2001 the NSA began providing the FBI tippers derived from the NSA's e-mail meta data analysis (e-mail tippers). These e-mail tippers initially were routed to the same two analysts who were managing the telephone tippers. The analysts told us that the e-mail tippers were processed and disseminated in the same manner as the telephone tippers. Content tippers, which according to the analysts were received very infrequently during this early period, generally were also disseminated by EC to the appropriate field offices, but little if any research regarding the information was conducted. The analysts said they considered the content tippers particularly time-sensitive and for that reason occasionally transmitted the ECs directly to the appropriate field offices or called the offices to advise that the information was being loaded into the FBI's Automated Case Management System. In 2002, responsibility for e-mail tippers was reassigned to the Electronic Communications Analysis Unit. ~~(TS//STLW//SI//OC/NF)~~

In February 2002, one of the two FBI analysts left the [redacted] after being selected for a management position in a different analytical section within the FBI's Counterterrorism Division. The remaining analyst became solely responsible for managing the Stellar Wind tippers under the [redacted] a situation that continued for approximately the next 12 months. The analyst told us that while her work hours during this period were "ridiculous," she did not feel there was any pressure to add analysts to the project because "the process was working well." ~~(TS//SI//NF)~~

In early 2002, FBI management instructed the lone [redacted] analyst to conduct some of her work while physically located in the NSA Headquarters at Fort Meade, Maryland. This created an unusual arrangement for the analyst. The analyst continued to receive the NSA's daily Stellar Wind reports at FBI Headquarters, and she would then drive to the NSA with the reports to draft the ECs (the analyst had remote access to FBI databases from an NSA workstation). The analyst told us that interaction with NSA counterparts during these daily visits was minimal. After the ECs were drafted, the analyst returned to FBI Headquarters to obtain approval to disseminate the communications to the FBI's field offices. The analyst's impression was that FBI management created this unusual arrangement "for show" and that its purpose was to establish an FBI "presence" at the NSA in connection with Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

The analyst continued working on Stellar Wind matters until approximately February 2003, when a small team of FBI personnel were

assigned permanently to the NSA to manage the FBI's participation in the Stellar Wind program.[74] ~~(S//NF)~~

2. FBI Field Offices' Response to [redacted] Leads ~~(S//NF)~~

According to the two FBI analysts responsible for managing Stellar Wind information under the [redacted] from approximately October 2001 to February 2003, some agents in FBI field offices grew frustrated with the information they were receiving under the program. Because the [redacted] ECs that disseminated the tippers to the field offices assigned most of them as Action leads, this required that the leads be covered expeditiously. ~~(S//NF)~~

Under ordinary operating procedures, investigative leads for international terrorism matters are set by FBI Headquarters' International Terrorism Operations Section. In addition, the ECs assigning international terrorism leads typically identified a Supervisory Special Agent within ITOS as the point-of-contact for any questions field offices might have. Because the Stellar Wind program was so tightly compartmented, the leads sent during this early period by the [redacted] were not coordinated with ITOS, and the FBI Headquarters point-of-contact identified in the ECs for any questions generally was one of the two [redacted] analysts. ~~(S//NF)~~

According to one of the [redacted] analysts, agents responsible for covering the Action leads complained that the lack of background information provided in the ECs about the tippers made it difficult to determine what investigative steps could or should be taken. [redacted][75] Consequently, the analyst

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[74] This co-location of FBI personnel at the NSA is discussed below. ~~(S//NF)~~

[75] To open a full investigation, the FBI was required to [redacted] A preliminary inquiry required only a showing of [redacted] See Attorney General Guidelines for [redacted]

The FBI's practice of issuing national security letters based on Stellar Wind-derived information is discussed in Chapter Six of this report. ~~(S//NF)~~

received calls from agents requesting additional information about the source of the intelligence provided in the ECs to help the agents decide whether there was sufficient predication to open an investigation on the telephone number or to issue a national security letter for subscriber information. ~~(TS//SI//NF)~~

The analyst stated that in response to these calls he could only reiterate to the agents that the information was provided by a reliable, sensitive source. The analyst said this situation produced a "dichotomy" with the tippers. On the one hand, there was a demand in the International Terrorism Operations Section and field offices for the telephone numbers because of their priority [redacted] status and the prevailing concern that there would be a second terrorist attack; on the other hand, the limited and vague information contained in the [redacted] ECs caused some confusion and frustration among agents investigating the lead. ~~(S//NF)~~

Agents also complained that many tippers were already known to the FBI from past or pending investigations and that the [redacted] ECs were providing "circular reporting."[76] However, according to one [redacted] analyst, this generally did not occur. The analyst explained that an agent in the field assigned to cover a lead on a telephone number did not know the NSA was the source of the intelligence. Consequently, when the agent discovered that the number was identical to a number the agent was already investigating or was aware of, it appeared to the agent that the [redacted] simply had identified a previously known number, conducted some additional research that the field office likely had already done, and disseminated the information back to the field as new reporting. Because the analysts could not fully explain the source of the intelligence, the agent did not realize the [redacted] reporting in fact reflected a new foreign connection to the telephone number. ~~(TS//STLW//SI//OC/NF)~~

Another frustration voiced by agents to the [redacted] analysts was that leads disseminated under the project that were designated "Action leads" frequently did not yield significant investigative results, such as identifying new persons of interest or contributing to an active investigation. [redacted]

[76] For example, circular reporting might have occurred when the FBI passed a Stellar Wind-derived telephone number or e-mail address to another agency within the U.S. Intelligence Community, that agency in turn requested the NSA to analyze the information, and the NSA subsequently disseminated the results back to the FBI in a Stellar Wind report. ~~(TS//STLW//SI//OC/NF)~~

[redacted]

~~(TS//STLW//SI//OC/NF)~~

The NSA responded to this frustration by implementing the [redacted] rankings described earlier to provide the agents some guidance on prioritizing the tippers. In addition, the FBI analysts told us that they became more adept at telephone analysis and "got better at their game" by eliminating low value tippers [redacted] from being disseminated to field offices. According to FBI documents, the FBI also sought additional information from the NSA about tippers ranked [redacted] before the FBI disseminated these tippers to the field for investigation. ~~(TS//STLW//SI//OC/NF)~~

3. FBI's Efforts to Track Stellar Wind Tippers and Update Executive Management on Status of [redacted] Leads ~~(S//NF)~~

Typically, FBI ECs originate from a specific investigative or administrative case file number. A file number is also required for an EC to be loaded into the FBI's Automated Case Management System and to enable the sending office to assign a lead to the receiving office. However, FBI Headquarters did not initially open an investigative file for the [redacted] ECs that disseminated Stellar Wind tippers to field offices. One of the original analysts assigned to the project told the OIG that he was familiar with a telephone analysis project in the FBI's drug program and that as a result he decided to issue the first Stellar Wind-related EC from that drug investigative file. This confused some field offices receiving the earliest ECs because counterterrorism leads were being disseminated under a drug investigation file number. ~~(TS//STLW//SI//OC/NF)~~

In mid-October 2001, the FBI created a subfile under the FBI's investigation of the September 11 terrorist attacks to disseminate Stellar Wind information. The FBI used this subfile, referred to as the [redacted] until September 2002, when a more formal program for disseminating Stellar Wind information, called [redacted] was created.[77] ~~(TS//STLW//SI//OC/NF)~~

The [redacted] analysts also told us that they created a database to attempt to track the status of leads disseminated to the field offices. The database identified each tipper by field office and the status of the lead that was assigned. One analyst stated that the response rate from

[77] We describe this more formal program in Chapter Six of this report. (U)

field offices was uneven during these early months, and their supervisors instructed the analysts at one point to contact the head of each field office to determine the status of the [redacted] leads for which each office was responsible. ~~(S//NF)~~

The [redacted] analysts used the database they created to produce status reports for senior FBI officials who were read into the Stellar Wind program. These reports provided statistics regarding the quantity and rankings of disseminated tippers, as well as brief synopses of the status of the [redacted] leads. The Stellar Wind program was viewed as an emergency response to the September 11 attacks and these status reports were intended to provide FBI executives information about how the program was contributing to the FBI's counterterrorism efforts. ~~(TS//SI//NF)~~

IV. Justice Department Office of Intelligence Policy and Review's (OIPR) and FISA Court's Early Role in Stellar Wind ~~(TS//STLW//SI//OC/NF)~~

When the President signed the first Authorization for the program on October 4, 2001, only two Department officials outside the FBI were read into the Stellar Wind program: Attorney General John Ashcroft, who certified the Authorization as to form and legality; and John Yoo, the Deputy Assistant Attorney General in the Office of Legal Counsel responsible for advising the Attorney General on the matter and for drafting the Department's first memorandum on the legality of the program.[78] The Department's Office of Intelligence Policy and Review (OIPR), despite its expertise in FISA matters, was not asked to consider how FISA might affect the program's legality or implementation, nor was OIPR asked to consider how the program might affect the Department's FISA operations. ~~(TS//SI//NF)~~

In this section, we provide an overview of OIPR, how James Baker, the head of OIPR, inadvertently came to learn about Stellar Wind soon after it was initiated, and the subsequent role that OIPR played in the program's operation. We also describe the circumstances surrounding the decision to have the FISA Court Presiding Judge and his successor read into the Stellar Wind program, and the Court's response to the program. ~~(TS//STLW//SI//OC/NF)~~

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[78] Levin told us that he did not believe Yoo was read into Stellar Wind before the October 4, 2001, Presidential Authorization was signed, and we were not able to determine precisely when Yoo's read-in occurred. However, Yoo's November 2, 2001, memorandum analyzes the legality of the October 4, 2001, Authorization and the draft of the November 2, 2001, Authorization. Thus, it appears that Yoo was read into the program not later than November 2, 2001. ~~(TS//STLW//SI//OC/NF)~~

A. Overview of OIPR (U)

At the time of the implementation of the Stellar Wind program, OIPR was responsible for advising the Attorney General on matters relating to the national security activities of the United States.[79] Created shortly after enactment of the Foreign Intelligence Surveillance Act of 1978, OIPR reviewed executive orders, directives, and procedures relating to the intelligence community, and approved certain intelligence-gathering activities. OIPR also provided formal and informal legal advice to the Attorney General and U.S. intelligence agencies regarding questions of law and procedure relating to U.S. intelligence activities. In addition, OIPR advised the Attorney General and agencies such as the CIA, FBI, and Defense and State Departments concerning questions of law relating to U.S. national security activities and the legality of domestic and overseas intelligence operations. (U//~~FOUO~~)

OIPR also represented the United States before the FISA Court. OIPR was responsible for preparing and presenting applications to the FISA Court for orders authorizing electronic surveillance and physical searches by U.S. intelligence agencies for foreign intelligence purposes in investigations involving espionage and international terrorism. When evidence obtained under FISA was proposed to be used in criminal proceedings, OIPR sought the necessary authorization from the Attorney General, and in coordination with the Criminal Division and U.S. Attorney's Office prepared the motions and briefs required by the federal court whenever surveillance under FISA was challenged. (U)

The head of OIPR was referred to as the Counsel for Intelligence Policy and was supported by two Deputy Counsel and a staff of attorneys, paralegals, and administrative professionals. James Baker served as the Counsel for OIPR from May 2001 to January 2007.[80] (U)

B. OIPR Counsel Learns of Stellar Wind Program (U//~~FOUO~~)

Baker told us that while standing outside the Department one evening several weeks after the September 11 attacks, he was approached by an FBI colleague who said, "There is something spooky going on," that it appeared

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[79] In September 2006, the Justice Department moved OIPR into the newly created National Security Division (NSD). In April 2008, NSD modified OIPR's structure and name. The new organization is called the Office of Intelligence and includes operations, oversight, and litigation sections. For purposes of this report we use the term OIPR to reflect the time period our review encompasses. (U)

[80] Baker served as Acting Counsel for OIPR from May 2001 to January 2002, and as Counsel from February 2002 until January 2007. Baker officially resigned from the Justice Department in October 2007. (U)

foreign-to-domestic collection was being conducted without a FISA order, and that some FBI personnel "were getting nervous." The FBI colleague asked Baker whether he knew anything about the activity, and Baker responded that he did not. ~~(TS//STLW//SI//OC/NF)~~

Baker said that while reviewing a FISA application several weeks after this conversation, a particular passage regarding international communications "leapt out at" him. According to Baker, the passage contained "strange, unattributed language" and information that was "not attributed in the usual way." Baker told the OIG that the information concerned connections between telephone numbers, but he could not recall if the information simply identified a link between individuals or also included the content of communications. ~~(TS//SI//NF)~~

Baker asked the OIPR attorney responsible for the application about the information in the passage, and the attorney responded that nobody at the FBI would disclose where the information had come from, only that it was part of a "special collection." Baker therefore contacted the FBI about the application. Unable to obtain any answers to his questions, Baker informed the FBI that he would not allow the application to be filed with the FISA Court. Baker said that, to the best of his recollection, he did not believe the application was filed with the Court. ~~(TS//SI//NF)~~

Soon thereafter, Baker spoke with Daniel Levin, who at that time was serving as both Counselor to the Attorney General and Chief of Staff to the FBI Director. Levin told Baker that approval from the White House was needed before he could tell Baker about the special collection. Levin told us that he successfully pressed the White House for Baker to be read into Stellar Wind. Baker stated that David Addington, counselor to Vice President Cheney, was the individual who approved his clearance into the program. ~~(TS//STLW//SI//OC/NF)~~

According to NSA records, Baker was read into Stellar Wind in January 2002.[81] He said his read in essentially consisted of Levin providing him a short briefing and a copy of Yoo's November 2, 2001, memorandum regarding the legality of the program. Baker told us that his initial reaction was that the program, and Yoo's memorandum, were flawed legally. Baker said he did not consider himself a constitutional law scholar, but was

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[81] Baker told us that he initially was read into the program in December 2001 by Levin. Baker said he later received a more formal briefing on the program at the NSA, where he was allowed to read the Presidential Authorizations and discuss the program with NSA attorneys. This formal briefing appears to be the event that the NSA considers Baker's official read-in, which according to NSA records occurred on January 11, 2002. We used this date for purposes of calculating the number of Justice Department employees read into the program. (U//~~FOUO~~)

nevertheless surprised that while Stellar Wind was in his view "overriding a criminal statute" on the basis of the President's power as Commander in Chief, Yoo's memorandum did not even cite an important U.S. Supreme Court opinion on presidential authority during wartime, *Youngstown Sheet & Tube Co.* Baker said he believed that it is important to exercise some "humility" when dealing with national security matters because of the complexity and importance of the issues, and he therefore reserved final judgment on the memorandum until he researched the legal issues further. Yet, Baker said his initial opinion that the memorandum was flawed legally did not change over time. ~~(TS//STLW//SI//OC/NF)~~

We asked Baker whether at the time he thought the collection authorized under Stellar Wind could have been accomplished under FISA. Baker said that his thinking on this issue has evolved over time, but that he staunchly believed that "FISA works in wartime." He stated that although it is difficult to do, FISA can be made to work under the circumstances that existed following the September 11 attacks, but that it also was easy to "make FISA not work" under these circumstances.
~~(TS//STLW//SI//OC/NF)~~

Baker cited a lack of resources as the primary impediment to using the FISA process, rather than Stellar Wind, to collect foreign intelligence following the September 11 attacks. Baker said that he did not believe OIPR, as staffed in October 2001, had sufficient resources to process the volume of telephone numbers the NSA was tasking for content collection under Stellar Wind at that time. However, Baker explained that in his view FISA is "scalable" and that to some degree the statute's utility is limited by the resources allocated to OIPR.[82] ~~(TS//STLW//SI//OC/NF)~~

Baker also observed that to bring Stellar Wind's content and meta data collections fully under FISA authority would have required a different approach to the statute. Baker said that developing such an approach would have been possible only by convening a working group to examine constitutional and practical issues. Baker, one of only three people in the Justice Department read into Stellar Wind as of January 2002, said he did not have the ability or the authority to do this himself.[83] Baker stated that his belief in this approach was informed by his own experience with and participation in a small, informal group composed of U.S. Intelligence Community officials that had worked periodically since shortly before the

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[82] Baker also observed that OIPR could have been staffed with detailees from the Department of Defense and other components within the Justice Department. (U)

[83] Baker also said that he did not have the legal resources within OIPR to "challenge" Yoo's November 2, 2001, legal analysis of the Stellar Wind program, although he believed it was flawed. ~~(TS//STLW//SI//OC/NF)~~

September 11 terrorist attacks to develop solutions to various foreign intelligence collection issues.[84] ~~(TS//STLW//SI//OC/NF)~~

C. FISA Court is Informed of Stellar Wind ~~(TS//SI//NF)~~

Baker told the OIG that sometime in the December 2001 to January 2002 time period he concluded, based on his awareness that information derived from Stellar Wind had been used to support at least one request for a FISA application, that the FISA Court also needed to be made aware of the Stellar Wind program. Baker said that the Department's counterterrorism efforts rely on good relations with the FISA Court and that candor and transparency are critical components of that relationship. According to Baker, OIPR had a policy of full disclosure with the Court that he said served the Department well when problematic issues arose. Baker also attributed the Department's record of success with FISA applications and the improved coordination between intelligence agents and prosecutors to the strong relationship that the Department had built with the Court. Baker believed it would be detrimental to this relationship if the Court learned later that information from Stellar Wind was included in FISA applications without notice to the Court. ~~(TS//STLW//SI//OC/NF)~~

Baker said he raised the issue of the FISA Court not being informed about Stellar Wind with Levin, who first responded by suggesting that the Attorney General order Baker not to disclose the program to the Court while the issue was being considered. Baker initially agreed to this approach and drafted a memorandum from Ashcroft to Baker to this effect. He said that Levin edited the document and presented it to Ashcroft, who signed it. The memorandum, dated January 17, 2002, stated that Ashcroft understood FISA Court applications would include information obtained or derived from Stellar Wind, and that these applications would seek authorizations to conduct surveillance of targets already subject to surveillance under Stellar Wind. Ashcroft's memorandum also stated that he was considering Baker's recommendation that the Department brief the FISA Court on the program. The memorandum stated further:

> In the interim, I am directing you to file applications with the Foreign Intelligence Surveillance Court without informing the court of the existence of the Stellar Wind program or any aspect thereof. I am also directing you not to brief any other

