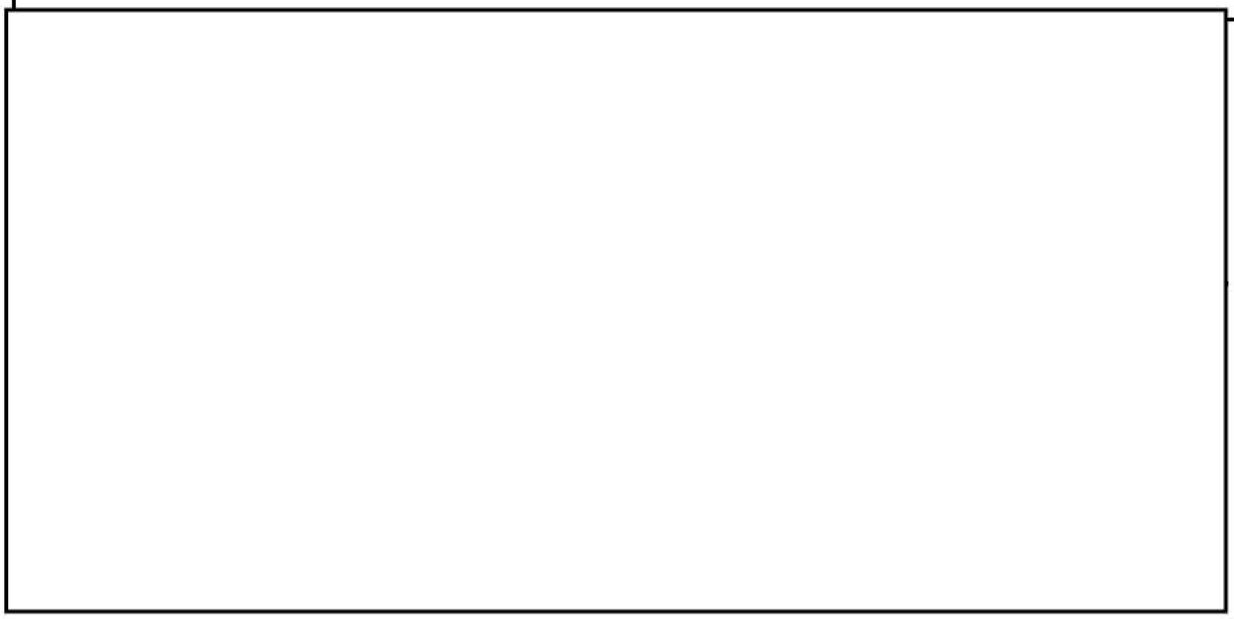
b7E



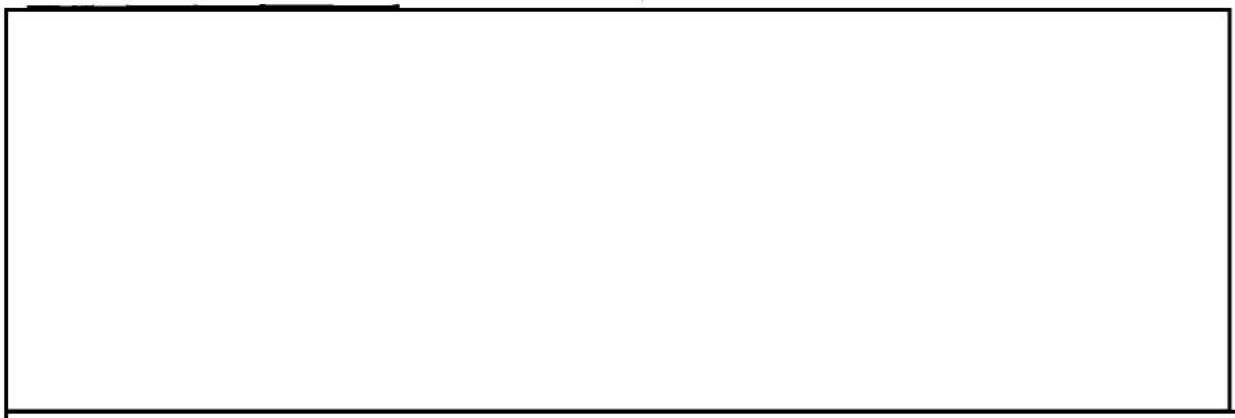
b7E



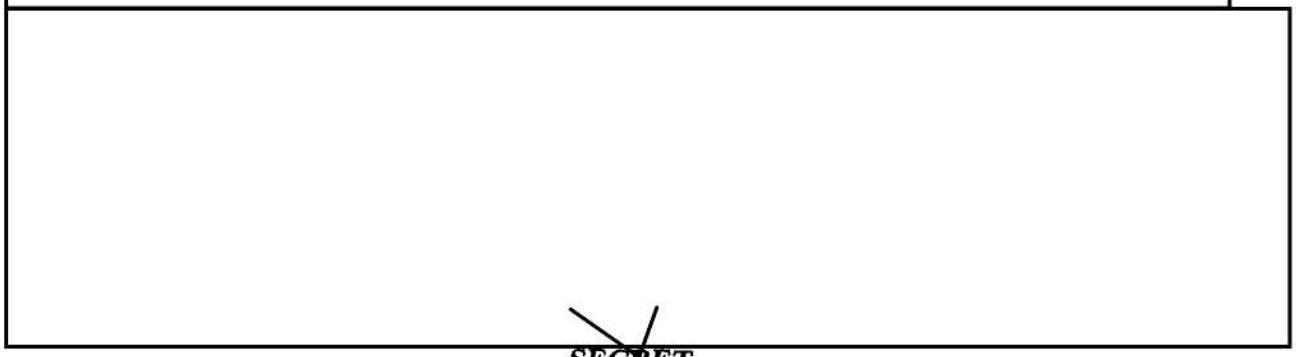
b7E



b7E

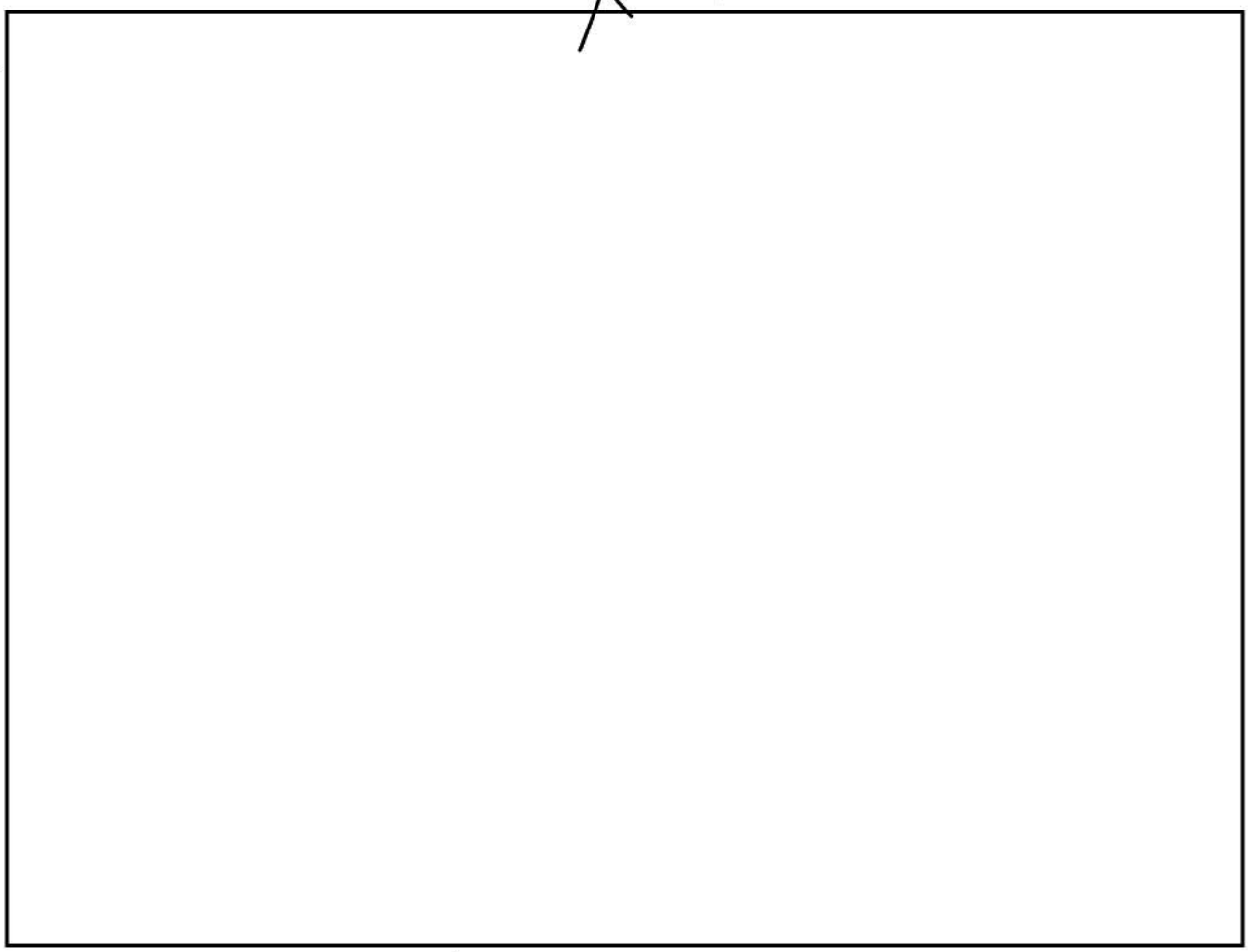


b7E

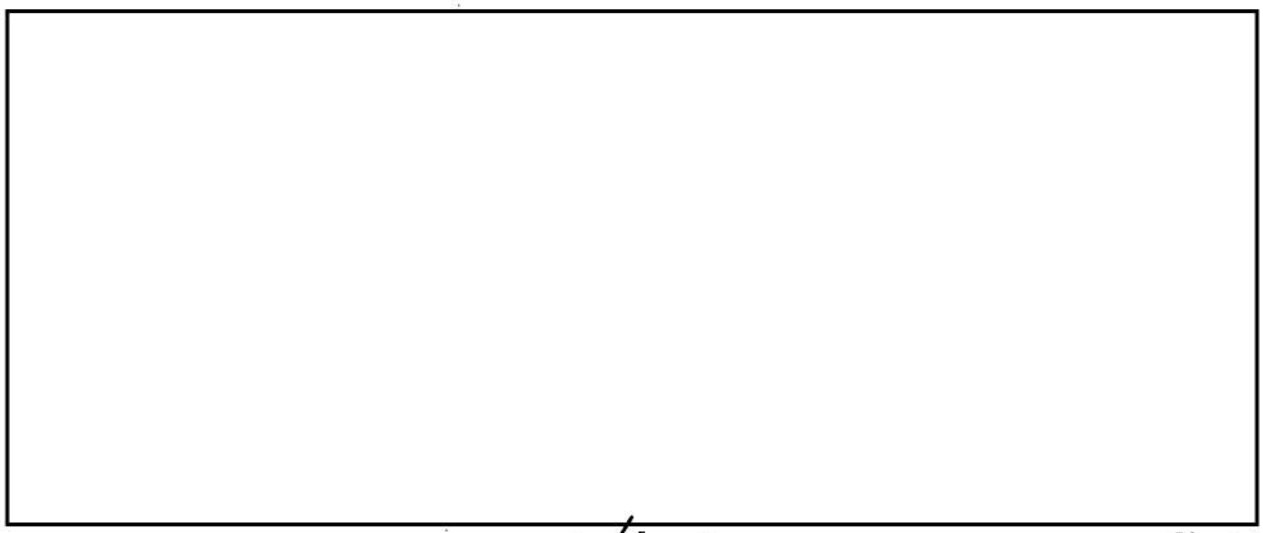


b7E

b7E



b7E

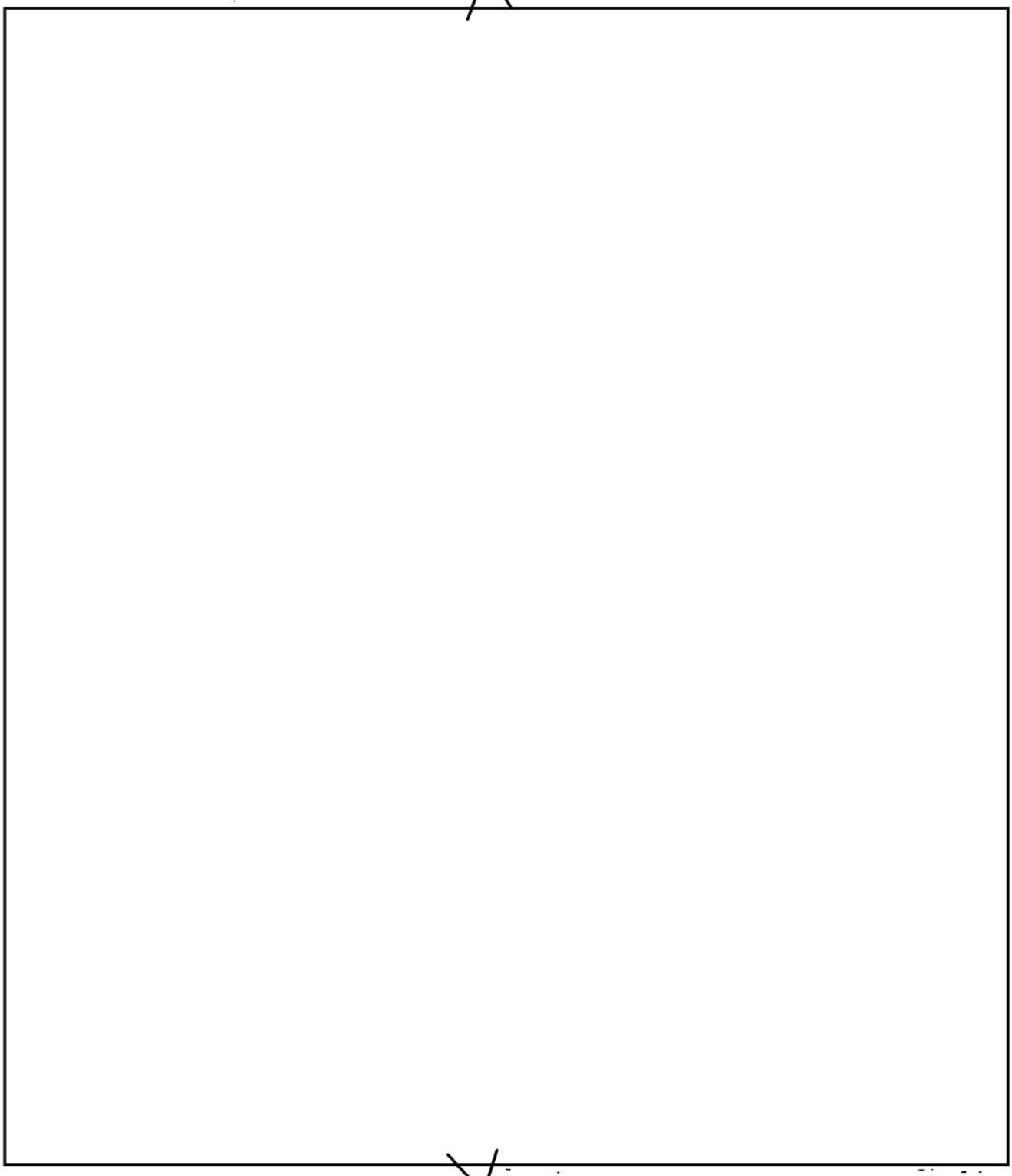


b7E

b7E

b7E

b7E



In addition to cost and security concerns, [redacted] b7E

[redacted]

[redacted] (S) b1 b3 b7E

(S)

b1
b3
b7E

b7E

b7E

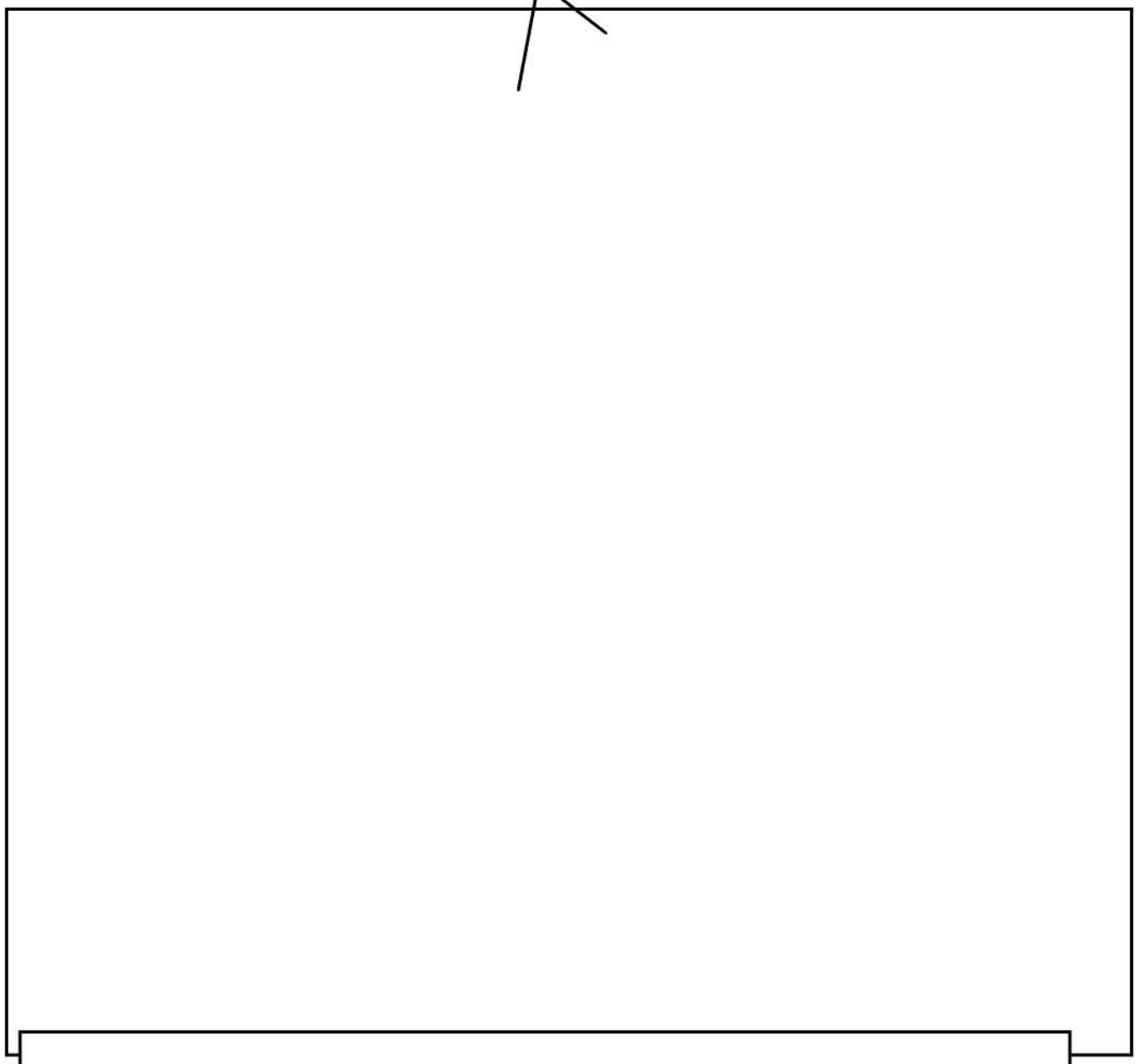
[redacted] b7E

2. [redacted] b7E

[redacted] b7E

[redacted] b7E

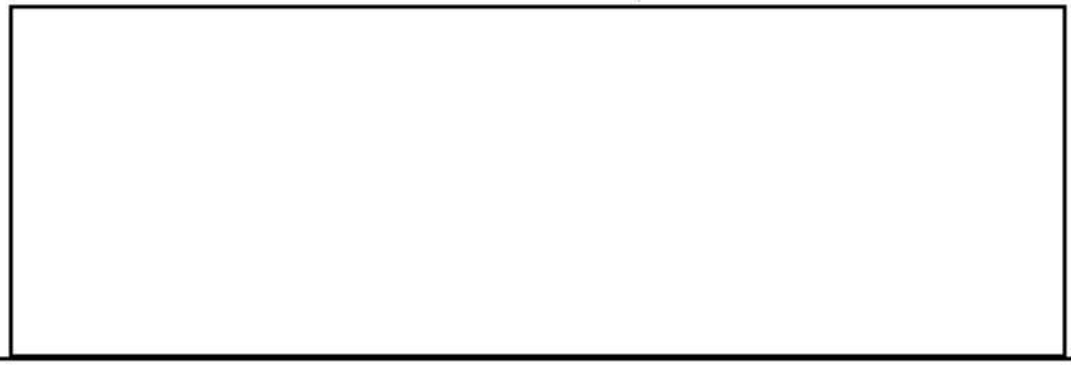
