

~~(TS//SI//NF)~~ Telephony and Internet
Metadata Collection and Analysis

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

NSA personnel used PSP metadata to perform contact chaining. Although the NSA had the capability to collect bulk telephony and Internet metadata before the PSP, collection was limited because the NSA was not authorized to collect metadata from a wire inside the United States without a court order when one end of the communication was in the United States. NSA could "chain" to, but not through, domestic selectors. Access to large amounts of metadata is required for effective contact chaining, and the PSP increased the data available to NSA analysts and allowed them to perform more thorough contact chaining.

~~(TS//SI//OC/NF)~~ Although NSA analysts could search bulk-collected metadata under the PSP, the analysts' searches were limited to targets that were approved under the standards set forth in the Presidential Authorizations. As such, only a small fraction of the metadata collected under the PSP was ever accessed. In August 2006, the NSA estimated that 0.000025 percent of the telephone records in the PSP database (or one of every four million records) could be expected to be seen by NSA analysts through chaining analysis.

~~(TS//SI//NF)~~ NSA analysts conduct contact chaining by entering a target selector—a telephone number or Internet communication address—in a specialized metadata analysis tool, which searches the metadata and identifies contacts between the selector and other telephone numbers or Internet communications addresses. The resulting contact graph is analyzed for intelligence and to develop investigative leads.

Although the Presidential Authorizations did not prohibit chaining more than two degrees of separation from the target, NSA analysts determined that it was not analytically useful to do so.

~~(TS//SI//NF)~~ An automated process was created to alert and automatically chain new and potentially reportable telephone numbers using what was called an "alert list." Telephone numbers on the alert list were automatically run against incoming metadata to look for contacts.

[REDACTED]

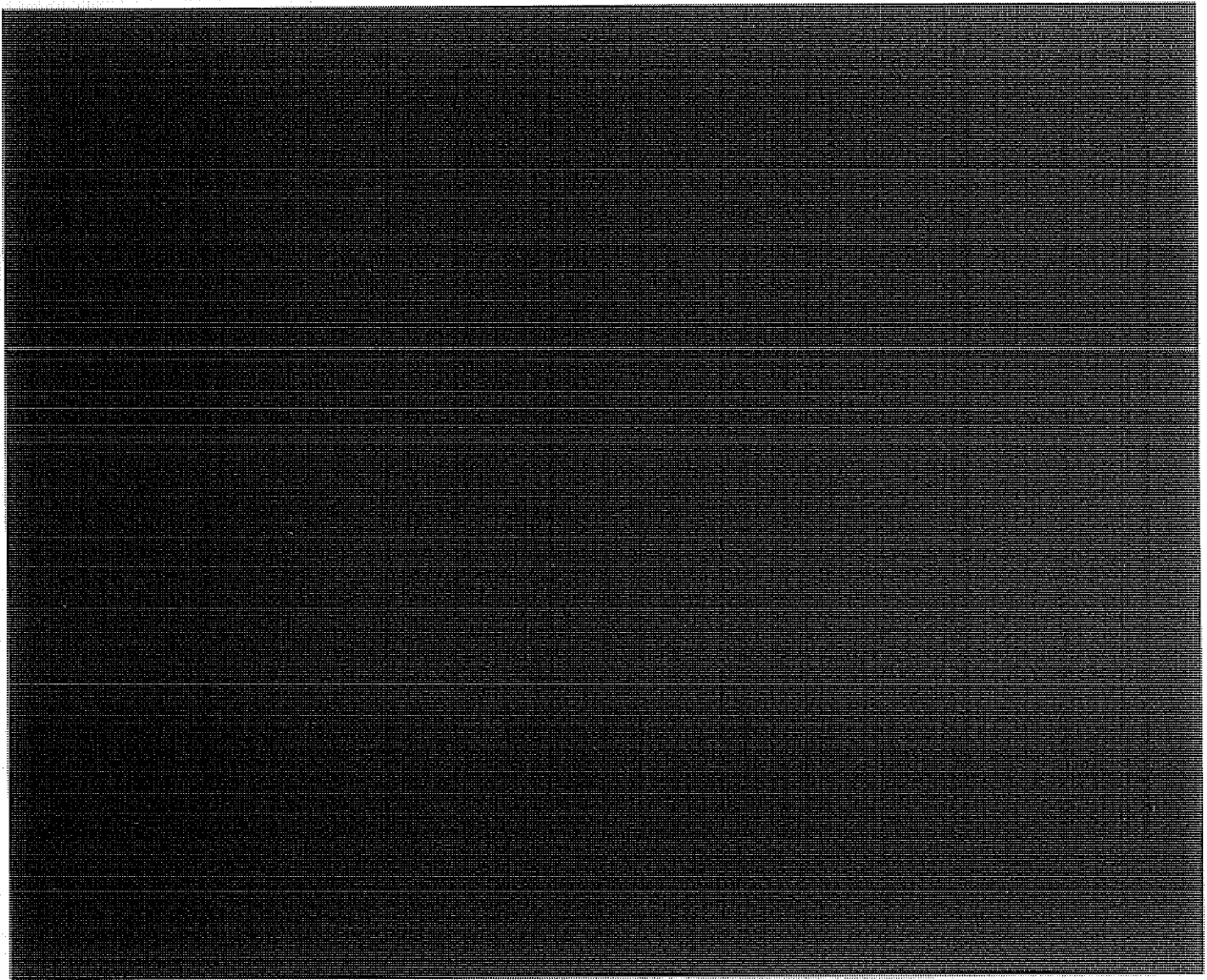
(TS//SI//NF) When NSA personnel identified erroneous metadata collection—usually caused by technical problems or inappropriate application of the authorization—they were directed to report the violation or incident through appropriate channels and to delete the collection from all NSA databases. NSA reported three such violations early in the program and took measures to correct them.

**(U) NSA Reporting From the
President's Surveillance Program**

(TS//SI//OC/NF) PSP information was disseminated in [REDACTED] types of reports: "tippers," which provided metadata analysis; content reports, which provided NSA analysis of content collection; [REDACTED]

[REDACTED] Tippers were sent to the FBI and the CIA by e-mail on a secure communications network. Some tippers contained "tear line" information that allowed for wider distribution of a sanitized version of the information. From October 2001 through January 2007, the NSA issued [REDACTED] tippers to the FBI and the CIA.⁸

[REDACTED]



**(U) NSA Managerial Structure and Oversight
of the President's Surveillance Program**

~~(S//NF)~~ Analysis and reporting associated with the PSP was conducted within SID at NSA's Fort Meade, Maryland headquarters. PSP activities were not conducted at NSA field sites. The Director and Deputy Director of NSA exercised senior operational control and authority over the program. The individual who was SIGINT Director in 2001 told us that, aside from ensuring that the PSP had appropriate checks and balances, she left direct management of the program to the NSA Director, the Deputy Director, and the Office of General Counsel. She noted that Hayden took personal responsibility for the program and managed it carefully.