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[84] This type of collaborative effort ultimately developed the legal theories used to transition Stellar Wind's collection activities to FISA authority. However, as we discuss in Chapter Five, while the transition was successful with respect to bulk meta data collection, the legal theory to transition Stellar Wind's content collection, while initially approved by one FISA Court judge, subsequently was rejected by a second judge. ~~(TS//STLW//SI//OC/NF)~~

individuals in the Department of Justice, including the FBI, regarding Stellar Wind without my prior authorization. ~~(TS//STLW//SI//OC/NF)~~

Levin told us that he, as well as Ashcroft, soon came to agree with Baker that the FISA Court should be made aware of the program. Levin said he told Ashcroft during this time that Baker had done a "remarkable job" building a relationship with the FISA Court that greatly benefited the Department's counterintelligence and counterterrorism efforts. Levin said he advised Ashcroft, "We should do what Baker thinks is right." According to Levin, Ashcroft agreed. ~~(TS//STLW//SI//OC/NF)~~

Levin said that he informed Gonzales and Addington at some point of Baker's position that the FISA Court should be made aware of Stellar Wind, but said they initially rejected the idea of reading any judges into the program. Levin stated that he continued to press the issue without success. ~~(TS//STLW//SI//OC/NF)~~

However, the issue came to a head on a weekend in January 2002 when Baker reviewed a second FISA application that contained the "strange, unattributed language" Baker understood to indicate that the information referenced was obtained from the Stellar Wind program. This second FISA application sought emergency approval from the FISA Court to conduct electronic surveillance of [redacted] Because this would be the first application seeking FISA authority to monitor this particular subject's telephone communications, Baker recognized that the NSA had already engaged in some level of electronic surveillance in the United States of a domestic telephone number without a FISA order. ~~(TS//STLW//SI//OC/NF)~~

Although Baker viewed the memorandum from Ashcroft directing him not to inform the FISA Court about Stellar Wind as "cover" for him not to inform the FISA Court about Stellar Wind, he remained uncomfortable about filing an application that contained Stellar Wind information without informing the FISA Court. Baker therefore approached the Chief of the Justice Department's Professional Responsibility Advisory Office (PRAO) to discuss his ethical responsibilities to the FISA Court under circumstances where a FISA application contains certain information that is material to the Court's decision, but Baker was not authorized to disclose the source of the

information.[85] Baker stated that the PRAO Chief told him that he had an affirmative duty of candor to the Court, and that this duty of candor was heightened due to the *ex parte* nature of the FISA proceedings.[86] Baker concurred with this guidance, which Baker felt also was compelled by his position as a federal officer and officer of the Court. Baker said he therefore concluded, and informed Levin, that he would not sign the pending application or present to it to the FISA Court, nor would he allow any OIPR attorney do so. According to Baker, Levin spoke to David Addington about the situation, but Addington nevertheless declared that the Court would not be read into the program. ~~(TS//STLW//SI//OC/NF)~~

According to Baker, the White House, the Attorney General, and Levin then decided that Levin, rather than Baker, would sign the FISA application and present it to Judge Claude M. Hilton, the FISA Court judge responsible for hearing FISA matters that weekend.[87] Baker told us that he notified Judge Hilton in advance that the application was being handled in this manner. Levin said he brought the application to Judge Hilton's residence and explained that he, instead of the OIPR Counsel, was presenting the case because it involved a "special classified program." Levin told us that Judge Hilton approved the application without asking any questions. According to Levin, when he later told Addington how the matter was resolved, and that he agreed with Baker's position that the Court should be briefed into the program, Addington responded that Baker should be fired for insubordination for not signing the application. ~~(TS//STLW//SI//OC/NF)~~

According to Baker, a consensus formed after this episode among the Attorney General, the FBI, and the White House that future FISA matters could not be handled in the same fashion, particularly in view of the anticipated increase in FISA applications resulting from the intelligence collected and disseminated under Stellar Wind.[88] Baker said that the

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[85] The Professional Responsibility Advisory Office provides advice to Department attorneys with respect to professional responsibility issues. (U)

[86] Baker cited Rule 3.3 of the American Bar Association's Model Rules of Professional Conduct as the specific rule implicated by the situation. That rule provides, in relevant part, that "in an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." Baker stated that he also consulted with two officials from the Office of the Deputy Attorney General on the matter and that they provided the same advice as PRAO. (U)

[87] Director Mueller and Attorney General Ashcroft already had signed the application. (U)

[88] We asked Baker whether he thought the FBI's restrictions on the use of Stellar Wind-derived leads disseminated to field offices, as described above, were sufficient to guard against including Stellar Wind information in FISA applications. Baker stated that his experience with FBI record-keeping practices did not give him a high degree of

(Cont'd.)

decision was therefore made to brief the FISA Court's Presiding Judge, Royce Lamberth.[89] ~~(TS//STLW//SI//OC/NF)~~

Judge Lamberth was read into Stellar Wind on January 31, 2002. The briefing was conducted in the Attorney General's office at the Department, and was attended by Ashcroft, Hayden, Mueller, Levin, Yoo, and Baker. According to a memorandum of talking points prepared for the briefing, Ashcroft provided Judge Lamberth a brief summary of the program's creation, explaining that the President had authorized a sensitive collection technique in response to the September 11 attacks in order to obtain foreign intelligence information necessary to protect the United States from future attacks and acts of international terrorism. Ashcroft said the NSA, at the instruction of the Secretary of Defense, implemented the collection, which was code named Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

According to the talking points, Ashcroft also discussed the factors the President considered in determining that an "extraordinary emergency exists" to support electronic surveillance without a warrant. The factors cited to Judge Lamberth paralleled those contained in the Presidential Authorizations, including "the magnitude and probability of death from terrorist attacks, the need to detect and prevent such attacks with secrecy, the possible intrusion into the privacy of American citizens, the absence of a more narrowly-tailored means to obtain the information, and the reasonableness of such intrusion in light of the magnitude of the potential threat of such terrorist acts and the probability of their occurrence." ~~(TS//STLW//SI//OC/NF)~~

According to the talking points, Ashcroft stated that he determined, based upon the advice of the Office of Legal Counsel, that the President's actions were lawful under the Constitution. Levin told us that Ashcroft emphasized to Judge Lamberth that the FISA Court was not being asked to approve the program. ~~(TS//STLW//SI//OC/NF)~~

Following Ashcroft's summary, the briefing continued in three parts. First, Hayden described how the program worked operationally. Second, Yoo discussed legal aspects of the program. Third, Baker discussed a

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confidence that such separation could be consistently maintained. In addition, Baker believed that the nature of FBI international terrorism investigations would make it difficult to track Stellar Wind-derived information. According the FBI OGC, Baker did not share with the FBI his concerns about whether its record-keeping practices would keep Stellar Wind information from being used in FISA applications. ~~(TS//STLW//SI//OC/NF)~~

[89] The Presiding Judge for the FISA Court is appointed to a 7-year term by the Chief Justice of the Supreme Court of the United States. Judge Lamberth was appointed as Presiding Judge in 1995. (U)

proposal for handling FISA applications that contained program-derived information. ~~(TS//STLW//SI//OC/NF)~~

Levin told us that when the briefing concluded, Lamberth acknowledged he was not being asked to approve the program and expressed his appreciation for being read in. According to Baker, Lamberth also remarked, "Well, it all depends on whether you can get five votes on the Supreme Court, but I'm comfortable with it." For the next 4 months, until the end of his term in May 2002, Judge Lamberth was the only FISA Court judge read into Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

D. OIPR Implements "Scrubbing" Procedures for Stellar Wind Information in International Terrorism FISA Applications ~~(TS//STLW//SI//OC/NF)~~

Following Judge Lamberth's read-in to the Stellar Wind program, Baker implemented procedures in OIPR to address two scenarios in which Stellar Wind could affect international terrorism FISA applications.[90] First, information obtained or derived from Stellar Wind might be included in a FISA application to establish probable cause that the target of the application is a foreign power or an agent of a foreign power and that the target is using or is about to use a particular "facility" (a term used in FISA generally to refer to a specific telephone number or e-mail address) at which the electronic surveillance is directed. Second, a FISA application might target facilities that were also targeted by Stellar Wind, a situation referred to as "dual coverage" because the targeted communications were collected under two separate authorities. Baker's procedures, referred to as "scrubbing" procedures, applied to initial FISA applications as well as to renewal applications seeking to continue existing coverage of targets (electronic surveillance under FISA generally is authorized for 90-day periods). ~~(TS//STLW//SI//OC/NF)~~

Judge Lamberth required that all applications that contained NSA information derived from Stellar Wind or that would produce dual coverage of a facility be filed with him only. Baker told the OIG that the scrubbing process was his idea, with Judge Lamberth's full concurrence, and that it had as its core principle OIPR's obligation to inform the Court of all material facts contained in a FISA application. According to Baker, the scrubbing

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[90] The procedures implemented by Baker only applied to international terrorism FISA applications, not to counterintelligence FISA applications. As Baker later explained in a letter to Judge Lamberth's successor as FISA Presiding Judge, this limitation was based on the understanding that the Stellar Wind program targeted only certain international terrorist communications "and there is no reason to believe that the fruits of Stellar Wind collection would appear in a counterintelligence FISA application." ~~(TS//STLW//SI//OC/NF)~~

procedures were a means of implementing his ethical duty of candor to the Court without disclosing the existence of the Stellar Wind program to uncleared attorneys and judges. Baker also said that Judge Lamberth wanted to be informed of applications that contained Stellar Wind information and of dual coverage situations, and that Judge Lamberth believed that the procedures devised by Baker were an appropriate and acceptable means of accomplishing this. According to Baker, the scrubbing process made him and Judge Lamberth "comfortable the Court was being told what it needed to be told."[91] ~~(TS//STLW//SI//OC/NF)~~

We describe below the initial two scrubbing procedures implemented by Baker as well as the difficulties they created for the FISA application process. ~~(TS//STLW//SI//OC/NF)~~

1. Initial Scrubbing Procedures ~~(TS//SI//NF)~~

Each international terrorism FISA application was "scrubbed" for Stellar Wind information and dual coverage before it was filed. However, Baker, as the only person in OIPR read into Stellar Wind, was unable to explain to his staff why the scrubbing was being conducted. With the NSA's cooperation, Baker initially scrubbed the applications without any assistance from OIPR staff. Baker said the time and effort he expended on this practice was not sustainable, and within weeks of beginning the scrubbing procedures Baker enlisted the assistance of OIPR's Acting Deputy Counsel for Intelligence Operations, Peggy Skelly-Nolen. Skelly-Nolen stated to the OIG that Baker told her at that time that he "needed to tell me something that he couldn't tell me," but was able to convey that he needed her and the office's assistance to process international terrorism FISA applications because the supporting declarations contained information that required special handling. ~~(TS//STLW//SI//OC/NF)~~

The scrubbing process, or "the program check" as it came to be known within OIPR, had two purposes. The first purpose was to identify draft applications that contained Stellar Wind-derived information in support of probable cause to believe that the target of the application was a foreign power or an agent of a foreign power and was using or was about to use a particular facility. The second purpose was to identify applications that targeted facilities that were already actively targeted under the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

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[91] The FBI OGC told us that Baker never disclosed to it that the FISA Court was concerned about risks presented by the inclusion of Stellar Wind information in FISA applications, nor did Baker inform the FBI that OIPR implemented procedures to address these concerns. ~~(TS//STLW//SI//OC/NF)~~

To accomplish the first purpose, OIPR attorneys were required to identify any information in applications attributed to the NSA, even if there was no suggestion the information was derived from a special program. The OIPR attorneys provided by e-mail the relevant excerpts from the applications to a designated OIPR legal assistant, who in turn compiled the information and transmitted it to the NSA by secure e-mail or facsimile. Upon receipt, the NSA conducted a check of the identified information against the Stellar Wind reports database, among others, to determine whether the information was derived or obtained from the program (as distinguished from being obtained by some other NSA signals collection activity). The NSA provided OIPR the results of its search by return e-mail or facsimile, writing next to each excerpt either "yes" or "no" to indicate whether the information was Stellar Wind-derived. Judge Lamberth did not require that Stellar Wind-derived information be removed from FISA applications, only that any such applications be filed with him exclusively and the Stellar Wind information identified to him orally.[92]
~~(TS//STLW//SI//OC/NF)~~

The second purpose of the scrub – to identify dual collection applications – followed similar steps. On approximately a weekly basis, an OIPR legal assistant requested that OIPR attorneys transmit to him all facilities targeted for electronic surveillance in applications scheduled to be filed with the FISA Court that week. The legal assistant created a single list of all targeted telephone numbers and e-mail accounts and e-mailed or faxed the information to the NSA. The NSA in turn checked the Stellar Wind database to determine whether any of the listed facilities were tasked for content collection under the program. The NSA provided OIPR the results of this check by return e-mail or facsimile, writing next to each facility either "yes" or "no" to indicate whether the facility was tasked under Stellar Wind.
~~(TS//STLW//SI//OC/NF)~~

Baker proposed to Judge Lamberth that OIPR notify him of dual coverage cases by including in the applications a [redacted]

[92] Baker said that only [redacted] international terrorism FISA applications presented to Judge Lamberth included Stellar Wind information to support the application.
~~(TS//STLW//SI//OC/NF)~~

[redacted]

(Cont'd.)

[redacted] Baker proposed to include this descriptive phrase in applications that, if approved, would result in dual coverage. ~~(TS//STLW//SI//OC/NF)~~

Beginning in early 2002, any FISA applications that included the descriptive phrase [redacted] were to be presented to Judge Lamberth, [redacted] also would inform Judge Lamberth directly that it was a "Lamberth only" case to indicate it was connected to Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

2. Complications with Scrubbing Procedures ~~(TS//SI//NF)~~

Skelly-Nolen told us that no one in OIPR, including her at that time, was aware that the checks Baker was requiring the office to make concerned a specific compartmented program. However, the scrubbing procedures generated questions from OIPR attorneys and FBI agents, particularly when Skelly-Nolen instructed an OIPR attorney to add to an application the descriptive phrase [redacted] Skelly-Nolen told us that she was not able to provide a satisfactory response to the questions because she did not have the answers. ~~(TS//SI//NF)~~

Skelly-Nolen also stated that it was stressful to comply with the procedures, due in large part to the fact that the attorneys and agents responsible for the contents of the international terrorism applications were asked to follow certain procedures for filings but were not being provided an explanation for these measures. She said this stress was compounded by the concurrent anthrax scare and the prevailing belief that there would be another terrorist attack. Skelly-Nolen stated that OIPR staff was acting based on Baker's representations alone, and while Baker sought to assuage any concerns the OIPR attorneys had over these new procedures by

[redacted]

explaining to the office that he had spoken to the Attorney General and the FISA Court on the issue, some OIPR attorneys simply were not comfortable under these circumstances and Skelly-Nolen had to reassign the international terrorism cases these attorneys were handling. Baker stated that he regularly told attorneys that they did not have to sign applications that they were not comfortable with. ~~(TS//SI//NF)~~

The process for filing international terrorism FISA applications was further complicated by the fact that of the two Justice Department officials authorized to approve such applications – the Attorney General and the Deputy Attorney General – only Attorney General Ashcroft was read into Stellar Wind.[94] As mentioned previously, Larry Thompson, who served as Deputy Attorney General from May 2001 to August 2003, was never read into the Stellar Wind program. Alberto Gonzales, who served as White House Counsel from January 2000 to February 2005, stated to the OIG that he recalled that Ashcroft wanted Thompson, as well as Ashcroft's Chief of Staff, read into Stellar Wind, but that neither official ever was. Gonzales said Ashcroft complained that it was "inconvenient" not having these two officials read into the program.[95] ~~(TS//STLW//SI//OC/NF)~~

The situation with Thompson caused Associate Deputy Attorney General David Kris, who oversaw national security matters in the Office of the Deputy Attorney General during Thompson's tenure, to draft a memorandum on January 11, 2002, advising Baker that he should not send Kris any FISA applications that included information obtained or derived from the Stellar Wind program, and that Kris intended to advise Thompson not to review or approve any such applications.[96] The memorandum stated that Kris was aware of the existence of a "highly classified information-collection program that has the unclassified code name 'Stellar Wind'," but that he was "wholly unaware of the nature and scope of the

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[94] Each FISA application must be approved by the Attorney General, defined under § 1801(g) to include the Deputy Attorney General or Acting Attorney General, based on the Attorney General's finding that the application "satisfies the criteria and requirements of such application as set forth in [subchapter I concerning electronic surveillance]." 50 U.S.C. § 1804(a). (U)

[95] As noted above, Gonzales also told the OIG that he never got the sense from Ashcroft that the situation affected the quality of the legal advice the Department provided to the White House. However, as described in Chapter Four, others had a decidedly different impression of Ashcroft's opinion of the legal advice he received on Stellar Wind during this period. We were unable to interview Ashcroft about this issue. ~~(TS//SI//NF)~~

[96] Baker told the OIG that he had informed Kris about the existence of a classified program that he could not discuss further, and that it impacted FISA applications. Baker said he and Kris agreed that, under the circumstances, it was not appropriate for Thompson to sign applications if he was not fully informed about all of the material facts related to them. ~~(TS//SI//NF)~~

program." Kris also stated in the memorandum that his request for a briefing on the program had been denied and that he was aware Deputy Attorney General Thompson also had not been briefed on the program.[97] ~~(TS//STLW//SI//OC/NF)~~

E. Judge Kollar-Kotelly Succeeds Judge Lamberth as FISA Court Presiding Judge (U)

Judge Lamberth's 7-year term on the FISA Court ended in May 2002. On May 19, 2002, Judge Colleen Kollar-Kotelly was appointed to the Court to replace Lamberth as the Presiding Judge. In connection with this appointment, Judge Kollar-Kotelly was read into the Stellar Wind program and provided an opportunity to examine the Department's analysis of the program's legality. Judge Kollar-Kotelly also spoke with Baker on numerous occasions about the scrubbing procedures he implemented to account for Stellar Wind information in international terrorism FISA applications and to identify applications that would result in dual coverage. ~~(TS//STLW//SI//OC/NF)~~

