Comey told us that he believed there was an urgent need to have Olson read into the program because he was confident Olson would agree with Comey and the others that Yoo's legal analysis was flawed and that Olson would be a strong ally in the matter because of Olson's respected intellect and credibility. (U)

During this meeting at the Justice Department, a call came from Vice President Cheney for Olson, which Olson took on a secure line in Comey's office while Comey waited outside. Comey told us he believes Vice President Cheney effectively read Olson into the program during that conversation. (U)

Comey and Olson then went to the White House at about 11:00 p.m., and met with Gonzales and Card that evening. Comey testified that Card would not allow Olson to enter his office. Comey relented and spoke to Card alone for about 15 minutes. At that point, Gonzales arrived and brought Olson into the room. According to Comey, he communicated the Department's views on the dispute and that the dispute was not resolved in this discussion. Comey stated that Card was concerned that he had heard reports that there was to be a large number of resignations at the Department. (U)

Gonzales told us that he recalled that Comey met first with him and Card while Olson waited outside the office, and that Olson joined them shortly thereafter. Gonzales said that little more was achieved than a general acknowledgement that a "situation" continued to exist because of the disagreement between the Department and the White House regarding the program.[165] (U)

5. March 11, 2004: Goldsmith Proposes Compromise Solution (U)

According to a memorandum to the file drafted by Goldsmith, he met with Gonzales at 6:30 a.m. the next morning, March 11, 2004, at the White House to discuss a proposal under which the Department could support

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[165] Comey stated that Olson did not become deeply involved in analyzing the Stellar Wind program in the days that followed because he was preparing for a major argument before the Supreme Court. Comey told us that Deputy Solicitor General Paul Clement was read into the program on March 12, 2004, and reviewed all of the OLC memoranda that weekend. Comey said Clement agreed with Goldsmith and Philbin's analysis "one hundred percent" and later worked with the OLC on drafting a new memorandum on the legality of the program, which is discussed below. However, Bradbury told us that Comey's characterization of Clement's view of the analysis was exaggerated. Bradbury told us that Clement had remarked to him after these events transpired that Goldsmith and Philbin's analysis "sounded reasonable to me at the time," and that Clement's view of the analysis was based only on a limited review of it. ~~(TS//SI//NF)~~

certification of the program. Goldsmith's proposal had three conditions.

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

Goldsmith told us that he did not specifically recall this meeting. Gonzales told us that he recalled conveying to Goldsmith and Philbin at some point during this day that the President had decided he had the constitutional authority to continue the program. Gonzales said he also expressed to Department officials the sentiment that the Department should continue seeking a way to "get comfortable" with the President's decision. (U)

6. March 11, 2004: White House Asserts that Comey's Status as Acting Attorney General was Unclear (U)

Goldsmith told the OIG that later during the morning of March 11, 2004, he received a call from Deputy White House Counsel David Leitch. Goldsmith said Leitch was "yelling and screaming" about the White House not being informed that Comey was the Acting Attorney General. Goldsmith told the OIG that Leitch made two specific complaints. First, Leitch claimed that the White House had never received a determination from OLC on Comey's assumption of Ashcroft's powers and duties. Goldsmith told us that to rebut this charge, OLC Deputy Assistant Attorney General Edward Whelan was sent to the Justice Command Center to retrieve from a waste basket the facsimile transmittal confirmation sheet from the March 5, 2004, memorandum Goldsmith had sent to Gonzales entitled "Determination that Attorney General is absent or disabled." This confirmation sheet subsequently was sent to Leitch.[166] (U)

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[166] In a March 12, 2004, e-mail to Ayres, Comey, Goldsmith, Philbin, and others (including a copy to Gonzales), Leitch offered a "clarification," asserting that the White House had in fact received the Goldsmith memoranda of March 5, as well as the

(Cont'd.)

Leitch's second claim was that the OLC memorandum was ambiguous because it did not specify whether the Attorney General was determined to be "absent" or "disabled," a difference for purposes of the Attorney General's authority. According to Goldsmith, if the Attorney General was "absent," the Deputy Attorney General could act as the Attorney General, although the Attorney General would retain his authority and technically could overrule the Deputy. If the Attorney General was "disabled," the Attorney General was divested of all authority. Goldsmith said he responded to Leitch by noting the inconsistency of the White House making this second claim because, according to Leitch, it had not received Goldsmith's memorandum in the first instance. (U)

Goldsmith said he also told Leitch to "lay off" the complaints, but that Leitch did not. Goldsmith said he therefore reluctantly sent a detailed e-mail to Leitch on March 11 to support the Department's contention that it had properly informed the White House of Ashcroft's status. Goldsmith stated that in the e-mail he also made the point that his conversation with Gonzales on March 9, 2004 (discussed above) was premised on Gonzales's knowledge that Ashcroft was ill and that Comey needed to authorize a "30-day bridge" until Ashcroft was well enough to sign the Authorizations again.[167] (U)

Gonzales told us that he had no recollection of having seen OLC's March 5, 2004, memorandum entitled "Determination that Attorney General is absent or disabled." As described above, Gonzales stated that he and Card would not have gone to the hospital if they believed Ashcroft did not have the authority to certify the Authorization as to form and legality. Gonzales also said that while he believed Comey would be making the decision to recertify the program, this did not mean that Ashcroft had relinquished his authority or had been "recused" from making the decision. Gonzales said he believed that Ashcroft retained the authority if he was competent to exercise it and was inclined to do so.[168] ~~(TS//SI//NF)~~

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memorandum from Comey's Chief of Staff Chuck Rosenberg memorializing Comey's decision that the Attorney General was "absent or disabled" within the meaning of 28 U.S.C. § 508(a). Leitch's clarification stated that the Rosenberg memorandum had been in draft form. (U)

[167] The OIG searched for but was unable to find this e-mail from Goldsmith to Leitch. (U)

[168] During his July 24, 2007, testimony before the Senate Judiciary Committee, however, Gonzales stated that he thought there had been newspaper accounts of Comey's assumption of the Attorney General's duties and stated that "the fact that Mr. Comey was the acting Attorney General is probably something that I knew of." Gonzales testified that he was aware that Ashcroft was ill and had undergone surgery, but Gonzales stated that Ashcroft "could always reclaim" his authority. (U)

7. March 11, 2004: Gonzales Certifies Presidential Authorization as to Form and Legality ~~(TS//SI//NF)~~

On the morning of March 11, 2004, with the Presidential Authorization set to expire, President Bush signed a new Authorization.[169] In a departure from the past practice of having the Attorney General certify the Authorization as to form and legality, the March 11 Authorization was certified by White House Counsel Gonzales. The March 11 Authorization also differed markedly from prior Authorizations in three other respects. ~~(TS//STLW//SI//OC/NF)~~

The first significant difference between the March 11, 2004, Presidential Authorization and prior Authorizations was the President's explicit assertion that the exercise of his Article II Commander-in-Chief authority [redacted] As discussed above, FISA and the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521 (generally referred to as Title III) are by their terms the "exclusive means by which electronic surveillance, as defined in [FISA], and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f). This new language was based on the same legal rationale Yoo first advanced in support of the Stellar Wind program – that FISA cannot be read to infringe upon the President's Commander-in-Chief authority under Article II of the Constitution during wartime. ~~(TS//STLW//SI//OC/NF)~~

[redacted] Steven Bradbury told the OIG that he believed the language was included in the March 11 Authorization as a way of indicating that the President did not agree with Goldsmith and Philbin's analysis, and to protect those who had been implementing the program under the prior OLC opinions. ~~(TS//SI//NF)~~

Second, [redacted]

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[169] The March 11, 2004, Presidential Authorization stated that it would expire on May 6, 2004. ~~(TS//SI//NF)~~

[redacted]

[redacted]

170 [redacted] ~~(TS//SI//NF)~~

[redacted]

According to Comey and Philbin, this new language was Addington's "fix."[172] Philbin said he believed the new language was "sufficient" to address the Department's concern that the Authorizations did not adequately describe the [redacted] being carried out by the NSA, although he believed the new language was "cumbersome." [redacted]

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

In his OIG interview, Gonzales declined to explain the significance of this new language, based on an assertion from the Special Counsel to the President that his answer would reveal internal White House deliberations [redacted]

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

[171] [redacted]

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

[172] Hayden and Philbin both told the OIG that Addington drafted the Presidential Authorizations. In his OIG interview, we asked Gonzales who drafted the March 11, 2004, Authorization. On the advice of the Special Counsel to the President, Gonzales declined to answer. ~~(TS//SI//NF)~~

The March 11 Presidential Authorization did not [redacted] ~~(TS//STLW//SI//OC/NF)~~

The third significant departure from prior Authorizations was the inclusion of a statement that [redacted] Id. at para. 10. ~~(TS//STLW//SI//OC/NF)~~

[redacted]

[redacted]

173 [redacted]

However, Gonzales told us that he found it "hard to believe" that no one at the Department understood that the NSA [redacted] Gonzales said he was aware that Philbin had been to the NSA several times and had met with NSA officials to gain an understanding of how the program was actually implemented. ~~(TS//STLW//SI//OC/NF)~~

[redacted]

We asked Gonzales why he signed the March 11, 2004, Presidential Authorization even though the Department could not support it. On the advice of the Special Counsel to the President, Gonzales declined to answer. However, Gonzales stated that the White House Counsel, like OLC, provides legal advice to the President and that his signature on the Authorization simply represented his advice as to its form and legality. ~~(TS//SI//NF)~~

NSA Director Hayden told us that Addington asked him whether the NSA would be willing to continue the Stellar Wind program without the Justice Department's certification of the Presidential Authorization. Hayden said this was a "tough question" and that he consulted with his leadership team at the NSA before making a decision. Hayden said that three considerations persuaded him to continue the program. First, the congressional members briefed on the situation on March 10, 2004, were supportive of continuing the program without Comey's certification. Second, the program had been operating for the previous two and a half years with Department approval. Third, the NSA General Counsel's office told him the program was legal. Hayden said he was unsure whether proceeding without the Department's certification was a sustainable approach, but that he was comfortable doing so when the issue arose in March 2004. ~~(TS//SI//NF)~~

B. Department and FBI Officials React to Issuance of March 11, 2004, Authorization ~~(TS//SI//NF)~~

Several Department and FBI leadership officials considered resigning after the Presidential Authorization was signed despite the Deputy Attorney General's refusal to certify the program based on the Department's determination that certain activities it authorized were without adequate legal support. Many of the Department, FBI, and White House officials we interviewed characterized the events immediately surrounding the issuance

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[174] In a closed session of the Senate Select Committee on Intelligence on June 26, 2007, Comey described his belief regarding the new language, stating, "[T]here were some additions to the text that were an effort by someone to try and fix the record in some respect." (U//~~FOUO~~)

of the March 11, 2004, Presidential Authorization in dramatic, sharp terms. Several of the Department witnesses described the impasse as a "crisis" and described a sense of distrust and anger that permeated their relations with White House officials during this period. In a letter of resignation that Comey wrote but did not send, he described this period as an "apocalyptic situation." ~~(TS//SI//NF)~~

In this section, we describe the reactions of Department, FBI, and White House officials to the White House decision to continue the program without the support of the Justice Department. (U)

1. Initial Responses of Department and FBI Officials (U)

White House Chief of Staff Card informed Comey by telephone on the morning of March 11, 2004, that the President had signed the new Authorization that morning. At approximately noon, Gonzales called Goldsmith to inform him that the President, in issuing the Authorization, had made an interpretation of law concerning his authorities and that the Department should not act in contradiction of his determinations. Goldsmith took notes on the call. According to his notes, Goldsmith asked Gonzales, "What were those determinations?" and Gonzales responded that he would let Goldsmith know. ~~(TS//SI//NF)~~

Later that day, Gonzales called Goldsmith again and told him that OLC should continue working on its legal analysis of the program. In a third call that day, however, Gonzales directed Goldsmith to suspend work on the legal analysis and to decline a request from the CIA General Counsel to review a draft of the new OLC memorandum. ~~(TS//SI//NF)~~

Goldsmith followed up this series of calls with a letter to Gonzales seeking clarification on Gonzales's instructions. Goldsmith wrote that he interpreted the March 11, 2004, Authorization signed by the President to mean that "the President has determined the legality of [the program] in all respects based upon the advice and analysis of your office, and that officers of the Department of Justice should refrain from calling into question the legality of [the program], or from undertaking further legal analysis of it." In the letter Goldsmith recounted how Gonzales had then called him to advise that OLC should continue its legal analysis of the program, adding, "I am now uncertain about your direction based on the President's exercise of his authority." Goldsmith concluded his letter by reiterating OLC's position that its existing legal memoranda "should not be relied upon in support for the entire program." Goldsmith described the document he wrote as a "for the record" letter.[175] As described below, Goldsmith and Philbin delivered