~~(S//NF)~~ By 2004, specific managerial authorities concerning PSP collection, analysis, and reporting activities had been delegated to the SIGINT Director. The SIGINT Director further delegated managerial authority to the PSP program manager and mission execution responsibilities to the Chief of the CT Product Line. The PSP program manager position was restructured to provide the incumbent authority and responsibility for oversight of PSP

~~(S//NF)~~ The NSA General Counsel was read into the PSP on 4 October 2001, the day the first Presidential Authorization was signed. On 6 October 2001, the General Counsel provided Hayden and his deputy talking points for use in briefing NSA personnel on the new program's authorities. The talking points included the fact that Hayden had directed the NSA General Counsel and the NSA Associate General Counsel for Operations to review and oversee PSP activities. The NSA Associate General Counsel for Operations provided most of the program oversight before the NSA IG was read into the PSP in August 2002. The Associate General Counsel for Operations oversaw program implementation, reviewed proposed target packages for compliance with the authorizations, and coordinated program-related issues with DoJ.

**(U) NSA Inspector General Oversight
of the Program**

~~(S//NF)~~ The NSA IG and other NSA Office of Inspector General personnel were read into the PSP beginning in August 2002. Over the life of the program, the NSA IG conducted:

- Three investigations in response to specific incidents and violations of the Presidential Authorizations to determine the cause, effect, and remedy.
- Ten reviews to determine the adequacy of management controls to ensure compliance with the authorization and related authorities, assess the mitigation of risk associated with program activities, and identify impediments to meeting the requirements of the authorizations.

~~(TS//SI//NF)~~ Ten of the NSA IG reports included a total of [REDACTED] recommendations to NSA management to strengthen internal controls and procedures over the PSP. The NSA IG identified no intentional misuse of the PSP. Significant findings from NSA IG reviews of the PSP include the following:

- In 2005, the NSA IG found [REDACTED] errors when comparing records of domestic telephone and communications selectors approved for PSP content collection with selectors actually on collection. The errors included selectors that were not removed from collection after being detasked, selectors that were not put on collection when approved, and selectors that were mistakenly put on collection due to typographical errors. NSA management took steps to correct the errors and establish procedures to reconcile approved selectors with selectors actually on collection.
- During a 2006 review, the NSA IG found that all items in a randomly selected sample of domestic selectors met Presidential Authorization criteria. Using a statistically valid sampling methodology, the IG concluded with 95 percent confidence that 95 percent or more of domestic

selectors tasked for PSP content collection were linked to al-Qa'ida, its associates, or international terrorist threats inside the United States.

~~(S//NF)~~ In addition to NSA IG report recommendations, in March 2003, the NSA IG recommended to Hayden that he report violations of the Presidential Authorizations to the President. The NSA IG prepared ~~(b)~~ Presidential notifications for the NSA Director concerning violations of the authorizations.

~~(S//NF)~~ Beginning in January 2007, violations involving collection activities conducted under PSP authority as well as violations related to former PSP activities that were operating under FISA authority were reported quarterly to the President's Intelligence Oversight Board, through the Assistant to the Secretary of Defense for Intelligence Oversight.

~~(TS//SI//NF)~~ The NSA IG learned in late 2008, that from approximately ~~(b)(1), (b)(3)~~ collection of ~~(b)(1), (b)(3)~~

All related collection records were purged from NSA databases in 2004; therefore, it was not possible to determine the exact nature and extent of the collection. NSA OIG will close out this incident in its upcoming report to the President's Intelligence Oversight Board.

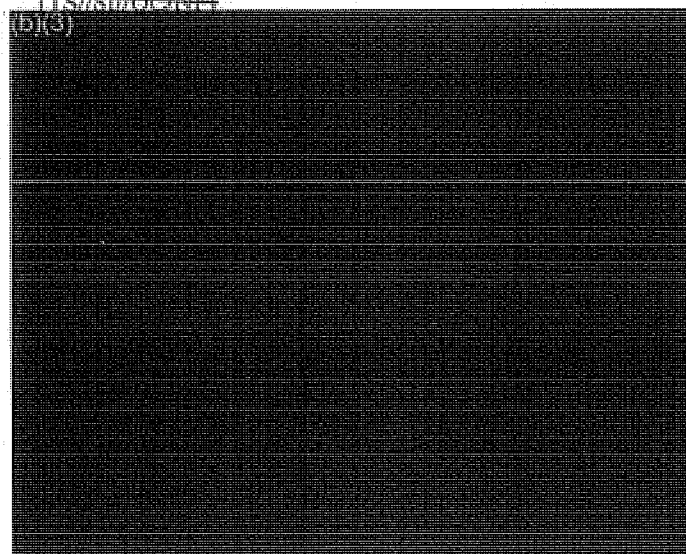
~~(TS//SI//NF)~~ On 15 January 2009, the DoJ reported to the FISC that the NSA had been using an "alert list" to compare FISA-authorized metadata against telephone numbers associated with counterterrorism targets tasked by the NSA for SIGINT collection. The NSA had reported to the FISC that the alert list consisted of telephone numbers for which NSA had determined the existence of a reasonable, articulable suspicion that the numbers were related to a terrorist organization associated with ~~(b)(1), (b)(3)~~. In fact, such a determination had not been made for the majority of the selectors on the alert list. The NSA IG reported this incident to the President's Intelligence Oversight Board, and has provided updates as required. The alert list and a detailed NSA 60-day review of processes related to the business records FISC order were the subject of several recent submissions to the FISC and of NSA briefings to the Congressional oversight committees.

(U) Access to the President's Surveillance Program

~~(b)(3)~~

(U) PSP Cumulative Clearance Totals
(as of 17 January 2007)

~~(TS//SI//NF)~~
(b)(3)



~~(S//NF)~~ Knowledge of the PSP was strictly controlled and limited at the express direction of the White House. Hayden eventually delegated his PSP clearance approval authority for NSA, FBI, and CIA operational personnel to the NSA PSP program manager. Hayden was required to obtain approval from the White House to clear members of Congress, FISC Judges, the NSA IG, and others.

~~(S//NF)~~ The NSA IG was not read into the PSP until August 2002. According to the NSA General Counsel at the time, the President would not allow the IG to be briefed prior to that date. Although Hayden did not recall why the IG had not been cleared earlier, he thought that it would have been inappropriate to clear him when the length of the program was unknown and before operations had stabilized. By August 2002, Hayden and the NSA General Counsel wanted to institutionalize PSP oversight with the involvement of the NSA IG. Hayden recalled having to "make a case" to the White House to have the NSA IG read in. The ODNI IG found that ODNI oversight of the PSP was limited by ODNI oversight personnel not being provided timely access to the program.