[redacted] b7E



b7E

b7E

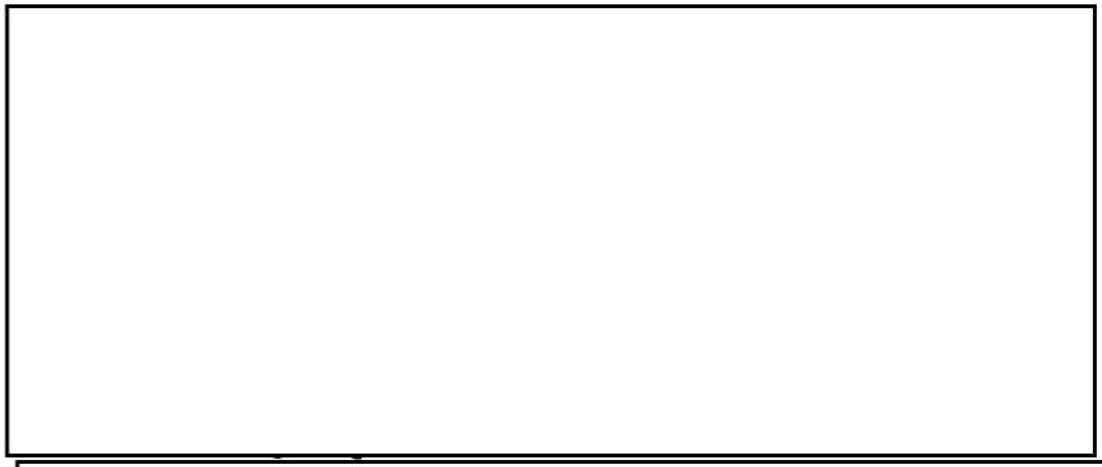
b7E

- 

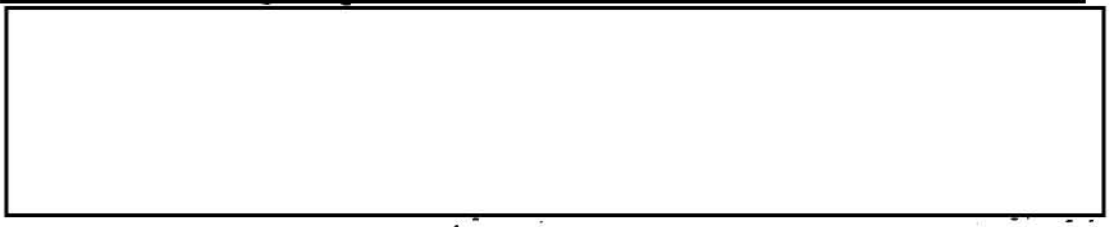
b7E

- 

b7E

- 

b7E

- 

b7E

[redacted] b7E

- [redacted] b7E
- [redacted] b7E

3. **Based on the Information Provided to It, the FBI's** [redacted] b7E

As described in the November 2006 Report, the FBI [redacted] b7E

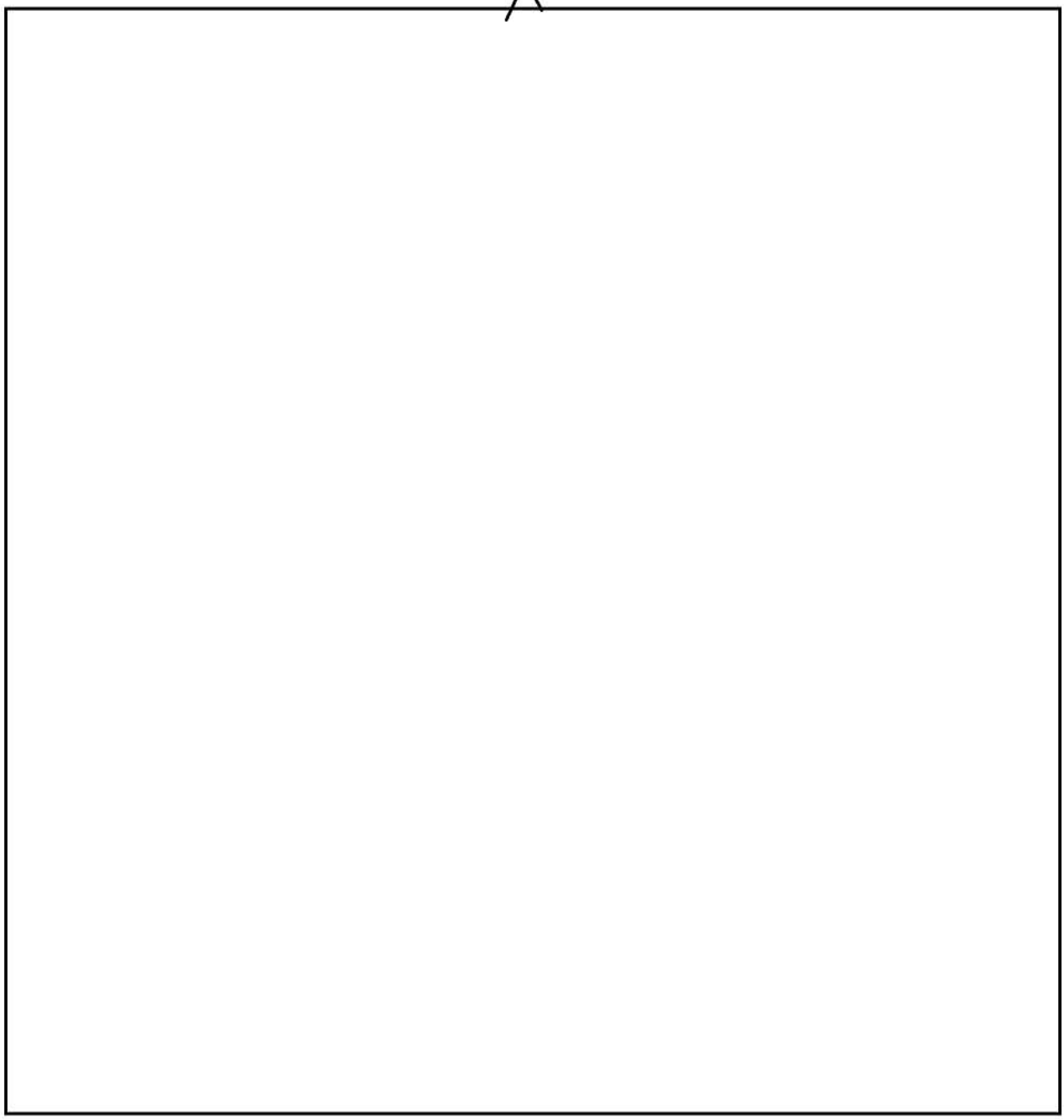
[redacted] b1 b3 b7E (S)

b7E

b1
b3
b7E

(S)

b7E



[14] [redacted] are the only large-scale otherwise CALEA-compliant service providers of which the FBI is aware that [redacted] b7E