[175] Goldsmith said he discussed a draft of the letter with Comey, Rosenberg, Ayres, Olson, and others and edited it based on their suggestions. (U)

this letter to Gonzales at his residence at approximately 11:00 p.m. that night. ~~(TS//SI//NF)~~

At noon on March 11, 2004, Director Mueller met with Card at the White House. According to Mueller's program log, Card summoned Mueller to his office to bring Mueller up to date on the events of the preceding 24 hours. Card recounted for Mueller the briefing of the congressional leaders the prior afternoon and the President's issuance of the new Authorization without the Department's approval. In addition, Card told Mueller that if no "legislative fix" could be found by May 6, 2004, when the current Authorization was set to expire, the program would be discontinued. ~~(TS//SI//NF)~~

According to Mueller's notes, Card acknowledged to Mueller that President Bush had sent him and Gonzales to the hospital to seek Ashcroft's certification for the March 11, 2004, Authorization, but that Ashcroft had said he was too ill to make the determination and that Comey was the Acting Attorney General. Mueller wrote in his program log that he told Card that the failure to have Department of Justice representation at the congressional briefing and the attempt to have Ashcroft certify the Authorization without going through Comey "gave the strong perception that the [White House] was trying to do an end run around the Acting [Attorney General] whom they knew to have serious concerns as to the legality of portions of the program." Card responded that he and Gonzales were unaware at the time of the hospital visit that Comey was the Acting Attorney General, and that they had only been following the directions of the President. ~~(TS//SI//NF)~~

Mueller reminded Card that Mueller had told Vice President Cheney during their March 9, 2004, noon meeting that Mueller could have problems with the FBI's continued involvement in the program if the White House issued an Authorization without the Department's approval. Card said he understood Mueller's concern and told him to stop by Gonzales's office to pick up a copy of the March 11, 2004, Authorization, which Mueller did. ~~(TS//SI//NF)~~

Mueller met with Comey at 1:15 p.m. to review the Authorization, and he left a copy of it with Comey. During this meeting, Mueller told Comey he would be submitting a letter to Comey requesting advice on the legality of the FBI's continued participation in the program.[176] ~~(TS//SI//NF)~~

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[176] According to the Mueller's program log, Gonzales called Mueller at 2:50 p.m. to tell him to "assure security of copy of President's order." (U)

Later that day, Mueller sent Comey a memorandum, prepared by FBI General Counsel Valerie Caproni and an FBI Deputy General Counsel, seeking guidance on how the FBI should proceed in light of recent developments. The memorandum asked whether FBI agents detailed to the NSA to work on Stellar Wind should be recalled; whether the FBI should continue to receive and investigate tips based on [redacted] and whether [redacted] ~~(TS//STLW//SI//OC/NF)~~

Office of Intelligence Policy and Review (OIPR) Counsel James Baker also expressed his concern about the White House's action. On the evening of March 11, 2004, he drafted a memorandum to Comey containing what he later described as a series of "loaded questions" concerning whether it was "lawful and ethical" for OIPR to continue filing applications with the FISA Court under the circumstances.[177] ~~(TS//SI//NF)~~

Goldsmith and Philbin called Gonzales late in the evening of March 11 to ask if they could visit him at his residence to deliver the letter Goldsmith had written earlier in the day. As described above, Goldsmith sought to make a record of his earlier conversations with Gonzales in which Goldsmith believed Gonzales had conveyed conflicting instructions regarding how OLC should proceed in light of the President's issuance of the March 11 Authorization. ~~(TS//SI//NF)~~

Gonzales told us that Goldsmith drafted the letter because Goldsmith was "confused" about whether OLC should continue working on its legal analysis of the program. Gonzales said he recalled that Goldsmith and Philbin were "somber" during the meeting at his house. Gonzales said that he told them that the President had decided to go forward with the program, but that they should continue working to resolve the outstanding legal questions they had and try to find a solution. He said he tried to convey to them his confidence that everyone would "get through this." ~~(TS//SI//NF)~~

Goldsmith and Philbin told us that Gonzales was very cordial during the meeting and expressed regret for having gone to Ashcroft's hospital room that evening. Philbin stated that initially he believed that Gonzales had instructed him and Goldsmith "not to do our job, not to determine what the law is," but that it became evident to him that Gonzales "wanted to do the legally right thing." Goldsmith also stated that as a general proposition

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[177] These issues are described in Section II C of this chapter in connection with the Department's meetings with FISA Court Presiding Judge Kollar-Kotelly to discuss the use in FISA applications of information derived from [redacted] collected under the program following the March 11, 2004, Presidential Authorization and its subsequent modifications. ~~(TS//STLW//SI//OC/NF)~~

he encountered more "pushback" from Addington than from Gonzales, and that Gonzales "wanted to do the right thing." ~~(TS//SI//NF)~~

2. Department and FBI Officials Consider Resigning (U)

Comey told us he drafted a letter of resignation shortly after the incident in Ashcroft's hospital room on March 10. Comey said he drafted the letter because he believed it was impossible for him to remain with the Department if the President would do something the Department said was not legally supportable.[178] (U)

Comey also testified that Ashcroft's Chief of Staff David Ayres believed Ashcroft also was likely to resign and urged Comey to wait until Ashcroft was well enough to resign with him. In written responses to Senator Charles Schumer following his testimony, Comey wrote that he believed the following individuals also were prepared to resign: Goldsmith, Philbin, Chuck Rosenberg, Daniel Levin, James Baker, David Ayres, Deputy Chief of Staff to the Attorney General David Israelite, and Director Mueller. Comey also responded to the question that he believed that "a large portion" of his staff also would have resigned if he had. (U)

Goldsmith told us he was "completely disgusted" by his recent meetings with White House officials in connection with the Stellar Wind program and that he drafted a resignation letter at around the same time as Comey. The OIG obtained a handwritten list Goldsmith had compiled as these events were taking place to memorialize his grievances with the White House's actions during this period. The list includes:

- the "[s]hoddiness of the whole thing," which Goldsmith told us referred to his belief that both the process by which the program was implemented and the substantive analysis underpinning it represented the extreme opposite of how to manage a program as important as the White House claimed Stellar Wind to be;

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[178] The letter was addressed to President Bush. Also, at 5:46 p.m. on the evening of March 11, 2004, Comey sent an e-mail to two Department colleagues stating in part:

> I have been through the roughest patch of my professional life in the last 24 hours. You would not believe what has gone on . . . . I am hugely upset about the conduct of certain members of the executive branch. But I am also hugely proud of the Department of Justice, including SG, Associate AG, OLC, Ayres, my staff, the AG, and even Mrs. Ashcroft. I believe this has been our finest hour, although it is not over yet. . . . I suspect I will either be fired by the President or quit, but I will have done the right thing for my country. (U)

- "[o]ver-secrecy," both in terms of not reading in attorneys at the Justice Department and other agencies, and not keeping Congress informed;
- the hospital incident, which Goldsmith described as "shameful"; "[d]isregard of law" on the part of the White House (a reference Goldsmith did not expand upon with more specificity during his interview with the OIG); and
- the White House's claim that a legislative fix could be achieved, which Goldsmith regarded as "irresponsible" because he believed at the time that a legislative remedy was not a viable option. ~~(TS//SI//NF)~~

Goldsmith described three additional items on the list in particular as "false representations" by the White House:

- "[l]ies re shutting down," referring to the White House's assurances to Goldsmith on several occasions that it would shut down the program if the Office of Legal Counsel could not find legal support for it;
- "[l]ies re telling [the President] of problem," referring to representations that the President had been kept informed of the Department's concerns about the program; and
- assertions by White House officials that they "[d]idn't know AG was incapacitated". ~~(TS//SI//NF)~~

Goldsmith stated that on Thursday, March 11, Ayres asked him not to resign because the Attorney General should have the chance to do so first once he had fully recovered from his surgery. Goldsmith said he was still "on the fence" the following Monday or Tuesday about resigning and that there was great concern that his and other resignations would "spark a panic" that might lead to the program being revealed publicly.[179] (U)

Philbin told us that there was an "eerie silence" at the Department on March 11 as he and others awaited word from the White House on the fate of the program. Philbin said he and others believed they would have to resign. Philbin said his primary concern was that the White House planned to go forward with the Presidential Authorization and continue the program

[179] Goldsmith ultimately tendered his resignation in June 2004, effective July 30, 2004. Goldsmith told us he resigned in part because he did not believe he could be an effective head of the Office of Legal Counsel after his "unprecedented" withdrawal of several legal memoranda, including those drafted by Yoo. Goldsmith added that he also resigned because he was "exhausted" from his work in OLC and had recently been offered a teaching position at Harvard Law School. (U)

despite the flaws that the Office of Legal Counsel had identified in its legal analysis. Philbin said he was "absolutely serious" about resigning, adding, "[If] they're going to try to strong-arm the guy on morphine, what else are they going to do?" ~~(TS//SI//NF)~~

Baker told us that he also considered resigning after the President signed the Authorization but ultimately decided to remain in his position, in part because of his fear that if the White House was willing to tolerate mass resignations of senior government officials rather than revise the Stellar Wind program, "I don't know what this means in terms of the rule of law in this country." Baker also stated that he knew he had certain protections from removal for a period of time because he was a career official and that he wanted to remain as Chief of OIPR to protect the government's relationship with the FISA Court and to protect the attorneys in his office. ~~(TS//SI//NF)~~

Levin said he was willing to resign over the matter, and he gave a signed resignation letter to Comey to be used by him "however [he] felt appropriate." Levin said he did so "if it would help to get the White House to change its mind." Levin said that even though he was not certain he shared Goldsmith's view that the [redacted] was legally without support, he thought the White House's conduct during the incident at the hospital had been "outrageous" and he was willing to resign on that basis alone. ~~(TS//STLW//SI//OC/NF)~~

FBI General Counsel Caproni told us that she also was prepared to resign. She said that the FBI's primary concern regarding the impasse between the Department and the White House over the program was not with issues of privacy and civil liberties, but rather with "the rule of law." ~~(TS//SI//NF)~~

At approximately 1:30 a.m. on March 12, 2004, Mueller drafted by hand a letter stating, in part: "[A]fter reviewing the plain language of the FISA statute, and the order issued yesterday by the President . . . and in the absence of further clarification of the legality of the program from the Attorney General, I am forced to withdraw the FBI from participation in the program. Further, should the President order the continuation of the FBI's participation in the program, and in the absence of further legal advice from the AG, I would be constrained to resign as Director of the FBI." Mueller told us he planned on having the letter typed and then tendering it, along with his March 11, 2004, memorandum to Comey, but that based on subsequent events his resignation was not necessary. ~~(TS//SI//NF)~~

3. Comey and Mueller Meet with President Bush (U)

On the morning of March 12, 2004, Comey and Mueller went to the White House to attend the regular daily threat briefing with the President in the Oval Office. Comey said that following the briefing President Bush called him into the President's private study for an "unscheduled meeting." (U)

Comey told us that President Bush said to him, "You look burdened." Comey told the President that he did feel burdened, to which the President responded, "Let me lift that burden from you." Comey told the President that he felt as if he were standing on railroad tracks with a train coming toward him to run over his career and "I can't get off the tracks." (U)

Comey said he then explained to the President the three baskets of Stellar Wind collection and the issues and problems associated with each. President Bush responded with words to the effect, "You whipped this on me" all of a sudden, that he was hearing about these problems at the last minute, and that the President not being told of these developments regarding the program was "not fair to the American people." Comey responded that the President's staff had been advised of these issues "for weeks," and that the President was being "poorly served" and "misled" by his advisors. Comey also said to the President, "The American people are going to freak when they hear what collection is going on." President Bush responded, "That's for me to worry about." ~~(TS//STLW//SI//OC/NF)~~

According to Comey, the President said that he just needed until May 6 (the date of the next Authorization), and that if he could not get Congress to fix FISA by then he would shut down the program. The President emphasized the importance of the program and that it "saves lives." Comey told the President that while he understood the President's position he still could not agree to certify the program. Comey said he then quoted Martin Luther to the President: "Here I stand, I can do no other." At the end of the conversation, Comey told the President, "You should know that Bob Mueller is going to resign this morning." The President thanked Comey for telling him that and said he would speak with Mueller next. ~~(TS//STLW//SI//OC/NF)~~

Comey said his conversation with the President lasted approximately 15 minutes. Following the conversation, Comey went to Mueller, who was waiting in the West Wing, and started discussing his meeting with the

President. Word was then sent to Mueller through a Secret Service agent that the President wanted to meet with him.[180] (U)