(U) Congressional Briefings on the Program

~~(TS//SI//NF)~~ On 25 October 2001, Hayden conducted a briefing on the PSP for the Chairman and the Ranking Member of the House Permanent Select Committee on Intelligence, Nancy P. Pelosi and Porter J. Goss; and the Chairman and the Vice Chairman of the Senate Select Committee on Intelligence (SSCI), D. Robert Graham and Richard C. Shelby. Between 25 October 2001 and 17 January 2007, Hayden and current NSA Director Alexander, sometimes supported by other NSA personnel, conducted

49 briefings to members of Congress and their staff. Hayden told us that during the many PSP briefings to members of Congress, no one ever suggested that the NSA should stop the program. Hayden emphasized that he did more than just "flip through slides" during the briefings, which lasted as long as attendees had questions.

**(U) Foreign Intelligence Surveillance Court
Briefings on the Program**

~~(TS//SI//OC/NF)~~ On 31 January 2002, the FISC Presiding Judge Royce Lamberth became the first member of the court to be read into the PSP. He was briefed on the program after James Baker, the head of DoJ's Office of Intelligence Policy and Review (OIPR) ~~(b) (5)~~

~~(b) (5)~~ Lamberth's briefing was conducted at the DOJ and was attended by Ashcroft, Hayden, Mueller, Yoo, and Baker.

~~(TS//SI//OC/NF)~~ Ashcroft provided Lamberth a brief summary of the President's decision to create the PSP, and Ashcroft stated that he had determined, based upon the advice of John Yoo, an attorney in DoJ's Office of Legal Counsel (OLC), that the President's actions were lawful under the Constitution. Ashcroft also emphasized to Lamberth that the FISC was not being asked to approve the program. Following Ashcroft's summary, Hayden described for Lamberth how the program functioned operationally, Yoo discussed legal aspects of the program, and Baker proposed procedures for handling international terrorism FISA applications that contained PSP-derived information. For the next four months, until the end of his term in May 2002, Lamberth was the only FISC judge read into the PSP.

~~(TS//SI//OC/NF)~~ Judge Colleen Kollar-Kotelly succeeded Lamberth as the FISC Presiding Judge and was briefed on the PSP on 17 May 2002. The briefing was similar in form and substance to that provided to Lamberth. In response to several questions from Kollar-Kotelly about the scope of the President's authority to conduct warrantless surveillance, DoJ prepared a letter to Kollar-Kotelly, signed by Yoo, that, according to Kollar-Kotelly, "set out a broad overview of the legal authority for conducting [the PSP], but did not analyze the specifics of the [PSP] program." The letter, which Kollar-Kotelly reviewed at the White House but was not permitted to retain, essentially replicated Yoo's 2 November 2001 memorandum regarding the legality of the PSP. Kollar-Kotelly was the only sitting FISC judge read into the PSP until January 2006, when the other FISC judges were read in.

~~(TS//SI//OC/NF)~~ Baker was read into the PSP only after he came upon "strange, unattributed" language in a FISA application that suggested the existence of a ~~(b) (5)~~ compartmented program.

~~(b) (5)~~ As noted, eventually Lamberth, and later his successor, Kollar-Kotelly, were read in. The DoJ IG believes that not having OIPR officials and members of the FISC read into the PSP, while program-derived information was being disseminated as investigative leads to the FBI and finding its way into FISA

applications, put at risk the DoJ's important relationship with the FISC. The DoJ IG agrees with Baker's assessment that, as the government's representative before the FISC, good relations between the DoJ and the FISC depend on candor and transparency.

**(U) FBI Participation in the
President's Surveillance Program**

~~(TS//SI//NF)~~ As a user of PSP-derived information, the FBI disseminated leads—tippers—to FBI field offices. Tippers primarily consisted of domestic telephone numbers and Internet communications addresses that NSA analysts had determined through metadata analysis were connected to individuals involved with al-Qa'ida or its affiliates. Domestic telephone numbers represented the overwhelming majority of PSP-derived information contained in tippers. Tippers also provided information derived from content collection under the PSP.

~~(TS//SI//NF)~~ The FBI's principal objective during the earliest months of the PSP was to disseminate program information to FBI field offices for investigation while protecting the source of the information and the methods used to collect it. The FBI initially assigned responsibility for this to its Telephone Analysis Unit (TAU), which developed procedures to disseminate information from NSA's PSP reports in a non-compartmented, Secret-level format. The resulting [REDACTED] Electronic Communications (ECs) included restrictions on how the information could be used, i.e., FBI field offices were to use the information "for lead purposes only" and not use the information in legal or judicial proceedings.

b1, b3,
b7E

~~(S//NF)~~ The FBI's participation in the PSP evolved over time as the program became less a temporary response to the September 11 attacks and more a permanent surveillance capability. To improve the effectiveness of its participation in the program, the FBI initiated the [REDACTED] project in [REDACTED] to manage its involvement in the PSP. In February 2003, the FBI assigned a team of FBI personnel—"Team 10"—to work full-time at the NSA to manage the FBI's participation in the program.

b1, b3,
b7E

~~(TS//SI//NF)~~ Team 10's primary responsibility was to disseminate PSP information through [REDACTED] ECs to FBI field offices for investigation or other purposes. However, over time, Team 10 began to participate in the PSP in other ways. For example, Team 10 occasionally submitted telephone numbers and Internet communications addresses to the NSA to be searched against the bulk metadata collected under the PSP. The NSA conducted independent analysis to determine whether telephone numbers or Internet communications addresses submitted by Team 10 met the standards established by the Presidential Authorizations. Team 10 also regularly contributed to NSA's PSP process by reviewing draft reports and providing relevant information from FBI databases.

b1, b3,
b7E

~~(S//NF)~~ FBI field offices were not required to investigate every tipper disseminated by Team 10 under the [REDACTED] project. Rather, the type of lead that the [REDACTED] EC assigned—"action," "discretionary," or "for information"—drove the field office's

b1, b3,
b7E

response to a tipper.⁹ The vast majority of FBI investigative activity related to PSP information involved responding to [REDACTED] telephone number tippers that assigned action leads. Team 10 generally assigned action leads for telephone numbers that were not already known to the FBI or telephone numbers that Team 10 otherwise deemed a high priority, such as a number that had a relationship to a major FBI investigation. From approximately [REDACTED] when [REDACTED] was established, to [REDACTED] action leads instructed field offices to obtain subscriber information for the telephone numbers within its jurisdiction and to conduct any "logical investigation to determine terrorist connections." Some agents complained that action leads lacked guidance about how to make use of the tippers, which was of particular concern because agents were not confident that [REDACTED] communications provided sufficient predication to open national security investigations.

b1,
b3,
b7E

~~(TS//SI//NF)~~ Two changes to FBI procedures in 2003 addressed some FBI agents' concerns. [REDACTED] FBI Headquarters assumed responsibility from field offices for issuing national security letters (NSLs) to obtain subscriber information about PSP-tipped telephone numbers and Internet communications addresses. [REDACTED] the Attorney General issued new guidelines for FBI national security investigations that created a new category of investigative activity called a "threat assessment." Under a threat assessment, FBI agents are authorized to investigate or collect information on individuals, groups, and organizations of possible investigative interest without opening a preliminary or full national security investigation. Beginning [REDACTED] action leads assigned by [REDACTED] metadata tippers instructed field offices to conduct threat assessments and advised that FBI headquarters would issue NSLs to obtain subscriber information.

b1, b3,
b7E

~~(S//NF)~~ In general, an FBI threat assessment involved searching several FBI, public, and commercial databases for information about the tipped telephone number, and requesting that various state and local government entities conduct similar searches. Sometimes these searches identified the subscriber to the telephone number before FBI Headquarters obtained the information with an NSL. In other cases, the threat assessments continued after the field office received the NSL results.