1. Judge Kollar-Kotelly Modifies OIPR Scrubbing Procedures ~~(TS//SI//NF)~~

Judge Kollar-Kotelly received her first briefing on the Stellar Wind program in the Attorney General's office on May 17, 2002, 2 days prior to being formally appointed Presiding Judge for the FISA Court. Baker, who attended the briefing, told us that the presentation was similar to the briefing initially provided to Judge Lamberth. Judge Kollar-Kotelly had several questions concerning the scope of the President's authority to conduct warrantless surveillance, and the Department responded that same day with a letter signed by OLC Deputy Assistant Attorney General Yoo that outlined the legal basis for the activity. The letter essentially replicated Yoo's November 2, 2001, memorandum regarding the legality of Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

According to Baker, Judge Kollar-Kotelly met at the White House with Addington, Gonzales, and Yoo to read Yoo's letter, but she was not permitted to retain a copy or take any notes. Judge Kollar-Kotelly later wrote in a letter to Baker that Yoo's letter "set out a broad overview of the legal authority for conducting [Stellar Wind], but did not analyze the specifics of the [Stellar Wind] program." ~~(TS//SI//NF)~~

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[97] [redacted]

~~(TS//SI//NF)~~

Judge Kollar-Kotelly also requested an opportunity to review the Presidential Authorization initiating Stellar Wind. On August 12, 2002, she reviewed the October 4, 2001, Authorization. ~~(TS//SI//NF)~~

Baker said that he met with Judge Kollar-Kotelly on several occasions after her initial Stellar Wind briefing to discuss how OIPR had been handling Stellar Wind's impact on FISA applications. Baker described for her the existing procedures to account for NSA information contained in FISA applications derived from Stellar Wind, and to identify applications that, if approved, would produce dual coverage of a facility. ~~(TS//STLW//SI//OC/NF)~~

Judge Kollar-Kotelly also was interested in identifying whether a facility targeted in a FISA application had been tipped to the FBI as Stellar-Wind derived information. Baker told the OIG that at this time he did not believe the FBI and NSA had the ability to track Stellar Wind tips on a timely basis. Baker said he mistakenly believed that as tips passed from the NSA to FBI Headquarters, and from there to FBI field offices for investigation, it would be exceedingly difficult to trace the specific source of the information in a sufficiently timely manner for inclusion in a FISA application. Baker provided his understanding to Judge Kollar-Kotelly, likening the Stellar Wind information in tips to the FBI as "salt in soup" that is impossible to extract once added. Based on Baker's representations, Judge Kollar-Kotelly did not require the Department to identify whether a facility targeted in a FISA application was ever provided to the FBI under Stellar Wind.[98] ~~(TS//STLW//SI//OC/NF)~~

Judge Kollar-Kotelly decided that the scrubbing procedures implemented under Judge Lamberth should continue, but she directed OIPR to discontinue including in applications the descriptive phrase [redacted] as a means of notifying her that facilities targeted by the applications were also targeted under Stellar Wind. Baker said that while Judge Kollar-Kotelly understood that instances of dual coverage would occur, she did not want to appear to judicially sanction Stellar Wind coverage. Baker told us his impression was that Judge Kollar-Kotelly "did not want to rule on the legality of the program" by appearing to "authorize" the NSA's technique for collecting the same information the government was seeking to collect under FISA.[99]

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[98] Baker eventually learned that the FBI and the NSA in fact did have some ability to track Stellar Wind information. As discussed in Chapter Six, in March 2004 Judge Kollar-Kotelly added to the scrubbing process a check performed by the FBI to determine whether any telephone numbers or e-mail addresses contained in a FISA application had ever been provided to the FBI in a Stellar Wind report. ~~(TS//STLW//SI//OC/NF)~~

[99] Judge Kollar-Kotelly later wrote about the dual coverage issue, in a January 12, 2005, letter to Baker that discussed the "Stellar Wind Program and Practice Before the

(Cont'd.)

Baker said he believes Judge Kollar-Kotelly was trying to protect the FISA Court and did not want the legality of the Court's orders called into question. ~~(TS//STLW//SI//OC/NF)~~

Judge Kollar-Kotelly also directed OIPR to excise from FISA applications any information obtained or derived from Stellar Wind. Baker told Judge Kollar-Kotelly that OIPR could implement this requirement using the scrubbing procedures already in place, and that where the FBI included NSA information in an application determined to be Stellar Wind-derived, OIPR would excise it. ~~(TS//STLW//SI//OC/NF)~~

Judge Kollar-Kotelly also instructed Baker to alert her of any instances where an application's basis for the requisite probable cause showing under FISA was weakened by excising the Stellar Wind information. In such cases, Judge Kollar-Kotelly would then decide whether to approve the application with the knowledge that additional relevant information had been excised. ~~(TS//STLW//SI//OC/NF)~~

Even though Judge Kollar-Kotelly's scrubbing process was intended to eliminate all Stellar Wind information from international terrorism FISA applications, she still required that scrubbed applications be filed with her only. In time, Judge Kollar-Kotelly relaxed this requirement and permitted other judges on the Court to handle these applications, although only after first being filed with her.[100] ~~(TS//STLW//SI//OC/NF)~~

2. OIPR implements Judge Kollar-Kotelly's Scrubbing Procedure ~~(TS//SI//NF)~~

According to Baker and Skelly-Nolen, the mechanics within OIPR for determining whether an application contained Stellar Wind information or targeted a facility also targeted under Stellar Wind remained essentially unchanged after the transition from Judge Lamberth to Judge Kollar-Kotelly. However, the scrubbing process became more complex. For

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FISC." The letter memorialized the information Judge Kollar-Kotelly received from the government about the program and how she requested the government to proceed in preparing and presenting applications. On the subject of dual coverage, Judge Kollar-Kotelly wrote, "Without opining on [Stellar Wind]-related legal issues, I have sought to protect the proper functioning of the FISA process, under which separate court authorities are granted to conduct foreign intelligence collection against a set of targets that overlaps the set of [Stellar Wind] targets." We discuss this letter in Chapter Four of this report. ~~(TS//STLW//SI//OC/NF)~~

[100] [redacted]

example, because only the Attorney General could sign the applications and Judge Kollar-Kotelly required that only she receive the applications (even after being scrubbed), Skelly-Nolen had to regularly visit the Attorney General's and Presiding Judge's residences with stacks of what Skelly-Nolen came to refer to as "AG-KK only" FISA applications. ~~(TS//STLW//SI//OC/NF)~~

The situation was further complicated when Ashcroft was on overseas travel and his signature was needed for a scrubbed application ready to be filed. When this occurred, the classification of the application's signature page was "downgraded" and then sent to Ashcroft by secure fax. The actual application was not faxed; instead, Skelly-Nolen typically included a statement from her or Baker with the signature page indicating that the application was proper and complied with the requirements of the FISA statute. Skelly-Nolen observed that in these cases Ashcroft essentially relied on her and Baker's assessments of the applications – even though Skelly-Nolen was not read into Stellar Wind at this time. Scrubbed applications were handled similarly when Ashcroft was traveling domestically, although in those instances the applications could be provided along with the signature page if requested.[101] ~~(TS//STLW//SI//OC/NF)~~

Judge Kollar-Kotelly also required that hearings for the "AG-KK only" FISA applications and renewals be scheduled for late in the day or on the weekend, either in her courtroom chambers at the District Court for the District of Columbia or at her residence. According to Skelly-Nolen, Judge Kollar-Kotelly insisted on this practice so that the "AG-KK only" docket did not interfere with her regular court docket. From Skelly-Nolen's perspective, this practice proved to be an "enormous burden," particularly in cases involving applications to continue FISA coverage on targets of emergency authorizations.[102] Skelly-Nolen explained that these authorizations were, for "no good operations reason" that she was aware of, routinely approved by the Attorney General on Fridays, meaning that a FISA application had to be filed with the Court within 72 hours – by Monday – to continue the emergency surveillance coverage. However, because Judge Kollar-Kotelly had a regular court docket on Mondays, she required that any scrubbed FISA application seeking authority to continue surveillance initiated under

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[101] Baker and Skelly-Nolen told the OIG that in their experience it was not unusual for an Attorney General or Deputy Attorney General to rely on OIPR's representations that the FISA applications presented for signature satisfied the statute's requirements, instead of reviewing the full contents of each application. (U//~~FOUO~~)

[102] As previously described, under FISA during this time period, when the Attorney General reasonably determines that an emergency situation exists prior to obtaining a FISA order, the Attorney General may approve the use of electronic surveillance for a period of up to 72 hours without an order. (U)

emergency authorization be scheduled with her for Sunday. Skelly-Nolen stated that these cases would be in addition to the renewal applications that also had to be heard on Sundays so the authority for the surveillance in those cases did not expire and the coverage lapse. ~~(TS//STLW//SI//OC/NF)~~

Baker identified another issue that stemmed from Judge Kollar-Kotelly's requirement that only she receive dual coverage applications. The problem arose when Judge Kollar-Kotelly was out of town and unavailable to hear a dual coverage application. Baker's solution was either to fly the application to the place Judge Kollar-Kotelly was located, or to contact the NSA and request that it "de-task" the facilities that the FISA application was targeting. In this way, the application could be presented to an alternative FISA Court judge because it no longer targeted facilities that were also targeted under Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

For example, Baker described a situation where the FBI was urgently interested in a particular individual whose telephone was currently tasked by the NSA under Stellar Wind. In this case, Baker instructed the NSA to de-task the telephone number so the FBI's FISA application could be presented to a judge other than Judge Kollar-Kotelly. To prevent any gap in coverage between the time the NSA detasked the telephone number and the Court approved the FBI's application, surveillance was initiated under FISA's emergency authorization provision and then presented to a FISA Court judge within the requisite 72 hours. According to Baker, proceeding in this fashion "made everyone comfortable," including the NSA. Baker told us that this situation occurred a couple of times each year. ~~(TS//STLW//SI//OC/NF)~~

According to Baker and Skelly-Nolen, these examples illustrate how having only the Attorney General and a single judge on the FISA Court read into Stellar Wind complicated the FISA process. Baker said that "fairly early on" after being read into the program, Judge Kollar-Kotelly made several requests for other FISA Court judges to be read into the program. Baker told the OIG that these requests were generally made through him, orally and in writing, but was aware that on at least one occasion Judge Kollar-Kotelly made the request directly to Attorney General Ashcroft. Baker said that sometime prior to March 2004 he personally advised Ashcroft of Judge Kollar-Kotelly's concerns, and that Ashcroft responded with words to the effect that the White House would not allow more judges to be read into Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

In a January 12, 2005, letter to Baker, Judge Kollar-Kotelly summarized the situation, stating, "I have repeatedly asked that the other members of the FISC be given access to the same information that I have received regarding the [Stellar Wind] program. To date, the executive

branch has declined to do so, citing a need to maintain the strictest secrecy regarding [Stellar Wind]." ~~(TS//STLW//SI//OC/NF)~~

As a consequence of only Judge Kollar-Kotelly being read into Stellar Wind and her insistence that she alone handle applications scrubbed of Stellar Wind information or that involved tasking telephone numbers or e-mail addresses already tasked under Stellar Wind (dual coverage), by November 2004 she was handling approximately [redacted] percent of all FISA applications. Judge Kollar-Kotelly also tended to hear successive applications regarding the same targeted facilities. She discontinued this practice in November 2004 and permitted other judges to hear scrubbed applications. Judge Kollar-Kotelly later wrote that her decision was "based on the operational systems" OIPR had in place to scrub applications and that she assured her colleagues "that they could properly decide [the cases] based on the information in each application, without the additional information on which I have been briefed, but which, to date, the other judges have not received." ~~(TS//STLW//SI//OC/NF)~~

V. FBI Initiates Measures to Improve the Management of Stellar Wind Information ~~(S//NF)~~

Following the terrorist attacks of September 11, the FBI had reallocated personnel and resources to counterterrorism operations, and established the Telephone Analysis Unit (TAU) to exploit telephone communications data. We described above how a small team of agents and analysts from this unit was reassigned to the [redacted] which was responsible for handling the Stellar Wind reports provided by the NSA. ~~(S//NF)~~

In approximately May 2002, the TAU was renamed the Communications Analysis Unit (CAU) and became one of the units within the newly created Communications Exploitation Section (CXS). According to the first Acting CAU Unit Chief, the FBI's vision for the unit was that it would support FBI international terrorism investigations by [redacted] The Stellar Wind program was one source for obtaining this [redacted] ~~(S//NF)~~

In this section, we describe changes the FBI implemented in late 2002 and early 2003 to manage the intelligence it received under Stellar Wind. These changes included attempts to improve coordination with the NSA, implement a more formal program to receive intelligence from the NSA and disseminate it to FBI field offices, educate the FBI field offices about the value of the intelligence and FBI Headquarters' expectations concerning its use, and assign a small team of FBI personnel to work full-time at the NSA on Stellar Wind. ~~(S//NF)~~

A. CAU Acting Unit Chief Evaluates FBI Response to Stellar Wind ~~(S//NF)~~

When the first CAU Unit Chief arrived at FBI Headquarters in September 2002, CXS was newly established and most of the Section's 15-20 staff was there on temporary duty assignments. The CAU was staffed similarly at this time, but also contained some professional support employees from other divisions at FBI Headquarters. ~~(S//NF)~~

The CAU Unit Chief said that the CAU's mission was to support FBI international terrorism investigations – al Qaeda investigations in particular – by analyzing telephone calling activity and e-mail communications. He explained that prior to September 11, 2001, the FBI analyzed telephone numbers received by field offices or other sources by querying the numbers against the FBI's [redacted] database, the FBI's central repository for telephone subscriber data. However, he said the FBI's database at that time was relatively small and had limited analytical capability. In the wake of the September 11 attacks, the FBI gained access to additional tools and began to utilize more sophisticated analytical techniques. Stellar Wind was one of those new tools. ~~(TS//STLW//SI//OC/NF)~~

The CAU Unit Chief said that after he was read into Stellar Wind in late September 2002, it was clear to him based on conversations with the CXS Acting Section Chief that the FBI wanted to increase its participation in the Stellar Wind program. As a counterterrorism agent in the FBI's Chicago field office, the Unit Chief had some exposure to Stellar Wind in the form of [redacted] leads. He told us that he had recalled thinking the leads were "stupid" and "not sensible." He also said that he had been critical of the leads because they did not provide any context to the information, such as how it was obtained. He stated that the leads did not adequately explain the [redacted] rankings associated with the telephone numbers, and the leads were not sufficiently specific as to what action the field office was expected to take. In his view, the intelligence disseminated by the [redacted] ECs was not "actionable." The Unit Chief told us that he could not figure out why FBI Headquarters was "pushing this stuff out" after September 11, and that other agents in the field shared his views.[103] ~~(TS//STLW//SI//OC/NF)~~

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[103] As previously described, former NSA Director Hayden told us that immediately following the September 11 terrorist attacks the NSA modified the agency's collection [redacted] and that this resulted in a flood of telephone numbers to the FBI. Thus, it is possible that (Cont'd.)

After becoming the acting Unit Chief for the CAU and reviewing how the FBI was handling the Stellar Wind information, he learned that there was no unit that oversaw the [redacted] and no guidance for how the NSA information should be processed by FBI analysts. He also said that the process in place – essentially re-typing into ECs the tearline information contained in Stellar Wind reports – merely "regurgitated" information that, by itself, was not actionable. He was not critical of the FBI analysts responsible for drafting the ECs, who simply performed this task as directed. Rather, he believed the process suffered from a lack of leadership. He described the FBI's involvement in Stellar Wind up to this point as "happenstance" and said the FBI did not have "a real good handle on it." He said that the deficiencies he identified were attributable in part to the significant resource challenges the FBI encountered after September 11, but he nevertheless considered the FBI's effort to respond to the Stellar Wind information as "half-baked." He said he therefore set about implementing changes within the CAU to better organize this effort, which he believed would improve the quality of the intelligence disseminated to FBI field offices. ~~(TS//STLW//SI//OC/NF)~~

B. FBI Increases Cooperation with NSA and Initiates [redacted] Project to Manage Stellar Wind Information ~~(TS//STLW//SI//OC/NF)~~

The CAU Unit Chief said that the first step he took to improve the FBI's involvement in Stellar Wind was to detail to the NSA one of CAU's temporary duty special agents. He instructed the agent to form a working group at the NSA to identify any problems and evaluate the quality of the information provided in the NSA's Stellar Wind reports, as well as the information that the FBI reported back to the NSA about tips.[104] The CAU Unit Chief said he took this step so that the NSA gained a "case agent's perspective" on the type of information useful to FBI field offices, and also to explain to the NSA that the information that could be disseminated about the tippers should include "context" and "clarity" sufficient to justify the FBI conducting an inquiry under the FBI's investigative guidelines.[105] He said he did not believe that the NSA's interest in obscuring the "sources and methods" associated with the information had to compromise the quality of the information provided to the FBI. He also said that the NSA needed to

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FBI agents' early frustration with leads that provided telephone numbers was attributable in part to the leads generated under this NSA collection activity. ~~(TS//STLW//SI//OC/NF)~~

[104] The CAU Unit Chief recalled that the NSA had expressed frustration that the FBI never provided the NSA any responses to the tipped information. ~~(S//NF)~~

[105] FBI international terrorism investigations at this time were governed by the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations. (U)

understand how the FBI investigated intelligence that it received, and that FBI agents did not have to know the specific sources and methods used to acquire information in order to effectively investigate the information. ~~(S//NF)~~

The CAU Unit Chief said that this liaison effort occurred over a couple of weeks, with the temporary duty agent driving to the NSA daily. According to the Unit Chief, the agent explained to NSA personnel what the FBI was permitted to do with certain types of information and that the NSA would receive more feedback from the FBI if the quality of the disseminable information about the tippers improved. The Unit Chief told us that following this exchange the NSA improved the Stellar Wind reports by providing better information in both the compartmented and tearline portions of the reports. ~~(S//NF)~~

In addition, the CAU Unit Chief told us that he took steps to increase cooperation within the FBI between CAU, which was part of an analytical section that supported counterterrorism investigations, and FBI Headquarters' International Terrorism Operations Section, which was responsible for overseeing FBI counterterrorism investigations. The Unit Chief said that based on his experience in the field working counterterrorism cases, he believed it was important that the CAU analysts consult with agents in the operational section about leads the CAU proposed to set in the ECs. While he was confident the CAU analysts could identify logical investigative steps, he thought they should nevertheless coordinate with the operational personnel to see if there was agreement and to determine whether a lead potentially could affect any ongoing operations that the CAU was not aware of. He also noted that his CAU Unit Chief successors discontinued this practice, a decision he disagreed with and complained about to the Section Chief for CXS because he believed the program risked losing a measure of effectiveness and efficiency as a consequence. ~~(S//NF)~~