Mueller later made notes in his program log about his meeting with President Bush. According to his notes, the President told Mueller that he was "tremendously concerned" about another terrorist attack and that he had been informed that the Stellar Wind program was essential to protecting against another attack. The President cited an ongoing investigation [redacted] The President said he believed that he would be "justly held accountable" if he did not do everything possible to prevent another attack. The President explained to Mueller that for these reasons he had authorized the continuation of the program even without the concurrence of the Attorney General as to the legality of "various aspects of the program." ~~(TS//STLW//SI//OC/NF)~~

According to the notes, the President told Mueller that the congressional leadership had been briefed on the President's action to extend the program and was "understanding and supportive of the President's position." The President also told Mueller that he had urged Comey to agree to extend the program until May 6 and that he hoped for a legislative fix by that time, but that if no legislative solution could be found and the legality of the program was still in question by that time, he "would shut it down." ~~(TS//SI//NF)~~

According to Mueller's notes, Mueller told the President of his concerns regarding the FBI's continued participation in the program without an opinion from the Attorney General as to its legality, and that he was considering resigning if the FBI were directed to continue to participate without the concurrence of the Attorney General. The President responded that he "wished to relieve any burden [Mueller] may be laboring under" and that he did not want Mueller to resign. Mueller said he explained to the President that he had an "independent obligation to the FBI and to the Justice Department to assure the legality of actions we undertook, and that a presidential order alone could not do that." ~~(TS//SI//NF)~~

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[180] At this point (9:27 a.m.), Comey sent an e-mail from his Blackberry to Goldsmith, Philbin, Ayres, Levin, and others, stating:

> President just took me into his private office for 15 minute one on one talk. Told him he was being misled and poorly served. We had a very full and frank exchange. Don't know that either of us can see a way out. He promised that he would shut down 5/6 if Congress didn't fix FISA. Told him Mueller was about to resign. He just pulled Bob into his office. ~~(TS//SI//NF)~~

According to Mueller's notes, the President expressed understanding for Mueller's position and asked what needed to be done to address Mueller's concerns. Mueller responded that Comey, the Office of Legal Counsel, the CIA, and the NSA "needed to sit down immediately" and assess the legal status of the program in light of OLC's doubts about the existing legal rationale and the March 11, 2004, Authorization. Mueller wrote:

> The President questioned me closely on the impact on national security from discontinuing elements of the program. [redacted]

According to Mueller's notes, the President then directed Mueller to meet with Comey and other principals to address the legal concerns so that the FBI could continue participating in the program "as appropriate under the law." ~~(TS//SI//NF)~~

Mueller told us he met with Comey an hour later to begin coordinating that effort. At 4:50 p.m. that afternoon, Mueller called Gonzales to request that additional Department lawyers be read into the program.[181] Mueller told us that this request originated with Comey and that Mueller was merely acting as an "intermediary." (U)

The President's direction to Mueller to meet with Comey and other principals to address the legal concerns averted the mass resignations at the Department and the FBI. According to Comey and other Department officials, the White House's decision to seek a legal solution and allow more attorneys to be read into the program was a significant step toward resolving the dispute, and in the words of one Department official provided a way of "stepping back from the brink." As we describe below, these Department officials still faced the challenge of finding a legal and operational remedy for the program that would address the concerns of the White House, the NSA, and Department. ~~(TS//SI//NF)~~

4. Comey Directs Continued Cooperation with NSA (U)

On the morning of March 12, 2004, Comey decided not to direct OIPR and the FBI to cease cooperating with the NSA in conjunction with the program. Comey's decision is documented in a 1-page memorandum from

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[181] At least three additional Department attorneys were read into the program on March 12, 2004, including OIPR Acting Deputy Counsel for Intelligence Operations Peggy Skelly-Nolen and two OLC attorneys. (U)

Goldsmith to Comey in which Goldsmith explained why Comey's action was legal. ~~(S//NF)~~

In his memorandum, Goldsmith stated that the President, as Commander-in-Chief and Chief Executive with the constitutional duty to "take care that the laws are faithfully executed," made a determination that Stellar Wind, as practiced, was lawful. Goldsmith concluded that this determination was binding on the entire Executive Branch, including Comey in his exercise of the powers of the Attorney General.[182] ~~(TS//SI//NF)~~

[redacted]

5. Department Conducts Additional Legal Analysis (U)

On March 12, 2004, an interagency working group was convened to continue the legal analysis of the program. In accordance with the President's directive to Mueller, officials from the FBI, NSA, and the CIA were brought into the process, although the OLC maintained the lead role. The working group included Deputy Solicitor General Clement, Baker, FBI General Counsel Caproni, Mueller, and several attorneys from OLC. Comey said CIA Director Tenet and his Deputy, McLaughlin, may have had limited participation as well. ~~(TS//STLW//SI//OC/NF)~~

On March 13, Mueller asked NSA Director Hayden to assist FBI General Counsel Caproni in assessing the value of the Stellar Wind program. Mueller said he wanted Caproni to become more familiar with the program and to understand how the FBI's view of the value of the program

[182] Goldsmith told us his determination that the entire Executive Branch was bound by the President's interpretation of law was based on his discussions with several other Justice Department attorneys, as well as on long-standing OLC precedent. (U)

compared with that of the NSA.[183] Mueller said that Hayden provided slides highlighting cases in which the NSA believed Stellar Wind-derived information proved useful. ~~(S//NF)~~

Caproni told us that during this March 2004 period she and two other FBI officials made an effort to determine what value the FBI was getting from Stellar Wind-derived information. She explained that it was difficult to assess the value of the program during its early stages because FBI field offices at that time were not required to report back to FBI Headquarters with information about how information from the NSA program had been used.[184] ~~(S//NF)~~

On the afternoon of Sunday, March 14, 2004, the Department convened a large meeting in the Justice Command Center to review OLC's analysis on the legality of the program. Mueller, Comey, Goldsmith, Philbin, Baker, CIA General Counsel Muller, Caproni, Tenet, Hayden, Olson, Clement, and several NSA lawyers attended the meeting. ~~(TS//SI//NF)~~

Prior to the meeting, Goldsmith and Philbin prepared a detailed outline of OLC's current analysis, which Goldsmith described to us as his "most honest take" of the legal issues at that time. Goldsmith said he distributed the outline to meeting participants and used it to walk the group through the analysis. (U)

The outline highlights the evolution of OLC's analysis. [redacted]

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[183] Caproni had been appointed the FBI General Counsel in August 2003 and was read into the Stellar Wind program in September or October 2003. She told us she did not give much thought to the program at the time because OLC had determined that it was legal. She stated that in 2004 she learned that OLC was re-examining Yoo's legal analysis and had concerns with it. She told us she later spoke with Philbin, who confirmed to her that he and Goldsmith had problems with the legal support for the program and that he was frustrated because the program was so tightly compartmented that he could not talk to anybody about it. Caproni told us that at some point she obtained a copy of Yoo's legal opinion. She stated that after reading it she immediately understood Philbin's concerns because the opinion appeared to lack analysis and simply concluded that the program was legal. ~~(TS//SI//NF)~~

[184] The FBI's Electronic Communications Analysis Unit compiled a summary of known [redacted] Stellar Wind tip results from January 1, 2003, through mid-December 2003. However, the data included in the summary was incomplete, and the summary did not contain any analysis of the effectiveness of these tips. Another study of the [redacted] tippers was conducted in 2006. The results of that study are discussed in Chapter Six of this report, along with the OIG's analysis of the effectiveness of the program. ~~(TS//STLW//SI//OC/NF)~~

[redacted]

[185] Goldsmith also noted that as of the March 14, 2004, meeting, the Attorney General had not yet reported to Congress on the program under 28 U.S.C. § 530D. However, as discussed above, the White House had briefed the congressional leadership about the program on March 10, 2004. In addition, the former Presiding Judge of the FISA Court, Royce Lamberth, and the current Presiding Judge, Colleen Kollar-Kotelly, had been read into the program by this time. (U)

[redacted]

186 [redacted]

(Cont'd.)

[redacted]

[redacted]

[redacted]

Goldsmith told us that during his presentation of the legal analysis at the March 14 meeting he received "tough but fair and appropriate" questions from Mueller and Olson with respect to why the [redacted] ~~(TS//STLW//SI//OC/NF)~~

Goldsmith told us that the March 14 meeting was designed to achieve full consensus among the principals on the issues, and that the meeting was successful in this regard. (U)

That evening, Mueller called Gonzales to report that progress had been made, although legal support for [redacted] still had not been found. Mueller also told Gonzales that in the future Gonzales should speak directly with Comey on these matters. ~~(TS//STLW//SI//OC/NF)~~

6. Comey Determines that Ashcroft Remains "Absent or Disabled" (U)

Attorney General Ashcroft was released from the hospital at noon on March 14, 2004. The next day, Comey advised Ayres by memorandum that Ashcroft's doctor believed that Ashcroft required additional time to recuperate at home and was not yet ready to resume his responsibilities as Attorney General. Comey's memorandum noted that the doctor intended to reassess Ashcroft's condition on March 24, 2004. Comey's memorandum stated that, based on these circumstances, Comey continued to believe that Ashcroft was "absent or disabled" within the meaning of 28 U.S.C. § 508(a). Comey's memorandum concluded:

> As before, notwithstanding my continued temporary capacity as Acting Attorney General, I intend, where possible, to exercise "all the power and authority of the Attorney General" pursuant to the authority that 28 C.F.R. § 0.15(a) delegates to me in my regular capacity as Deputy Attorney General. (U)

A copy of the memorandum was sent to Gonzales at the White House and to senior Department officials.[189] (U)

7. Judge Kollar-Kotelly Briefed on Lack of Attorney General Certification (U)

As discussed earlier in this report, the extent to which OIPR could use Stellar Wind-derived information in FISA applications had been limited by Judge Kollar-Kotelly, the FISA Court's Presiding Judge. After her read-in to the program in May 2002, Judge Kollar-Kotelly had directed OIPR to continue, with some modifications, the "scrubbing" procedures for FISA applications in place at that time. ~~(TS//STLW//SI//OC/NF)~~

According to an OLC memorandum, on March 14, 2004, Judge Kollar-Kotelly was informed that the President had reauthorized the Stellar Wind program, but that the latest Authorization lacked the Attorney General's certification as to form and legality.[190] The memorandum indicated that as a result of Judge Kollar-Kotelly's uncertainty about the implications of this development, she intended to insist on a complete separation of any information derived from Stellar Wind, whether directly or indirectly, from all FISA applications presented to the FISA Court. The memorandum noted that "[b]ecause of the way tips get worked into (and lost in) the mix of intelligence information, that standard would have virtually crippled all counter-terrorism FISAs." ~~(TS//STLW//SI//OC/NF)~~

8. Comey and Gonzales Exchange Documents Asserting Conflicting Positions (U)

According to Mueller's program log, on the morning of Monday, March 15, 2004, following the daily threat briefing in the White House Situation Room, President Bush remarked to Mueller that he understood "progress had been made," referring to the discussions on the legal basis for the Stellar Wind program. Mueller called Comey shortly thereafter to convey the President's remark. Mueller suggested to Comey that additional briefings on the program should be given to Congress, including to both the House and Senate Judiciary Committees. ~~(TS//SI//NF)~~

Also on March 15, Goldsmith drafted for Comey a 3-page memorandum summarizing OLC's views with respect to the legality of the program. The memorandum recast in narrative form Goldsmith's outline of

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[189] As discussed below, Ashcroft's doctors later cleared Ashcroft to resume his duties as Attorney General as of March 31. (U)

[190] The memorandum was prepared in anticipation of a briefing for the Attorney General on March 30, 2004. (U)

March 14, 2004 (discussed above), and noted that OLC had not reached any "final conclusions and [was] not yet prepared to issue a final opinion on the program." The memorandum also stated that the Stellar Wind program potentially implicated various congressional and intra-Executive Branch reporting requirements imposed both by statute and Executive Order. The memorandum stated that OLC was only beginning to analyze these reporting issues. ~~(TS//SI//NF)~~

Goldsmith and Philbin went to see Gonzales on the afternoon of March 15 to explain what OLC had determined in its legal analysis to that point, and also to notify Gonzales that he would be hearing from Comey shortly about the Department's position as to the program's legality. (U)

According to Philbin's contemporaneous notes on the events of the next two days, on March 16, 2004, following the morning threat briefing at the White House, Comey told President Bush that OLC had finished its preliminary legal analysis of the program.[191] Comey asked the President if Comey should convey the details of the analysis to Gonzales, and the President indicated that Comey should do so. ~~(TS//SI//NF)~~