~~(S//NF)~~ The [REDACTED] leads frequently were closed after conducting a threat assessment interview with the subscriber and determining that there was no nexus to terrorism or threat to national security. In other cases, the leads were closed based solely on the results of database checks.

b1, b3, b7E

~~(S//NF)~~ Beginning [REDACTED] FBI field offices were required to report the results of their threat assessments to FBI headquarters. FBI field offices typically reported all of the information that was obtained about the tipped telephone numbers, including the details of any subscriber interviews, and then stated that the office had determined that the

b1, b3, b7E

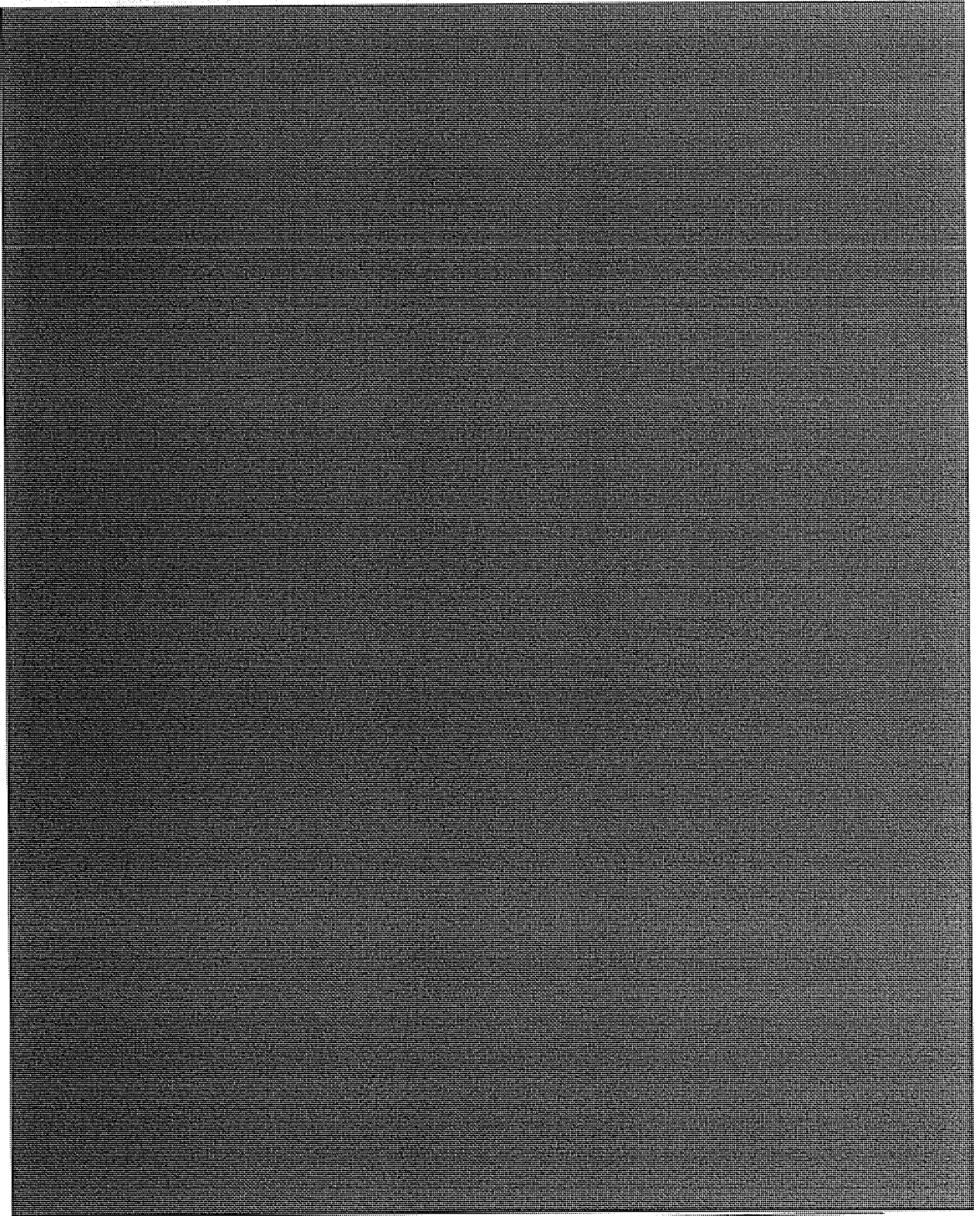
⁹~~(S//NF)~~ An action lead instructs an FBI field office to take a particular action in response. A discretionary lead allows the field office to make a determination whether the information provided warrants investigative action. A field office is not expected to take any specific action on a for information lead.

telephone number did not have a nexus to terrorism and considered the lead closed. Much less frequently, field offices reported that a preliminary investigation was opened. Regardless of whether any links to international terrorism were identified in a threat assessment, the results of the threat assessments and the information that was collected about subscribers generally were reported to FBI headquarters and uploaded to FBI databases.

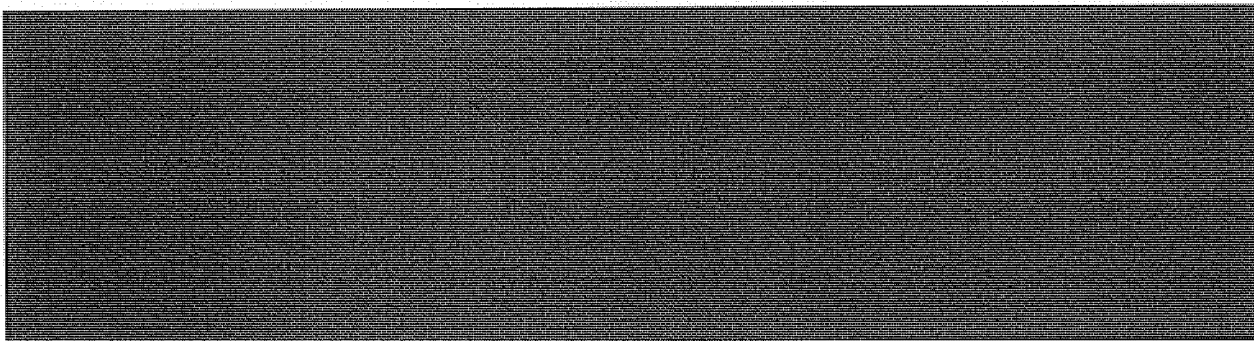
**(U) CIA Participation in the
President's Surveillance Program**

~~(S//NF)~~ CIA analysts and targeters, as PSP consumers, requested information from the program and utilized program reporting in their analyses. 