Another step the CAU Unit Chief took relating to the FBI's management of Stellar Wind information was to open an administrative file, or "control file," to serve as the repository for all communications that the CAU sent to the field offices containing Stellar Wind information, as well as all communications the CAU received from field offices reporting the results of the investigative activity taken in response to assigned leads.[106] As explained previously, the [redacted] communications had been

[redacted]

disseminated from a subfile associated with the FBI's international terrorism investigation of the September 11 attacks. In the EC requesting that a control file be opened for Stellar Wind information, the CAU Unit Chief wrote that "a dedicated control file for this project will better serve the specific needs of the special project and will add an additional layer of security for the source." ~~(TS//STLW//SI//OC/NF)~~

A control file for Stellar Wind information was opened on September 30, 2002, and given the designation [redacted] From that point forward, all ECs that disseminated Stellar Wind tips were sent in connection with the [redacted] control file.[107] The ECs were classified at the Secret level and, similar to the [redacted] ECs, included a vague explanation about the source of the information and a caveat concerning its use.[108] ~~(TS//STLW//SI//OC/NF)~~

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[107] The Unit Chief told us that Director Mueller held a telephone conference call in October 2002 with the heads of all FBI field offices and advised them that FBI Headquarters was working to improve the process for disseminating [redacted] information to the field offices by adding both context and clarity to the communications. Director Mueller expressed his expectation that the offices would act on the information. According to the Unit Chief, Director Mueller essentially was trying to sell the program and ensure the "tool" was being used. Director Mueller told the OIG that he did not recall having specific discussions with the heads of FBI field offices about Stellar Wind information. ~~(TS//STLW//SI//OC/NF)~~

[redacted]

Several months later, in January 2003, the CAU Unit Chief sent an EC to all FBI field offices seeking "to clarify the mission of [CAU] . . . as well as to describe this unit's distinct role in the FBI's participation in the global war on terror." The EC emphasized CAU's capabilities in examining telephone calling activity and its liaison function with members of the U.S. Intelligence Community that are "in a unique position to provide potentially actionable intelligence to the FBI." The EC explained that many of the leads from the CAU were sent under the [redacted] file. On the subject of investigative responses to [redacted] leads, the EC stated:

[redacted]

C. FBI Assigns CAU Personnel to NSA on Full-Time Basis ~~(S//NF)~~

The CAU Unit Chief also assigned a team of FBI personnel to the NSA on a full-time basis to manage Stellar Wind information. The Unit Chief told us that shortly before his temporary duty assignment to FBI Headquarters was set to expire, he and the CXS Acting Section Chief briefed Director Mueller's assistant – and later Director Mueller – about the role they recommended that the FBI take in the Stellar Wind program. The CAU Unit Chief recommended co-locating at the NSA approximately four FBI agents and analysts with remote access to FBI information systems. He likened the suggestion to a "task force environment" that would introduce the FBI's investigative skills at the beginning of the NSA's analysis of Stellar Wind information. Director Mueller approved the recommendation and told the CAU Unit Chief to implement it. ~~(S//NF)~~

For the next 2 months, the CAU Unit Chief worked with the NSA on the proposal. [redacted]

[redacted] The Memorandum of Understanding between the FBI and the NSA to facilitate the co-location was finalized in December 2002, and in February 2003 a CAU team began its co-location at the NSA to manage the FBI's involvement in Stellar Wind. This co-location continues today. ~~(TS//STLW//SI//OC/NF)~~

VI. OIG Analysis (U)

In analyzing the Department's and the FBI's involvement in the NSA's expanded signals intelligence collection activity after the September 11 attacks, it is important to recognize the exceptional circumstances that existed at the time. Many Department and FBI officials emphasized to us the sense of crisis and alarm during this period, and noted the widely shared concern within the Intelligence Community that a second wave of attacks was imminent. The Stellar Wind program was conceived and implemented amid these challenging circumstances. ~~(S//NF)~~

This chapter described the role of Justice Department and FBI officials in the inception and early implementation of the Stellar Wind program, including the Department's initial reviews of the legality of the program. ~~(TS//SI//NF)~~

We believe that a significant problem during this early phase of the Stellar Wind program was the lack of a sufficient number of Justice Department attorneys read into the program to conduct an analysis of the program's legality. The White House – and according to Gonzales, the President – determined who within the Department was permitted access to the program. We believe that Attorney General Ashcroft, who met frequently with the President on national security matters, was in a position to personally advocate for the read-in of an adequate number of attorneys necessary for the Department to perform a thorough and factually accurate legal analysis of the program. We know that Ashcroft's request that his chief of staff David Ayres and Deputy Attorney General Larry Thompson be read into the program was not granted. But because Ashcroft did not agree to be interviewed, we were unable to determine from him whether he sought additional Department read-ins to assist in the legal analysis of the program, how hard he may have pressed for these additional resources, or whether he believed he was receiving adequate legal advice about the program from Yoo alone. ~~(TS//SI//NF)~~

As described in this chapter, John Yoo was the only Department attorney read in to work on the legal analysis supporting the program from

September 2001 through May 2003.[109] As described in Chapter Four, Department officials who succeeded Yoo concluded that the analysis Yoo produced was significantly flawed and found the legal basis for aspects of the program to be lacking. We believe that reading in only one Department attorney to analyze the legality of the program impeded the Department's ability to conduct a thorough and factually accurate legal analysis, and undermined the Department's early role in the program. In Chapter Four we discuss the harm that resulted in late 2003 and early 2004 from the Department's highly restricted access to the program. ~~(TS//SI//NF)~~

We also described in this chapter how the harm attributable to the Justice Department's insufficient early involvement in the program extended beyond conducting an analysis of the program's legality. The Justice Department's relationship with the FISA Court was put at risk by not having officials from OIPR and members of the FISA Court read into Stellar Wind when program-derived information started being disseminated as investigative leads to FBI field offices. In our view, it was foreseeable that Stellar Wind-derived information would be included in FISA applications.[110] OIPR Counsel Baker told us that the Department's counterterrorism and counterintelligence efforts rely on good relations with the FISA Court and that candor and transparency are critical components of the relationship. Baker attributed the Department's record of success with FISA applications and the improved coordination between intelligence agents and prosecutors to the strong relationship that the Department built with the Court. Baker believed, and we agree, that it would have been detrimental to the relationship if the Court learned that information from Stellar Wind was

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[109] As was the case with Ashcroft, because Yoo did not agree to be interviewed we were unable to learn from him what if any efforts he made either within the Department or at the White House to advocate for additional attorneys – including his supervisor in OLC – to be read into the program to assist in his legal analysis. However, in his book "War by Other Means," Yoo wrote of his experience working on the Stellar Wind program:

> While meeting with Ashcroft alone reflected the importance of the issues, it also placed me in a difficult position. I could not discuss certain matters with my DOJ superiors, or rely on the collective resources of OLC, which usually assigned several attorneys to work on an opinion. Operational security demanded by the war on terrorism changed some of OLC's standard operating procedures.

War by Other Means at 101. ~~(S//NF)~~

[110] The restrictions the FBI imposed on the use of program-derived information – that it could be used for "lead purposes" only and not for "legal or judicial purposes" (such as affidavits) – reflected a good faith and reasonable effort. However, such restrictions could not ensure that program-derived information would not appear in FISA applications. Indeed, this eventuality led to Baker's discovery of the program. ~~(TS//STLW//SI//OC/NF)~~

included in FISA applications without the Court being told so in advance. ~~(TS//STLW//SI//OC/NF)~~

Yet we are not aware of any effort or consideration on the part of Attorney General Ashcroft or officials at the White House to account for Stellar Wind's impact on Justice Department FISA operations by reading in any OIPR officials or members of the FISA Court. In fact, as we described in this chapter, Baker was read into Stellar Wind only after hearing from an FBI colleague that "there is something spooky going on" with the collection of foreign-to-U.S. communications and subsequently reviewing a FISA application that contained "strange, unattributed" language that the FBI would not explain to him. Baker was read in when Daniel Levin, then Counselor to Ashcroft and Chief of Staff to Mueller, pressed White House officials for the clearance. ~~(TS//STLW//SI//OC/NF)~~

Moreover, White House officials initially rejected the idea of reading in members of the FISA Court, and then took no action even as Levin, who together with Ashcroft agreed with Baker that the Court needed to be informed about the program, continued to press the issue. It was not until Levin was required to sign and file a FISA application that Baker refused to handle because it contained Stellar Wind-derived information that the decision was made to read in a single judge (Presiding Judge Lamberth, followed by Presiding Judge Kollar-Kotelly). ~~(TS//STLW//SI//OC/NF)~~

The decisions to read in Baker and a member of the FISA Court, which in our view were unnecessarily delayed, were important steps in preserving the relationship the Justice Department had built with the Court. However, we believe that once Stellar Wind's impact on the Justice Department's FISA operations became evident, limiting read-ins to a single OIPR official and a single FISA Court judge was unduly restrictive and short-sighted. This chapter described how the scrubbing procedures imposed by the FISA Court and implemented by OIPR to account for Stellar Wind-derived information created concerns among some OIPR attorneys about the unexplained changes being made to their FISA applications. The scrubbing procedures also substantially distorted the assignment of cases to FISA Court judges and by November 2004 resulted in Judge Kollar-Kotelly handling approximately [redacted] percent of all FISA applications. In our view, once Stellar Wind began to affect the functioning of the FISA process, OIPR and the FISA Court effectively became part of the program's operations and the number of OIPR staff and FISA Court judges read into Stellar Wind to manage the impact should have increased. ~~(TS//STLW//SI//OC/NF)~~

This chapter also described the FBI's handling of Stellar Wind-derived information in the initial weeks and months of the program. The FBI's chief objective during this period was to expeditiously disseminate

program-derived information to FBI field offices for investigation while protecting the source of the information and the method by which it was obtained. We concluded that the FBI's procedures to meet this objective generally were reasonable. The FBI personnel assigned to the [redacted] developed a straightforward process for receiving Stellar Wind reports, reproducing the information in a non-compartmented, Secret-level format, and disseminating the information in Electronic Communications, or ECs, to the appropriate field offices for investigation. The [redacted] ECs disseminated to FBI field offices also placed appropriate restrictions on how the information could be used, instructing field offices that the information was "for lead purposes only" and could not be used for any legal or judicial purpose. FBI personnel at the field offices we visited as part of our review generally were familiar with the restrictions. ~~(S//NF)~~

However, we found that the exceptionally compartmented nature of Stellar Wind created deficiencies in the FBI's initial process for handling program-derived information and understandably frustrated agents assigned to handle [redacted] leads. The limited resources allocated to the [redacted] hampered the analysts' ability to enhance Stellar Wind information with relevant FBI or public source information before disseminating leads to field offices for investigation. More significantly, the [redacted] was prohibited from disclosing information that agents traditionally were accustomed to receiving with leads that required investigation. The [redacted] ECs consequently suffered from vagueness about the source of the information being provided and lacked factual details about the individuals allegedly involved with international terrorism and with whom the domestic numbers being disseminated possibly were in contact. ~~(S//NF)~~

We found that the FBI sought over time to address these deficiencies and improve the effectiveness of its participation in the Stellar Wind program. In April 2002, transmitting Stellar Wind-derived leads to FBI field offices became a priority of the Communications Exploitation Section, and within it, the Communications Analysis Unit (CAU). The first chief of the CAU assigned a team of FBI personnel to work full-time at the NSA on Stellar Wind and to initiate the [redacted] project to manage the FBI's participation in Stellar Wind. As we discuss in this chapter and in Chapter Six, these measures enhanced the FBI's knowledge about Stellar Wind operations and gave the NSA better insight about how FBI field offices investigated Stellar Wind information, which improved Stellar Wind reports and the leads that were disseminated to FBI field offices. ~~(TS//STLW//SI//OC/NF)~~

CHAPTER FOUR
LEGAL REASSESSMENT OF STELLAR WIND (MAY 2003 THROUGH MAY 2004) ~~(TS//SI//NF)~~

By early 2003, while the operation of the Stellar Wind program had evolved, particularly with respect to the means by which intelligence from the program was provided to the FBI, the program still remained legally premised on John Yoo's November 2001 and October 2002 Office of Legal Counsel memoranda. ~~(TS//SI//NF)~~

This chapter describes the pivotal period between May 2003 and May 2004 during which Yoo's departure from the Office of Legal Counsel and the arrival of new officials at the Justice Department resulted in a comprehensive reassessment of the Stellar Wind program's legal basis. This legal reassessment led to a contentious dispute between the Justice Department and the White House on the legality of important aspects of the program. This dispute eventually resulted in modifications to the operation of the program, and also contributed to the decision to place at least one aspect of the program under FISA authority. ~~(TS//STLW//SI//OC/NF)~~

Section I of this chapter discusses how personnel changes within the Office of Legal Counsel led to a re-examination of Yoo's legal analysis, culminating in a Justice Department legal position against continuing to certify the program and the resulting dispute with the White House. Section II describes how, faced with the prospect that the Attorney General, Deputy Attorney General, FBI Director, and other senior Department officials would resign in March 2004 if the program continued unchanged, the White House agreed to modify the program to conform it to the Department's revised legal analysis. ~~(TS//SI//NF)~~

I. Justice Department Reassesses Legality of Stellar Wind Program ~~(TS//SI//NF)~~

A. Overview of Office of Legal Counsel (U)

One of the responsibilities of the Assistant Attorney General for the Office of Legal Counsel (OLC) is to assist the Attorney General in his function as legal advisor to the President and all Executive Branch agencies. OLC drafts legal opinions for the Attorney General and also provides its own opinions in response to requests from the Counsel to the President, various agencies of the Executive Branch, and offices within the Department of Justice. OLC often deals with complex legal issues on which two or more agencies are in disagreement, and provides legal advice to the Executive Branch on constitutional questions, including the review of pending

legislation for constitutionality. Executive Orders proposed to be issued by the President are reviewed by OLC as to form and legality, as are other matters that require the President's formal approval. OLC also reviews proposed orders by the Attorney General and all regulations requiring the Attorney General's approval. (U)

B. Personnel Changes within Office of Legal Counsel (U)

John Yoo advised Attorney General Ashcroft and White House officials on the Stellar Wind program from the program's inception in October 2001 through Yoo's resignation from the Department in May 2003. Upon Yoo's departure, Patrick Philbin told the OIG that he was selected by the White House to assume Yoo's role as advisor to the Attorney General concerning the program.[111] With this personnel change came a fresh review of the legal underpinnings of the Stellar Wind program. We describe in the following sections the circumstances leading to what one official described as "the great rethink" of the program. ~~(TS//SI//NF)~~

1. Yoo's Role in the Program (October 2001 through May 2003) (U)

On September 11, 2001, and through November 2001, Daniel Koffsky was the Acting Assistant Attorney General for OLC. Koffsky was not read into the Stellar Wind program. Jay Bybee served as Assistant Attorney General for OLC from November 2001 until March 2003, when he became a judge on the U.S. Court of Appeals for the Ninth Circuit.[112] Bybee also was never read into the Stellar Wind program. As discussed in Chapter Three, John Yoo, a Deputy Assistant Attorney General in OLC, had sole responsibility within that office and within the Department of Justice for developing the legal analysis relating to the Stellar Wind program until May 2003.[113] Bybee told us he was not aware at the time that Yoo was drafting legal opinions in connection with a compartmented program. ~~(TS//SI//NF)~~

Bybee told us that the OLC normally adheres to a tradition called the "two Deputy rule," so that OLC opinions are reviewed by two OLC Deputy Assistant Attorneys General before going to the OLC Assistant Attorney General for approval. Bybee said that the purpose of this rule is to ensure

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[111] On June 1, 2003, Philbin became an Associate Deputy Attorney General. However, he told us that he still technically remained a Deputy Assistant Attorney General in OLC and was thus "dual-hatted." (U)

[112] Bybee was nominated by President Bush to serve on the Ninth Circuit in May 2002 but was not confirmed by the Senate until March 2003. (U)

[113] Yoo's major opinions about electronic surveillance and Stellar Wind are summarized in Chapter Three. ~~(TS//SI//NF)~~

the quality of the legal research and soundness of the legal analysis. In addition, Bybee stressed that the Assistant Attorney General must be aware of all opinions that issue from the OLC. Bybee said that the OLC Assistant Attorney General has an obligation to "see the whole picture" and is the only person in the office who knows the full range of issues that are being addressed by the OLC. Bybee also said the Assistant Attorney General is the only official in that office who can assure that OLC opinions remain consistent. Bybee stated that the Assistant Attorney General, as a Senate-confirmed official, has ultimate accountability for the work of the office. Bybee noted that, by contrast, the Deputy Assistant Attorney General position, though political, does not require Senate confirmation. (U)

Bybee told the OIG that it would not be unusual for a Deputy Assistant Attorney General such as Yoo to have direct contact with the White House for the purpose of rendering legal advice. Bybee stated that it is "not clear" whether or to what extent the Attorney General needs to be kept informed of such contacts. However, Bybee said that the Attorney General may appropriately decide to ask a single OLC attorney to work on a particular project, but that it is "not the White House's call" to make such assignments because the White House may not be aware of what advice the OLC is providing to other Executive Branch agencies. Bybee told us that during his tenure as Assistant Attorney General he did not know that Yoo was working alone on a sensitive compartmented program, and he had no knowledge of how Yoo came to be selected for this responsibility. (U)

Philbin said he believed that White House Counsel Gonzales and Vice President Cheney's Counsel David Addington had selected Yoo to draft the OLC's opinions on Stellar Wind and other national security programs, and that Yoo was the "obvious choice" to assume this role because of his expertise in war powers issues and the authority of the Commander-in-Chief.[114] ~~(S//NF)~~

Gonzales told the OIG he understood that Yoo had asked others within OLC to help out with specific legal issues during this period without telling them what they were being asked to assist with, and Yoo then aggregated that work into his memoranda concerning electronic surveillance and the Stellar Wind program. Gonzales also stated that Yoo did not consult with any experts outside the Department in drafting his memoranda.[115] ~~(TS//SI//NF)~~

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[114] As discussed in Chapter Three, Yoo had been given responsibility for working on national security issues prior to the inception of the Stellar Wind program. (U)

[115] When Gonzales testified before the Senate Judiciary Committee on February 6, 2006, he stated that although he was not at the Department when the program commenced, "I suspect – in fact I'm fairly sure – that there were not discussions with

(Cont'd.)