After Comey returned to the Department, he signed a short memorandum to Gonzales that he had drafted the night before. In the memorandum, Comey first recounted how the President on March 12, 2004, had directed the Justice Department to continue its analysis of the Stellar Wind program and to "provide its best advice concerning ways to change the program to conform with the Justice Department's understanding of the applicable law." Comey then described the composition of the working group convened to accomplish this objective and how the group's efforts had resulted in Goldsmith's 3-page analysis, which Comey attached to his memorandum. ~~(TS//SI//NF)~~

Comey then set out his advice to the President. According to the memorandum, Comey advised that the President may lawfully continue [redacted] Comey wrote that [redacted] involved "close legal questions, requiring legally aggressive – indeed, novel – supporting arguments . . . ." Comey further wrote that the Department remained unable to find a legal basis to support [redacted] Accordingly, Comey advised that such [redacted]

[191] Philbin told the OIG he kept notes of these events because Comey had asked him to "keep a record." (U)

[redacted] Finally, Comey cautioned that he believed the ongoing collection of [redacted] raised "serious issues" about congressional notification, "particularly where the legal basis for the program is the President's decision to assert his authority to override an otherwise applicable Act of Congress." Comey wrote that the Department would continue to explore the notification issue. ~~(TS//STLW//SI//OC/NF)~~

Comey instructed Goldsmith and Philbin to hand deliver the memoranda to Gonzales at the White House, which they did. Philbin also delivered copies to Solicitor General Olson. Philbin's notes indicate that Olson was "annoyed" that Comey had sent the memoranda to the White House without consulting him, and asked Philbin several times, "What's my role supposed to be here?" Olson also said to Philbin that he thought the memoranda were a "poke in the eye" to the White House. Philbin wrote that Olson's reaction "raised concerns that [Comey] may have gotten himself too far out there alone" by not bringing Olson in on the Department's legal opinion in advance. (U)

Comey told us that he knew his memorandum would anger people at the White House because he had put in writing the arguments questioning the legality of aspects of the program and that the memorandum and Goldsmith's attachment would become a part of the Presidential records and would be discovered later by historians. He stated he believed it was important to "make a record." (U)

According to Mueller's program log, Gonzales called Mueller at 1:45 p.m. on March 16 to discuss the situation. Gonzales explained to Mueller that, in view of the Department's tentative conclusion that legal support for [redacted] was still lacking, Gonzales would have to make a recommendation to the President on how to proceed. Gonzales told Mueller he needed to know whether Mueller would resign if the President decided [redacted] Mueller responded that he would have to take time to consider his actions, but that he "would have to give it serious consideration if the President decided to go ahead in the face of DOJ's finding." ~~(TS//STLW//SI//OC/NF)~~

Later that afternoon on March 16, Card called Comey to the White House for a meeting. According to Philbin's notes, "the back channel word from Judge Gonzales" was that President Bush might be willing to [redacted] Prior to the meeting, Comey, Goldsmith, and Philbin agreed that Comey should be ready to convey to the White House that the Department would support [redacted] ~~(TS//STLW//SI//OC/NF)~~

Philbin's notes indicate that at the meeting Card told Comey that the President was "wrestling" with the issue of whether to [redacted] and would decide "very soon." Card also expressed to Comey his displeasure that Comey had put in writing the Department's position on the legality of the program. ~~(TS//STLW//SI//OC/NF)~~

That evening, while attending a farewell dinner for a Department colleague at a local restaurant, Philbin received a call from David Addington indicating that he wanted to deliver a letter Gonzales had written to Comey. Philbin met Addington at the Department at 8:30 p.m. that night to accept the letter. Philbin's notes also indicate that Gonzales had called Comey in advance to tell Comey "not to get too overheated by the letter." (U)

Comey told us he recalled that Gonzales told him in the call that the White House would agree to work with the Department to fix the program and that Comey should not "overreact" to Gonzales's letter. Comey said he believed Addington, and not Gonzales, had actually drafted the letter, and that Gonzales sent it only to counter Comey's memorandum and to make a record on behalf of the White House. (U)

Gonzales's letter stated that the President had directed him to respond to Comey's memorandum. The letter stated:

> Your memorandum appears to have been based on a misunderstanding of the President's expectations regarding the conduct of the Department of Justice. While the President was, and remains, interested in any thoughts the Department of Justice may have on alternative ways to achieve effectively the goals of the activities authorized by the Presidential Authorization of March 11, 2004, the President has addressed definitively for the Executive Branch in the Presidential Authorization the interpretation of the law.[192]

The letter also excerpted the language of paragraph 10 from the March 11, 2004, Authorization, which recited the bases on which the President acted to reauthorize the program, and then concluded: "Please ensure that the

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[192] Gonzales's letter also addressed Comey's comments about congressional notification. Citing *Department of the Navy v. Egan*, 484 U.S. 518 (1988) and a 2003 OLC opinion, Gonzales's letter stated that the President has the constitutional authority to define and control access to the nation's secrets, "including authority to determine the extent to which disclosure may be made outside the Executive Branch." ~~(TS//STLW//SI//OC/NF)~~

Department of Justice complies with the direction given in the Presidential Authorization."[193] ~~(TS//STLW//SI//OC/NF)~~

C. White House Agrees to [redacted] ~~(TS//STLW//SI//OC/NF)~~

Notwithstanding Gonzales's letter, on March 17, 2004, the President decided to [redacted] effective at midnight on March 26, 2004. According to Mueller's program log, Gonzales called Comey to advise him of the President's decision on March 17, 2004, and Comey passed this information to Mueller later that day. Comey, in an e-mail dated March 17, expressed relief at the President's decision, writing:

> Today, in a remarkable development, we stepped back from the brink of disaster. All seems well in the Government. The right thing was done. ~~(TS//STLW//SI//OC/NF)~~

Gonzales told the OIG during his interview that he could not say whether the prospect of resignations at the Department and the FBI may have had an impact on the President's decision.[194] We were not able to interview others at the White House to determine what specifically caused the program to be modified in accord with the Department's legal position. (U)

The President's directive was expressed in two modifications to the March 11, 2004, Presidential Authorization. These modifications, as well as the operational and legal implications of the President's decision for the Department and the FBI, are described in the next sections. ~~(TS//SI//NF)~~

1. March 19, 2004, Modification (U)

On March 19, 2004, the President signed, and Gonzales certified as to form and legality, a Modification of the March 11, 2004, Presidential

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[193] Comey stated that he did not believe Gonzales wrote this letter. He stated that "Addington was the flame-thrower" and that Gonzales was generally more reasonable and moderate. Comey said that Gonzales had later apologized to both Comey and Ashcroft for his conduct during the March 10 incident at the hospital and had even come around to agree with Philbin and Goldsmith's analysis regarding the program. Gonzales told the OIG that he did not apologize to Ashcroft for the incident in the hospital because he had been instructed by the President to go there, but stated that he "regretted" the incident. (U)

[194] However, when Gonzales commented on a draft of this report, he told the OIG that the prospect of resignations at the Department and the FBI were not the reason for the President's decision. Gonzales stated that he could not elaborate on this statement due to executive privilege considerations. (U)

Authorization. The first paragraph of the Modification stated that [redacted] The March 19 Modification made two significant changes to the existing Authorization and a third important change affecting all Authorizations. [redacted] these changes were to become effective beginning at midnight on [redacted]
~~(TS//STLW//SI//OC/NF)~~

[redacted]

Modification, March 19, 2004, para. 2(a)(italics and brackets added). This additional language resulted in [redacted] ~~(TS//STLW//SI//OC/NF)~~

Second, the Modification [redacted] The language, with the deleted language in brackets and the insertion indicated in italics, was:

[redacted]

[redacted]

Modification, March 19, 2004 [redacted]

Third, the March 19 Modification [redacted]

Modification, March 19, 2004 [redacted]

Each Presidential Authorization had contained a directive to the Secretary of Defense not to disclose the program outside the Executive Branch without the President's approval. The Modification reiterated that any change was not intended to reverse the President's control over access to the program. ~~(TS//STLW//SI//OC/NF)~~

[redacted]

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[195] The ultimate disposition of this previously obtained [redacted] was subsequently addressed in an April 2, 2004, Modification, and thereafter in an August 2004 Presidential memorandum to the Secretary of Defense, as described below in subsection 6. ~~(TS//STLW//SI//OC/NF)~~

[redacted] [196] The President's decision to [redacted] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

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[196] Bradbury was nominated to be Assistant Attorney General for OLC in June 2005. He was not confirmed for this position, and told us that after exhausting the time period for use of the "Acting" title under the Vacancies Reform Act of 1998 (see 5 U.S.C. § 3345 et seq.) in April 2007, he reverted to Principal Deputy Assistant Attorney General, the position he had held prior to his nomination. As head of OLC, Bradbury became responsible for briefing members of Congress on OLC's legal analyses concerning the program as well as on the Presidential Authorizations. Bradbury's access to these documents and the officials responsible for drafting them provided him significant background information on the changes to the program. (U)

[197] [redacted]

[redacted]

2. [redacted]

[redacted]

3. [redacted]

[redacted]

198 [redacted]

199 [redacted]

200 [redacted]

(Cont'd.)

[redacted]

[redacted]

201 [redacted]

4. [redacted]

5. Judge Kollar-Kotelly is Presented with the OLC Legal Analysis Regarding [redacted] ~~(TS//STLW//SI//OC/NF)~~

As noted above, Judge Kollar-Kotelly was made aware on March 14, 2004, that the March 11 Authorization had been signed by the President

but had not been certified as to form and legality by the Justice Department. On March 18, 2004, Goldsmith, Philbin, Baker, and Gonzales met with Judge Kollar-Kotelly to further brief her on the status of the program. According to an internal OLC memorandum, they advised her that forthcoming legal opinions from OLC would allay her concerns about the use of program-derived information in FISA applications.[202] ~~(TS//STLW//SI//OC/NF)~~

The OIG reviewed a handwritten letter from Judge Kollar-Kotelly to OIPR Counsel Baker, which appeared to have been written just after the initiation of [redacted] mandated in the March 19, 2004, Modification. Baker told us that the handwritten letter should be viewed as an informal draft designed to convey Judge Kollar-Kotelly's preliminary understanding of the issues raised by the changes to the Stellar Wind program. In the letter, Judge Kollar-Kotelly reiterated her position that Stellar Wind-derived information should be excluded from FISA applications, writing, "so there is no misunderstanding, I will not sign a FISA application which contains any information derived from and/or obtained from the [Stellar Wind] program," including applications in which a Stellar Wind tip "was the sole or principal factor in starting an investigation by any of the agencies, even if the investigation was conducted independently of the tip from [Stellar Wind]." Judge Kollar-Kotelly also requested, as a precondition to her agreeing to sign FISA applications in the future, that OIPR clarify in writing its proposal for reviewing FISA applications to ensure that all Stellar Wind-derived information had been excluded. Baker told us that he had a lot of "verbal back and forth" with Judge Kollar-Kotelly to explain OIPR's scrubbing procedures. ~~(TS//STLW//SI//OC/NF)~~

In late March 2004, OLC provided Judge Kollar-Kotelly with a draft analysis discussing [redacted]

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[202] As described below, these legal opinions, which addressed the legality of [redacted] were provided to Judge Kollar-Kotelly in late March and early April 2004. ~~(TS//STLW//SI//OC/NF)~~

[203] Chapter Three, Section II B contains a description of this process. (U)

[redacted]

On March 26, 2004, OLC completed a draft memorandum for Baker entitled "Use or Disclosure of Certain Stellar Wind Information in Applications Under FISA." This memorandum addressed the inclusion in FISA applications of information derived indirectly from [redacted].[205] OLC also provided Judge Kollar-Kotelly with a copy of its draft legal analysis.[206] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

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[204] This argument is discussed below in connection with Goldsmith's May 6, 2004, legal analysis. (U)

[205] With respect to [redacted] the memorandum stated that the Department did not believe the acquisition of such information was subject to any constitutional restraints or statutory restrictions, but that "[t]o the extent Judge Kollar-Kotelly has concerns about those conclusions, we note that the analysis in this memorandum independently demonstrates that there are no legal restrictions on the use of information indirectly derived from [redacted] tippers in FISA applications." ~~(TS//STLW//SI//OC/NF)~~

[206] The draft memorandum did not address inclusion in FISA applications of information derived *directly* from the program because OIPR had successfully managed to address Judge Kollar-Kotelly's order to exclude such information. ~~(TS//STLW//SI//OC/NF)~~

6. [redacted] Modification (U)