~~TOP SECRET//STLW//COMINT//ORCON//NOFORN~~



~~TOP SECRET//STLW//COMINT//ORCON//NOFORN~~




(U) NCTC Participation in the President's Surveillance Program

~~(TS//SI//NF)~~ The ODNI IG found that the ODNI's primary role in the PSP was the preparation of the threat assessments that summarized the al-Qa'ida threat to the United States and were used to support periodic reauthorization of the program. The ODNI IG found that the threat assessments were drafted by experienced NCTC personnel who prepared the documents in a memorandum style following an established DoJ format. The ODNI IG also determined that the ODNI threat assessments were prepared using evaluated intelligence information chosen from a wide variety of IC sources. ODNI personnel said that during the period when the ODNI prepared the threat assessments, the IC had access to fully evaluated intelligence that readily supported an assessment that al-Qa'ida remained a significant threat to the United States.

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

 The NCTC analysts told us that PSP information was subject to stringent security protections 


~~(S//NF)~~ The NCTC analysts said that they handle NSA surveillance information, including PSP information, consistent with the standard rules and procedures for handling NSA intelligence information including minimization of U.S. person identities. On those occasions when the NCTC analysts knew that a particular NSA intelligence product was derived from the PSP, the analysts told us they reviewed program information in the same manner as other incoming NSA intelligence products. If appropriate, NCTC analysts then incorporated the PSP information into analytical products being prepared for the Director of National Intelligence (DNI) and other senior intelligence officials. They identified the President's Terrorism Threat Report and the Senior Executive Terrorism Report as examples of the types of finished intelligence products that would, at times, contain PSP information.

**(U) The President's Surveillance Program
and the Foreign Intelligence Surveillance Court**

~~(TS//SI//NF)~~ DoJ, initially with the FISC's concurrence and later at the court's direction, developed and implemented procedures—referred to as “scrubbing” procedures—to account for and make the court aware of instances when PSP-derived information was included in FISA applications. Lamberth required that all FISA applications that contained PSP-derived information, or that would result in simultaneous collection against particular targets under both the PSP and a FISC order, be filed with him only. Baker told us that Lamberth wanted to be informed of applications that contained PSP information and of dual coverage situations. According to Baker, the scrubbing procedures were a means of meeting his ethical duty of candor to the FISC without disclosing the existence of the PSP to uncleared judges.

~~(TS//SI//NF)~~ DoJ effectuated the scrubbing procedures by compiling lists of information contained in initial and renewal FISA applications that was attributed to the NSA and of all facilities targeted for electronic surveillance in the applications. These lists were sent to the NSA to determine whether any of the NSA-attributed information was PSP-derived and whether any of the facilities also were targeted under the PSP. The NSA communicated the results back to DoJ, which then filed the applications with the FISC consistent with the scrubbing procedures.

~~(TS//SI//NF)~~ Kollar-Kotelly continued the procedures that had been developed by Baker and agreed to by Lamberth for handling FISA applications that contained PSP-derived information. However, Kollar-Kotelly required DoJ to excise from FISA applications any information obtained or derived from the PSP. But Kollar-Kotelly also instructed Baker to alert her to any instances where an application's basis for the requisite probable cause showing under FISA was weakened by excising PSP information. In such cases, Kollar-Kotelly would then assess the application with the knowledge that additional relevant information had been excised.

~~(TS//SI//OC/NF)~~ Kollar-Kotelly also instructed DoJ to discontinue the practice employed under Lamberth of including in applications a descriptive phrase associated with [REDACTED] as a means of indicating that facilities targeted by the applications were also targeted under the PSP. Baker told us that while Kollar-Kotelly understood that instances of dual coverage would occur, she did not want to appear to judicially sanction PSP coverage.

b1, b3,
b7E

~~(TS//SI//NF)~~ In March 2004, Kollar-Kotelly was informed of operational changes made to the PSP following a dispute between DoJ and the White House about the legal basis for certain aspects of the program. Kollar-Kotelly responded by imposing an additional scrubbing requirement to further ensure, to the extent possible, that PSP-derived information was not included in FISA applications. The FBI, in coordination with DoJ and NSA, was to determine whether a facility included in a FISA application—not just a targeted telephone number or Internet communication address—also appeared in a PSP report. Kollar-Kotelly permitted any such facility to remain in the application if it could be

demonstrated that the FBI had developed, independent of the PSP, an investigative interest in the facility, or that the FBI inevitably would have identified the facility in question through normal investigative steps. An OIPR official who was responsible for discussing such cases with Kollar-Kotelly told us that the judge generally accepted DoJ's assessment that there was a non-PSP investigative basis for a facility in question, or that the facility inevitably would have been discovered even in the absence of PSP-derived leads to the FBI.

~~(S//NF)~~ Implementing the scrubbing procedures, both under Lamberth and Kollar-Kotelly, was a complicated and time-consuming endeavor for OIPR staff. Baker, who until March 2004 was the only individual in OIPR read into the PSP, found himself having to ask OIPR attorneys to compile information about their cases, and sometimes to make changes to their FISA applications, without being able to provide an explanation other than that he had spoken to the Attorney General and the FISC about the situation. Baker regularly told attorneys that they did not have to sign applications that they were not comfortable with, and, in some instances, international terrorism cases had to be reassigned for this reason.

~~(S//NF)~~ The situation was further complicated by the fact that, until August 2003, only one of the two DoJ officials authorized by statute to approve FISA applications—Attorney General Ashcroft and Deputy Attorney General Larry Thompson—was read into the PSP. Thompson, who served as Deputy Attorney General from May 2001 to August 2003, was never read into the PSP, despite Ashcroft's request to the White House.

~~(TS//SI//NF)~~ Similarly, Kollar-Kotelly, who by November 2004 was handling approximately [REDACTED] percent of all FISA applications as a result of her requirement that scrubbed applications be filed with her only, made unsuccessful requests for additional FISC judges to be cleared for the program. Kollar-Kotelly decided in November 2004 that in view of the scrubbing procedures that were in operation, international terrorism FISA applications could be decided by other judges based on the information contained in the applications.