As noted above, neither Yoo nor Ashcroft agreed to be interviewed for the OIG's investigation. Other witnesses gave the OIG various accounts of Yoo's interactions with Attorney General Ashcroft and with the White House concerning the program. Gonzales told us that Yoo regularly advised Ashcroft on the legal aspects of the program so that Ashcroft could continue to certify it as to form and legality. Gonzales also said that it was incumbent on Ashcroft as Attorney General to satisfy the Department's legal obligations regarding the program. Gonzales told us he thus understood Yoo's opinions as representing the opinions of the Department. However, Gonzales acknowledged that White House officials consulted with Yoo and sought his advice without going through the Attorney General or Bybee – Yoo's supervisor – although Gonzales also said they did not seek Department approval from Yoo concerning the Stellar Wind program. ~~(TS//SI//NF)~~

Other witnesses described their concerns regarding Yoo's direct contacts with the White House, and with Addington and Gonzales in particular. Philbin said he told Addington that Yoo's direct access to Addington on legal matters was "not a good way to run things," referring to the lack of oversight of an OLC Deputy Assistant Attorney General by a supervisor. Philbin stated that there was nothing wrong with assigning a project to a subordinate, but not without the head of the office knowing what the subordinate was doing. (U)

Jack Goldsmith told us that when he became the Assistant Attorney General for the Office of Legal Counsel in October 2003, he learned that Yoo's contacts with the White House had had the effect of cutting the Attorney General "out of the loop," a practice Goldsmith said he resolved not to continue with any OLC attorney. (U)

Goldsmith also told us the White House had wanted Yoo to replace Bybee as the Assistant Attorney General for the Office of Legal Counsel following Bybee's confirmation as a judge on the Ninth Circuit, but that Ashcroft blocked the move. Yoo resigned from the Department in May 2003.[116] (U)

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outside expertise at the Department, although I don't know for sure." An NSA Associate General Counsel for Operations told the OIG that Yoo visited the NSA for a briefing about the program at some point after he had drafted his November 2, 2001, legal memorandum. ~~(TS//SI//NF)~~

[116] In addition to working on the legal analysis for the Stellar Wind program while at the Justice Department, Yoo also worked on at least one other project involving a Top Secret compartmented detainee interrogation program. In contrast to the Stellar Wind program, the OIG determined that at least three OLC attorneys, including Bybee and Philbin, worked on the program's legal analysis with Yoo or participated by supervising his work. In addition, attorneys from the Department's Criminal Division and from other

(Cont'd.)

2. Philbin Replaces Yoo (U)

Patrick Philbin joined the Department as a Deputy Assistant Attorney General in the Office of Legal Counsel on September 4, 2001.[117] He was read into the Stellar Wind program in late May 2003, just before Yoo left the Department. Philbin said that he, accompanied by Yoo, was read into the program by Addington in Addington's office in the Old Executive Office Building. Philbin told us that Addington provided an overview of the program, describing the two basic categories of collection as "content" and "meta data." Philbin said that later, based on his legal analysis of the Stellar Wind program, he developed the "three baskets" terminology to describe more specifically the three types of collections. ~~(TS//STLW//SI//OC/NF)~~

Philbin said he was told by Addington he was being read into the program because Yoo was leaving the Department and another attorney was needed to review the threat assessments that supported the Presidential Authorizations and to then advise the Attorney General on recertifying the program as to form and legality.[118] Philbin said he also was told that he and the Attorney General were the only Justice Department officials who were supposed to be involved in this "review and recertification" process. Philbin told us he was aware that OIPR Counsel James Baker had also been read into the program; however, Philbin stated that Addington told him he should not discuss the program with Baker and should only advise the Attorney General on the program. Philbin said he believed Addington did not want Philbin speaking with Baker about the program because Addington had always taken the position that the program should be kept as compartmented as possible.[119] ~~(TS//SI//NF)~~

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agencies were regularly consulted by Yoo in his drafting of the legal memoranda on the legality of this program. Yoo told the Department's Office of Professional Responsibility that Attorney General Ashcroft determined who was allowed to work on the memoranda for the detainee interrogation program. Transcript of Interview of John Yoo by Office of Professional Responsibility, June 7, 2005, at 12. ~~(TS//STLW//SI//OC/NF)~~

[117] Prior to joining the Department Philbin had been at a private law firm and had specialized in telecommunications law. (U)

[118] When asked whether he had any knowledge of the program prior to being read in, Philbin said he did not, but he recalled that in the fall of 2001 he had a discussion with Yoo about some general electronic surveillance issues. Yoo told Philbin that Yoo was told to work alone on this particular matter. Yoo did not state who had given him this instruction. ~~(TS//SI//NF)~~

[119] Baker told us he was not similarly advised to avoid discussions with Philbin about the program, nor was he aware that Addington had instructed Philbin not to discuss the program with him. In fact, according to Baker, Philbin initiated several conversations with Baker about the operational details of the program as Baker understood them at the time. (U)

The day after being read into the program, Philbin moved from the Office of Legal Counsel to the Office of the Deputy Attorney General to become an Associate Deputy Attorney General, although technically he still retained his OLC Deputy Assistant Attorney General position and was thus "dual-hatted." Philbin took over the "national security portfolio" from David Kris, who had recently left the Department. Philbin stated he was "somewhat concerned" that he would be advising the Attorney General on the Stellar Wind program even though Deputy Attorney General Larry Thompson, Philbin's supervisor, was not read into the program. However, Philbin said he anticipated at the outset that his work on the program would not require a lot of his time. ~~(S//NF)~~

3. Initial Concerns with Yoo's Analysis (U)

Philbin said that after he was read into the Stellar Wind program he believed he needed to do "due diligence" to learn about the program. He said he reviewed Yoo's legal opinions about the program and realized that Yoo had omitted from his analysis any reference to the FISA provision allowing the interception of electronic communications without a warrant for a period of 15 days following a congressional declaration of war. See 50 U.S.C. § 1811. Philbin also stated that Yoo's OLC opinions were premised on the assumption that FISA did not expressly apply to wartime operations, an assumption that from Philbin's perspective rendered the opinions "problematic." Philbin said that this gap in Yoo's analysis was his first indication that the legal reasoning underpinning the Presidential Authorizations would have to be revisited. ~~(TS//STLW//SI//OC/NF)~~

Philbin said the second indication of problems with Yoo's analysis came when he read a summary document Yoo had prepared concerning the program. [redacted]

[redacted]

Second, and more significantly, Philbin stated that [redacted]

[120] ~~(TS//STLW//SI//OC/NF)~~ [redacted]

[120] See Presidential Authorization of April 22, 2003 at para. 4(b)(i) & (ii). The April 22, 2003, Authorization was the only Authorization personally approved as to form and legality by Yoo. He approved the Authorization on April 18, 2003, five days before the date of his talking points memorandum. ~~(TS//STLW//SI//OC/NF)~~

[121] [redacted]

[redacted]

Philbin said the errors in the Yoo's talking points document represented "a significant step toward the realization that the whole legal analysis was screwed up." Philbin told us he felt he could not rely on the existing analysis and that he needed to "build from the ground up." ~~(TS//SI//NF)~~

4. Problems with [redacted] ~~(TS//STLW//SI//OC/NF)~~

In addition to the flaws Philbin identified in Yoo's legal analysis, Philbin told us he grew increasingly concerned that [redacted] ~~(TS//STLW//SI//OC/NF)~~

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[122] Philbin told us he visited the NSA three times during the summer of 2003 in an effort to learn how the program operated. Several officials we interviewed told us that Philbin understood the program well, in part due to his background in telecommunications law. (U//~~FOUO~~)

[redacted]

Philbin said that he and later Goldsmith recognized that the existence of the Stellar Wind program would be disclosed at some point in the future.

[redacted]

[redacted][123] ~~(TS//STLW//SI//OC/NF)~~

5. Other Collection Concerns ~~(S//NF)~~

Philbin told us that during the summer of 2003 he identified other concerns about the Stellar Wind program. First, Philbin said he began to believe that the existing OLC memoranda failed to describe the [redacted] Philbin said he also had concerns over [redacted] ~~(TS//STLW//SI//OC/NF)~~

6. Decision to Draft New OLC Memorandum (U)

In August 2003, Philbin brought his concerns about the OLC legal opinions to Attorney General Ashcroft. Philbin told Ashcroft that there were problems with the legal analysis supporting the program but probably not with the conclusions reached. Philbin told us that he believed that since the conclusions would not change there would be no need to "pull the plug" on the analytically problematic aspects of the program. Philbin said he

[123] [redacted]

[124] [redacted]

therefore advised that Ashcroft could continue to certify the program "as to form and legality." ~~(TS//SI//NF)~~

However, Philbin also recommended that a new OLC memorandum be drafted. According to Philbin, Ashcroft concurred, told him to continue working on his analysis, and asked to be kept updated on Philbin's progress. After meeting with Ashcroft to discuss the issue, Philbin said he began to write a new memorandum on the legality of the entire Stellar Wind program.[125] ~~(TS//SI//NF)~~

C. Reassessment of Legal Rationale for the Program ~~(TS//SI//NF)~~

1. Goldsmith Becomes OLC Assistant Attorney General (U)

Jack Goldsmith told the OIG that he was recommended for the Assistant Attorney General position by Yoo after Yoo was not selected for the position. Goldsmith stated that during his interview for the position, Attorney General Ashcroft and Ashcroft's Chief of Staff David Ayres emphasized that the OLC Assistant Attorney General must keep the Attorney General informed of matters the Office of Legal Counsel was working on and stressed the importance of keeping the Attorney General "in the loop." Goldsmith told the OIG that he believed Ashcroft and Ayres raised these issues as a result of their experience with Yoo. (U)

Goldsmith was selected for the position, confirmed by the Senate, and on October 6, 2003, was sworn in as the OLC Assistant Attorney General. (U)

According to Goldsmith, he was told by Department colleagues that the procedures OLC historically followed in drafting its opinions were changing and that the Attorney General was being circumvented in the new

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[125] Philbin said that he was not certain at the time that Ashcroft fully understood the [redacted] because the subject matter was "difficult." Philbin also stated that for "client management" purposes, he needed to first make sure that he too fully understood the issues before raising his concerns to others. He said he did not just want to be "a naysayer" identifying problems, but also wanted to propose solutions. He said that the program would be examined by Congress one day and that the legal analysis had to be "carefully done to protect the President." Philbin said he therefore believed that the OLC legal memoranda had to be rewritten to achieve that objective. Philbin told us he also was concerned that the program not appear like a "rogue operation," but rather as a responsible approach to collecting intelligence with adequate controls and oversight. In this regard, Philbin emphasized that it would be important to demonstrate that the program had appropriate restrictions based on the law, and that the restrictions guarded against abuses. ~~(TS//SI//NF)~~

process. Goldsmith said that OLC Principal Deputy Assistant Attorney General Ed Whelan also told him that OLC's procedures, built on custom and practice but still "hugely important," had "broken down" prior to Goldsmith's arrival as the Assistant Attorney General. (U)

Goldsmith told us that he also became aware that Ashcroft sensed there was a White House-Office of Legal Counsel relationship over which Ashcroft did not have full control. Goldsmith said that when he became the OLC Assistant Attorney General he immediately moved to "bring things back to normalcy" by, for example, making sure all OLC memoranda were provided to client agencies for review and input and that all memoranda were reviewed by two OLC deputies, as was the traditional OLC practice.[126] (U)

With regard to the Stellar Wind program, Philbin told us he had always intended to request that Goldsmith be read into the program after Goldsmith was confirmed by the Senate. Philbin said that he went to the White House and asked Addington (and possibly Gonzales) to have Goldsmith read into the program. Philbin stated that Addington told him that he would have been "fine" with not allowing Goldsmith to be read in, and that Philbin would have to justify the request before Addington would convey the request to the President. Philbin told us he explained to Addington that he would need to have the head of OLC sign off on the new memorandum he was writing or the memorandum would lack credibility. (U//~~FOUO~~)

On November 17, 2003, Goldsmith was read into the Stellar Wind program by Addington in Addington's office.[127] Philbin was also present. On the way to the read-in, Philbin told Goldsmith to "prepare for your mind to be blown." Goldsmith told us that the read-in took approximately 5 minutes, and when it was over he remarked to Philbin, "That doesn't seem

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[126] Goldsmith's view of how the OLC should operate was later echoed by a subsequent head of the office, Steven Bradbury. In a May 16, 2005, internal OLC guidance memorandum entitled "Best Practices for OLC Opinions," Bradbury emphasized that OLC legal memoranda should reflect the positions and expertise of interested agencies, and he also stressed the importance of a rigorous peer review process within the office before finalizing OLC memoranda. (U)

[127] After Ashcroft, Yoo, Baker, and Philbin, Goldsmith was only the fifth non-FBI Justice Department official to be read into the Stellar Wind program since the program's inception over 2 years earlier. Philbin stated that prior to Goldsmith's arrival at the Department and subsequent read-in to the program, he had no one to help him draft a new legal memorandum and no one other than Ashcroft with whom to discuss the legal issues. He told the OIG that it was extremely beneficial to have another attorney working with him on the project. Philbin also told us he did not press the White House to read in additional attorneys during the summer 2003 period before Goldsmith arrived at the Department. ~~(TS//SI//NF)~~

so bad." Goldsmith said that 3 weeks later, after studying the matter, he would come to a "different conclusion." (U//~~FOUO~~)

2. NSA Denied Access to OLC Memoranda (U//~~FOUO~~)

One of the first Stellar Wind meetings Goldsmith and Philbin attended after Goldsmith's read-in was held in the DOJ Command Center with Addington, NSA Deputy General Counsel Vito Potenza, and NSA Inspector General Joel Brenner. Goldsmith stated that the NSA Inspector General requested a copy of the OLC legal memoranda regarding the program as part of an audit the NSA Office of the Inspector General wanted to conduct of the program. According to Goldsmith, Addington "bit [the Inspector General's] head off," and made it clear that the memoranda would not be provided to the NSA OIG. ~~(TS//SI//NF)~~

Goldsmith said he learned either at that meeting or shortly thereafter that NSA's Office of General Counsel also had been denied access to the OLC memoranda. Bob Deitz, the NSA General Counsel during this period, told the NSA OIG that he was never permitted to see Yoo's legal memoranda. Dietz stated that he called Addington several weeks after the first Presidential Authorization was signed and asked if he could see a copy of Yoo's memorandum (likely the November 2, 2001, memorandum), and that Addington responded "no." Dietz said that Addington would only read "a paragraph or two" from the memorandum to him over a classified telephone line. Deitz stated that he never advised Yoo on his legal analysis, although he did advise NSA Director Hayden that he thought the program was legal and within the President's authority. ~~(TS//SI//NF)~~

The OIG also interviewed [redacted] the NSA's Associate General Counsel for Operations during Yoo's and Goldsmith's tenure in OLC. [redacted] told us that he was not troubled by the fact that other senior NSA officials had been denied access to Yoo's legal memoranda, and that he felt no need to review them. [redacted] stated that his primary concern with respect to the legality of the program was whether "Justice was comfortable with it." [redacted] also stated that he assumed that the Justice Department would find the program legal by resolving the tension between FISA and the President's inherent Commander-in-Chief authority based upon the doctrine of constitutional avoidance. ~~(TS//STLW//SI//OC/NF)~~

Goldsmith told us he found it "shocking" that the NSA was not provided access to Yoo's legal memoranda. He stated that the decision to withhold the memoranda was one of the "most astonishing things" he learned about how the program was handled, and that he could not "draw a good inference" from that fact. Goldsmith emphasized that under the Stellar Wind program the NSA had been asked to do something contrary to its ordinary practices, and yet was not allowed to review the legal

justifications for being permitted to do it. Goldsmith told us he believed that the NSA might have identified problems or mistakes in Yoo's analysis early in the program had it been given access to his memoranda. ~~(TS//SI//NF)~~

Goldsmith told us that upon becoming the Assistant Attorney General he intended to reverse the practice of keeping OLC memoranda closely held, and that he also decided he would seek client agency expertise in drafting these documents. (U)

3. Goldsmith Joins Effort to Reassess Legal Basis for the Program ~~(TS//SI//NF)~~

In the two or three weeks following his read-in to the Stellar Wind program, Goldsmith reviewed several documents to educate himself about the program. These included the memorandum that Philbin had already begun to draft (which included a description of how the program worked operationally), Yoo's memoranda, and older OLC memoranda concerning surveillance activities. After Goldsmith familiarized himself with the program, Goldsmith provided Philbin with additional research and helped supplement Philbin's draft memorandum. ~~(TS//STLW//SI//OC/NF)~~

Goldsmith stated that Philbin had done an "amazingly heroic job" in reviewing the program. Goldsmith believed "ninety-nine out of a hundred" attorneys in Philbin's position, having been asked simply to opine as to form and legality, would have just relied on the previous Office of Legal Counsel memoranda. Goldsmith said that Philbin, however, was not convinced by those memoranda and therefore did not rely on them. In addition, Goldsmith noted that Philbin sought to understand the program as it was actually implemented at the NSA before advising the Attorney General on its legality. ~~(TS//SI//NF)~~

[redacted]

128 [redacted]

(Cont'd.)