[redacted] b7E

[redacted] (U)

B. [redacted] b7E

[redacted] b7E

---

[15] The DAG Memo specifically states, "The authorities granted by the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801, *et seq.*, are outside the scope of this Memorandum." DAG Mem. at 1, n. 1. As discussed below, the FBI has since enacted policies that apply the principles of the DAG Memo [redacted] b7E

[redacted] (U)

[redacted] b7E

[redacted] b7E

[redacted] b1 b3 b7E (S)

[redacted] b7E

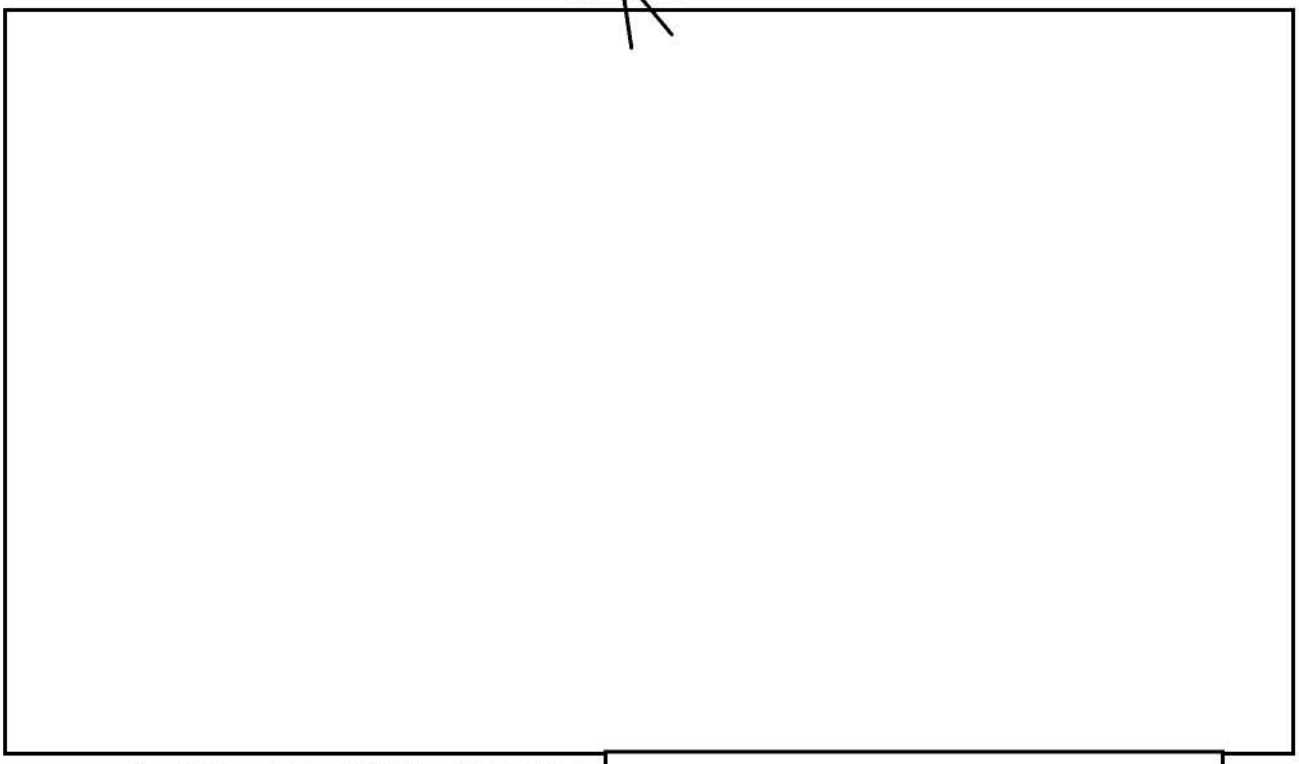
[redacted] (S) b1 b3 b7E

[redacted] b7E

In or about July 2008, the FBI [redacted] b7E

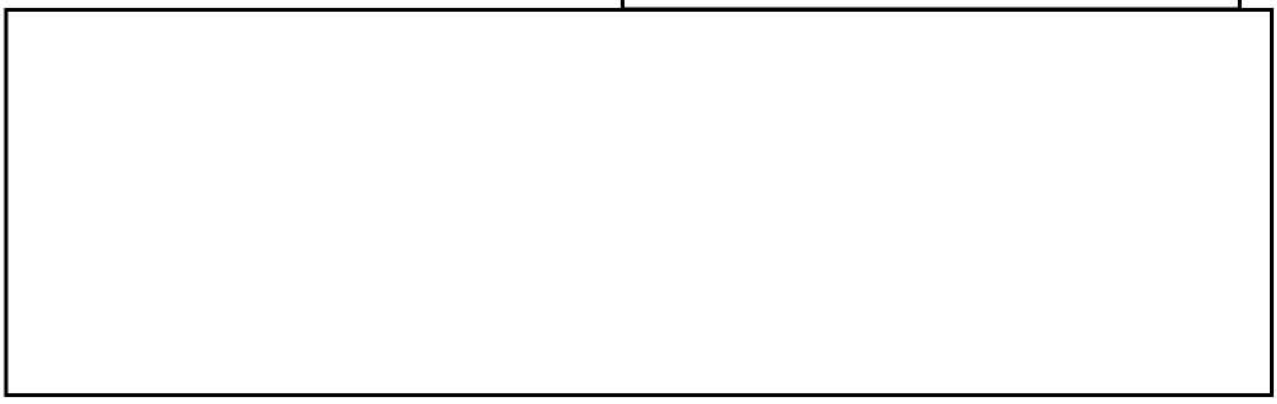
[redacted]

b7E



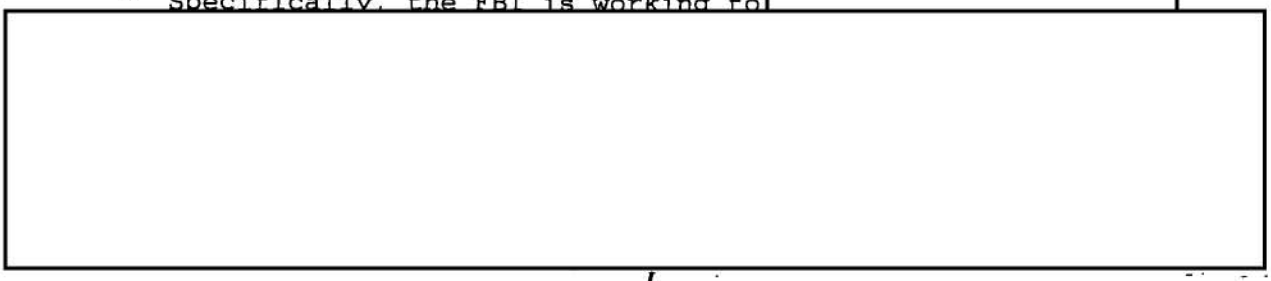
In December 2008, the FBI

b7E



[17] Specifically, the FBI is working to

b7E

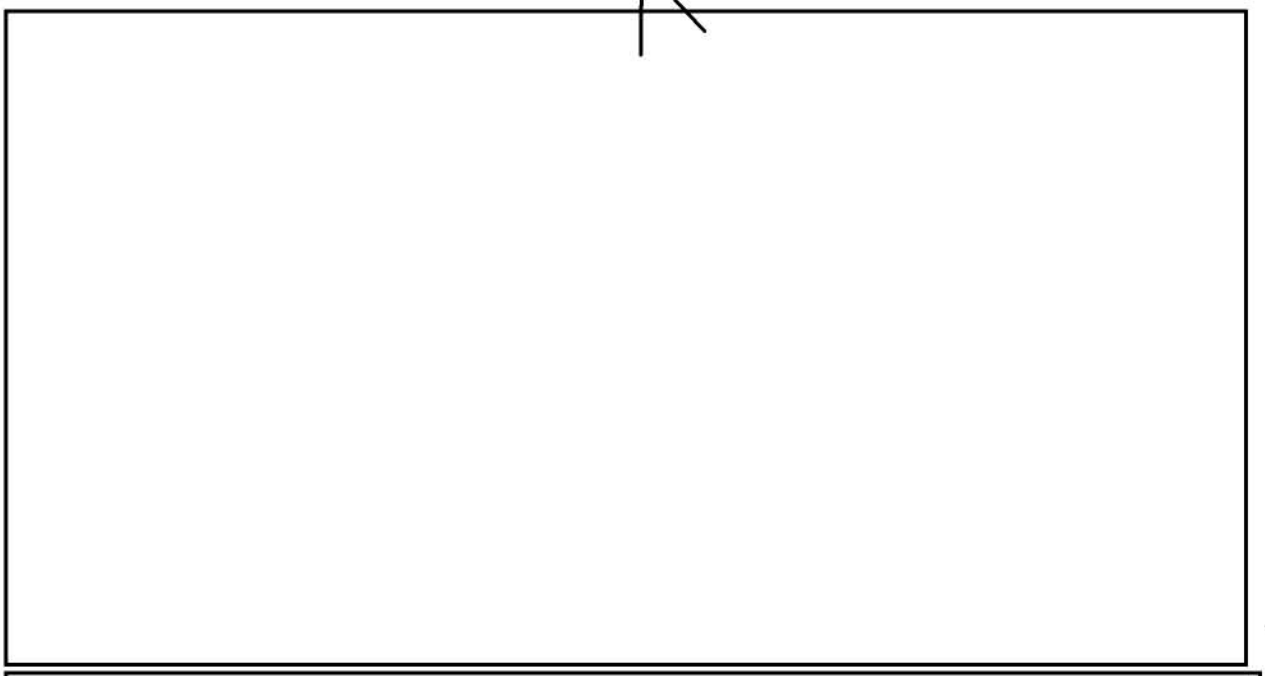


[redacted] b7E

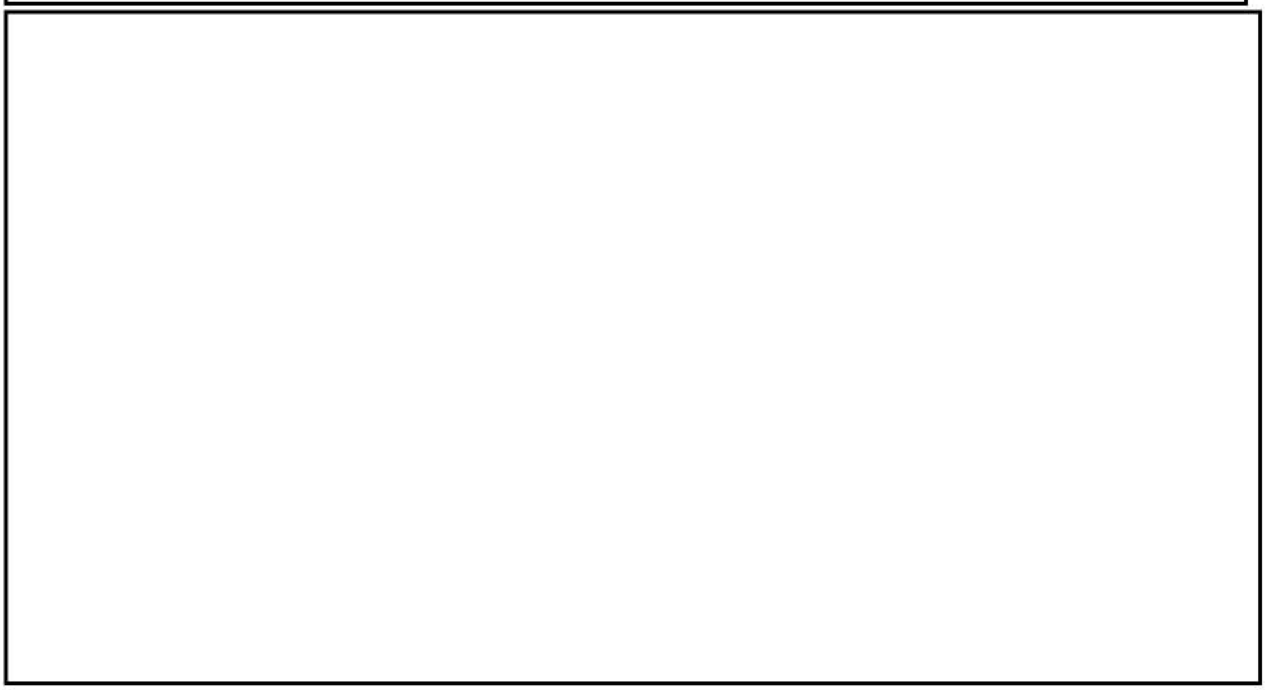
Although the DAG Memo, as written, applies only to the issuance of criminal [redacted] b7E