~~(TS//SI//NF)~~ DoJ, together with the FBI and the NSA, continue to apply the scrubbing procedures to international terrorism FISA applications. Since January 2006, all members of the FISC have been briefed on the PSP and all of the judges handle applications that involve the issue of PSP-derived information. Although compliance with the scrubbing procedures has been burdensome, we did not find instances when the government was unable to obtain FISA surveillance coverage on a target because of the requirement. However, the DoJ IG concluded that once the PSP began to affect the functioning of the FISA process, OIPR and the FISC effectively became part of the PSP's operations, and more OIPR staff and FISC judges should have been read into the PSP to address the impact. Instead, access to the PSP was limited for years to a single OIPR official and one FISC judge.

**(U) Discovery Issues Associated With
the President's Surveillance Program**

~~(TS//STLW//SI//OC/NF)~~ DoJ was aware as early as (b)(1) (b)(3) that information collected under the PSP could have implications for DoJ's litigation responsibilities under Rule 16 of the Federal Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83 (1963).

Analysis of the discovery issue was first assigned to Yoo in (b)(1) (b)(3)

(b)(1) (b)(3)

b1,
b3,
b6,
b7C,
b7E

(b)(1) (b)(3)

b1,
b3,
b6,
b7C
b7E

~~(S//NF)~~ No DoJ attorneys with terrorism prosecution responsibilities were read into the PSP until mid-2004, and as a result, DoJ did not have access to the advice of attorneys who were best equipped to identify and examine discovery issues associated with the PSP. The DoJ IG believes that, since then, DoJ has taken steps to respond (b)(1) (b)(3)

to (b)(1) (b)(3) discovery motions

DoJ's responses to the discovery motions involve the use of the Classified Information Procedures Act, 18 U.S.C. App. 3, to file *ex parte* in camera pleadings with federal courts to describe potentially responsive PSP-derived information. (b)(1) (b)(3)

(b)(3) (b)(1)

~~(S//NF)~~

the DoJ IG recommends that DoJ assess its discovery obligations regarding PSP-derived information in international terrorism prosecutions, carefully consider whether it must re-examine past cases to see whether potentially discoverable but undisclosed Rule 16 or *Brady* material was collected by the NSA, and take appropriate steps to ensure that it has complied with its discovery obligations in such cases. The DoJ IG also recommends that DoJ, in coordination with the NSA, implement a procedure to identify PSP-derived information that may be associated with international terrorism cases

currently pending or likely to be brought in the future and evaluate whether such information should be disclosed in light of the government's discovery obligations under Rule 16 and *Brady*.

**(U) LEGAL REASSESSMENT OF THE
PRESIDENT'S SURVEILLANCE PROGRAM (2003 – 2004)**

~~(TS//SI//NF)~~ Concern Over the [REDACTED] Collection
(b)(1), (b)(3)

~~(TS//SI//NF)~~ Yoo was the sole OLC attorney who advised Ashcroft and White House officials on the PSP from the program's inception in October 2001 through Yoo's resignation from DoJ in May 2003. Upon Yoo's departure, Patrick Philbin was selected by the White House to be read into the PSP to assume Yoo's role as advisor to the Attorney General concerning the program.

~~(TS//SI//NF)~~ Philbin told us that when he reviewed Yoo's legal memorandums about the PSP, he realized that Yoo had omitted from his analysis any reference to the FISA provision allowing the interception of electronic communications without a warrant for a period of 15 days following a Congressional declaration of war. (See 50 U.S.C. § 1811.) Philbin stated that Yoo's OLC opinions were premised on the assumption that FISA did not expressly apply to wartime operations, an assumption that from Philbin's perspective made the opinions "problematic."



(b) (5), (b) (1), (b) (3)

~~(S//NF)~~ In August 2003, Philbin told Ashcroft that there were problems with the legal analysis supporting the PSP but probably not with the conclusions reached, and he therefore advised Ashcroft to continue to certify the program "as to form and legality." Philbin also recommended that a new OLC memorandum assessing the legality of the PSP be drafted, and with Ashcroft's concurrence he began drafting the memorandum.

(U) A New Legal Basis for the Program Is Adopted

~~(S//NF)~~ Goldsmith was sworn in as the Assistant Attorney General for OLC on 6 October 2003, replacing Bybee, who had left that position several months earlier to serve as a judge on the U.S. Court of Appeals for the Ninth Circuit. Philbin told us that he pressed hard to have Goldsmith read into the PSP, and that Addington told Philbin he would have to justify the request before Addington would take it to the President for a decision. Addington subsequently read Goldsmith into the program on 17 November 2003.

~~(TS//SI//NF)~~ After reviewing Yoo's memorandums and Philbin's new draft analysis of the PSP, Goldsmith agreed with Philbin's concerns about the existing legal analysis supporting the program.

(b) (5), (b) (1), (b) (3)

~~(S//SI//NF)~~
(b) (5), (b) (1), (b) (3)

(b) (5), (b) (1), (b) (3)

(b) (5), (b) (1), (b) (3)

~~(S//SI//NF)~~ Goldsmith concluded that the NSA's interception of (b) (5), (b) (1), (b) (3) did not comply with FISA's requirement to obtain judicial authorization, and did not fall within any of the exceptions to this requirement. Goldsmith later wrote in a 6 May 2004 legal memorandum reassessing the legality of the program that a proper analysis of the PSP "must not consider FISA in isolation" but rather must consider whether Congress, by authorizing the use of military force against al-Qa'ida, also "effectively exempts" such surveillance from FISA. Goldsmith believed that this reading of the AUMF was correct because the AUMF authorized the President to use "all necessary and appropriate force" against the enemy that attacked the United States on 11 September 2001, and to "prevent any future acts of international terrorism against the United States" by such enemy—authority that has long been recognized to include the use of SIGINT as a military tool. Alternatively, Goldsmith reasoned that even if the AUMF did not exempt surveillance under the program from the restrictions imposed by FISA, the question was sufficiently ambiguous to warrant the application of the doctrine of constitutional avoidance, and therefore should be construed not to prohibit the activity.¹¹

(b) (5), (b) (1), (b) (3)

~~(S//SI//NF)~~

(b) (5), (b) (1), (b) (3)

~~(TS//SI//NF)~~ In late 2003, Philbin and Goldsmith were the only two DoJ officials in a position to brief the Attorney General and White House officials on the status of their legal reassessment and its potential ramifications for the operation of the program. Goldsmith advised Ashcroft that, despite concerns about the program, Ashcroft should certify the 9 December 2003 Presidential Authorization. Goldsmith later advised Ashcroft to certify the 14 January 2004 authorization as well. Goldsmith told us that he made these recommendations to Ashcroft with the caveat that although he believed Yoo's memorandums to be flawed, Goldsmith had not yet concluded that the program itself was illegal.