[redacted] ~~(TS//STLW//SI//OC/NF)~~

4. AUMF Becomes the Primary Legal Rationale Supporting [redacted] of the Stellar Wind Program ~~(TS//STLW//SI//OC/NF)~~

[redacted]

Goldsmith concluded the NSA's interception of [redacted] did not comply with FISA's requirement to obtain judicial authorization, and did not fall within any of the exceptions to this requirement. Goldsmith later wrote in his legal memorandum reassessing the legality of the program that a proper analysis

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[redacted] ~~(TS//STLW//SI//OC/NF)~~

[129] [redacted]

[130] See Goldsmith's May 6, 2004, memorandum entitled "Review of the Legality of the Stellar Wind Program" (Goldsmith Memorandum, May 6, 2004). This memorandum is discussed in Section II C below. ~~(TS//STLW//SI//OC/NF)~~

of Stellar Wind "must not consider FISA in isolation" but rather must consider whether Congress, by authorizing the use of military force against al Qaeda, also "effectively exempts" such surveillance from FISA. Goldsmith concluded that this reading of the AUMF was correct because the AUMF authorized the President to use "all necessary and appropriate force" against the enemy that attacked the United States on September 11, 2001, and to "prevent any future acts of international terrorism against the United States" by such enemy – authority that has long been recognized to include the use of signals intelligence as a military tool. ~~(TS//STLW//SI//OC/NF)~~

Alternatively, Goldsmith reasoned that even if the AUMF did not exempt surveillance under the program from the restrictions imposed by FISA, the question was sufficiently ambiguous to warrant the application of the doctrine of constitutional avoidance, and therefore should be construed not to prohibit the activity.[131] ~~(TS//STLW//SI//OC/NF)~~

[redacted] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

[131] In his May 6, 2004, memorandum, Goldsmith concluded that if the [redacted] arguments under the AUMF did not create sufficient ambiguity as to trigger the doctrine of constitutional avoidance, FISA as applied would represent an unconstitutional infringement on the President's exclusive authority as Commander-in-Chief in wartime to protect the nation from attack. ~~(TS//STLW//SI//OC/NF)~~

[redacted]

5. Office of Legal Counsel Raises its Reassessment of the Stellar Wind Program (December 2003 through January 2004)[133] ~~(TS//SI//NF)~~

During late 2003, Goldsmith and Philbin continued their analysis of the legal bases for the Stellar Wind program. During this time Philbin and Goldsmith were the only two Department officials in a position to brief the Attorney General and White House officials on the status of their legal reassessment and its potential ramifications for the operation of the program.[134] ~~(TS//SI//NF)~~

With the existing Presidential Authorization set to expire on December 11, 2003, Goldsmith and Philbin met with Ashcroft on December 8, 2003, to advise him on recertifying the program as to form and legality. Goldsmith wrote in notes that he maintained during this time period that at the meeting he and Philbin "note[d] problems gently" to Ashcroft. Goldsmith told us Ashcroft was "extraordinarily supportive" of his and Philbin's efforts to reassess the legality of the program and made clear his view that the program had to be on solid legal footing. ~~(TS//STLW//SI//OC/NF)~~

Goldsmith advised Ashcroft that, despite concerns about the program, Ashcroft should certify the December 9, 2003, Authorization. Goldsmith

[132] [redacted]

[133] The narrative in this and the following sections is based on our interviews of Philbin, Goldsmith, Comey, Mueller, Gonzales, and others. We also relied on Philbin's and Goldsmith's contemporaneous notes, Goldsmith's chronology of events that he wrote during this period, Mueller's Program Log documenting events in March 2004, and Attorney General Ashcroft's FBI security detail log of events that occurred while Ashcroft was hospitalized from March 4 through March 14, 2004, among other documents. (U)

[134] James Comey became the Deputy Attorney General on December 9, 2003, but was not read into the program until over 2 months later. (U)

later advised Ashcroft to certify the January 14, 2004, Authorization as well. Goldsmith told us he made these recommendations to Ashcroft with the caveat that although he believed Yoo's memoranda to be flawed, Goldsmith had not yet concluded that the program itself was illegal. ~~(TS//SI//NF)~~

Based on Goldsmith's advice, Ashcroft certified the December 9, 2003, and January 14, 2004, Authorizations. ~~(TS//SI//NF)~~

In December 2003 Philbin and Goldsmith informed Ashcroft that they believed Comey, who was sworn in as the new Deputy Attorney General in December 2003, also needed to be read into the program. Philbin said he justified this request by noting that he would be traveling abroad for 2 weeks later that month on an unrelated Justice Department matter.[135] (U)

In December 2003, Goldsmith and Philbin met with Addington and Gonzales at the White House to express their growing concerns about the legal underpinnings for program. Goldsmith said he told them that OLC was not sure the program could survive in its current form. According to Goldsmith's notes, these discussions did not contemplate an interruption of the program, although the White House represented that it would "agree to pull the plug" if the problems with the program were found to be sufficiently serious. Goldsmith told us that the White House – typically through Addington – told him "several times" that it would halt the program if the Department found that it could not be legally supported. ~~(TS//SI//NF)~~

Philbin told us he recalled that Addington in particular was "annoyed" with the OLC's preliminary conclusion that [redacted] Philbin said that Addington nevertheless told him and Goldsmith to continue analyzing the program and that if serious problems were found, the program would be shut down. ~~(TS//STLW//SI//OC/NF)~~

On December 18, 2003, while Philbin was abroad, Goldsmith met again with Addington and Gonzales. Goldsmith wrote in his chronology that this time he conveyed with "more force" his "serious doubts and the need to get more help to resolve the issue [as soon as possible]." Goldsmith also told Addington and Gonzales that he needed more resources to continue examining the legality of the program. They responded to this request by telling Goldsmith that Philbin should devote all of his time to the project.

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[135] As discussed in Chapter Three, Comey's predecessor as Deputy Attorney General, Larry Thompson, was never read into the Stellar Wind program despite Ashcroft's request to the White House on behalf of both Thompson and Ashcroft's chief of staff. (U//~~FOUO~~)

Goldsmith told us that he asked to have Comey read into the program. According to Goldsmith's notes, Addington and Gonzales "bristle[d]" at that suggestion. Goldsmith told us he made the request for Comey to be read in because he believed he would need the Deputy Attorney General's assistance to help "make the case" to the White House that the program was legally flawed. Goldsmith also stated that he wanted Comey read in because, as the Deputy Attorney General, Comey was Philbin's direct supervisor. ~~(TS//SI//NF)~~

We asked Gonzales when he first became aware that the Department had concerns about the legality of the Stellar Wind program. Gonzales stated that he remembered that sometime after Philbin and Goldsmith joined the Department, they decided to conduct a programmatic review of the legal basis for Stellar Wind. Gonzales said that he welcomed this review, and that it was always important to reassess the value of or need for the program, as well as its legality. Gonzales told us he thought that Goldsmith and Philbin's review arose out of concerns about Yoo's November 2, 2001, opinion and that their review was limited to that document. Gonzales said that Goldsmith periodically told him that Philbin was reviewing the program and that some questions had been raised or that some changes to the program might be needed as a result of their reassessment. Gonzales said that he told Goldsmith to let him know how the review was progressing. Gonzales also told us he did not recall getting into any specific discussions with Goldsmith about OLC's concerns until early March 2004. ~~(TS//SI//NF)~~

In contrast, Goldsmith told us he had been "crystal clear" with Gonzales and Addington that the Office of Legal Counsel had concerns about the legality of aspects of the program as early as December 2003, although Goldsmith also acknowledged that his discussions with Gonzales and Addington became more detailed in March 2004. Goldsmith told us that he gave the two White House officials the same caveats he gave Ashcroft when advising him on the legality of the program – that there were flaws in Yoo's analysis, but that OLC had not yet concluded that the program itself was illegal. ~~(TS//SI//NF)~~

Goldsmith's efforts to gain the White House's permission to have others (including Comey) read into the program continued through January 2004. According to Goldsmith's notes, both Addington and Gonzales pressed Goldsmith on his reason for the request and continued to express doubt that additional resources were needed. However, in late January the White House agreed to allow Comey to be read in, provided that Philbin devoted all of his time to his analysis of the program and, according to Goldsmith, that the Department's legal analysis be completed by March 2004 when the Presidential Authorization was due to be renewed. (U)

6. Deputy Attorney General Comey is Read into the Program (U)

Comey became the Deputy Attorney General on December 9, 2003, and was read into the Stellar Wind program on February 17, 2004. Comey told us that he had no awareness of the program prior to being read in. He said he learned after his read-in that Addington had resisted Goldsmith and Philbin's efforts to have him read in earlier. Comey said Addington was the "gatekeeper" for Stellar Wind and wanted to keep the program a "close hold." (U)

Comey told us that NSA Director Hayden personally wanted to conduct Comey's read-in to the program. Hayden read in Comey at the Justice Command Center in a briefing that took approximately 20 to 30 minutes. Comey said that, at the read in, Hayden explained the "three baskets" to him. ~~(TS//STLW//SI//OC/NF)~~

Comey told us that after Hayden left the Command Center, Comey and Philbin continued discussing the program. Philbin told Comey that there were problems with the legality of the program and that there were "operational issues" as well. Comey told us that his initial reaction to the program was "unprintable." He said he thought that the NSA could not collect the content of certain communications covered by the program outside of FISA authority. Hayden told the OIG that Comey raised no objections to him about the program upon being read in. (U)

Within the first month after being read in, Comey discussed the program with Ashcroft, Goldsmith, Philbin, and other Department officials who had been read in by this time, including James Baker, Counsel for Intelligence Policy; Chuck Rosenberg, Comey's Chief of Staff, and Daniel Levin, Counsel to the Attorney General.[136] Comey said he did not recall having any discussions about the program with FBI Director Mueller during this period. (U)

Comey also recalled meeting with Scott Muller, the CIA General Counsel, shortly after being read into the program. Comey said that he told Muller about the legal concerns Philbin and Goldsmith had raised regarding Yoo's analysis and that Muller agreed that the concerns were well founded. (U)

Comey also told us that Goldsmith had identified for Comey as a particular concern the notion that Yoo's legal analysis entailed ignoring an

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[136] Levin had just returned to the Department after working in private practice and serving as a Bush Administration liaison to the September 11 Commission. Rosenberg was read into Stellar Wind in 2003 while serving as Counsel to FBI Director Mueller. (U)

act of Congress, and doing so in secret. Comey stated that Goldsmith described such action as "breathtaking." Comey agreed, describing the action as "unprecedented." (U)

D. Office of Legal Counsel Presents its Conclusions to the White House (U)

On March 1, 2004, Philbin completed a first draft of a revised OLC opinion on the Stellar Wind program. According to Goldsmith's notes, at this time Goldsmith and Philbin had not yet concluded "definitively" that there was "anything certainly wrong" with the program, with the possible exception of the scope of [redacted] ~~(TS//STLW//SI//OC/NF)~~

In explaining the rationale for the revised opinion, Comey described to the OIG his view of two approaches or standards that could be used to undertake legal analysis of government action. If the government is contemplating taking a particular action, OLC's legal analysis will be based on a "best view of the law" standard. However, if the government already is taking the action, the analysis should instead focus on whether reasonable legal arguments can be made to support the continuation of the conduct.[137] Comey said that because Stellar Wind was an ongoing program, Goldsmith and Philbin's analysis proceeded under the second approach. Under this approach, at this point they concluded that there were reasonable legal arguments to be made to continue the collection of [redacted] but they still had not identified a legal argument to support [redacted] ~~(TS//STLW//SI//OC/NF)~~

Comey said that during early March 2004 the sense was that "we can get there" as to [redacted] albeit by using an aggressive legal analysis. However, he said that collection of [redacted] would require [redacted] ~~(TS//STLW//SI//OC/NF)~~

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[137] Goldsmith emphasized to us that this second situation almost never presents itself, and that OLC rarely is asked to furnish legal advice on an ongoing program because the pressure "to say 'yes' to the President" invariably would result in applying a lower standard of review. Goldsmith stated that OLC's involvement in Stellar Wind was "unprecedented" because OLC is always asked to review the facts and formulate its advice "up front." ~~(S//NF)~~

On March 1, 2004, Comey met with FBI Director Mueller to inform him that the OLC had found problems with the legal authority for the Stellar Wind program, particularly with the [redacted] According to a log Mueller kept documenting events in March 2004 concerning the program, Comey said he was trying to work out these problems with the OLC and "other interested parties."[138] Mueller told us that March 1, 2004, was when he first became aware of the Department's concerns about the legal support for the program. Mueller described the FBI as "recipients of information from the program," and that the dialogue as to the program's legality was between the Department and the White House. ~~(TS//STLW//SI//OC/NF)~~

1. March 4, 2004: Comey Meets with Ashcroft to Discuss Problems with the Program (U)

Comey told us he met with Attorney General Ashcroft for lunch on March 4, 2004, to discuss the Stellar Wind program. Comey reminded Ashcroft of the details of the program and said he used salt and pepper shakers and a knife to represent the three baskets during the discussion. According to Comey, Ashcroft agreed with Comey and OLC's assessment of the potential legal problems, and he instructed Comey to "just fix it" and "tell them to make the changes that need to be done." ~~(TS//STLW//SI//OC/NF)~~

Comey said he assumed Ashcroft meant that Comey should reach out to the NSA and the White House for the necessary changes. The Presidential Authorization in effect at the time was due to expire on March 11, 2004. Comey said Ashcroft did not discuss with him whether he would recertify the program as it was currently being authorized by the President. ~~(TS//SI//NF)~~

Comey also described Ashcroft as being frustrated, and said he was "beating himself up" because he was "in a box" with Yoo, yet was learning from Philbin, Goldsmith, and now Comey that parts of the program were not in their view legally supportable.[139] ~~(TS//SI//NF)~~

After the lunch meeting on March 4, Comey traveled to Phoenix, Arizona, to make a speech. Three hours after their lunch meeting, Ashcroft was struck with severe gallstone pancreatitis and was admitted to the

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[138] Mueller told us he maintained the program log because "[t]hese were extraordinary circumstances about which I would one day be questioned." Mueller said the program log was drafted "relatively contemporaneously" with the events described in it. (U)

[139] By the time Ashcroft received OLC's preliminary findings concerning the legality of the program in December 2003, he had already certified the program as to form and legality approximately 20 times. ~~(TS//SI//NF)~~

George Washington University Hospital. After being informed that Ashcroft was hospitalized, Comey returned to Washington the next morning on an FBI jet. (U)

2. March 5, 2004: Comey Determines Ashcroft is "Absent or Disabled" (U)

On March 5, 2004, Goldsmith advised Comey by memorandum that under the circumstances of Ashcroft's medical condition and hospitalization, a "clear basis" existed for Comey to determine that "this is a case of 'absence or disability' of the Attorney General" within the meaning of 28 U.S.C. § 508(a). This statute provides:

> In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for purposes of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General. (U)

Goldsmith's memorandum further advised Comey that he could serve as Acting Attorney General until Ashcroft's absence or disability no longer existed, and that Comey could exercise "all the power and authority of the Attorney General, unless such power or authority is required by law to be exercised by the Attorney General personally." See 28 C.F.R. § 0.15(a). Goldsmith noted in the memorandum that there are "very few duties" that can be exercised only by the Attorney General. Goldsmith wrote that, except for these duties, Comey could opt to exercise the duties of the Attorney General as Deputy Attorney General rather than as Acting Attorney General, noting, "Your office has informed us that this is your intention."[140] (U)

Goldsmith's memorandum to Comey referenced an attached draft memorandum for Comey's review, which would memorialize Comey's decision to invoke 28 U.S.C. § 508(a) in writing, although Goldsmith advised that it was not necessary to do so. The "cc" line of Goldsmith's memorandum to Comey indicated that a copy of the memorandum was also

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[140] According to an e-mail sent on March 5, 2004, at 9:15 a.m. from OLC Special Counsel Daniel Koffsky to OLC Principal Deputy Assistant Attorney General Edward Whelan and other Department officials, among the duties that can only be exercised by the Attorney General or his designee is the authority to approve FISA applications to engage in electronic surveillance of a specific type of agent of a foreign power based on requests of certain high level officials. 50 U.S.C. § 1804(e)(2)(A). This section represents an exception to FISA's general conferral of authority on the Attorney General, a term that is defined to include the Acting Attorney General and the Deputy Attorney General. See 50 U.S.C. § 1801(g). (U)

sent to White House Counsel Gonzales.[141] As discussed below, a significant dispute between White House and Department officials later arose over whether the White House in fact received notice of Comey's decision to assume the powers of the Attorney General, whether as Deputy Attorney General or otherwise. (U)

3. March 5, 2004: Goldsmith and Philbin Seek Clarification from White House on Presidential Authorizations (U)

On the afternoon of Friday, March 5, 2004 – 6 days before the Presidential Authorization then in effect was set to expire – Goldsmith and Philbin met with Addington and Gonzales at the White House to seek clarification on two key issues related to the Authorizations. (U//~~FOUO~~)

First, Goldsmith expressed his belief that the [redacted] Philbin said they explained to Addington and Gonzales the importance of briefing the President on this new legal approach to justifying the program. ~~(TS//STLW//SI//OC/NF)~~

Second, [redacted] ~~(TS//STLW//SI//OC/NF)~~

[141] A March 12, 2004, e-mail from Ashcroft's Chief of Staff David Ayres to Deputy White House Counsel David Leitch detailing the Department's efforts to inform the White House Counsel's Office of Ashcroft's hospitalization and Comey's assumption of Ashcroft's duties shows that Ayres confirmed the White House's receipt of a facsimile from OLC advising the White House of Comey's decision to exercise "all the power and authority of the Attorney General . . . in [his] capacity as Deputy Attorney General." Ayres also wrote in the e-mail that a copy of OLC's "legal memorandum" was sent to White House Counsel Gonzales. Ayres also wrote in the e-mail that he personally called Harriet Miers, a White House Deputy Chief of Staff, and informed her that Comey "had assumed the Attorney General's responsibilities[.]" Ayres wrote in the e-mail that he also informed others at the White House of Comey's status, including another White House Deputy Chief of Staff [Joe Hagin] and the White House Cabinet Secretary [Brian Montgomery]. (U)

[redacted]

However, according to Gonzales, Goldsmith's conclusion [redacted] created a serious issue. Gonzales stated that Goldsmith's argument on this point was that Congress had spoken on the matter by enacting FISA, but Yoo previously had opined that FISA was unconstitutional to the extent it infringed on the President's Commander-in-Chief authority to conduct electronic surveillance without a judicial warrant.[142] ~~(TS//STLW//SI//OC/NF)~~

Gonzales also told us that the March 5, 2004, meeting with Goldsmith and Philbin represented the first substantively detailed discussion he had with the OLC officials regarding their concerns with the existing legal analysis and their reservations about continuing the program as it had been operating. As noted above, Goldsmith said that he had informed Gonzales and Addington about his general concerns with Yoo's legal analysis of the program as early as December 2003. ~~(TS//SI//NF)~~