Attorney General Ashcroft's doctors cleared him to resume his duties as Attorney General as of March 31. Comey advised Ayres in a March 30, 2004, memorandum that as of 7:00 a.m. on March 31, the Attorney General was no longer "absent or disabled" within the meaning of 28 U.S.C. § 508(a), and that as of that time Comey could no longer exercise the duties of the Office of Attorney General pursuant to the statute. A copy of the memorandum was sent to White House Counsel Gonzales and other senior Department officials. (U)

On [redacted] President Bush signed, and Gonzales certified as to form and legality, a second Modification of the March 11, 2004, Presidential Authorization. This modification addressed only [redacted] activities of the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

[redacted]

Thus, under this new standard [redacted] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

[redacted]

[207] An April 5, 2004, Goldsmith memorandum to file stated that OLC worked with Addington to craft the new [redacted] standard. ~~(TS//STLW//SI//OC/NF)~~

[208] Bradbury distinguished the limitation on [redacted] ~~(TS//STLW//SI//OC/NF)~~

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

7. [redacted] Standard is Conveyed to the FBI ~~(TS//SI//NF)~~

The OIG sought to determine how the presidentially authorized limitations on [redacted] in the Modifications and subsequent Authorizations were communicated to FBI employees responsible for tipping Stellar Wind information to the field. ~~(TS//STLW//SI//OC/NF)~~

A former Unit Chief in the Communications Analysis Unit (CAU) within the FBI's Communications Exploitation Section (CXS) of the Counterterrorism Division told us he became aware that at some point the scope of collection under Stellar Wind was narrowed to include only [redacted] He said this information was passed along to him and others at the FBI during either a monthly or quarterly meeting with NSA representatives. He said the [redacted] practice was "taken very seriously" by the NSA. As an example, he said that Requests for Information (RFI) from the FBI to the NSA on numbers not associated with [redacted] were rejected by the NSA as outside the scope of the revised Authorization. ~~(TS//STLW//SI//OC/NF)~~

An FBI Supervisory Special Agent in the CAU's unit co-located at the NSA (called Team 10), told us that when he first began collection and analysis work under the program, [redacted] were "fair game." He recalled that at some later point the scope of collection [redacted] He said that [redacted] was rigorously adhered to and was "scrutinized very closely." He said that when the FBI requested that the NSA collect information on a particular number, the NSA closely analyzed the number and requested supporting information from the FBI before querying the Stellar Wind database. This supervisor also stated that the NSA did a good job of keeping the co-located FBI personnel informed of changes to the scope of collections. He said this information typically would be conveyed to appropriate personnel during the daily "all hands meetings." ~~(TS//STLW//SI//OC/NF)~~

8. Office of Legal Counsel Assesses NSA's Compliance with New Collection Standards ~~(TS//SI//NF)~~

Goldsmith told us that during the week of March 29, 2004, he and Philbin conducted an "audit" of the Stellar Wind program to ensure that the querying of [redacted] was being conducted in accordance with the Presidential Authorizations. ~~(TS//STLW//SI//OC/NF)~~

Goldsmith said that while resources were not available to conduct a "professional" audit, he visited the NSA and reviewed with relevant NSA officials the legal parameters for querying [redacted] which as discussed above required a showing of reasonable articulable suspicion that the target belonged to a group that was engaged in international terrorism.[209] Goldsmith told the OIG that as part of the review, he and Philbin familiarized the NSA with the new collection parameters [redacted] ~~(TS//STLW//SI//OC/NF)~~

To conduct their review, Goldsmith and Philbin requested that the NSA [redacted] ~~(TS//STLW//SI//OC/NF)~~

On April 15, 2004, Goldsmith reported the results of his and Philbin's review to [redacted] the Assistant General Counsel for Operations in the NSA's Office of General Counsel. On April 22, 2004, Goldsmith memorialized his conversation with [redacted] in a memorandum to file. In the memorandum, Goldsmith noted four types of problems he and Philbin found in their review. [redacted] The memorandum stated that Goldsmith also conveyed this advice to Vito Potenza, the NSA's Acting General Counsel at the time. ~~(TS//STLW//SI//OC/NF)~~

9. May 5, 2004, Presidential Authorization ~~(TS//SI//NF)~~

As noted above, the March 11, 2004, Presidential Authorization, as modified, was set to expire on May 6, 2004. On May 5, the President signed another Authorization extending the Stellar Wind program through June 24, 2004. Unlike the March 11 Authorization and the two modifications that

[209] [redacted]

followed it, the May 5 Authorization was certified as to form and legality by Attorney General Ashcroft. ~~(TS//SI//NF)~~

The May 5, Authorization contained the language from the March 11 Authorization narrowing the scope of [redacted] The May 5 Authorization also included the paragraph defining the scope of [redacted] as modified on March 19 to encompass only [redacted] As to [redacted] the May 5 Authorization reiterated the new collection standard set forth in the April 2, 2004, Modification, which required that [redacted] ~~(TS//STLW//SI//OC/NF)~~

With minor variations, the collection standards and other language set forth in the May 5, 2004, Presidential Authorization remained unchanged in all of the subsequent Authorizations.[211] ~~(TS//STLW//SI//OC/NF)~~

10. May 6, 2004, OLC Memorandum ~~(TS//SI//NF)~~

On May 6, 2004, Goldsmith completed a revised OLC memorandum on the legality of the Stellar Wind program. The 108-page document stated that it was written for the Attorney General in response to his request for OLC "to undertake a thorough reexamination of the Stellar Wind program as it is currently operated to confirm that the actions that the President has directed the Department of Defense to undertake through the National Security Agency (NSA) are lawful." ~~(TS//SI//NF)~~

The memorandum traced the history of the program and analyzed the legality of each of the three collection baskets in light of applicable statutes, Executive Orders, cases, and constitutional provisions. ~~(TS//STLW//SI//OC/NF)~~

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[210] This Authorization also dropped the language describing [redacted] in the March 11, 2004, Authorization. ~~(TS//SI//NF)~~

[211] [redacted]

The memorandum noted that Section 111 of FISA, 50 U.S.C. § 1811, providing that the President "may authorize electronic surveillance without a court order . . . to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by Congress," made it clear that FISA expressly addresses electronic surveillance during wartime.[212] The memorandum stated that the Authorization for Use of Military Force (AUMF) passed by Congress shortly after the attacks of September 11, 2001, gave the President authority to use both domestically and abroad "all necessary and appropriate force," including signals intelligence capabilities, to prevent future acts of international terrorism against the United States. According to the memorandum, the AUMF was properly read as an express authorization to conduct targeted electronic surveillance against al Qaeda and its affiliates, the entities responsible for attacking the United States. ~~(TS//STLW//SI//OC/NF)~~

The memorandum noted that the legislative history of FISA indicates that the 15-day window was "thought sufficient for the President to secure legislation easing the restrictions of FISA for the conflict at hand." Quoting H.R. Conf. Rep. No. 95-1720, at 34, reprinted in U.S.C.C.A.N. 4048, 4063 ("[T]he conferees intend that this period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency"). According to the OLC memorandum, "The Congressional Authorization functions as precisely such legislation: it is emergency legislation passed to address a specific armed conflict and expressly designed to authorize whatever military actions the Executive deems appropriate to safeguard the United States." ~~(TS//SI//NF)~~

The memorandum concluded that at a minimum the AUMF made the application of FISA in a wartime context sufficiently ambiguous that the doctrine of constitutional avoidance properly applied to avoid a conflict between FISA and the presidentially authorized Stellar Wind program. Alternatively, the memorandum argued that FISA, as applied in the particular circumstances of a President directing surveillance of the enemy to prevent future attacks upon the nation, represented an unconstitutional infringement on the President's Article II Commander-in-Chief powers. ~~(TS//STLW//SI//OC/NF)~~

These two arguments also were cited in support of [redacted]

[212] As discussed in section I of this chapter, the legal implications of this provision of FISA was not addressed in the memoranda John Yoo had drafted in support of the program in late 2001. ~~(TS//SI//NF)~~

[redacted]

The memorandum also analyzed the legal rationale for [redacted] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

[redacted]

[redacted]

213 [redacted]

[redacted]

Finally, the memorandum discussed the Fourth Amendment implications of the Stellar Wind program. To determine whether interception of [redacted] violated the Fourth Amendment's prohibition against unreasonable searches, the memorandum analyzed whether the importance of the government's interest in this collection outweighed the individual privacy interests at stake. Citing various authorities, including Supreme Court opinions, the Federalist Papers, [redacted] and congressional testimony, the memorandum concluded that "the government's overwhelming interest in detecting and thwarting further al Qaeda attacks is easily sufficient to make reasonable the intrusion into privacy involved in intercepting selected communications." The memorandum noted that the weight of the

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214 [redacted]

215 [redacted]

government's interest in this regard could change over time if the threat from al Qaeda were deemed to recede. ~~(TS//STLW//SI//OC/NF)~~

The memorandum also analyzed telephone and e-mail meta data collection under the Fourth Amendment. The memorandum concluded, based on the Supreme Court's holding in *Smith v. Maryland*, 442 U.S. 735, 742 (1979), that there is no legitimate expectation of privacy in the numbers dialed to place telephone calls. Referring to cases holding that no expectation of privacy attached to the address information on either letter mail or e-mail, the memorandum concluded that no Fourth Amendment privacy interests were implicated in the collection of e-mail meta data. ~~(TS//STLW//SI//OC/NF)~~

In sum, the May 6 memorandum was the most comprehensive assessment of the Stellar Wind program drafted by the Office of Legal Counsel. [redacted] ~~(TS//STLW//SI//OC/NF)~~

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

III. OIG Analysis (U)

A. Department's Access to and Legal Review of Stellar Wind Program Through May 2004 ~~(TS//SI//NF)~~

The Justice Department's access to the Stellar Wind program was controlled by the White House, and Gonzales told the OIG that the President decided whether non-operational personnel, including Department lawyers, could be read into the program. Department and FBI officials told us that obtaining approval to read in Department officials and FISA Court judges involved justifying the requests to Addington and Gonzales, who effectively acted as gatekeepers to the read-in process for non-operational officials. In contrast, according to the NSA, operational personnel at the NSA, CIA, and the FBI were read into the program on the authority of the NSA Director, who at some point delegated this authority to the Stellar Wind Program Manager. ~~(TS//SI//NF)~~

Various officials we interviewed about the issue uniformly agreed that the White House sought to strictly limit overall access to the Stellar Wind program. We believe that this policy was applied at the Department in an unnecessarily restrictive manner prior to March 2004, and was detrimental to the Department's role in the operation of the program through that period. We also believe that Attorney General Ashcroft, as head of the Department, was responsible for seeking to ensure that the Department had adequate attorney resources to conduct a thorough and accurate review of the legality of the program. Because Ashcroft did not agree to be interviewed for this investigation, we were unable to determine the extent of his efforts to press the White House to read in additional Department officials between the program's inception in October 2001 and the critical events of March 2004. ~~(TS//SI//NF)~~

In Chapter Three we described how the Department's early involvement in the Stellar Wind program was limited to the participation of only three attorneys – Attorney General Ashcroft, OLC Deputy Assistant Attorney General John Yoo, and Counsel for Intelligence Policy James Baker.[216] Working alone, Yoo drafted several legal memoranda in 2001 and 2002 advising the Attorney General and the White House that the program was legally supported. In reliance on Yoo's advice, Attorney General Ashcroft certified the legality of the Presidential Authorizations to implement the program. ~~(TS//SI//NF)~~

Because Yoo worked alone, his legal analysis was not reviewed by other attorneys, either in OLC or elsewhere in the Department.[217] Even

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[216] Counsel for Intelligence Policy James Baker was read into the program in either late 2001 or January 2002. But Baker appears to have been read in only because he inadvertently came across information that suggested such a program existed. While Baker had involvement in several aspects of the program, he had no involvement in drafting or reviewing Yoo's legal memoranda supporting the program. Daniel Levin, who served as both Chief of Staff to FBI Director Mueller and briefly as a national security counselor to Ashcroft, also was read into Stellar Wind at the inception of the program. However, Levin only served for two months at the Department during this early phase of Stellar Wind and had very limited involvement in the program during this period. Levin told us he was read into Stellar Wind along with Director Mueller at the FBI and that he understood that he was being cleared into the program as an FBI official. We therefore consider Levin to be an FBI read-in, not a Department read-in. ~~(TS//STLW//SI//OC/NF)~~

[217] Gonzales told us that he thought Yoo may have assigned discrete tasks to other attorneys in connection with his work on the Stellar Wind legal memoranda. Because Yoo declined our request for an interview, we were unable to confirm this. In any event, no other attorneys were read into Stellar Wind and therefore would not have been permitted to work on or review those portions of the memoranda that contained Top Secret/Sensitive Compartmented Information (TS/SCI) related to the Stellar Wind program. By contrast, Yoo had at least one other OLC attorney to assist him in drafting other OLC legal memoranda on the detainee interrogation program during the 2001 to 2003 period, and these memoranda were reviewed by another OLC Deputy Assistant Attorney General