**(U) Department of Justice Officials Convey
Concerns About the Program to the White House**

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

~~(TS//SI//NF)~~ On 18 December 2003, Goldsmith met again with Addington and Gonzales and wrote in his notes that during this meeting he conveyed with "more force" his "serious doubts and the need to get more help to resolve the issue [as soon as possible]." Goldsmith told us that during this meeting he also asked to have Deputy Attorney General Comey read into the program. According to Goldsmith's notes, Addington and Gonzales "bristle[d]" at that suggestion. Goldsmith told us that he requested that Comey be read in because he believed he would need Comey's assistance to help "make the case" to the White House that the program was legally flawed. In addition, he said he wanted Comey read in because, as the Deputy Attorney General, Comey was Philbin's direct supervisor.

~~(TS//SI//NF)~~ Goldsmith's efforts to gain the White House's permission to have additional attorneys, and especially Comey, read into the program continued through January 2004. According to Goldsmith's notes, both Addington and Gonzales pressed Goldsmith on his reason for the request and continued to express doubt that additional DoJ personnel were needed. However, in late January 2004 the White House agreed to allow Comey to be read in, and Comey was briefed into the PSP on 12 March 2004 by Hayden.

~~(S//NF)~~ After his briefing, Comey discussed the program with Goldsmith, Philbin, and other DoJ officials, and agreed that the concerns with Yoo's legal analysis were well-founded.¹² Comey told us that of particular concern to him and Goldsmith was the notion that Yoo's legal analysis entailed ignoring an act of Congress, and doing so without full Congressional notification.

~~(TS//SI//NF)~~ Comey told us that in early March 2004 the sense at DoJ was that "we can get there" with regard to (b)(1), (b)(3) albeit by using an aggressive legal analysis. However, he agreed with Goldsmith's conclusion that (b)(1), (b)(3) would require (b)(1), (b)(3)

(U) Conflict Between the Department of Justice and the White House Over the Program

(U) Comey told us that he met with Ashcroft for lunch on 4 March 2004 to discuss the PSP, and that Ashcroft agreed with Comey and the other DoJ officials' assessment of the potential legal problems with the program. Three hours after their lunch meeting, Ashcroft became ill and was admitted to the George Washington University Hospital.¹³ On 5 March 2004, Goldsmith advised Comey by memorandum that under the circumstances of Ashcroft's medical condition and hospitalization, a "clear basis" existed for Comey to exercise the authorities of the Attorney General allowed by law as Deputy Attorney General or Acting Attorney General. The "cc" line of Goldsmith's memorandum to Comey indicated that a copy of the memorandum was sent to Gonzales.

~~(TS//SI//NF)~~ On 5 March 2004—six days before the Presidential Authorization then in effect was set to expire—Goldsmith and Philbin met with Addington and Gonzales at the White House to again convey their concerns about the PSP. (b)(5), (b)(1), (b)(3)

Later that day, Gonzales called Goldsmith to request a letter from OLC stating that Yoo's prior OLC opinions "covered the program." Philbin told us that Gonzales was not requesting a new opinion that the program itself was legal, but only a letter stating that the prior opinions had concluded that it was.

¹² ~~(TS//SI//OC/NF)~~ The other officials included Counsel for Intelligence Policy Baker, Counselor to the Attorney General Levin, and Comey's Chief of Staff Chuck Rosenberg. Both Levin and Rosenberg had been read into the PSP while at the FBI. Comey also discussed DoJ's concerns about the legality of the program with FBI Director Mueller on 1 March 2004. Mueller told us that this was the first time he had been made aware of DoJ's concerns.

¹³ (U) Ashcroft's doctors did not clear Ashcroft to resume his duties as Attorney General until 31 March 2004.

~~(TS//SI//NF)~~ As a result of Gonzales's request, Goldsmith, Philbin, and Comey re-examined Yoo's memorandums with a view toward determining whether they adequately described the actual collection activities of the NSA under the Presidential Authorizations. They concluded that the memorandums did not. According to Goldsmith, the conclusion that Yoo's memorandums failed to accurately describe, let alone provide a legal analysis of (b) (5), (b) (1), (b) (3) meant that OLC could not tell the White House that the program could continue under the authority of those legal memorandums.

~~(TS//SI//NF)~~ On 6 March 2004, Goldsmith and Philbin, with Comey's concurrence, went to the White House to meet with Addington and Gonzales to convey their conclusions that (b) (5), (b) (1), (b) (3)

According to Goldsmith's notes, Addington and Gonzales "reacted calmly and said they would get back with us." On Sunday, 7 March 2004, Goldsmith and Philbin met again with Addington and Gonzales at the White House. According to Goldsmith, the White House officials informed Goldsmith and Philbin that they disagreed with their interpretation of Yoo's memorandums and on the need to change the scope of the NSA's collection under the PSP.

~~(S//NF)~~ On 9 March 2004, Gonzales called Goldsmith to the White House in an effort to persuade him that his criticisms of Yoo's memorandums were incorrect and that Yoo's analysis provided sufficient legal support for the program. (b) (5)

After Goldsmith stated that he disagreed, Gonzales next argued for a "30-day bridge" to get past the expiration of the current Presidential Authorization on 11 March 2004. Gonzales reasoned that Ashcroft, who was still hospitalized, was not in any condition to sign a renewal of the authorization, and that a "30-day bridge" would move the situation to a point where Ashcroft would be well enough to approve the program. Goldsmith told Gonzales he could not agree to recommend an extension because aspects of the program lacked legal support.

~~(TS//SI//NF)~~ At noon on 9 March, another meeting was held at the White House in Card's office. According to Mueller's notes, Mueller, Card, Vice President Cheney, Deputy Director of Central Intelligence John E. McLaughlin, Hayden, Gonzales, and other unspecified officials were present. Comey, Goldsmith, and Philbin were not invited to this meeting. After a presentation on the value of the PSP by NSA and CIA officials, it was then explained to the group that Comey "has problems" with (b) (1), (b) (3). Mueller's notes state that the Vice President suggested that "the President may have to reauthorize without [the] blessing of DoJ," to which Mueller responded, "I could have a problem with that," and that the FBI would "have to review legality of continued participation in the program."

~~(TS//SI//NF)~~ A third meeting at the White House was held on 9 March, this time with Comey, Goldsmith, and Philbin present. Gonzales told us that the meeting was held to make sure that Comey understood what was at stake with the program and to demonstrate its value. Comey said the Vice President stressed that the program was "critically

important" and warned that Comey would risk "thousands" of lives if he did not agree to recertify it. Comey said he stated at the meeting that he, as Acting Attorney General, could support reauthorizing (b)(1), (b)(3) provided the collection was (b)(1), (b)(3)

(b)(1), (b)(3) However, he told the group "we can't get there" on (b)(1), (b)(3)

According to Comey, the White House officials said they could not agree to that modification.