[redacted]

[redacted] b7E



b7E



b7E

(S)

b1
b3
b7E

b7E

b7E

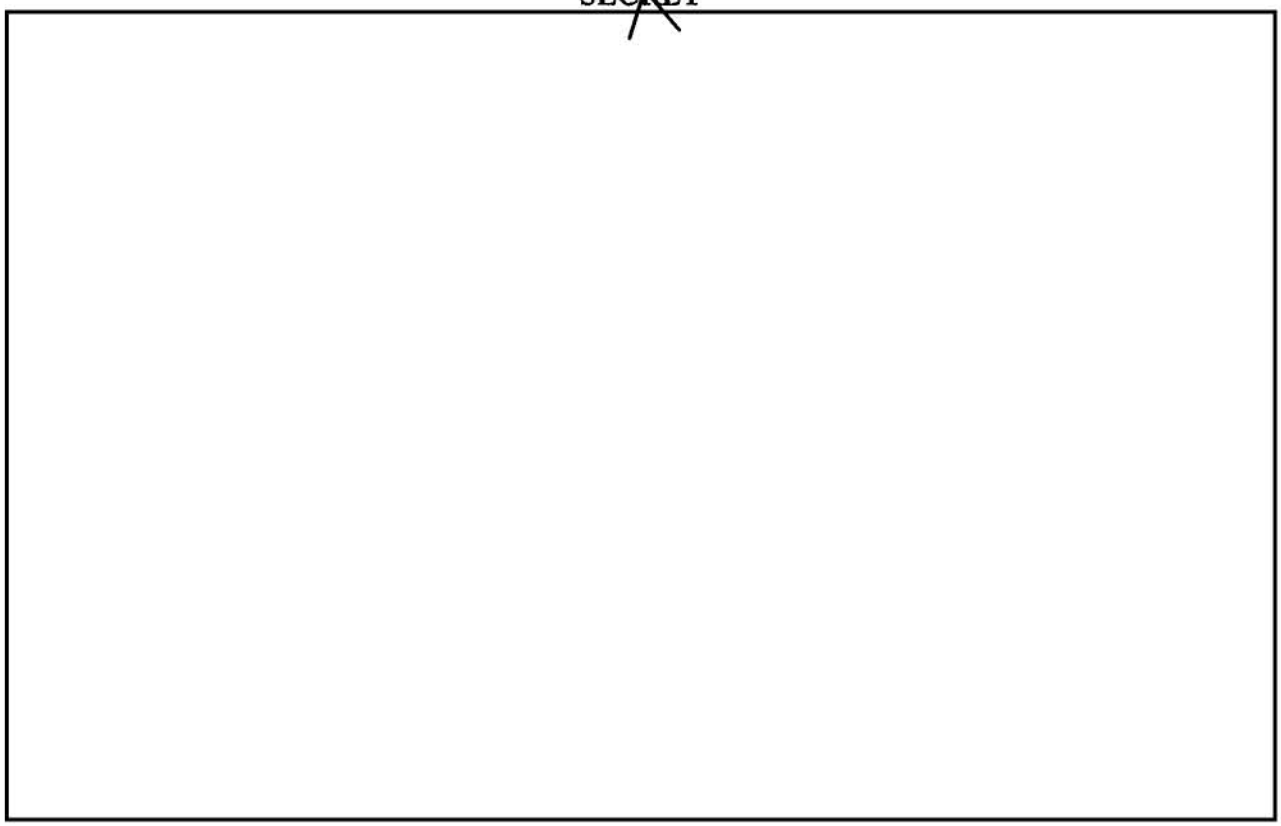
b7E

[redacted] b7E

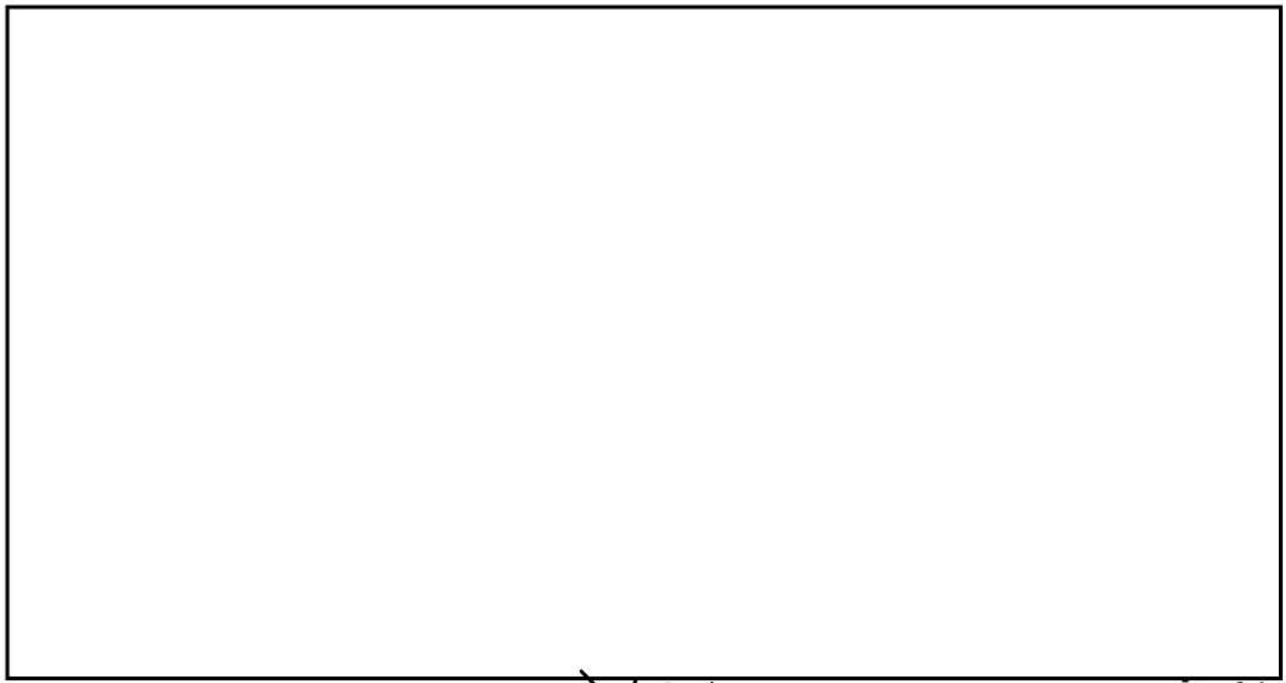
III. ANALYSIS OF LAW (U)

In light of the current state of technology and the law, the government respectfully submits that it is appropriate for this Court to continue to approve pen register applications [redacted] b7E

[redacted]



b7E



b7E

[redacted] b7E

A. [redacted] b7E

1. [redacted] b7E

Congress initially adopted the definition of "pen register" as part of the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 302, 100 Stat. 1848 (ECPA). As originally enacted, 18 U.S.C. section 3127(3) defined "pen register" in terms of now out-dated telephone technology, referring to a "device" being attached to a "telephone line." Specifically, the earlier version of the pen register definition provided:

> [T]he term "pen register" means a device which records or decodes electronic or other impulses which identify the number dialed or otherwise transmitted on the telephone line to which such device is attached . . . .

18 U.S.C. § 3127(3) (2000). (U)

[redacted] b7E

The definition of "pen register" remained unaltered until 2001, but in the interim in 1994 Congress enacted CALEA (discussed above) and added the "limitation" provision of the criminal pen register statute, 18 U.S.C. § 3121(c). As originally enacted, this provision stated:

> (c) Limitation - A Government agency authorized to install and use a pen register under this chapter or under state law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing.

CALEA, § 207, 108 Stat. at 4292 (emphasis added). The limitation provision makes clear that although the purpose of a pen register is to collect "dialing and signaling information" utilized in call processing, [redacted] (U) b7E

[redacted] b7E

b7E

b7E

2.

In 2001, section 216 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 216, 115

[20] See TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (citation omitted) ("It is a cardinal principle of statutory construction that, a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."). (U)

Stat. 272, 288 (2001) (PATRIOT Act) amended both the definition of pen register in section 3127(3) and the limitation provision in section 3121(c). PATRIOT Act § 216, 115 Stat. at 288, 290. The PATRIOT Act amended the definition of pen register to clarify that the pen register provision applies to an array of modern communications technologies (*e.g.*, the Internet) and not simply traditional telephone lines. See H.R. Rep. No. 107-236(I), at 52-53 (2001) (discussing predecessor bill H.R. 2975); see also 147 Cong. Rec. S11,006 (daily ed. Oct. 25, 2001)(section-by-section analysis by Sen. Leahy). [redacted] b7E

[redacted] Thus, Congress amended the pen register definition in only two respects, both of which merely clarified the limits of existing law: (1) Congress broadened the language to include the recording or decoding of "dialing, routing, addressing or signaling information" in order to confirm the statute's proper application to communications in an advanced electronic environment; and (2) Congress confirmed the proper purpose and scope of a pen register device: to obtain

information used to process a wire or electronic communication,

[redacted] (U) b7E

Importantly, [redacted] b7E

[redacted]

[redacted]"

[redacted] b7E

[redacted]

[redacted] Congress also amended the b7E

limitation provision in 18 U.S.C. section 3121(c) to conform to the revised language of the pen register definition. [redacted]

[redacted]

[redacted]

[redacted] b7E

[redacted] Congress made essentially the same revisions to the limitation provision that it made to the pen register definition: (1) it clarified that the term "pen register" applies not only to traditional telephone lines, but to b7E all manner of modern electronic communications; and (2) it clarified that the purpose of a pen register is to collect call processing information, [redacted]

Accordingly, as reflected by the plain text, Congress left intact the scheme it had previously adopted in 1994. [redacted] b7E

[redacted]

On their face, neither the original versions of the pen register definition and limitation provision nor the revised versions as amended by the PATRIOT Act dictate the means by which a pen register device should function technologically. By its own terms, 18 U.S.C. section 3127(3) is simply a definition. Notably, section 3127 is entitled "Definitions for Chapter." b7E