(Cont'd.)

when Jay Bybee became the OLC Assistant Attorney General in November 2001, and was therefore Yoo's supervisor, Bybee was not read into the program.[218] Bybee told us he also was unaware that Yoo was providing advice to the Attorney General and the White House on the legal basis to support the program. ~~(TS//SI//NF)~~

We believe that even before Patrick Philbin voiced his initial concerns with Yoo's analysis in 2003, the circumstances in 2001 and 2002 plainly called for additional Department resources to be applied to the legal review of the program and that it was the Attorney General's responsibility to be aware of this need and to take steps to address it. Moreover, because Ashcroft met frequently with the President on national security matters, he would have been well-positioned to request additional legal resources if he believed they were necessary. ~~(TS//SI//NF)~~

The facts suggest that Ashcroft had some awareness and concern that Yoo was working on the legal justification for the Stellar Wind program without any Department assistance or oversight, and possibly was advising the White House directly of his findings. Based on accounts of the incident in Ashcroft's hospital room in March 2004, Ashcroft made specific complaints to Gonzales and Card about insufficient legal resources at the Department and that the Department had been "cut out of the whole affair." He had also expressed frustration to Comey months earlier about being "in a box" with Yoo. Further, according to Goldsmith, when Goldsmith first interviewed for the position of Assistant Attorney General for OLC in 2003, Ashcroft and his Chief of Staff alluded to concerns over being kept informed of matters the Office of Legal Counsel was working on and the importance of keeping the Attorney General "in the loop." We also note that Yoo's November 2, 2001, memorandum to Ashcroft indicated that "[b]ecause of the highly sensitive nature of this subject and the time pressures involved, this memorandum has not undergone the usual editing and review process for opinions that issue from our Office [OLC]." ~~(TS//SI//NF)~~

While we believe that Ashcroft may have been aware that Yoo was working alone on the Stellar Wind analysis and had concerns about this, we do not know whether or how hard he pressed the White House to read in additional attorneys to assist or supervise Yoo. At the same time, however,

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(Philbin) and approved by the OLC Assistant Attorney General (Bybee). The detainee interrogation program also was classified as TS/SCI. We also note that Philbin's background in telecommunications law would have made him a logical choice to assist Yoo on the Stellar Wind legal analysis. ~~(TS//SI//NF)~~

[218] In contrast, Bybee was allowed to supervise Yoo's work drafting legal memoranda concerning a detainee interrogation program during the same time period. ~~(TS//SI//NF)~~

we cannot assume that any requests by Ashcroft for additional attorney read-ins would have been granted by the White House. Gonzales told us that Ashcroft had requested that Deputy Attorney General Larry Thompson and Ashcroft's Chief of Staff David Ayres be read in. However, neither request was approved.[219] Gonzales stated that he did not recall Ashcroft requesting additional read-ins beyond Thompson and Ayres. (U)

In analyzing the read-in situation at the Department during Yoo's tenure, we also considered that Ashcroft certified the program as to its legality each time the program came up for renewal, and did so at a time when Yoo's legal advice was the only Department guidance available concerning the program's legality. We believe the fact that only three Department attorneys were read into Stellar Wind through mid-2003 may have been due at least in part to Ashcroft's routine recertifications of the Presidential Authorizations during this period. As noted in Chapter Three, Gonzales told us that it was up to the Attorney General to decide how to satisfy his legal obligations as Attorney General, and that if Ashcroft believed more attorneys were needed for this purpose, he could have asked the President to approve additional Department read-ins. Gonzales also told us that Ashcroft's continued certifications of the Presidential Authorizations supported Gonzales's belief that Ashcroft was satisfied with the quality of the legal advice he was receiving at the time within the Department. ~~(TS//SI//NF)~~

There is evidence as well that Gonzales, as White House Counsel, was satisfied with Yoo's legal memoranda supporting the program. Gonzales told us that although he did not believe Yoo's first two memoranda fully addressed the White House's understanding of the Stellar Wind program, Gonzales believed that they described as lawful activities that were broader than those carried out under Stellar Wind, and that Yoo's memoranda therefore "covered" the program.[220] ~~(TS//SI//NF)~~

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[219] Deputy Attorney General Thompson resigned from the Department in August 2003, so Ashcroft's request to have him read into the program would have been made before that time. That neither Thompson nor Ayres was read in contrasts with the decision to allow in the case of [redacted] to be briefed about the program in 2002, and [redacted] to be read into the program in 2003. The OIG does not know who authorized these read-ins. ~~(TS//SI//NF)~~

[220] We were troubled by Gonzales's suggestion that Yoo's memoranda covered the program because the memoranda determined to be lawful a range of "hypothetical" activities that were interpreted by Gonzales to be broader than those actually carried out under Stellar Wind. Such an approach, if deemed acceptable by the "client" (in this case the White House), would encourage the Office of Legal Counsel to draft broad and imprecise (Cont'd.)

However, even apart from the limited number of Department read-ins, we believe that the White House imposed excessively strict controls over access to the program in other ways that were detrimental to the Department's ability to provide the White House with the soundest possible legal advice. For instance, we found no indication that Yoo coordinated his legal analysis with the NSA. According to Michael Hayden, the Director of the NSA when Stellar Wind began, the NSA relied on its Office of General Counsel, and not the Department of Justice, for advice as to the legality of the program when it was created. However, we found that the NSA's Office of General Counsel did not coordinate its legal advice with the Department, and even as late as 2003 the NSA General Counsel was prevented by the White House from reviewing the Department's legal opinions on the program.[221] Hayden also told the OIG that he was "surprised with a small 's'" that the Department did not participate in the early meetings with him and White House officials when Stellar Wind was first conceived. In addition, Addington instructed Philbin not to discuss the program with Baker, who as Counsel for Intelligence Policy was responsible for representing the government before the FISA Court.[222] ~~(TS//SI//NF)~~

We believe that that White House should have allowed and even encouraged coordination between the Department and the NSA regarding the development of the legal analysis of the program, especially as this analysis was first being formulated in late 2001. Such interaction between the Department and other Executive agencies is a mainstay of traditional OLC practice, and we believe its absence here contributed to factual errors in Yoo's opinions regarding the operation of the program. ~~(TS//SI//NF)~~

Although we could not determine exactly why Yoo remained the only Department attorney assigned to assess the program's legality from 2001 until his departure in May 2003, we discuss below our belief that this practice represented an extraordinary and inappropriate departure from OLC's traditional review and oversight procedures and resulted in significant harm to the Department's role in the program. ~~(TS//SI//NF)~~

When Yoo left the Department in May 2003, he was replaced by Patrick Philbin, who was read into the program to advise Ashcroft whether he could continue to certify the Presidential Authorizations as to their form

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legal analysis and would discourage the type of careful scholarship to which the OLC traditionally aspires. ~~(TS//SI//NF)~~

[221] In addition, the NSA Office of the Inspector General, which wanted to conduct an internal audit of the program during this period, was prevented by Addington from reviewing the Justice Department's legal memoranda supporting the program. (U//~~FOUO~~)

[222] Philbin told the OIG that he spoke with Baker about the program despite Addington's instruction not to. (U)

and legality. When Goldsmith became the OLC Assistant Attorney General in October 2003, Philbin pressed Addington to have Goldsmith read in, and Goldsmith became the first head of OLC to be read into the program. As noted, Goldsmith's predecessor Jay Bybee was never read into the program. ~~(TS//SI//NF)~~

Thus, by the end of 2003, a total of only 5 Department officials – Yoo, Ashcroft, Baker, Philbin, and Goldsmith – had been read into Stellar Wind. By comparison, and as shown in Chart 4.1 below, we determined that many other individuals throughout the government were read into the program. Through the same period, [redacted] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

The assignment of only one Department attorney, John Yoo, to conduct a legal review of the program without assistance or oversight from anyone else at the Department, combined with the White House's decision to prevent the NSA from reviewing Yoo's work, resulted in legal opinions by Yoo that were later determined by OLC to be so inaccurate and incomplete

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[223] This table was derived from NSA read-in information. Justice Department read-ins include [redacted] OIG personnel who were read into Stellar Wind in 2006. (U//~~FOUO~~)

as to be regarded as not covering key aspects of the Stellar Wind program. Given the enormously complex nature of the program from both a technical and legal perspective, coupled with the fact that he was working alone, it was not altogether surprising that Yoo's analysis contained inaccuracies and omitted critical elements, particularly given the pressure to generate a legal analysis within weeks of the program's implementation. However, Yoo's analysis did not change or include a more accurate description of the program's operation over the course of his 20-month tenure with the OLC. ~~(TS//SI//NF)~~

After reviewing Yoo's legal opinions on the program, Goldsmith and Philbin quickly discovered what they characterized as serious flaws in Yoo's legal analysis. These flaws included Yoo's failure to describe [redacted] being conducted by the NSA under the Stellar Wind program and his failure to assess the legality of this and other activities as they were carried out by the NSA. ~~(TS//STLW//SI//OC/NF)~~

Specifically, both Goldsmith and Philbin stated that Yoo mischaracterized in his memoranda the nature and scope of the NSA's [redacted] They stated that Yoo's characterization of this activity in his 2001 and 2002 legal memoranda was factually flawed and that Yoo appears to have based his legal analysis of this aspect of the program on an incomplete and inaccurate description both of [redacted] and the [redacted][224] Both Goldsmith and Philbin also acknowledged that they initially incorrectly believed the NSA's [redacted] was broader than it in fact was under the program. However, unlike Yoo, Goldsmith and Philbin accurately

[224] [redacted]

characterized the collection [redacted] and thus their legal advice was based on facts that more closely reflected the actual operation of the program.[225] ~~(TS//STLW//SI//OC/NF)~~

In addition, Goldsmith and Philbin discovered that Yoo's assertion that the President had broad authority to conduct electronic surveillance without a warrant pursuant to his Commander-in-Chief powers under Article II of the Constitution, particularly during wartime, never addressed the FISA provision that expressly addressed electronic surveillance following a formal declaration of war. See 50 U.S.C. § 1811. Goldsmith also criticized Yoo's legal memoranda for failing to support Yoo's aggressive Article II Commander-in-Chief theory with a fully developed separation of powers analysis, and instead offering only sweeping conclusions. As an example, Goldsmith cited Yoo's assertion that reading FISA to be the "exclusive statutory means for conducting electronic surveillance for foreign intelligence" amounts to an "unconstitutional infringement on the President's Article II authorities."[226] Moreover, noted Goldsmith, Yoo omitted from his separation-of-powers discussion any analysis of how the Youngstown Steel Seizure Case, a seminal Supreme Court decision on the distribution of governmental powers between the Executive and Legislative Branches during wartime, would affect the legality of the President's actions with respect to Stellar Wind.[227] ~~(TS//STLW//SI//OC/NF)~~

In reliance on Yoo's advice, the Attorney General certified the program "as to form and legality" some 20 times before Yoo's analysis was determined to be flawed by his successors in OLC and by attorneys in the Office of the Deputy Attorney General. We agree with many of the criticisms offered by Department officials regarding the practice of allowing a single Department attorney to develop the legal justification for the program

[225] [redacted]

[226] See Yoo Memorandum, November 2, 2001, at 9. Yoo went on to state that [redacted] Yoo concluded that FISA "represents a statutory procedure that creates a safe harbor for surveillance for foreign intelligence purposes." Id. ~~(TS//SI//NF)~~

[227] The Department's Office of Professional Responsibility (OPR) intends to review whether Yoo's legal analysis concerning the Stellar Wind program violated any standards of professional conduct. OPR has similarly reviewed whether the legal analysis by Yoo and others concerning the detainee interrogation program violated standards of professional conduct. ~~(TS//SI//NF)~~

during its early stage of operation. We summarize these criticisms below. ~~(TS//SI//NF)~~

Goldsmith described as "crazy" and "outrageous" the assignment of an OLC Deputy Assistant Attorney General to provide legal advice to the White House without the knowledge or concurrence of the Senate-confirmed Assistant Attorney General for OLC, who is accountable for the legal positions taken by the office. (U)

Goldsmith said that not a single critical eye reviewed Yoo's work on a program that Goldsmith described as "flying in the face" of the conventional understanding of the law at the time. Goldsmith noted that Yoo's legal memoranda did not include facts about how the Stellar Wind program operated in practice, and he surmised that Yoo instead might have "keyed off" the Presidential Authorizations rather than NSA's actual collection practices in developing his analysis. Goldsmith also said it was "insane" that Yoo's memoranda were not shared with the NSA. Goldsmith said that had the NSA reviewed these memoranda Yoo's failure to accurately describe the nature and scope of the collection by the NSA and the resulting "mismatch" between the actual practice and the wording of the Presidential Authorizations might have been detected earlier. ~~(TS//SI//NF)~~