Later that day on March 5, Gonzales called Goldsmith to request a letter from the OLC stating that Yoo's prior OLC opinions "covered the program." Philbin told the OIG that Gonzales was not requesting a new

[142] [redacted]

opinion that the program itself was legal, but only that the prior opinions had concluded that it was. ~~(TS//SI//NF)~~

4. March 6 to 8, 2004: The Department Concludes That Yoo's Legal Memoranda Did Not Cover the Program (U)

As a result of Gonzales's request on March 5, Goldsmith re-examined Yoo's memoranda with a view toward determining whether they adequately described the actual collection activities of the NSA under the Authorizations. Goldsmith told us that after a brief review, he called Philbin to tell him he agreed with Philbin's assessment that Yoo's memoranda were problematic from a factual standpoint. Philbin said that through this re-examination he and Goldsmith confirmed Philbin's initial sense that Yoo's memoranda did not describe the [redacted] [143] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

Goldsmith's account of the response to Gonzales's request was similar. Goldsmith also stated that his and Philbin's conclusion that Yoo's memoranda failed to adequately describe the [redacted] meant that OLC could not tell the White House that the program could continue under the authority of those legal memoranda. Goldsmith stated that he and Philbin realized at this point that the program had been conducted for 2 years without a proper OLC review. Specifically, both Goldsmith and Philbin stated that they had always viewed Yoo's legal analysis as poorly reasoned; however, they were now realizing that Yoo's factual description of the program was inaccurate and incomplete as well, and thus did not "cover" aspects of the program. Goldsmith said Gonzales's request for ratification of Yoo's memoranda "forced [the Office of Legal

143 [redacted]

Counsel's] hand" and was the point at which the "presumption in favor of legality flipped."[144] ~~(TS//STLW//SI//OC/NF)~~

On Saturday, March 6, 2004, Goldsmith and Philbin advised Comey that they believed the [redacted] Goldsmith also told Comey that the White House would have to be notified of this development. Comey agreed with this recommendation. ~~(TS//STLW//SI//OC/NF)~~

Later on March 6, Goldsmith and Philbin went to the White House to meet with Addington and Gonzales to convey their conclusions that the [redacted] According to Goldsmith's chronology of these events, Addington and Gonzales "reacted calmly and said they would get back with us." Goldsmith told us that the White House was now worried that it was "out there," meaning that it was implementing a program without legal support. ~~(TS//STLW//SI//OC/NF)~~

On Sunday afternoon, March 7, 2004, Goldsmith and Philbin met again with Addington and Gonzales at the White House.[145] According to Goldsmith, the White House officials informed Goldsmith and Philbin that they disagreed with Goldsmith and Philbin's interpretation of Yoo's memoranda and on the need to change the scope of the NSA's collection.[146] Gonzales told us he recalled the meetings of March 6 and 7, 2004, but did not recall the specifics of the discussions. He said he remembered that the overall tenor of the meetings with Goldsmith was one of trying to "find a way forward."[147] ~~(TS//SI//NF)~~

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[144] As noted in Chapter Three, Gonzales told us that he believed Yoo's memoranda described as lawful activities that were broader than those carried out under Stellar Wind, and that therefore these opinions "covered" the Stellar Wind program. ~~(TS//SI//NF)~~

[145] Gonzales told us that White House Chief of Staff Card may also have been present for this meeting. Goldsmith's chronology indicates that only Addington and Gonzales were present. (U)

[146] In discussing these early March meetings with the OIG, Goldsmith told us that Addington had stated on more than one occasion that Goldsmith was the head of OLC and if he determined that the program needed to be shut down, it would be shut down. Goldsmith told us he believed that the White House officials' references to "shutting down the program" extended only to those aspects of the program for which no legal support could be found. Goldsmith also told us that he did not know whether Addington and Gonzales were keeping the President informed of OLC's concerns. ~~(TS//SI//NF)~~

[147] As noted above, Gonzales was represented by counsel during his interview with the OIG. Also present during the interview because of the issue of executive privilege was a Special Counsel to the President, Emmitt Flood. We asked Gonzales whether the President had been informed by this point in time of the OLC position regarding the lack of legal

(Cont'd.)

On the evening of Sunday, March 7, 2004, Goldsmith and Philbin met with Comey in Comey's office to again review Yoo's opinions and make sure all three agreed with the conclusion that the opinions failed to support the Stellar Wind program as it was being implemented. Philbin said that until Gonzales's March 5 request for a letter from the OLC stating that Yoo's prior OLC opinions "covered the program," he and Goldsmith had intended to recommend that the program be recertified on March 11, 2004, while they continued to work on the new OLC opinion. [redacted] ~~(TS//STLW//SI//OC/NF)~~

According to Goldsmith's chronology, there was no interaction with the White House on the issue on the following day, Monday, March 8, 2004. Goldsmith wrote in his chronology of events for this day: "Monday, March 8: Silence." (U)

5. March 9, 2004: White House Seeks to Persuade Department and FBI to Support Continuation of the Program ~~(S//NF)~~

On Tuesday, March 9, 2004, Gonzales called Goldsmith to attend an early morning meeting (at 6:00 or 6:30 a.m.) at the White House to discuss the issues regarding Yoo's memoranda and the Stellar Wind program.[149] Goldsmith called Philbin and told him to meet Goldsmith at the White House. According to Goldsmith, Philbin was allowed into the White House, but Gonzales excluded Philbin from the meeting despite Goldsmith's requests that Philbin be allowed to participate. ~~(S//NF)~~

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support for the program and [redacted]. Flood objected to the question on relevancy grounds and advised Gonzales not to answer, and Gonzales did not provide us an answer. However, when Gonzales commented on a draft of this report, he stated that he would not have brought Goldsmith and Philbin's "concerns" to the attention of the President because there would have been nothing for the President to act upon at that point. Gonzales stated that this was especially true given that Ashcroft continued to certify the program as to legality during this period. Gonzales stated he generally would only bring matters to the President's attention if the President could make a decision about them. ~~(TS//STLW//SI//OC/NF)~~

[148] [redacted]

[149] Gonzales told the OIG that he did not recall this meeting. Both Goldsmith and Philbin told the OIG about the meeting. The meeting is also briefly described in Goldsmith's contemporaneous notes and chronology. (U)

Goldsmith said Gonzales tried first to persuade him that he and Philbin were wrong to conclude that Yoo's memoranda did not provide sufficient legal justification to cover the parts of the program that OLC had identified as problematic, but that Gonzales did not persuade him on this point. Gonzales next argued for a "30-day bridge" to get past the upcoming March 11, 2004, Authorization. Gonzales reasoned that Ashcroft, who was still hospitalized, was not in any condition to sign the upcoming Authorization, and that a "30-day bridge" would move the situation to a point where Ashcroft would be well enough to approve the program. Goldsmith told Gonzales he could not agree to recommend an extension. ~~(TS//SI//NF)~~

Goldsmith said Gonzales noted that Ashcroft had certified the program as to form and legality for the previous two and a half years, yet now Comey was the Acting Attorney General. Goldsmith said the implication of Gonzales's statement was that not approving the March 11, 2004, Authorization would "undercut" Ashcroft. Goldsmith said he made clear to Gonzales that Ashcroft was "supportive" of his and Philbin's analysis. Goldsmith's notes from the meeting also indicate that Gonzales stated that he did not "want to face" Ashcroft in the hospital. Goldsmith told us he recommended to Gonzales that he not visit Ashcroft.[150] ~~(TS//SI//NF)~~

Goldsmith said his discussion with Gonzales lasted about 1 hour. Philbin was then brought into Gonzales's office and the issues were discussed again. According to Goldsmith's chronology, nothing was resolved during the meeting. (U)

At noon that day, another meeting was held in Andrew Card's office at the White House. According to Director Mueller's program log, Mueller, Chief of Staff Card, Vice President Cheney, CIA Deputy Director John McLaughlin, Hayden, Gonzales, and other unspecified officials were present. Comey, Goldsmith, and Philbin were not invited to this meeting. Mueller described this gathering as a "pre-meeting" in anticipation of another meeting that was to be held later that afternoon in which the Justice Department officials (Comey, Goldsmith, and Philbin) would be participating.[151] (U)

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[150] At noon on March 9, 2004, Attorney General Ashcroft underwent surgery at the George Washington University Hospital. The surgery was completed by 2:30 p.m. (U)

[151] Mueller prepared for this meeting by meeting earlier that morning with Michael Fedarcyk, the Chief of the FBI's Communications Exploitation Section; General Counsel Valerie Caproni; and possibly others. Mueller's program log indicates that Fedarcyk "appears unaware of details of how [redacted] is collected." ~~(TS//SI//NF)~~

According to Mueller's notes, a presentation on the value of the Stellar Wind program was given by CIA and NSA representatives.[152] It was then explained to the group that Comey "has problems" with [redacted] Mueller's notes state that Vice President Cheney suggested that "the President may have to reauthorize without [the] blessing of DOJ," to which Mueller responded, "I could have a problem with that," and that the FBI would "have to review legality of continued participation in the program." ~~(TS//STLW//SI//OC/NF)~~

A third meeting was held at the White House that afternoon, at 4:00 p.m. The meeting included Comey, Goldsmith, and Philbin, in addition to Vice President Cheney, Card, Addington, Gonzales, Hayden, Mueller, CIA General Counsel Muller, McLaughlin, and approximately 10 NSA analysts. Gonzales told us the meeting was held to make sure that Comey understood what was at stake with the program and to demonstrate its value. ~~(S//NF)~~

At the beginning of the meeting the NSA analysts made a presentation to Comey, Goldsmith, and Philbin. Comey said the presentation consisted of charts showing the chaining [redacted] capabilities that could be generated from Stellar Wind-derived information, as well as a description of "success stories" resulting from the program. Comey told us that the cases the analysts highlighted were not in his view the Stellar Wind successes that the analysts claimed, and that he felt "the NSA had no good stories to tell about the program."[153] Comey also told us that the collection of content communications under Stellar Wind was somewhat duplicative of existing FISA coverage, and that only the meta data collection under baskets 2 and 3 represented truly new capabilities. However, Comey said he did not challenge the analysts on the assertion that Stellar Wind was a critical anti-terrorism tool because the value of the program was not his primary concern. Rather, Comey said he was willing to concede the program's value, and that his concern was with its legality. ~~(TS//STLW//SI//OC/NF)~~

Goldsmith told us that he did not believe it was his place to judge the value of the program from an intelligence-gathering standpoint. Goldsmith told us he found persuasive a remark by Hayden that even though there may not have been major successes under the program to date, the program still could produce successes in the future. However, both Goldsmith and

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[152] Mueller's notes indicate that [redacted] were cited as examples during the presentation. We discuss [redacted] briefly in this chapter and [redacted] in Chapter Six. ~~(TS//STLW//SI//OC/NF)~~

[153] Comey specifically questioned whether the [redacted] case was a legitimate "success story" under the Stellar Wind program. The [redacted] case, as well as other cases cited as successes under Stellar Wind, is discussed in Chapter Six. ~~(TS//STLW//SI//OC/NF)~~

Philbin told us that they believed that identifiable successes under the program [redacted]

~~(TS//STLW//SI//OC/NF)~~

The NSA analysts were excused after their presentation and the meeting continued. Comey said Vice President Cheney stressed that the program was "critically important" and warned that Comey would risk "thousands" of lives if Comey did not agree to recertify it. Comey said he told those at the meeting that he, as the Deputy Attorney General exercising the powers of the Attorney General, could support reauthorizing [redacted].[154] However, he told the group "we can't get there" on [redacted] According to Comey, the White House said it could not agree to that modification. ~~(TS//STLW//SI//OC/NF)~~

Comey also told us he was certain the White House understood him to be the acting in Attorney General Ashcroft's stead during this meeting. (U)

[redacted]

Gonzales told us that he came away from the meeting with the understanding that Comey [redacted] ~~(TS//STLW//SI//OC/NF)~~

6. Conflict Ensues between Department and White House (U)

Each of the Department witnesses we interviewed concerning the Department's discussions with the White House during this time period

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154 [redacted]

emphasized the sense of pressure and anxiety that pervaded the discussions in March 2004. For instance, Comey said discussions during the meeting at the White House on March 9 became heated as he sought to convey to everyone how difficult it was for the Department to take the position it was taking, and how hard the Department officials were working to find a solution. Comey also stated that Vice President Cheney was "understandably frustrated" because the Department was changing its advice to the White House about the program. (U)

Goldsmith also recalled that at one point during these meetings with the White House, Addington told him that if he narrowed the Stellar Wind program Goldsmith "will have the blood of 100,000 American lives on his hands." ~~(S//NF)~~

Goldsmith observed to us that from the White House's point of view, due to the timing of the events, and in particular with Ashcroft in the hospital, it appeared to the White House that a "palace coup" was taking place at the Department of Justice. Goldsmith said that this perception was somewhat understandable under the circumstances. (U)

Philbin also stated that tensions were high during this period and that the Department and White House "started to divide into camps." Philbin added that Department and White House officials were "starting to attribute motives" to each other. Philbin said he thought Addington came to believe that Comey was opposed to recertifying the program for "political reasons," and that Comey wanted to be on the "politically right" side of the dispute. (U)

Comey said that his dealings with Gonzales, Card, Addington, and others at the White House were generally civil. Comey acknowledged that there was tension between the Department and the White House during the March 2004 period, but believed that it resulted primarily from differences in legal perspectives. (U)

II. White House Continues Program without Justice Department's Certification ~~(TS//SI//NF)~~

The Presidential Authorization under which the program was operating during early 2004 was set to expire on March 11, 2004. As described in the preceding section, Comey concurred with the views of Goldsmith and Philbin, and as the Deputy Attorney General exercising the powers of the Attorney General Comey refused to certify the program as to form and legality. He conveyed this decision to the White House during the meeting on the afternoon of March 9, 2004. In response, as described below, the President decided to reauthorize the program without the Justice

Department's support, precipitating a serious confrontation between White House and Department officials. ~~(TS//STLW//SI//OC/NF)~~

A. White House Counsel Gonzales Certifies March 11, 2004, Presidential Authorization ~~(TS//SI//NF)~~

1. March 10, 2004: Office of Legal Counsel Presses for Solicitor General to be Read into Program (U)

Goldsmith, Philbin, and Comey met in the early afternoon of March 10, 2004, to discuss the meeting at the White House the day before and how the Department should proceed. Goldsmith and Philbin reconfirmed their position to Comey that collection under [redacted] ~~(TS//STLW//SI//OC/NF)~~

Goldsmith and Philbin also recommended to Comey that Solicitor General Theodore Olson be read into the program. Goldsmith told us that Olson had been at the Department for a long time and had valuable experience and credibility. Goldsmith said that given the importance of the decisions being made at the Department concerning the program at this time, he believed it was imperative to have Olson read in. (U)

Comey agreed with Goldsmith and Philbin, and he directed Goldsmith to call Gonzales to reaffirm the Department's position on the program and also to request that Olson be read in. (U)

Goldsmith called Gonzales at 2:20 p.m. on March 10 to tell him that the Department could not support the legality of [redacted] as then being implemented under the program. Goldsmith also told Gonzales of the "urgent need" for approval to read Olson into the program. Goldsmith's notes indicate that he called Gonzales twice that day with the request to have Olson read in, but by early evening had not heard back from Gonzales. ~~(TS//STLW//SI//OC/NF)~~

2. March 10, 2004: Congressional Leaders Briefed on Situation (U)

Gonzales told us that after President Bush was advised of the results of the March 9, 2004, meeting, the President instructed Vice President Cheney on the morning of Wednesday, March 10, to call a meeting with congressional leaders to advise them of the impasse with the Justice Department. On the afternoon of March 10, at approximately 4:00 or 5:00 p.m., Gonzales and other White House and intelligence agency officials, including Vice President Cheney, Card, Hayden, McLaughlin, and Director of Central Intelligence George Tenet, convened an "emergency meeting" with Congressional leaders in the White House Situation Room. The

congressional leaders in attendance were Senate Majority and Minority Leaders Bill Frist and Tom Daschle; Senate Select Committee on Intelligence Chairman Pat Roberts and Vice Chairman Jay Rockefeller; Speaker of the House Dennis Hastert and House Minority Leader Nancy Pelosi; and House Permanent Select Committee on Intelligence Chair Porter Goss and Ranking Member Jane Harman. This congressional group was known informally as the "Gang of Eight." (U)

No officials from the Department were present at the meeting. When we asked Gonzales whether the White House had given any consideration to inviting Department officials to attend, Gonzales declined to answer on the advice of the Special Counsel to the President, who was present during Gonzales's interview with the OIG.[155] (U)

Gonzales told us that President Bush also directed him to "memorialize" the meeting, although Gonzales said he could not recall whether the President directed him to do so before or after the meeting. Gonzales did not take notes during the meeting. Rather, he said he wrote down his recollection of the meeting within a few days of Wednesday, March 10, probably, according to him, the following weekend.[156] Gonzales said that, with the exception of a single phrase discussed below, he wrote his notes in one sitting in his White House office. (U)

The notes indicate that President Bush appeared briefly at the start of the meeting to explain how important the meeting was. Vice President Cheney, who chaired the meeting, gave a general explanation of the program and indicated that the purpose of the meeting was to "discuss potential legislation to continue the program." According to Gonzales's notes, Hayden then explained the collection of "telephone content and meda data [sic]" under the program. [redacted]

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[155] However, when Gonzales commented on a draft of this report, he stated that the Department was not invited to the meeting because the purpose of the meeting was to advise the congressional leaders that a legislative fix was necessary, not to describe or resolve the legal dispute between the Department and the White House. (U//~~FOUO~~)

[156] Gonzales's handling of his notes from this meeting later became the subject of a separate OIG misconduct investigation. The OIG found that when Gonzales became the Attorney General in 2005, he took the notes, which contained TS/SCI information relating to the Stellar Wind program, from the White House and improperly stored these notes at his residence for an indeterminate period. When he brought the notes to the Justice Department, he kept them in a safe near his office that was not cleared for storage of TS/SCI material. The OIG also determined through this investigation that Gonzales improperly stored several other TS/SCI documents in the safe near his office, many of which concerned Stellar Wind. The OIG's report, entitled "Report of Investigation Regarding Allegations of Mishandling of Classified Documents by Attorney General Alberto Gonzales," was released by the OIG on September 2, 2008, and can be found at http://www.usdoj.gov/oig/special/s0809/index.htm. ~~(S//NF)~~