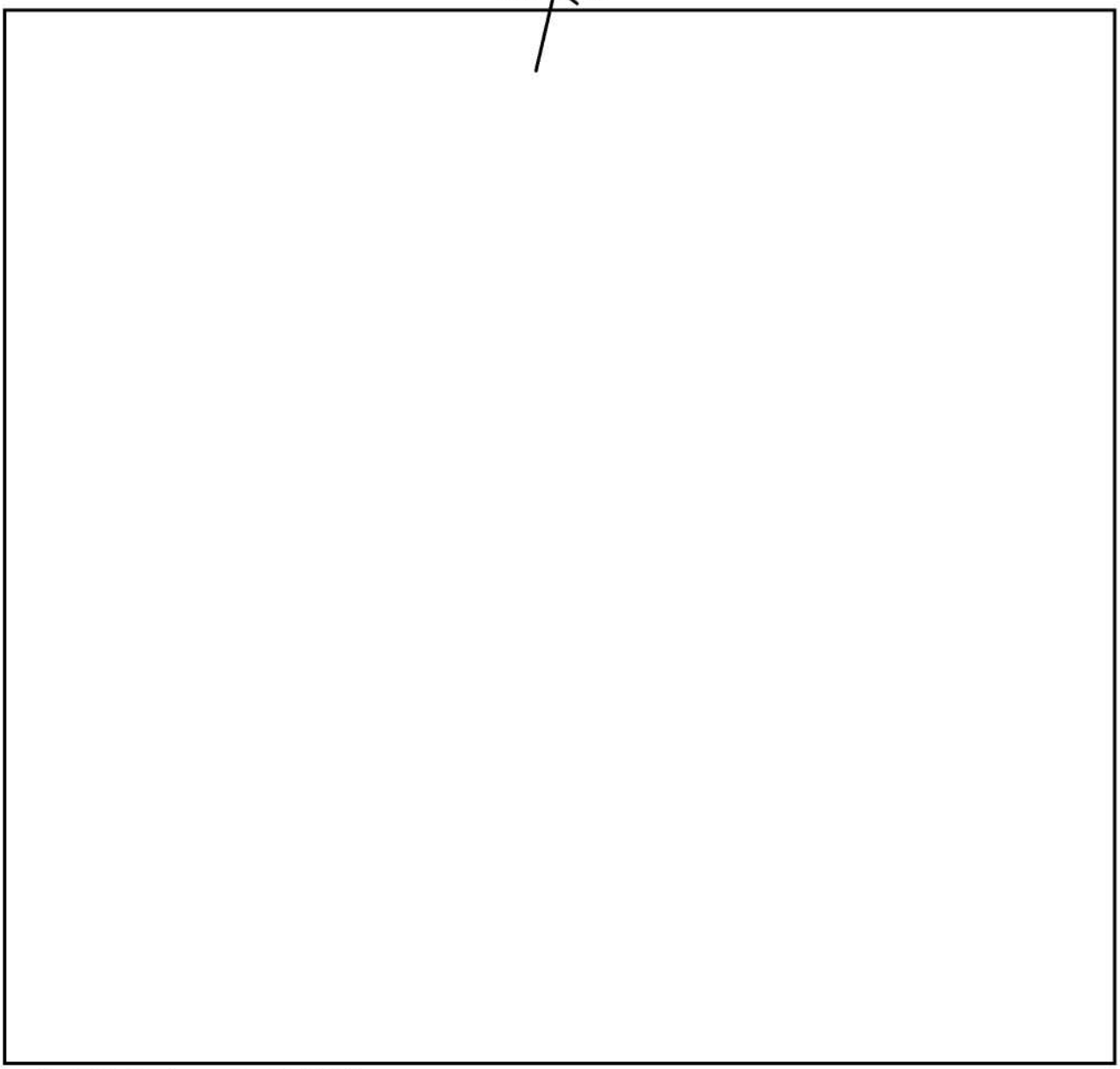
b7E

b7E

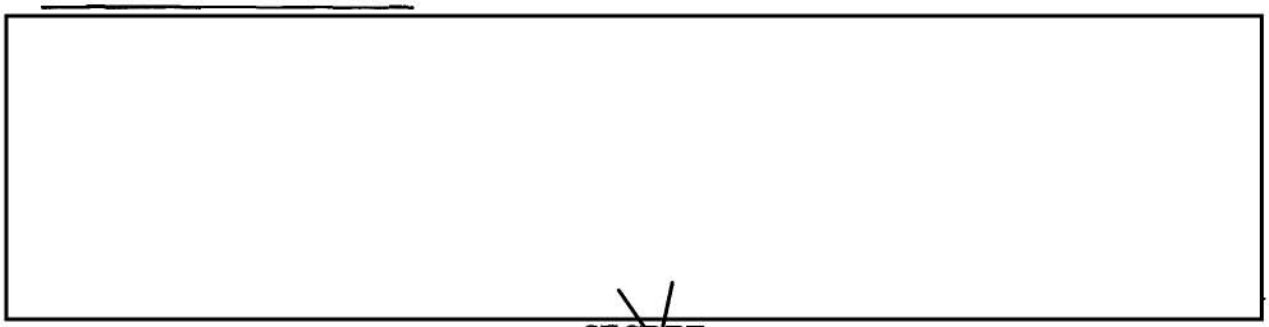
3. b7E

b7E

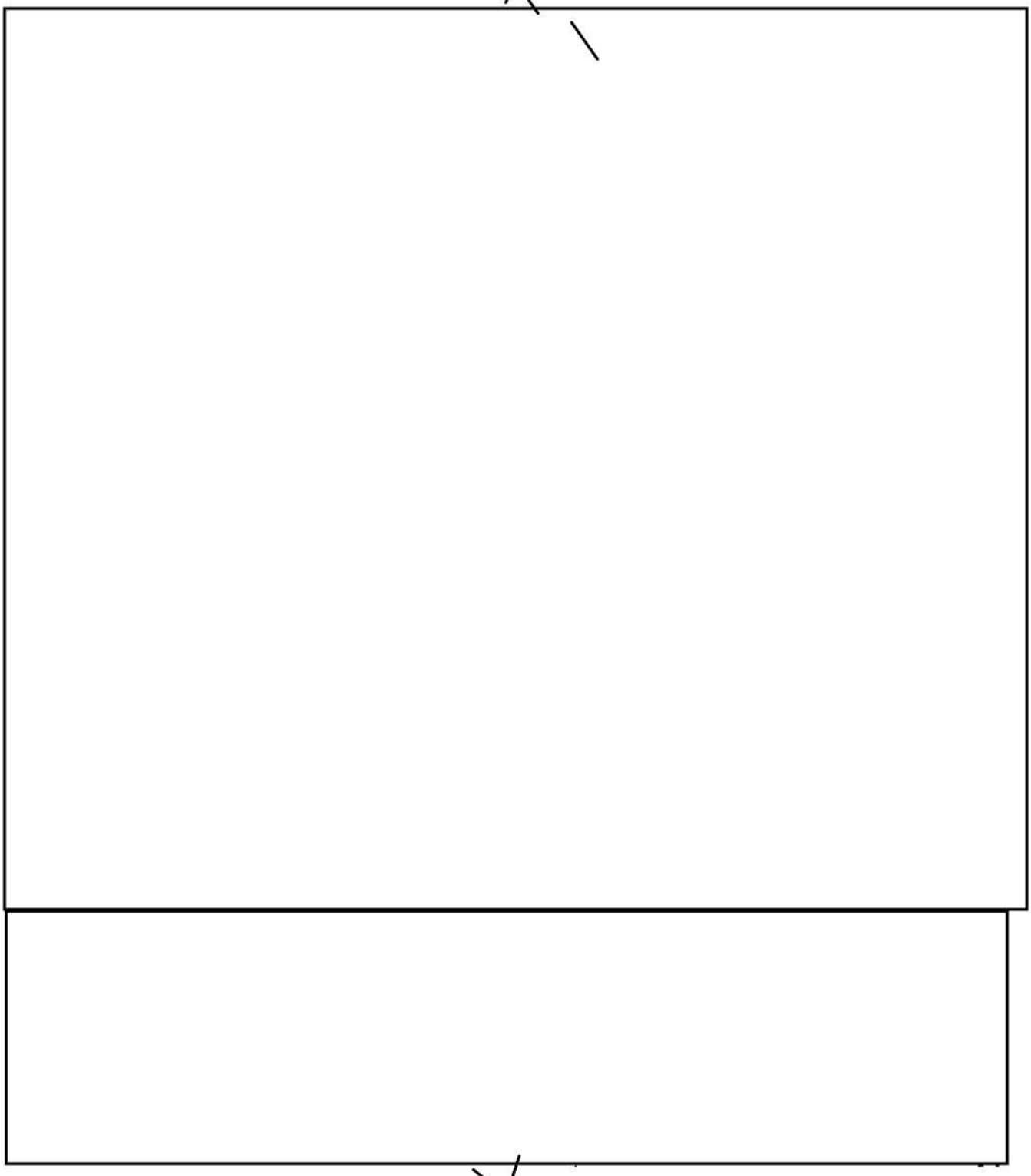
b7E



b7E

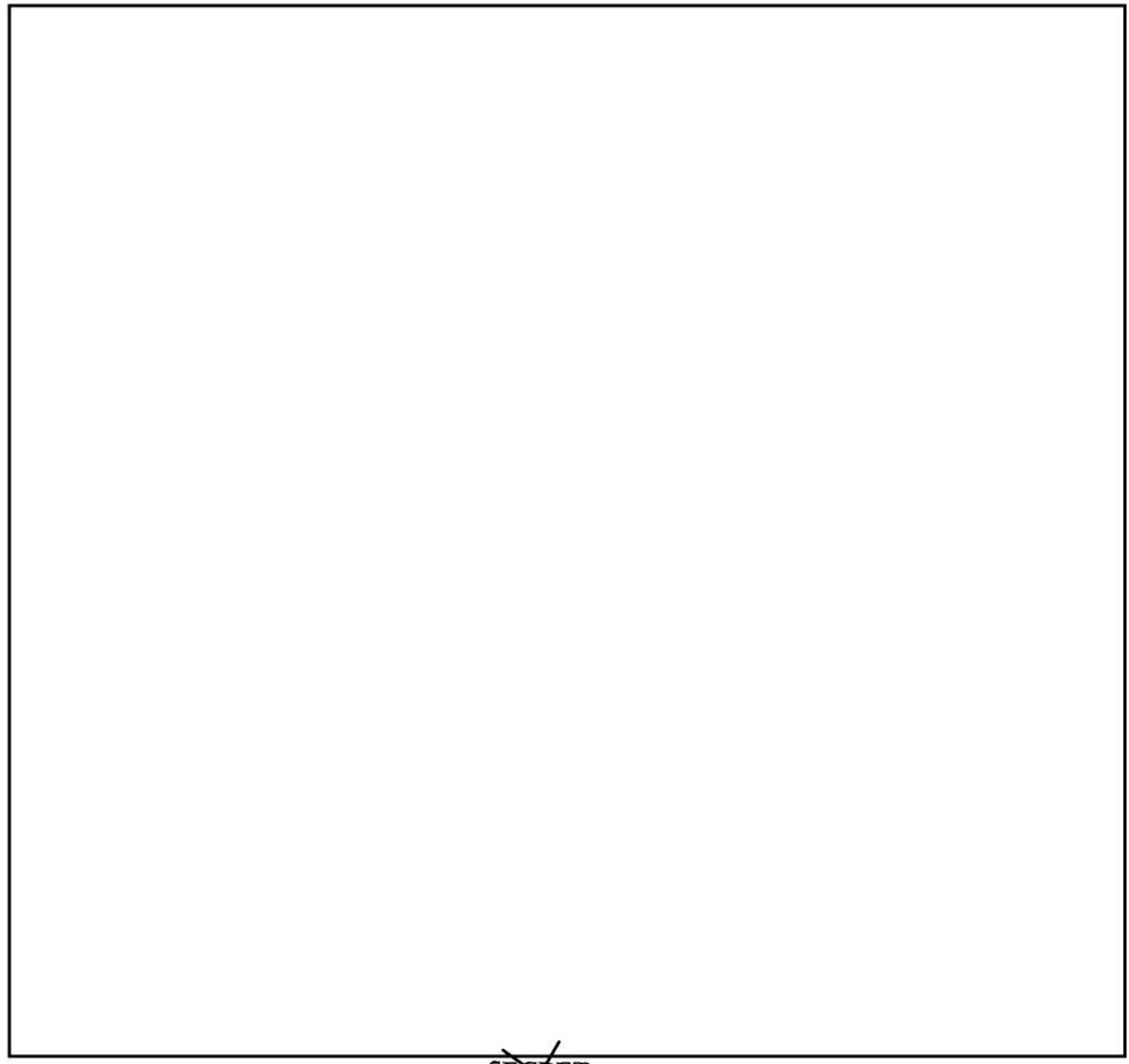


b7E



b7E

b7E



b7E

b7E

b7E

b7E

[redacted] b7E

B. **The Legislative History of the Criminal Pen Register Statute Confirms that Congress Intended** [redacted] b7E

1. **Legislative History Regarding the Enactment of 18 U.S.C. Section 3121(c) Confirms that Congress Intentionally Created a Technology-Driven Minimization Scheme.** (U)

Legislative history from the 1994 enactment of the pen register limitation provision confirms what the text of 18 U.S.C. section 3121(c) plainly implies. In 1994, Senator Leahy originally proposed 18 U.S.C. section 3121(c) as part of S.2375, the "Digital Telephone Act of 1994." See 140 Cong. Rec. S11,045-05 (1994). Most of the provisions of S.2375, including section 3121(c), were eventually adopted in CALEA. In his introductory remarks, Senator Leahy included a section-by-section summary in which he stated as follows regarding the limitation provision:

> [This subsection] requires government agencies installing and using pen register devices to use, when reasonably available, technology that restricts the information captured by such device to the dialing or signaling information necessary to direct or process a call, excluding any further communications conducted [redacted] b7E [redacted] Thus, Senator Leahy, the primary architect of section 3121(c), stated that the government was required to apply filtering technology only "when" such technology is reasonably available. [redacted] b7E [redacted] (U)

In addition to Senator Leahy's statement, committee reports from both the House and Senate further confirm that Congress originally intended [redacted] b7E [redacted] Specifically, both reports state that 18 U.S.C. section 3121(c) is intended to "require[] law enforcement to use reasonably available technology to minimize information obtained through pen registers." See S. Rep. No. 103-402, at 18; H.R. Rep. No. 103-

---

[22] Because he was the chairman of the committee that sponsored the bill, Senator Leahy's remarks are entitled to significant weight. See United States v. Int'l Union (UAW-CIO), 352 U.S. 567, 585 (1957). In this case, they are entitled to even greater weight, because both the Senate and House committee reports accompanying CALEA adopted Senator Leahy's above remark verbatim. See S. Rep. No. 103-402, at 31 (1994); H.R. Rep. No. 103-827(I), at 32 (1994). (U)