Similarly, Daniel Levin, who was one of the first FBI officials to be read into Stellar Wind and who would later become Acting Assistant Attorney General for OLC upon Goldsmith's departure in June 2004, criticized allowing a single attorney to be the sole voice of the OLC concerning a program such as Stellar Wind. Levin stated that OLC has a special role at the Department and within the government, especially with "highly secret programs where opinions may never see the light of day." Under such circumstances, according to Levin, it is very difficult not to say "yes" to the White House – OLC's client – in the face of national security threats. Levin stated that unlike situations where a court places limitations on the positions the government may take, there are no such limitations when OLC considers a position that will remain secret, and it is easier to be more aggressive and "cut some corners" under such circumstances. ~~(TS//STLW//SI//OC/NF)~~

Levin stated that Yoo's memoranda justifying the program suffered from too little circulation and a lack of alternative views. He said that the OLC memoranda produced under Goldsmith's tenure were better, not because the authors were "smarter" than Yoo, but because the authors benefited from multiple viewpoints and input. Levin also said that he never understood why the Stellar Wind program was deemed so sensitive at the operational level. Levin said he appreciated that the program was politically sensitive, but added that it was a "huge mistake" to keep the program so closely held within the Department. ~~(TS//STLW//SI//OC/NF)~~

We believe that Goldsmith's and Levin's comments concerning the secrecy of Stellar Wind are especially relevant to the need for legally and factually sound OLC analysis with respect to classified national security programs. Because programs like Stellar Wind are not subject to the usual external checks and balances on Executive authority, OLC's advisory role is particularly critical to the Executive's understanding of potential statutory and Constitutional constraints on its actions. ~~(TS//STLW//SI//OC/NF)~~

Deputy Attorney General Comey also criticized the decision to allow a single person to assess the legality of the program on behalf of the Department. Comey told us that Goldsmith had once aptly described the Yoo situation to him as "the perfect storm" in which the following factors converged: the terrorist attacks of September 11, 2001; a "brilliant guy" at the Department who was "an aggressive advocate for executive power"; and a White House "determined to restore executive power." Comey expressed a degree of sympathy for Yoo, noting the extraordinary situation into which Yoo had been placed. Comey also observed that the response to September 11 essentially placed the policy burden on lawyers, who were now looked to by others for guidance as to what counterterrorism activities fell within the bounds of the law. However, Comey said that he believed White House officials "got what they ordered" by asking Yoo for opinions and restricting the number of persons with access to the program or the opinions.[228] ~~(TS//SI//NF)~~

Attorney General Ashcroft declined to be interviewed in our review, and we were thus unable to determine what his views were on the assignment of Yoo alone to conduct the legal review of the program. However, as noted above, witness accounts of his statements concerning the Yoo situation leave little doubt that Ashcroft was plainly upset with the White House for putting him "in a box" with Yoo. According to Goldsmith and Philbin, Ashcroft was direct about his grievances when Gonzales and Card came to see him in the hospital on March 10, 2004, including complaining that Ashcroft's Chief of Staff and until recently the Deputy Attorney General had not been allowed to be read into the program, and that he found it "very troubling that [redacted] people in other agencies" had been read into the program. What remains unclear is whether Ashcroft came to the realization that the Department had been given an insufficient number of read-ins only after Philbin and Goldsmith presented him with their concerns about the quality of Yoo's legal analysis, or at some point before. ~~(TS//SI//NF)~~

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[228] As noted in Chapter Three, Yoo had been given the national security portfolio when he first joined the OLC in July 2001, several months before the attacks of September 11, 2001, and the inception of Stellar Wind. (U//~~FOUO~~)

We sought to obtain Yoo's and the White House's perspective on his selection as the sole Justice Department attorney to be read into Stellar Wind to provide advice on the legality of the program. We were not able to interview Yoo, who declined our request, or Addington and Card, who did not respond to our requests. ~~(TS//SI//NF)~~

The OIG asked Gonzales about how the White House determined who in the Department could be read into the program, but on the advice of Special Counsel to the President, Gonzales limited his answer to his personal views and declined to discuss internal White House deliberations that may have factored into the read-in decisions. Gonzales stated that he believed it was necessary for national security reasons to limit the number of read-ins to those "who were absolutely essential." Gonzales also stated that there had to be sufficient operational personnel at the NSA, CIA, and FBI read in for the purpose of running the program, while reading in additional lawyers at the Department had comparatively less value because all lawyers will "have opinions" about the program. Yet, Gonzales also stressed to us that he welcomed the Department's reassessment of Yoo's opinions and encouraged Goldsmith and Philbin to re-examine the legal basis for the program in 2003 and 2004.[229] ~~(TS//SI//NF)~~

We think the proposition that the participation of Department attorneys to analyze the legality of a program as factually and legally complex as Stellar Wind should be limited for the reasons offered by Gonzales is shortsighted and counterproductive. First, it is evident that Stellar Wind was as legally complex as it was technically challenging. Just as a sufficient number of operational personnel were read into the program to assure its proper technical implementation, we think as many attorneys as necessary should have been read in to assure the soundness of the program's legal foundation. This was not done during the early phase of the program. ~~(TS//SI//NF)~~

The full history of the program also indicates that the program benefited from additional attorney read-ins. In this chapter, we described how Philbin and Goldsmith – who held differing opinions on which legal theory best supported the program – discovered serious deficiencies in Yoo's analysis and together drafted more factually accurate and legally thorough support for the program. In Chapters Five, Six, and Seven we further describe how reading in additional attorneys facilitated the grounding of the program on firmer legal footing under FISA, allowed the Department more efficiently to "scrub" Stellar Wind-derived information in FISA applications,

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[229] As discussed in this chapter, Comey, Goldsmith, and Philbin generally agreed that Gonzales supported the Department's legal reassessment of the program. They also characterized Addington as far less supportive of their work than Gonzales. ~~(TS//SI//NF)~~

and improved the handling of Stellar Wind-related discovery issues in international terrorism prosecutions. ~~(TS//STLW//SI//OC/NF)~~

Second, we do not believe that reading in a few additional Department attorneys during the first 2 years of the program would have jeopardized national security as suggested by Gonzales, especially given the hundreds of operational personnel who were cleared into the program during the same period (see Chart 4.1). In fact, as noted above, we think the highly classified nature of the program, rather than constituting an argument for limiting the OLC read-ins to a single attorney, made the need for careful analysis and review within the Department and by the NSA only more compelling. ~~(TS//SI//NF)~~

In sum, we concluded that the departure from established OLC and Department practices resulted in legal opinions to support the program that were later determined to be flawed. We believe the strict control over the Department's access to the program undermined the role of the Department to ensure the legality of Executive Branch actions, and as discussed below, contributed to the March 2004 crisis that nearly resulted in the mass resignation of the Department's leadership. ~~(TS//SI//NF)~~

We recommend that when the Justice Department is involved with such programs in the future, the Attorney General should carefully assess whether the Department has been given adequate resources to carry out its vital function as legal advisor to the President and should aggressively seek additional resources if they are found to be insufficient. We also believe that the White House should allow the Department a sufficient number of read-ins when requested, consistent with national security considerations, to ensure that sensitive programs receive a full and careful legal review. (U)

B. The Hospital Visit (U)

The Department's reassessment of Yoo's analysis led Comey, who was exercising the powers of the Attorney General while Ashcroft was hospitalized in March 2004, to conclude that he could not certify the legality of the Stellar Wind program. In response, the President sent Gonzales and Chief of Staff Andrew Card to visit Ashcroft in the hospital to seek his certification of the program, an action Ashcroft refused to take. We believe that the way the White House handled its dispute with the Department about the program – particularly in dispatching Gonzales and Card to Ashcroft's hospital room to override Comey's decision – was troubling for several reasons. ~~(TS//SI//NF)~~

As discussed in this chapter, by March 2004, when the Presidential Authorization was set to expire again, Goldsmith had placed Gonzales and Addington on notice for several months of the Department's doubts about

the legality of aspects of the Stellar Wind program. In particular, he and Philbin had made clear that the Department questioned the legality of the collections of [redacted].[230] ~~(TS//STLW//SI//OC/NF)~~

After Attorney General Ashcroft was hospitalized and unable to fulfill his duties, the White House was informed that Deputy Attorney General Comey had assumed the Attorney General's responsibilities. We found that the assertion by some in the White House at the time that they had not been informed of the situation was subsequently contradicted by the facts. In particular, Gonzales later acknowledged that he was aware that Comey was acting as the Attorney General.[231] (U)

Before the Presidential Authorization was set to expire on March 11, Comey, who was exercising the powers of the Attorney General at the time, told top officials in the White House – including Vice President Cheney and White House Counsel Gonzales – that the Justice Department could not recertify the legality of the program as it was presently operating. The White House disagreed with the Justice Department's position, and on March 10, 2004, convened a meeting of eight congressional leaders to brief them on the Justice Department's seemingly sudden reluctance to recertify the program and on the need to continue the program. The White House did not invite anyone from the Department to this briefing to describe the basis for its advice about the legality of the program, nor did it inform the Department of its intention to hold the meeting.[232] ~~(TS//SI//NF)~~

Following this briefing, Gonzales and Card went to the hospital to ask Attorney General Ashcroft, who was in the intensive care unit recovering

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[230] Our conclusion that Goldsmith advised Gonzales and Addington of the Department's concerns in December 2003 is supported by his contemporaneous notes of these events. In addition, although Gonzales told us that the first time he recalled hearing of these concerns in detail was in early March 2004, he did not dispute that Goldsmith had first begun to advise him of the Department's general concerns months earlier. (U)

[231] During his congressional testimony, when questioned about whether he knew that Attorney General Ashcroft's powers had been transferred to Comey, Gonzales responded, "I think that there were newspaper accounts, and that fact that Mr. Comey was the acting Attorney General is probably something I knew of." (U)

[232] On the advice of White House counsel, Gonzales declined to provide a reason to the OIG why the Department was not asked to participate in the briefing. However, when Gonzales commented on a draft of this report, he stated that the purpose of the meeting was to inform the congressional leaders that the Department had a problem with the legal basis for aspects of the program, [redacted] and that a legislative fix therefore was necessary. Gonzales stated that the purpose of the meeting was not to have a "debate" between the White House and the Department concerning the legality of the program, but rather to explore just such a legislative "fix." ~~(TS//SI//NF)~~

from surgery and according to witnesses appeared heavily medicated, to certify the program, notwithstanding Comey's stated opposition. Yet, they did not notify Comey or anyone else in the Department that they intended to take this action. Their attempt to have Ashcroft recertify the program did not succeed. Ashcroft told them from his hospital bed that he supported the Department's legal position, but that in any event he was not the Attorney General at the time – Comey was. (U)

Gonzales stated that even if he knew that Ashcroft was aware of Comey's opposition to recertifying the program, Gonzales would still have wanted to speak with Ashcroft because he believed Ashcroft still retained the authority to certify the program. Gonzales testified before the Senate Judiciary Committee in July 2007 that although there was concern over Ashcroft's condition, "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." Gonzales 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.'" (U)

We found this explanation and the way the White House handled the dispute to be troubling. Rather, we agree with Director Mueller's observation, as recorded in his program log following his meeting with Card on March 11, 2004, that the failure to have Department of Justice representation at the congressional briefing and the attempt to have Ashcroft certify the Authorization by overruling Comey "gave the strong perception that the [White House] was trying to do an end run around the Acting [Attorney General] whom they knew to have serious concerns as to the legality of portions of the program." ~~(TS//SI//NF)~~

At a minimum, we would have expected the White House to alert Comey directly that it planned to brief the congressional leaders on the Department's position and that it intended to seek Ashcroft's approval of the program despite Comey and Goldsmith's stated legal position against continuing certain activities under the program. Instead, White House officials briefed congressional leaders and sought to have Attorney General Ashcroft recertify the program from his hospital bed without any notice to Comey or anyone else at the Department. We believe these actions gave the appearance of an "end run" around the ranking Justice Department official with whom they disagreed. ~~(TS//SI//NF)~~

C. Recertification of the Presidential Authorization and Modification of the Program (U)

As described in this chapter, the Department had notified Gonzales and Addington of its concerns about the legality of aspects of the program

for several months. In fact, the Department had made clear to the White House in December 2003 and more emphatically in a series of meetings in March 2004 that it believed that aspects of the program could not be legally supported in their existing form. Comey and Goldsmith were clear in their advice to the President and other White House officials. At the hospital, Ashcroft also expressed deep concern [redacted] and told Gonzales and Card that he supported the position of his subordinates. We believe that Ashcroft acted admirably under arduous circumstances. ~~(TS//STLW//SI//OC/NF)~~