[redacted]'[157] According to Gonzales's notes, the briefers then left the meeting and the remaining participants discussed the need for legislation so that the program's intelligence collection activities could continue. ~~(TS//STLW//SI//OC/NF)~~

Gonzales's notes indicate that when he was asked at the meeting why Comey was "reluctant" to sign the Authorization, Gonzales responded [redacted] The notes do not indicate what else was discussed about the basis for the Department's concerns about the legal support for the program. ~~(TS//STLW//SI//OC/NF)~~

The notes indicate that Andrew Card stated that "it would be hard to explain if another attack occurred and we could have stopped it with this tool." Gonzales's notes then state:

- Andy asked if anyone had any reservation and no one spoke up raising an objection
- The VP said that what I am hearing is that we should go forward with the program for a period of 30-45 days and see if there was a legislative fix. ~~(TS//SI//NF)~~

The notes indicate that Vice President Cheney read aloud proposed language of new legislation. However, the notes do not describe the proposed legislation that was discussed. (U)

According to Gonzales's notes, the reactions and comments of the congressional leaders were as follows: Both Hastert and Roberts "said they now felt an obligation to use the tool," although according to the notes Hastert "kept coming back to the [redacted] Roberts said that if Comey would not certify the Authorization "he should be fired." Harman suggested that another branch of government "should have some role, checks and balances on the program" and raised the possibility of involving the FISA Court. According to the notes, Gonzales responded to Harman's suggestion by volunteering that it would be possible to have the Presiding Judge of the FISA Court "approve or develop the guidelines to protect privacy rights." The notes state that Daschle felt it would be "impossible to get [new legislation] passed

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[157] Gonzales told us he was unable to recall [redacted] he was referring to in the notes, and said he did not recall whether it had to do with [redacted] (U)

without it becoming very public." Rockefeller was "concerned about privacy safeguards" and was advised of "the 39 steps followed [by the NSA] to make sure privacy concerns were addressed." According to the notes, Pelosi expressed concern about giving "total discretion" to the President and discussed the need for the proposed legislation to be periodically renewed by Congress and that it not be permanent. ~~(TS//STLW//SI//OC/NF)~~

Gonzales told us he initially left a gap in one section of the notes where he described Pelosi's comments. He stated that a day or so later, after recalling what she had said at the meeting, he filled in the gap with the following italicized language: "Pelosi said *tell DAG that everyone is comfortable* and the program should go forward."[158] (U)

3. March 10, 2004: Hospital Visit (U)

Gonzales told us that following the meeting with the congressional leaders during the afternoon of March 10, President Bush instructed him and Card to go to the George Washington University Hospital to speak to Ashcroft, who was recovering from surgery in the intensive care unit. The events that followed, which are recounted below, are based on notes from Ashcroft's FBI security detail, Goldsmith's notes, and Mueller's program log; the OIG's interviews of Gonzales, Comey, Goldsmith, Philbin, and Mueller; and Comey and Gonzales's congressional testimony.[159] (U)

At 6:20 p.m. on March 10, Card called the hospital and spoke with an agent in Ashcroft's FBI security detail, advising the agent that President Bush would be calling shortly to speak with Ashcroft. Ashcroft's wife told

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[158] When Gonzales testified before the Senate Judiciary Committee on July 24, 2007, he essentially described the congressional leaders' reactions to the March 10, 2004, Gang of Eight briefing as he did in his handwritten notes of the briefing, stating, "The consensus in the room from the congressional leadership is that we should continue the activities, at least for now." However, after Gonzales testified, Representative Pelosi, Senator Rockefeller, and Senator Daschle issued statements to the media sharply disputing Gonzales's characterization of their statements at the March 10, 2004, briefing, and stating that there was no consensus at the meeting that the program should proceed. See "Gonzales, Senators Spar on Credibility," by Dan Eggen and Paul Kane, The Washington Post (July 25, 2007). Pelosi's office also issued a statement that she "made clear my disagreement with what the White House was asking" concerning the program. See "Gonzales Comes Under New Bipartisan Attack in Senate," by James Rowley, Bloomberg.com (July 24, 2007). We did not attempt to interview the congressional leaders and obtain their recollections as to what was said at this meeting, because this was beyond the scope of our review. (U)

[159] Comey described the events surrounding the hospital visit in testimony before the Senate Judiciary Committee on May 15, 2007. Gonzales testified about these issues before the Senate Judiciary Committee on July 24, 2007. As noted above, Attorney General Ashcroft and Card declined our request to be interviewed. Ayres, Ashcroft's Chief of Staff at the time, also declined our request for an interview. (U)

the agent that Ashcroft would not accept the call. Ten minutes later, the agent called Ashcroft's Chief of Staff David Ayres through the Justice Command Center to request that Ayres speak with Card about the President's intention to call Ashcroft. The agent conveyed to Ayres Mrs. Ashcroft's desire that no calls be made to Ashcroft for another day or two.[160] Ayres told the agent he would relay this message to Card. (U)

However, at 6:45 p.m., Card and the President called the hospital and, according to the agent's notes, "insisted on speaking [with Attorney General Ashcroft]." According to the agent's notes, Mrs. Ashcroft, rather than Attorney General Ashcroft, took the call from Card and the President. According to the agent's notes, she was informed that Gonzales and Card were coming to the hospital to see Ashcroft regarding a matter involving national security. (U)

At approximately 7:00 p.m., Ayres was advised, either by Mrs. Ashcroft or a member of the Attorney General's security detail that Gonzales and Card were on their way to the hospital. Ayres then called Comey, who at the time was being driven home by his security detail, and told Comey that Gonzales and Card were on their way to the hospital. Comey told his driver to rush him to the hospital. According to Comey, his driver activated the emergency lights on the vehicle and headed to the hospital. (U)

According to his congressional testimony, Comey then called his Chief of Staff, Chuck Rosenberg, and directed him to "get as many of my people as possible to the hospital immediately." Comey then called FBI Director Mueller, who was having dinner with his wife and daughter at a restaurant, and told him that Gonzales and Card were on their way to the hospital to see Ashcroft, and that Ashcroft was in no condition to receive guests, much less make a decision about whether to continue the program. According to Mueller's program log, Comey asked Mueller to come to the hospital to "witness [the] condition of AG." Mueller told Comey he would go to the hospital right away. (U)

At 7:05 p.m., Ayres was notified by an agent on Ashcroft's security detail that Comey was en route to the hospital. Ayres called the agent back at approximately 7:20 p.m. and told the agent that "things may get 'a little weird'" when Gonzales and Card arrived. Ayres instructed Ashcroft's security detail, which was composed of FBI agents, to give its "full support" to Comey and to follow Comey's instructions. Ayres also told the agent that the security detail should not allow the U.S. Secret Service agents who

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[160] Ashcroft was recovering from his gallbladder surgery the prior day. He was described by those who saw him that night as being very weak and appearing heavily medicated. Philbin told us that Ashcroft was "on morphine" on the evening of March 10. (U)

would be accompanying Gonzales and Card to remove Comey from Ashcroft's room. The FBI agent told Ayres that the Attorney General's security detail would "fully back" Comey and that "this is 'our scene'." (U)

Philbin said he was leaving work that evening when he received a call from Comey, who said that Philbin needed to get to the hospital right away because Gonzales and Card were on their way there "to get Ashcroft to sign something." Comey also directed Philbin to call Goldsmith and tell him what was happening at the hospital. Philbin called Goldsmith from a taxi on his way to the hospital. Goldsmith told us he was home having dinner when he received Philbin's call telling him to go immediately to the hospital. (U)

Comey arrived at the hospital between 7:10 and 7:30 p.m.[161] In his congressional testimony, Comey said he ran up the stairs with his security detail to Ashcroft's floor, and he entered Ashcroft's room, which he described as darkened, with Ashcroft lying in bed and his wife standing by the bed. Comey said he began speaking to Ashcroft, "trying to orient him as to time and place, and try to see if he could focus on what was happening." Comey said it was not clear that Ashcroft could focus and that he "seemed pretty bad off[.]" Comey stepped out of the room into the hallway and telephoned Mueller, who was on his way to the hospital. With Mueller still on the line, Comey gave his phone to an FBI agent on Ashcroft's security detail, and according to Comey Mueller instructed the agent not to allow Comey to be removed from Ashcroft's room "under any circumstances." (U)

Goldsmith and Philbin arrived at the hospital within a few minutes of each other. Comey, Goldsmith, and Philbin met briefly in an FBI "command post" that had been set up in a room adjacent to Ashcroft's room. Moments later, word was received at the command post that Card and Gonzales had arrived at the hospital and were on their way upstairs to see Ashcroft. Philbin told us the FBI agents in the command post called down to the checkpoint at the hospital entrance to ask whether Card and Gonzales were accompanied by Secret Service agents, which Philbin said indicated concern that a "stand-off" between the FBI agents and the Secret Service agents might ensue. (U)

Comey, Goldsmith, and Philbin entered Ashcroft's room. Goldsmith described Ashcroft's appearance as "weak" and "frail," and observed that his breathing was shallow. Philbin said he was shocked by Ashcroft's appearance and said he "looked terrible." Philbin said that Ashcroft

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[161] There is a discrepancy in the Attorney General's security detail log on the time. One agent wrote that Comey arrived at 7:10. Another agent wrote that Comey arrived at 7:30. (U)

appeared to have lost a lot of weight, was "gray in the face," and was "almost out of it" because he was on morphine. Comey stated that Ashcroft was "clearly medicated." (U)

Comey testified that he sat in an armchair by the head of Ashcroft's bed, with Goldsmith and Philbin standing behind him; Mrs. Ashcroft stood on the other side of the bed holding Ashcroft's arm. No security or medical personnel were present. (U)

Goldsmith's notes indicate that at this point Comey and the others advised Ashcroft "not to sign anything." (U)

Gonzales and Card, unaccompanied by Secret Service agents, entered Ashcroft's hospital room at 7:35 p.m., according to the FBI agent's notes.[162] The two stood across from Mrs. Ashcroft at the head of the bed, with Comey, Goldsmith, and Philbin behind them. (U)

Gonzales stated that when he entered the hospital room, Ashcroft was in the bed and his wife was "at the 11:00 position." Gonzales said to us that he was unaware that Comey, Goldsmith, and Philbin were also present in the room until Card told him this later. Gonzales told us that he could "sense" that others were in the room, but that he was not sure who, because his focus was on Ashcroft. Gonzales said he carried with him in a manila envelope the March 11, 2004, Presidential Authorization for Ashcroft to sign. (U)

According to Philbin, Gonzales first asked Ashcroft how he was feeling. Ashcroft replied, "Not well." Gonzales then said words to the effect, "You know, there's a reauthorization that has to be renewed . . . ." (U)

Goldsmith told the OIG that Gonzales next reminded Ashcroft that he had been certifying the program for the past 2 years. Comey told us that Gonzales told Ashcroft, "We have arranged for a legislative remediation; we're going to get Congress to fix it," and that more time was needed to accomplish this. Comey told us he did not know what Gonzales meant by "legislative remediation." (U)

Gonzales told us that he did not recall telling Ashcroft that a legislative remediation had been arranged, but rather may have told Ashcroft that White House officials had met with congressional leaders "to pursue a legislative fix." (U)

Comey testified to the Senate Judiciary Committee about what happened next:

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[162] Gonzales told us he and Card arrived in Ashcroft's hospital room at 7:20. (U)

> . . . Attorney General Ashcroft then stunned me. He lifted his head off the pillow and in very strong terms expressed his view of the matter, rich in both substance and fact, which stunned me, drawn from the hourlong meeting we'd had a week earlier, and in very strong terms expressed himself, and then laid his head back down on the pillow. He seemed spent. . . . And as he laid back down, he said, "But that doesn't matter, because I'm not the Attorney General. There is the Attorney General," and he pointed to me – I was just to his left. The two men [Gonzales and Card] did not acknowledge me; they turned and walked from the room. (U)

Comey also testified that "I thought I had just witnessed an effort to take advantage of a very sick man, who did not have the powers of the Attorney General because they had been transferred to me." (U)

Philbin described to us Ashcroft's statements to Gonzales and Card in the hospital room, stating that Ashcroft "rallied and held forth for two minutes" about problems with the program as had been explained to him by Comey, and that Ashcroft agreed with Comey. Gonzales told us that he did not recall Ashcroft stating that he agreed with Comey. Goldsmith's notes indicate that Ashcroft argued in particular that NSA's collection activities exceeded the scope of the Authorizations and the OLC memoranda, stating that he was troubled by [redacted]"[163] According to Goldsmith's notes Ashcroft also said that it was "very troubling that [redacted] people in other agencies" had been read into the program, but that Ashcroft's own Chief of Staff, and until recently the Deputy Attorney General, had not been allowed to be read in. Gonzales told us he responded to Ashcroft that this was the President's decision. ~~(TS//SI//NF)~~

According to Goldsmith's notes, Ashcroft also complained that the White House had "not returned phone calls," and that the Department had been "treated badly and cut out of [the] whole affair." Ashcroft told Gonzales that he was "not prepared to sign anything." (U)

When we interviewed Gonzales about the hospital visit, he stated that these were "extraordinary circumstances," that the program had been reauthorized over the past two years, and that the sentiment of the

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[163] As discussed in Chapter Three, Ashcroft was present for the January 31, 2002, briefing of Presiding Judge of the FISA Court Royce Lamberth about the program. According to an outline of information to be covered during that briefing, NSA Director Hayden would have explained how the program functioned operationally. Because Ashcroft did not agree to be interviewed, we were unable to determine what Ashcroft understood about the [redacted] collection prior to Philbin and Goldsmith's explanation to him of this aspect of the program in late 2003. ~~(TS//STLW//SI//OC/NF)~~

congressional leadership was that it should continue. Gonzales said he therefore felt it was very important that Ashcroft be told what was happening, adding "If I were the Attorney General I would damn sure want to know." (U)

In his July 2007 congressional testimony, Gonzales also explained the visit to the hospital by stating that it was "important that the Attorney General knew about the views and recommendations of the congressional leadership; that as a former member of Congress and as someone who had authorized these activities for over two years, that it might be important for him to hear this information. That was the reason that Mr. Card and I went to the hospital." Gonzales further testified, "We didn't know whether or not he knew of Mr. Comey's position and, if he did know, whether or not he agreed with it." Gonzales also disputed Goldsmith's account that Ashcroft stated that he was "not prepared to sign anything," and referred us to his July 2007 testimony where he stated: (U)

> My recollection, Senator [Feinstein], is – and, of course, this happened some time ago and people's recollections are going to differ. My recollection is that Mr. Ashcroft did most of the talking. At the end, my recollection is, he said, "I've been told it would be improvident for me to sign. But that doesn't matter, because I'm no longer the Attorney General." (U)

Gonzales told us that he and Card would not have gone to the hospital if they believed Ashcroft did not have the authority to certify the Authorization and told us that as soon as Ashcroft stated he no longer retained authority to act, Gonzales decided not ask Ashcroft to sign the Authorization. In his congressional testimony Gonzales stated, "Obviously there was concern about General Ashcroft's condition . . . [W]e knew, of course, that he was ill, that he'd had surgery." Gonzales also stated that "We would not have sought nor did we intend to get any approval from General Ashcroft if in fact he wasn't fully competent to make that decision." He also testified, "There's no governing legal principle that says that Mr. Ashcroft [. . .] If he decided he felt better, could decide, 'I'm feeling better and I can make this decision, and I'm going to make this decision.'"[164] (U)

The Attorney General security detail's logs indicate that Gonzales and Card left Ashcroft's room at 7:40 p.m. (U)

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[164] Hearing before Senate Judiciary Committee, July 24, 2007. Gonzales also told us that he would not have gone to the hospital solely over the dispute concerning the scope [redacted] ~~(TS//SI//NF)~~

Moments after Gonzales and Card departed, Mueller arrived at the hospital. According to Mueller's notes, outside the hospital room Comey informed him of the exchange that had occurred in Ashcroft's room, and in particular that Ashcroft had stated that Comey was the Acting Attorney General, that "all matters" were to be taken to Comey, but that Ashcroft supported Comey's position regarding the program. Mueller's notes also state: "The AG also told [Gonzales and Card] that he was barred from obtaining the advice he needed on the program by the strict compartmentalization rules of the [White House]." (U)

Mueller's notes indicate that Comey asked Mueller to witness Ashcroft's condition, and requested Mueller to inform the FBI security detail that no visitors, other than family, be allowed to see Ashcroft without Mueller's consent. Both Mueller's notes and the security detail log indicate that Mueller instructed the detail that under no circumstances was anyone to be allowed into Ashcroft's room without express approval from either Mrs. Ashcroft or Mueller. (U)

At approximately 8:00 p.m. Mueller went into Ashcroft's room for 5 to 10 minutes. Mueller wrote in his program log: "AG in chair; is feeble, barely articulate, clearly stressed." (U)

4. March 10, 2004: Olson is Read into the Program (U)

According to Comey's congressional testimony, while he was speaking with Mueller prior to Mueller's departure from the hospital, an FBI agent interrupted, stating that Comey had an urgent telephone call from Card. Comey testified that he then spoke with Card, who was very upset and demanded that Comey come to the White House immediately. Comey testified that he told Card that based on the conduct Comey had just witnessed at the hospital, he would not meet with Card without a witness present. Comey testified that Card replied, "What conduct? We were just there to wish him well." Comey reiterated his condition that he would only meet Card with a witness present, and that he intended the witness to be Solicitor General Olson. Comey testified that until he could "connect" with Olson, he was not going to meet with Card. Card asked if Comey was refusing to come to the White House, and Comey responded that he was not refusing and would be there, but that he had to go back to the Justice Department first. (U)

Comey and the other Department officials left the hospital at 8:10 p.m. Philbin stated that he returned to the Department with Comey in Comey's vehicle, and that the emergency lights were again activated. Goldsmith also left the hospital and went to the Department. At the Department Comey, Goldsmith, and Philbin were joined by Olson, who had come to the Justice Department after being contacted at a dinner party.