827(I), at 17 (emphasis added). Well in advance of the 1994 enactment of this provision, the term "minimize" had acquired a specific legal meaning under the electronic surveillance laws of both Title III, enacted in 1968, and FISA, enacted in 1978. (U)

For example, 18 U.S.C. section 2518(5) of Title III provides, in relevant part, that electronic surveillance "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception" under Title III. Under well-established precedent, Title III "does not forbid the interception of all nonrelevant conversations, but rather instructs the [government] to conduct the surveillance in such a manner as to minimize the interception of such conversations." Scott v. United States, 436 U.S. 128, 140 (1978) (emphasis omitted). (U)

Similarly, under FISA, each application for electronic surveillance submitted by the government must contain, among other things, a statement of the government's proposed minimization procedures. 50 U.S.C. § 1804(a)(5). FISA defines "minimization procedures," in part, as follows:

> specific procedures, . . . that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and

disseminate foreign intelligence information. 50 U.S.C. § 1801(h)(1). Both federal case law and FISA legislative history demonstrate that the definition of minimization procedures under FISA was intended to take into account the realities of foreign intelligence collection, where the activities of individuals engaged in clandestine intelligence activities or international terrorism are often not obvious on their face, and an investigation develops over time. See, e.g., United States v. Rahman, 861 F. Supp. 247, 253 (S.D.N.Y. 1994), aff'd on other grounds, 189 F.3d 88 (2d Cir. 1999) (rejecting the notion that the "wheat" could be separated from the "chaff" while the "stalks were still growing"). In addition, the Senate Select Committee on Intelligence observed in its final report regarding FISA that in certain situations, [redacted] b7E [redacted] See In the Matter of Kevork, 634 F. Supp. 1002, 1017 (C.D. Cal. 1985) (stating that "minimization may occur at any of several stages"), aff'd on other grounds, 788 F.2d 566 (9th Cir. 1986). (U)

When drafting 18 U.S.C. section 3121(c) and its associated legislative history, Congress undoubtedly knew the legal meaning

that the term "minimize" had acquired under Title III and FISA, electronic surveillance laws that had, at the time, existed for many years and in the case of Title III nearly three decades. In any event, Congress is presumed, as a matter of law, to have known the legal meaning of that word. See United States v. Bonanno Organized Crime Family, 879 F.2d 20, 25 (2d Cir. 1989), relying on Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988) (As a matter of law, Congress is presumed to have been (a) knowledgeable about existing laws pertinent to later-enacted legislation, (b) aware of judicial interpretations given to sections of an old law incorporated into a new one, and (c) familiar with previous interpretations of specific statutory language.). (U)

Although Congress used the word "minimize" in the legislative history rather than in section 3121(c) itself, it is reasonable to infer, under the authorities cited above, that in describing the requirement of section 3121(c) as one of minimization, [redacted] b7E

[redacted]

The government's and FBI's above-described policies

and procedures [redacted] (U) b7E

2. The Legislative History of Section 216 of the PATRIOT Act Confirms that Congress [redacted] b7E

[redacted] (U)

When it enacted the PATRIOT Act, as described below, Congress was aware that [redacted] b7E

[redacted] Indeed, the legislative history confirms what is suggested by the plain language of section 216 itself: [redacted] b7E

[redacted]

Although the PATRIOT Act has no definitive congressional committee report, on October 11, 2001, the House Judiciary Committee reported on a predecessor bill, H.R. 2975, that proposed updating the language of sections 3127(3) and 3121(c) to confirm that pen registers apply to communications instruments other than traditional telephones:

[redacted] b7E

b7E

("This section updates the language of the statute to clarify that the pen/register authority applies to modern communications technologies."). This report, b7E reveals that H.R. 2975 was focused on ensuring that the pen register statute applied to modern communications technologies,

Similar statements were made regarding a predecessor bill in the Senate, the Uniting and Strengthening America Act, S. 1510, which included a identical in relevant part to the one soon thereafter enacted in the PATRIOT Act. See generally

147 Cong. Rec. S10,547-01, *S10,609 (Oct. 11, 2001). Contemporaneous comments about the legislation demonstrate that the amendments at issue were to ensure that pen registers apply to communications instruments other than traditional telephones. See 147 Cong. Rec. *S10,592 (Oct. 11, 2001)(Sen. Feinstein) ("[t]he problem with current law is that it has not kept up with technology"); 147 Cong. Rec. *S10,561, *S10,602 (Oct. 11, 2001)(Sen. Hatch) ("[t]he legislation under consideration today would make clear what the federal courts have already ruled - that Federal judges may grant pen register authority to the FBI to cover [redacted] (U) b7E

Contemporaneous statements about [redacted] also make clear that its amendments were to ensure that pen registers apply to [redacted] On October 25, 2001, Senator Leahy, the chairman of the Senate Judiciary Committee, appeared before the Senate and read final remarks about the Patriot Act, which were published in the Congressional Record. Senator Leahy observed: "[t]he language of the existing statute is hopelessly out of date and speaks of a pen register or trap and trace 'device' being 'attached' to a telephone 'line.'". 147 Cong. Rec. S10,999 (daily ed. Oct. 25, 2001). When considering the amendment to include "routing" and b7E

"addressing" information among the data captured by a pen register, [redacted] b7E

[redacted]

[redacted] Thus, the [redacted] was aimed at the expanded technologies subject to pen register authority - and ensuring that the "new" terms were not misinterpreted to change the nature of information a pen register order is used to collect. (U)

Senator Leahy's comments and analysis also clarify that [redacted] does not alter the minimization scheme under which the government [redacted] b7E

[redacted]

[redacted] Despite these facts, Senator Leahy also b7E
acknowledged that the "technology reasonably available" language
in [redacted] remained in effect, noting that the statute
[redacted] These repeated references to
reasonably or latest available technology demonstrate that
[redacted] was not intended to be a departure from prior
practice, including the minimization scheme created in 1994. (U)

3. [redacted] b7E

The two opinions cited in footnote 3 of the Court's [redacted]
[redacted] Order that examine legislative history, [redacted]
[redacted] misinterpret or take out of context a number of
statements, particularly statements by Senator Leahy, and
erroneously conclude that [redacted] b7E

[redacted] when b7E
Congress first codified the pen register statute under ECPA, it did not address the question [redacted] because [redacted] asserted that Congress passed the CALEA "limitation" amendment to the pen register statute when it first became aware of the issue in 1994, and then [redacted] In fact, the PATRIOT Act legislative history, though scant, proves just the opposite. As described above, Congress was aware that b7E [redacted] (U)

The [redacted] Opinion also takes and uses out of context b7E
portions of Senator Leahy's final remarks about the PATRIOT Act [redacted] quotes some of Senator Leahy's remarks and suggests that the Senator, "who had been instrumental in passing the CALEA 'reasonably available technology' limitation, declared on the

Senate floor that § 3121(c) had so far [at the time of the PATRIOT Act's enactment] [redacted] further implied that Senator Leahy called [redacted] b7E

To the contrary, Senator Leahy stated that his original proposal for the PATRIOT Act amendments to the pen register statute was threefold: (1) to give nationwide effect to pen register and trap and trace orders obtained by government attorneys and obviate the need to obtain identical orders in multiple federal jurisdictions; (2) to clarify that such devices can be used for computer transmissions to obtain electronic addresses, not just telephone lines; and (3) "as a guard against abuse," to provide for "meaningful judicial review" of government attorney applications for pen registers and trap and trace devices. 147 Cong. Rec. S10,999. Senator Leahy's third proposal was not adopted in the PATRIOT Act, and his comments regarding the [redacted] b7E

[redacted] b7E

In short, Senator Leahy had proposed that the criminal pen register application process should be subjected to heightened judicial review. Id. at S11,000. Currently, under the criminal pen register statute, the government must certify that the information likely to be obtained by the installation of a pen register device will be "relevant to an ongoing criminal investigation." Id. A court is required to issue an order upon seeing the certification and is not authorized to look behind the certification and evaluate the judgment of the prosecutor. Senator Leahy sought to amend this standard to require the government to include facts in its pen register certification. Id. Then, the court would grant the order only if it found that the facts supported the government's assertion of relevancy.

[redacted] heightened judicial review of the b7E

applications was necessary to ensure that the government was

properly using pen register orders. Id. A majority of Congress apparently did not agree with him, because this proposed amendment did not become law. Senator Leahy did not claim that under his proposed approach, or as amended by the PATRIOT Act, the criminal pen register statute would eliminate, or even curtail, [redacted] (U) b7E

The [redacted] Opinion also misinterprets or takes out of context numerous statements by Senator Leahy in its examination of the legislative history of the pen register statute, even though it ultimately concludes that [redacted] The [redacted] Opinion acknowledges the presence of the term "minimize" in the legislative history of CALEA. [redacted] agrees that [redacted] Ultimately, however, [redacted] finds, based on Senator Leahy's 1994 statements on the Senate floor, that the legislative history of CALEA does not in the end support the government's b7E

interpretation: [redacted] Notably, this statement does not specifically refer [redacted] Contrary to the [redacted] Opinion, Senator Leahy's statements that the limitation provision is designed to restrict access to "transactional information" is consistent with the House and Senate Reports' expectation that the government would "minimize" such information. (U) b7E

In turning to Leahy's comments regarding the PATRIOT Act amendments, the [redacted] Opinion asserts that Leahy "worrie[d]" that there was [redacted]. The [redacted] Opinion suggests that Leahy's [redacted] b7E

[redacted] The

[redacted] Opinion fails to consider the full context of Senator Leahy's remarks. [redacted] in [redacted] of the PATRIOT Act was intended to address any risk that terms describing new technology [redacted] would be misinterpreted to change the nature of information collected with pen register devices. Furthermore, the [redacted] Opinion generally fails to consider the statements (discussed above) indicating that the limitation provision's minimization scheme had not changed. (U) b7E

Finally, the [redacted] Opinion mistakenly interprets Senator Leahy's statements that [redacted] considered this an important indication that Senator Leahy intended [redacted] to address constitutional concerns regarding the use of pen register devices, [redacted] The [redacted] Opinion takes out of context Senator Leahy's comments, which were directed towards his desire for heightened judicial review of criminal pen register applications, not the minimization scheme in place under the b7E

limitation provision. Again, Senator Leahy's proposal for heightened judicial review was not adopted in the PATRIOT Act, and his comments regarding [redacted] b7E

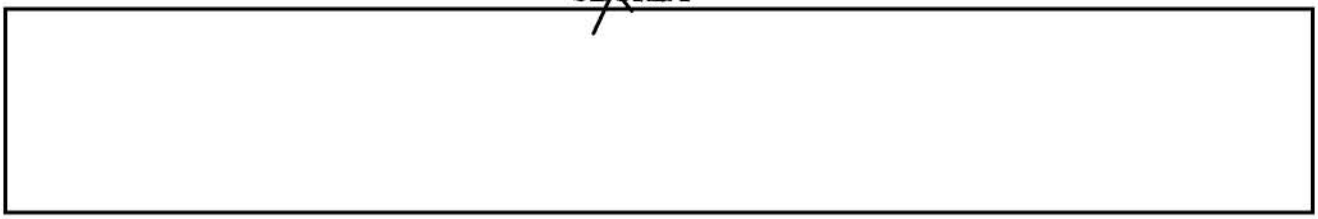
[redacted]

(U)

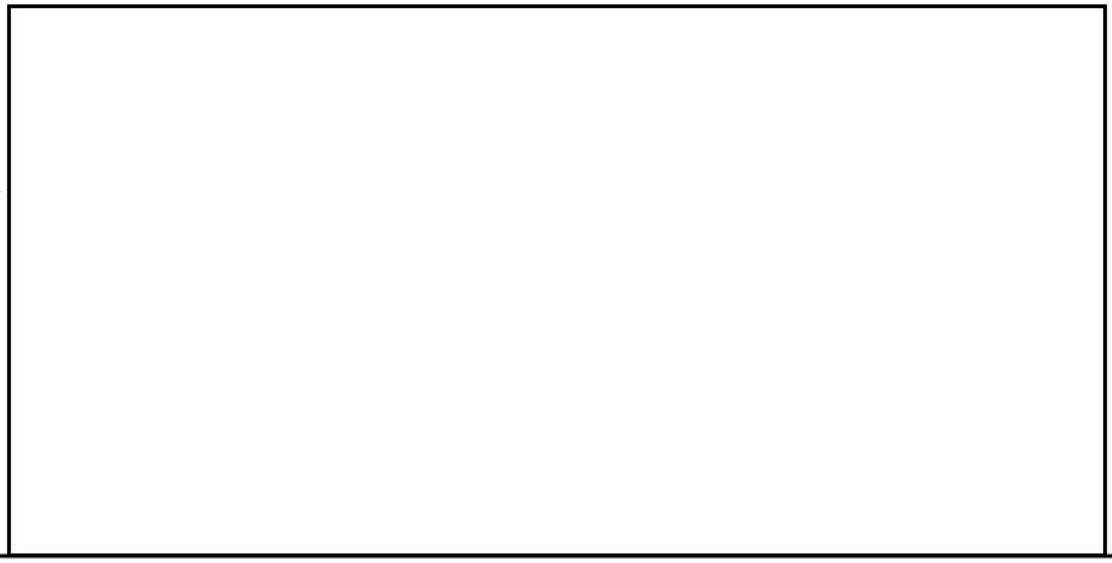
C. **Congress Has Provided Additional Authority to Allow the Government** [redacted] b7E