Despite the legal concerns uniformly expressed by senior Department of Justice leaders, the White House, through White House Counsel Gonzales, recertified the Authorization, allowing the program to continue substantively unchanged. ~~(TS//SI//NF)~~

Only after Mueller, Comey, and other senior Department and FBI officials made known their intent to resign if the White House continued the program unchanged, despite the Department's conclusion that aspects of the program could not be legally supported, did the President direct that the issue be resolved, and the program be modified to address the Department's legal concerns. Because we were unable to interview key White House officials, we could not determine for certain what caused the White House to change its position and modify the program, although the prospect of mass resignations at the Department and the FBI appears to have been a significant factor in this decision.[233] According to Comey, the President raised a concern that he was hearing about these problems at the last minute, and the President thought it was not fair that he was not told earlier about the Department's legal position. In fact, as Comey informed the President, the President's staff had been advised of these issues "for weeks." ~~(TS//SI//NF)~~

Finally, we believe that the Department and FBI officials who resisted the pressure to recertify the Stellar Wind program because of their belief that aspects of the program were not legally supportable acted courageously and at significant professional risk. We believe that this action by Department and FBI officials – particularly Ashcroft, Comey, Mueller,

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[233] For instance, we found it significant that on March 16, 2004, White House Counsel Gonzales, who had to make a recommendation to the President about how to proceed with the program in view of the Department's conclusion that legal support for [redacted] called Director Mueller to ask him whether he would resign if the President did not [redacted] Mueller responded that he "would have to give it serious consideration if the President decided to go ahead in the face of DOJ's finding." [redacted] ~~(TS//STLW//SI//OC/NF)~~

Goldsmith, Philbin, and Baker – was in accord with the highest professional standards of the Justice Department. ~~(TS//SI//NF)~~

CHAPTER FIVE
STELLAR WIND PROGRAM'S TRANSITION TO FISA AUTHORITY
(JUNE 2004 THROUGH AUGUST 2007)

In this chapter we examine the transition in stages of the Stellar Wind program from presidential authority to FISA authority. We first describe the FISA Court's approval in July 2004 of the government's application to acquire foreign intelligence information through the collection of bulk e-mail meta data (basket 3 information). This application was based on a legal theory related to FISA's pen register and trap and trace device provisions. We next discuss the government's successful May 2006 application to the FISA Court for an order to obtain bulk telephony meta data (basket 2 information) by the production of business records by certain telecommunications carriers. We then describe the government's interaction with the FISA Court to place under FISA the government's authority to intercept the content of certain communications involving both domestic and foreign telephone numbers and e-mail addresses (basket 1 information). Finally, we summarize legislation enacted in August 2007 and July 2008 to amend FISA to address, among other concerns, the difficulty the government encountered in obtaining FISA authority for content collection, as well as the government's contention that certain provisions of FISA had failed to keep pace with changes in telecommunications technology. ~~(TS//STLW//SI//OC/NF)~~

I. E-Mail Meta Data Collection Under FISA ~~(TS//SI//NF)~~

A. Application and FISA Court Order (U)

[redacted] The FISA Court granted this authority on July 14, 2004 [redacted] ~~(TS//STLW//SI//OC/NF)~~

1. Decision to Seek a Pen Register and Trap and Trace (PR/TT) Order from the FISA Court ~~(TS//SI//NF)~~

[redacted]

[redacted]

Philbin told us that he encountered some opposition to the FISA approach from Counsel to the Vice President David Addington, who argued that the FISA Court was unconstitutional and questioned the need to seek its authorization for e-mail meta data collection. Philbin said that he responded that obtaining an order from the FISA Court was "ironclad safe." Baker recalled attending at least one meeting at the White House with White House Counsel Gonzales and Addington to discuss whether to seek an order from the FISA Court based on FISA's pen register and trap and trace device provisions (a PR/TT Order) and how the FISA Court should be approached to obtain such an order. Baker stated that during the meeting Addington said, "We are one bomb away from getting rid of this obnoxious Court." Baker said Addington also stressed to him that there "is a lot riding on your [Baker's] relationship with this Court." ~~(TS//STLW//SI//OC/NF)~~

In contrast, Hayden told us that he did not have any concerns about transitioning the bulk e-mail meta data collection to FISA authority and was enthusiastic about the move. Hayden stated that while he believed the President had the authority to collect the bulk meta data for the NSA to conduct meta data analysis, he believes that involving an additional branch of government in the activity provided some clarity on this subject. ~~(TS//STLW//SI//OC/NF)~~

Gonzales told us that he did not recall much about the process of filing the application with the FISA Court to obtain e-mail meta data through a PR/TT Order, but stated that there may have been individuals at the White House who expressed concern that seeking the Order from the FISA Court was not a good idea. However, Gonzales told us that he was supportive of seeking the Order [redacted] He stated that he relied on what the intelligence professionals told him and that he would not have supported the PR/TT application if NSA Director Hayden and others did not believe the collection under the PR/TT Order provided the coverage necessary to protect the nation [redacted] Gonzales

also told us that there was concern at the White House that filing the PR/TT application could lead to an unauthorized disclosure of the program. ~~(TS//STLW//SI//OC/NF)~~

2. Briefing for Judge Kollar-Kotelly (U)

In [redacted] Baker, Philbin, and Goldsmith met with Gonzales and Addington at the White House to discuss how to approach Judge Kollar-Kotelly concerning the proposed PR/TT application, and it was decided to give her a "presentation" about the application. The presentation was provided to Judge Kollar-Kotelly on [redacted] Present were Attorney General Ashcroft, Central Intelligence Agency Director George Tenet, FBI Director Mueller, Hayden, Gonzales, OLC Assistant Attorney General Goldsmith, Philbin, Baker, and Director of the Terrorist Threat Integration Center (TTIC) John Brennan. According to an agenda of the briefing, and as confirmed to the OIG, the presentation was given in three parts. First, Mueller, Tenet, and Brennan described the nature of the terrorist threat facing the United States, including concerns of [redacted] Second, Hayden described the technical aspects of the proposed bulk e-mail meta data collection, including how the information was to be collected, archived, queried, and minimized. This portion of the presentation stressed that the NSA required the collection of meta data in bulk to maximize analytic capabilities through contact chaining [redacted] to identify terrorist communications.[234] Third, Philbin explained the government's legal argument that FISA authorized the Court to approve a broad application to collect e-mail meta data under the statute's pen register and trap and trace provisions. ~~(TS//STLW//SI//OC/NF)~~

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

3. The PR/TT Application ~~(TS//SI//NF)~~

Philbin, Baker, and at least two Office of Legal Counsel attorneys assumed primary responsibility for drafting the PR/TT application to the FISA Court and a memorandum of law in support of the application.[235]

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[234] The agenda refers to the "needle in haystack" metaphor to illustrate the need for bulk collection, noting "must transform streams of hay into haystack that can later be searched." ~~(TS//SI//NF)~~

[235] The application package, captioned [redacted] consisted of the application; a proposed order authorizing the collection activity and secondary orders mandating carriers to cooperate; a declaration of NSA Director Hayden explaining the technical aspects of the (Cont'd.)

Baker said that Judge Kollar-Kotelly was given a "read-ahead copy" of the application, since it was standard practice to give the FISA Court draft applications for review. ~~(TS//SI//NF)~~

The final application was filed [redacted] A short addendum to the application filed [redacted] it sought authorization from the FISA Court to collect. ~~(TS//SI//NF)~~

The objective of the application was to secure authority under FISA to collect [redacted] bulk e-mail meta data [redacted] the meta data to be collected under FISA authority would be stored in a database. According to the application, queries could be run against the database to identify [redacted] by looking for contacts with other individuals reasonably suspected to be [redacted] and to reveal communications links between such operatives. The resulting analytical products would then be tipped out as leads to the FBI and other elements of the U.S. Intelligence Community to find members of [redacted] disrupt their activities, and prevent future terrorist attacks in the United States.[236] ~~(TS//STLW//SI//OC/NF)~~

The Justice Department constructed its legal argument for this novel use of pen register and trap and trace devices around traditional authorities provided under FISA. Specifically, 50 U.S.C. § 1842(a)(1) authorizes the Attorney General or other designated government attorney to apply

> for an order or an extension of an order authorizing or approving the installation and use of a pen register or trap and trace device for any investigation to obtain foreign intelligence information not concerning a United States person or to protect

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proposed e-mail meta data collection and identifying the government official seeking to use the pen register and trap and trace devices covered by the application for purposes of 50 U.S.C. § 1842(c)(1); a declaration of Director of Central Intelligence Tenet describing the threat posed by [redacted]; a certification from Attorney General Ashcroft stating that the information likely to be obtained from the pen register and trap and trace devices was relevant to an ongoing investigation to protect against international terrorism, as required by 50 U.S.C. § 1842(c); and a memorandum of law and fact in support of the application. ~~(TS//SI//NF)~~

[236] The application emphasized that Internet e-mail is one of the primary methods by which [redacted] communicate. The memorandum of law in support of the application stated that Internet e-mail is particularly attractive to terrorists [redacted] ~~(TS//SI//NF)~~

> against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution which is being conducted by the Federal Bureau of Investigation under such guidelines as the Attorney General approves pursuant to Executive Order No. 12333, or a successor order. ~~(TS//SI//NF)~~

FISA incorporated the definitions of the terms "pen register" and "trap and trace device" from 18 U.S.C. § 3127. Thus, FISA adopted as the definition of a "pen register"

> a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication. ~~(TS//SI//NF)~~

18 U.S.C. § 3127(3). FISA also adopted as the definition of a "trap and trace device"

> a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication. ~~(TS//SI//NF)~~

18 U.S.C. § 3127(4).

In its application the government argued that the NSA's proposed collection of meta data met the requirements of FISA by noting that the meta data sought comported with the "dialing, routing, addressing, or signaling information" type of data described in FISA's definitions of pen registers and trap and trace devices. The government also noted that nothing in these definitions required that the "instrument" or "facility" on which the device is placed carry communications of only a single user rather than multiple users. ~~(TS//SI//NF)~~

The government next argued that the information likely to be obtained from the pen register and trap and trace devices was relevant to an ongoing investigation to protect against international terrorism, as certified by the Attorney General under 50 U.S.C. § 1842(c). In support of this "certification of relevance" the government stated that the FBI was conducting more than [redacted] ~~(TS//SI//NF)~~

The government acknowledged that "the overwhelming majority of communications from which meta data will be collected will not be associated with [redacted]." However, the government maintained that FISA did not impose any requirement to tailor collection precisely to obtain only communications that are strictly relevant to the investigation. The government argued that, in any event, "the tailoring analysis must be informed by the balance between the overwhelming national security interest at stake . . . and the minimal intrusion into privacy interests that will be implicated by collecting meta data – especially meta data that will never be seen by a human being unless a connection to a terrorist-associated e-mail is found." ~~(TS//SI//NF)~~

The government also stated that the NSA needed to collect meta data in bulk in order to effectively use analytic tools such as contact chaining [redacted] that would enable the NSA to discover enemy communications. This argument echoed a premise many officials told us about the nature of intelligence gathering in general. For example, Baker likened the search for useful intelligence, particularly in the meta data context, to finding a needle in a haystack, stating, "the only way to find the needle is to have the haystack." Gonzales argued that "to connect the dots you first have to collect the dots." ~~(TS//SI//NF)~~

The application and supporting documents described the [redacted] types of e-mail meta data NSA sought authority to collect:

[redacted]

The application requested that the NSA be authorized to collect this meta data [redacted] were described as follows:

[redacted]

The application represented that for most of the proposed collection on [redacted] it was "overwhelmingly likely" that at least one end of the transmitted communication either originated in or was destined for locations outside the United States, and that in some cases both ends of the communication were entirely overseas.[237] However, the government acknowledged that [redacted] ~~(TS//SI//NF)~~

[redacted]

[237] [redacted]

[redacted]

[redacted] As discussed below, the government argued and the FISA Court ultimately agreed that the above-described collection [redacted] satisfied the definitions of pen register and trap and trace devices under FISA and Title 18. See 50 U.S.C. § 1841(2); 18 U.S.C. § 3127(3) & (4). ~~(TS//SI//NF)~~

The application also explained the proposed archiving and querying process. According to the application, the collected meta data would be stored in a secure NSA network accessible only through two administrative login accounts and by specially-cleared meta data archive system administrators. Each time the database was accessed, the retrieval request would be recorded for auditing purposes. ~~(TS//SI//NF)~~