(U)

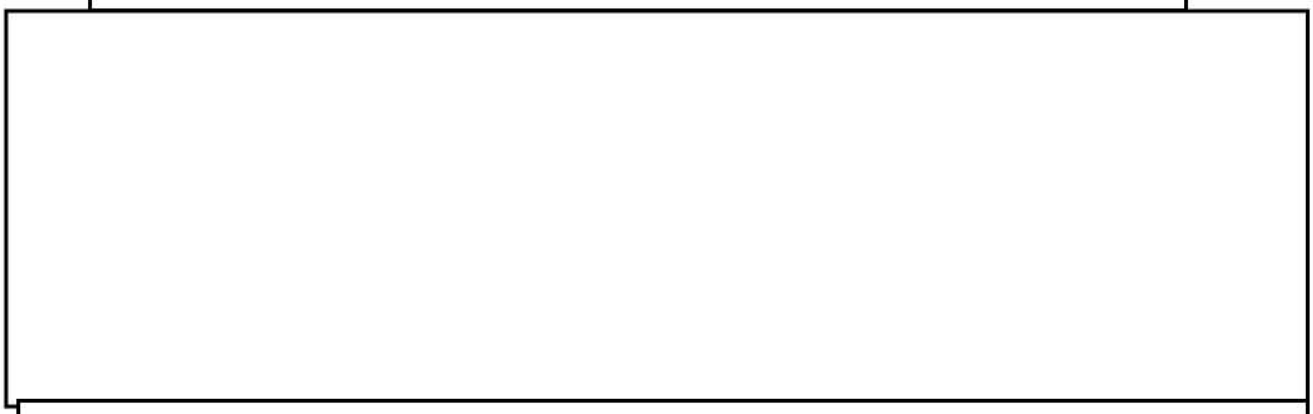
[redacted] b7E



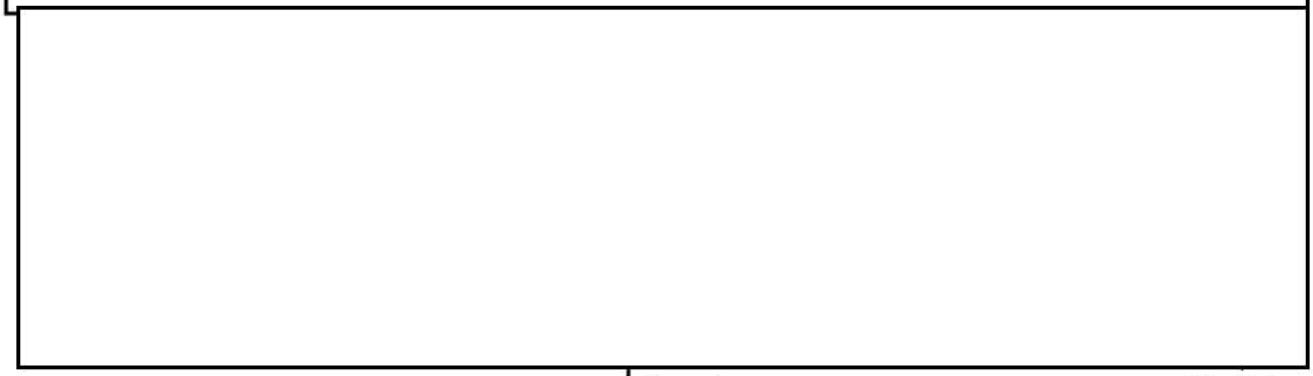
b7E



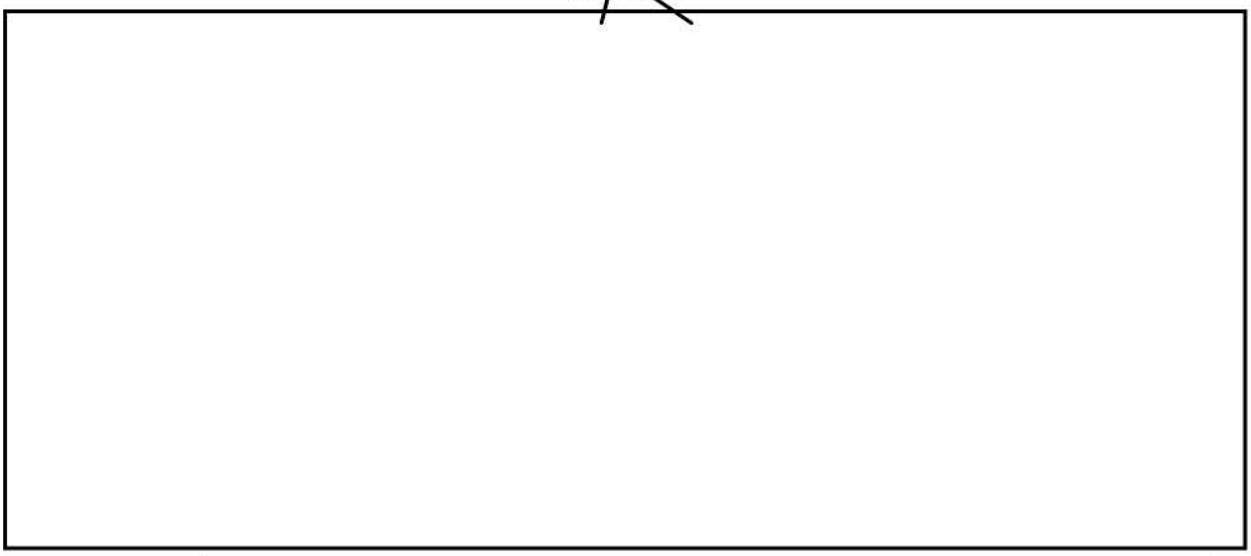
b7E



b7E



b1
b3
(S) b7E

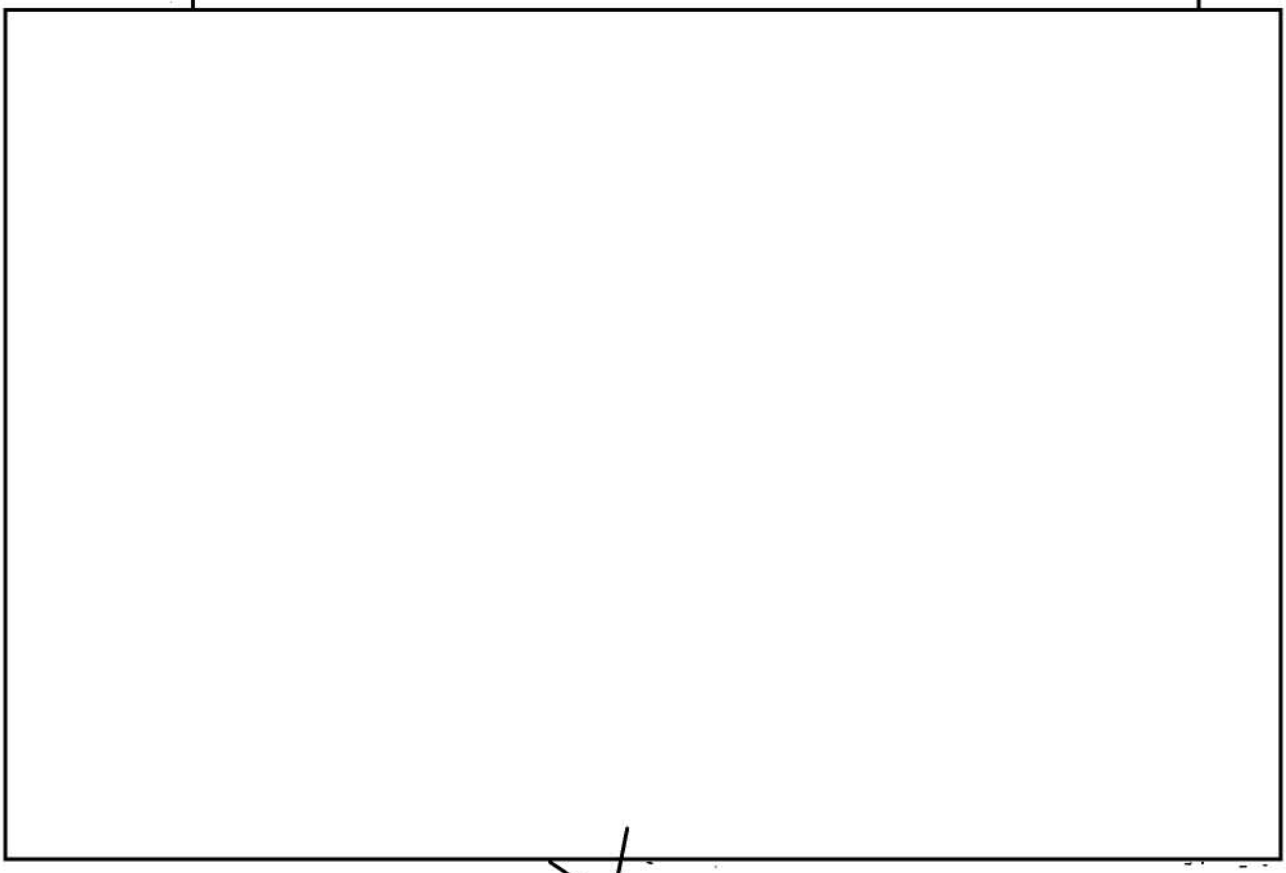


(S)

b1
b3
b7E

D.

b7E



b7E

1. No Clause or Word Should be Rendered Superfluous. (U)

As noted above, "[i]t is a cardinal principle of statutory construction that, . . . if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." TRW, 534 U.S. at 31 (citation omitted). Courts must strive to "give effect, if possible, to every clause and word of a statute." Id. (citation omitted). (U)

Both the [redacted] and [redacted] Opinions address this issue. Indeed, the [redacted] Opinion acknowledges that an interpretation of the definition of pen register denying authorization to any device that [redacted] b7E

[redacted] superfluous. [redacted]

[redacted] Nevertheless, [redacted] declined to find this issue "dispositive," largely because of what [redacted] saw as the more significant concerns raised by the canon of constitutional avoidance (discussed below). Id. at 336. (U)

Unlike [redacted] rejected the government's argument that [redacted] reading of the

statute – [redacted] renders the words "technology reasonably available to it" superfluous. [redacted] He determined that the government's conflicting interpretation "rests almost entirely on legislative silence," and that [redacted] determined that "[t]he most natural reading of the provision is that Congress assumed that such technology would be available, and for that reason did not address or even contemplate the contrary scenario." Id. This determination contradicts indications that [redacted] b7E

The [redacted] Opinion concluded that a reading that would permit [redacted] "contradicts, or at least creates serious tension with, [redacted] The [redacted] Opinion concluded that the most harmonious reading of the statute would deny access [redacted] b7E

[redacted] Id. (U)

Under that interpretation, [redacted] b7E

[redacted]

However, [redacted]

[redacted] Thus, under the interpretation advanced by [redacted] is left without a function in the statutory scheme. (U)

The doctrine against superfluities should apply with special force in this case. This is not an instance of a single word or tangentially related provision being rendered superfluous. Rather, the [redacted] and [redacted] Opinions interpret one part of the criminal pen register provision, the definition, to render another part of the very same chapter, the limitation provision, superfluous to the statutory scheme.[23] Moreover, Congress amended both provisions in the very same section [redacted] and clearly was aware of and chose to retain both. One must therefore conclude that Congress saw a continuing

---

[redacted] b7E

purpose for the limitation provision separate from and in addition to the amended definition of pen register. The [redacted] b7E Opinion's dismissal of the surplusage canon effectively [redacted] to fit a preconceived - and inaccurate - notion of Congress's intent. (U)

2. The Doctrine Against Implied Repeals (U)

In addition to rendering [redacted] superfluous, an interpretation of the pen register statute [redacted] b7E "[A] repeal by implication will only be found when there is clear legislative intent to support it." United States v. Mitchell, 39 F.3d 465, 472 (4th Cir. 1994)(citation omitted). Evidence of the legislature's intent to repeal a statute by implication must be "clear and manifest," Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) (quotation and citation omitted), and, "because an implied repeal is disfavored, there is a 'strong presumption' against finding such a repeal." Patten v. United States, 116 F.3d 1029, 1034 (4th Cir. 1997)(quoting Blevins v. United States, 769 F.2d 175, 181 (4th Cir. 1985)). In order to find an implied repeal, a court must find either that the two acts in question are "'in irreconcilable conflict,'" or that "'the later act covers the whole subject of

the earlier one and is clearly intended as a substitute[.]'" Radzanower, 426 U.S. at 154 (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)). (U)

As described above, in 1994, Congress added the limitation provision [redacted] with a pen register device. That limitation obligates the government to use technology that is reasonably available to it, and nothing more, to fulfill this objective. The government remains entitled to record or decode "dialing, routing, addressing, or signaling information" - [redacted] Under an interpretation of the pen register statute prohibiting [redacted] the limitations on the government's obligation inherent in Congress's choice of the words "technology reasonably available" is eliminated. (U)

b7E

The circumstances of the passage [redacted] do not provide any indication, much less a "clear and manifest" indication, that Congress intended such a change. If Congress intended the definition of pen register, [redacted] (U)

[redacted] dismissed the implied repeals claim, finding that because [redacted] and the strict interpretation of the definition of "pen register" [redacted] there is no conflict in the provisions. [redacted] This conclusion is based on a reading of the limitation provision that ignores the phrase "technology reasonably available." As discussed above, [redacted] b7E

[redacted]

3. The Canon of Constitutional Avoidance (U)

The canon of constitutional avoidance is based on the assumption that Congress usually intends to avoid passing unconstitutional laws, and thus counsels that a court should favor statutory interpretations that do not raise "serious constitutional doubts." See Clark v. Martinez, 543 U.S. 371, 381 (2005). The [redacted] Opinions rely on the canon of constitutional avoidance as a basis to deny government b7E

? See Comment on post it from SGIS Peggy Brown

applications [redacted] b7E

[redacted] and [redacted] both concluded that the interpretation of the statute [redacted] b7E

[redacted] Although [redacted] opinion appears primarily to be based on [redacted] plain reading of the text, [redacted] also references Fourth Amendment concerns, [redacted] b7E

[redacted]

(referring to DAG Memo and stating it does not remedy the problem; "this Court cannot cede to the executive branch its responsibility to safeguard the Fourth Amendment."). (U)

The canon of constitutional avoidance does not allow the court to overlook the plain text of the statute and thereby disregard congressional intent and Congress's scheme, including the minimization scheme adopted in 1994, as a means to resolve any possible Fourth Amendment issues [redacted] "The canon is thus a means of giving effect to congressional intent, not of subverting it." Clark, 543 U.S. at 382. (U) b7E

Moreover, the "serious constitutional doubt" claimed by [redacted] and [redacted] and suggested by [redacted] - that the government [redacted] - does not apply in the context of FISA pen register surveillance. In Katz, the Supreme Court explicitly declined to extend its holding that the Fourth Amendment requires a warrant to surveil content to national security cases. See Katz, 389 U.S. at 358 n.23 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is not a question presented by this case."). In United States v. United States District Court (Keith), 407 U.S. 297, 321-22 (1972), the Supreme Court similarly declined to extend the Fourth Amendment warrant requirement to activities of foreign powers or their agents. No other federal

court has ever held that the Fourth Amendment warrant requirement applies to cases involving foreign powers or agents of foreign powers. See In Re Sealed Case, 310 F.3d 717, 742 (FISA Ct. Rev. 2002); H.R. Rep. No. 95-1283(I), at 17-21 (1978). Given the unique constitutional and statutory context of FISA pen register orders, the canon of constitutional avoidance does not counsel against the government's interpretation, and does not require the Court to conclude that the Congress intended to prevent the government [redacted] b7E

[redacted] (U)

E. [redacted] b7E

The government submits that the scheme adopted by Congress [redacted] which allows the [redacted] b7E The touchstone for review of government action under the Fourth Amendment is whether a search is "reasonable." See, e.g., Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995); In Re Sealed Case, 310 F.3d at 737, 742, 746 (emphasizing reasonableness as critical factor in reviewing constitutionality

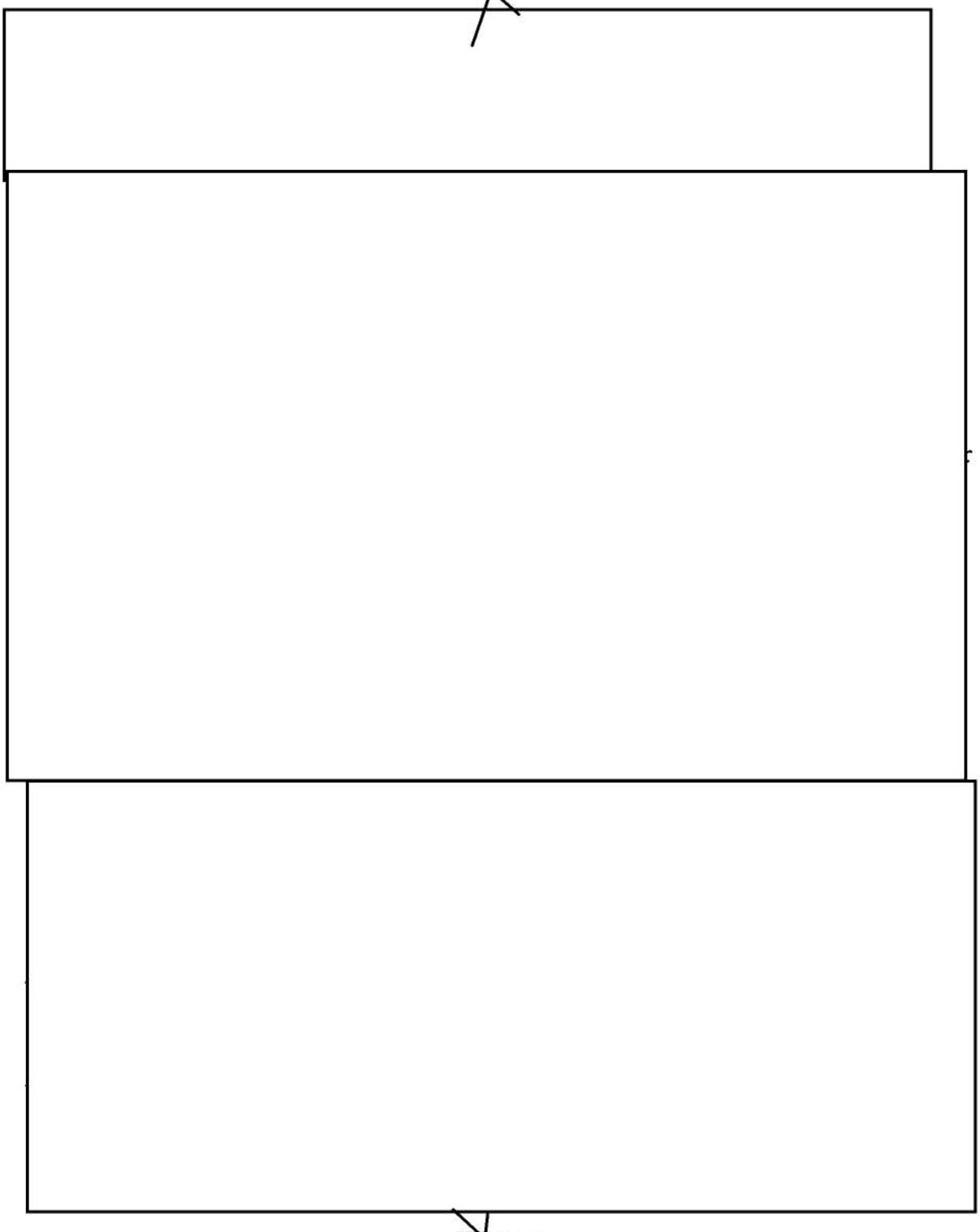
of FISA). (U)

Reasonableness, in this context, must be assessed under a general balancing approach, "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests." United States v. Knights, 534 U.S. 112, 118-19 (2001) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)). As recently observed by the Foreign Intelligence Surveillance Court of Review, [redacted] b7E

[redacted]

b7E

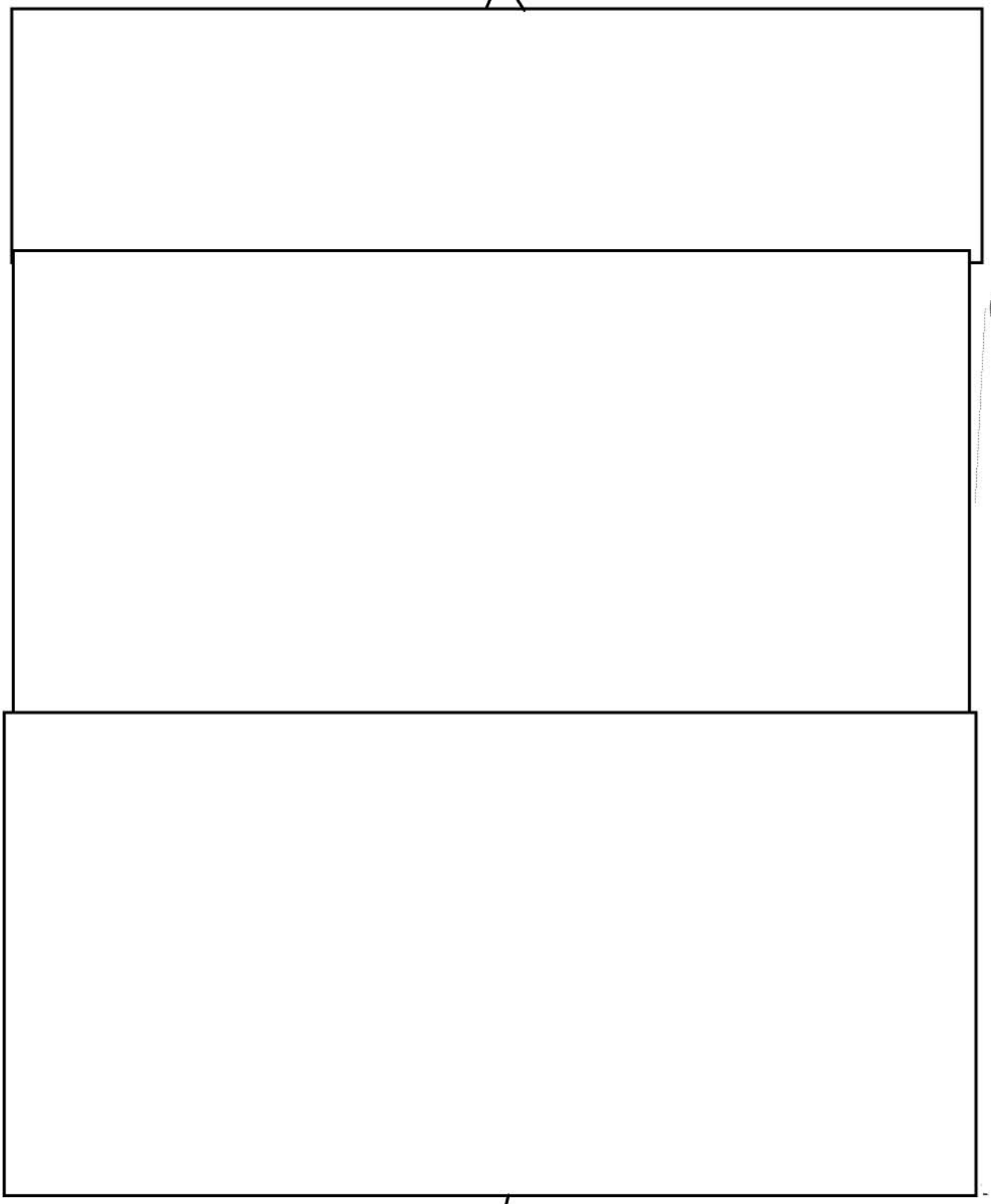
[redacted]



b7E

b7E

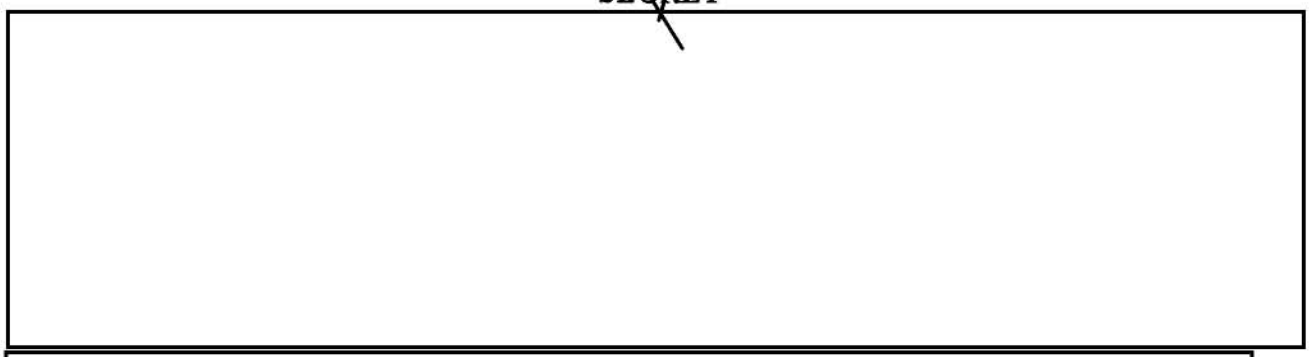
b1
b3
(S) b7E



(S) b1 b3 b7E

b1 b3 b7E

(S) b7E



b7E

b1
b3
(S) b7E

IV. CONCLUSION (U)

[redacted] (S)

b1
b3
b7E

Respectfully submitted,

David S. Kris
Assistant Attorney General for National Security

By: [redacted]

Office of Intelligence
National Security Division
United States Department of Justice