(S//NF) Gonzales told us that after President Bush was advised of the results of the 9 March meetings, he instructed the Vice President on the morning of 10 March to call a meeting with Congressional leaders to advise them of the impasse with DoJ. That afternoon, Gonzales and other White House and IC officials, including Vice President Cheney, Card, Hayden, McLaughlin, and Tenet, convened an "emergency meeting" with Congressional leaders in the White House Situation Room. The Congressional leaders in attendance were Senate Majority and Minority Leaders William H. "Bill" Frist and Thomas A. Daschle; Senate Select Committee on Intelligence Chairman Pat Roberts and Vice Chairman John D. Rockefeller, IV; Speaker of the House J. Dennis Hastert and House Minority Leader Nancy Pelosi; and House Permanent Select Committee on Intelligence Chair Porter Goss and Ranking Member Jane Harman. No DoJ officials were asked to be present at the meeting.

(S//NF) According to Gonzales's notes of the meeting, individual Congressional leaders expressed thoughts and concerns related to the program. Gonzales told us that the consensus was that the program should continue. Gonzales also said that following the meeting with Congressional leaders, President Bush instructed him and Card to go to the George Washington University Hospital to speak to Ashcroft, who was in the intensive care unit recovering from surgery.

(U) According to notes from Ashcroft's FBI security detail, at 18:20 on 10 March 2004, Card called the hospital and spoke with an agent in the security detail, advising the agent that President Bush would be calling shortly to speak with Ashcroft. Ashcroft's wife told the agent that Ashcroft would not accept the call. Ten minutes later, the agent called Ashcroft's Chief of Staff David Ayres at DoJ to request that Ayres speak with Card about the President's intention to call Ashcroft. The agent conveyed to Ayres Mrs. Ashcroft's desire that no calls be made to Ashcroft for another day or two. However, at 18:45, Card and the President called the hospital and, according to the agent's notes, "insisted on speaking [with Attorney General Ashcroft]." According to the agent's notes, Mrs. Ashcroft took the call from Card and the President and was informed that Gonzales and Card were coming to the hospital to see Ashcroft regarding a matter involving national security.

(U) At approximately 19:00, Ayres was advised that Gonzales and Card were on their way to the hospital. Ayres then called Comey, who at the time was being driven home by his security detail, and told Comey that Gonzales and Card were on their way to the

hospital. Comey told his driver to take him to the hospital. According to his May 2007 testimony before the Senate Judiciary Committee, Comey then called his Chief of Staff, Chuck Rosenberg, and directed him to "get as many of my people as possible to the hospital immediately." Comey next called Mueller and told him that Gonzales and Card were on their way to the hospital to see Ashcroft, and that Ashcroft was in no condition to receive visitors, much less make a decision about whether to recertify the PSP. According to Mueller's notes, Comey asked Mueller to come to the hospital to "witness [the] condition of AG." Mueller told Comey he would go to the hospital right away.

(U) Comey arrived at the hospital between 19:10 and 19:30. Comey said he began speaking to Ashcroft, and that it was not clear that Ashcroft could focus and that he "seemed pretty bad off." Goldsmith and Philbin also had been summoned to the hospital and arrived within a few minutes of each other. Comey, Goldsmith, and Philbin met briefly in an FBI "command post" that had been set up in a room adjacent to Ashcroft's room. Moments later, the command post was notified that Card and Gonzales had arrived at the hospital and were on their way upstairs to see Ashcroft. Comey, Goldsmith, and Philbin entered Ashcroft's room and, according to Goldsmith's notes, Comey and the others advised Ashcroft "not to sign anything."

(U) Gonzales and Card entered Ashcroft's hospital room at 19:35. Gonzales told us that he had with him in a manila envelope the 11 March 2004, Presidential Authorization for Ashcroft to sign. According to Philbin, Gonzales first asked Ashcroft how he was feeling. Ashcroft replied, "not well." Gonzales then said words to the effect, "You know, there's a reauthorization that has to be renewed . . ." Gonzales told us that he may also have told Ashcroft that White House officials had met with Congressional leaders "to pursue a legislative fix."

~~(TS//SI//NF)~~ Comey testified to the Senate Judiciary Committee that at this point Ashcroft told Gonzales and Card "in very strong terms" his objections to the PSP, which Comey testified Ashcroft drew from his meeting with Comey about the program a week earlier. Goldsmith's notes indicate that Ashcroft complained in particular that NSA's collection activities exceeded the scope of the authorizations and the OLC memorandums. Comey testified that Ashcroft next stated:

"But that doesn't matter, because I'm not the Attorney General. There is the Attorney General," and he pointed to me—I was just to his left. The two men [Gonzales and Card] did not acknowledge me; they turned and walked from the room.

(U) Moments after Gonzales and Card departed, Mueller arrived at the hospital. Mueller met briefly with Ashcroft and later wrote in his notes, "AG in chair; is feeble, barely articulate, clearly stressed."

(U) Before leaving the hospital, Comey received a call from Card. Comey testified that Card was very upset and demanded that Comey come to the White House immediately. Comey told Card that he would meet with him, but not without a witness, and that he intended that witness to be Solicitor General Theodore B. Olson.

(U) Comey and the other DoJ officials left the hospital at 20:10 and met at DoJ. They were joined there by Olson. During this meeting, a call came from the Vice President for Olson, which Olson took on a secure line in Comey's office while Comey waited outside. Comey told us he believes the Vice President effectively read Olson into the program during that conversation. Comey and Olson then went to the White House at about 23:00 that evening and met with Gonzales and Card. Gonzales told us that little more was achieved at this meeting than a general acknowledgement that a "situation" continued to exist because of the disagreement between DoJ and the White House regarding the program.

~~(S//NF)~~ White House Counsel Certifies
Presidential Authorization Without
Department of Justice Concurrence

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

~~(TS//STLW//SI//OC/NF)~~ The first significant difference between the 11 March 2004 Presidential Authorization and prior authorizations was the President's explicit assertion that the exercise of his Article II Commander-in-Chief authority "displace[s] the provisions of law, including the Foreign Intelligence Surveillance Act and chapter 119 of Title 18 of the United States Code (including 18 U.S.C. §2511(f) relating to exclusive means), to the extent of any conflict between the provisions and such exercises under Article II." Subsequent Presidential Authorizations did not include this particular language.

~~(TS//STLW//SI//OC/NF)~~ Second, to narrow the gap between the authority given on the face of prior authorizations and the actual operation of the program by the NSA, the terms governing the collection of telephony and Internet metadata were clarified. The underlying language for "acquiring" both telephony and Internet metadata remained as it had been, giving the NSA authority to "acquire" the metadata:

when (i) at least one party to such communication is outside the United States, (ii) no party to such communication is known to be a citizen of the United States, or (iii) based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are specific and articulable facts giving reason to believe that such communication relates to international terrorism, or activities in preparation therefor. [Presidential Authorization, 11 March 2004, para. 4(b).]

However, this language was now qualified by the following two subparagraphs:

(i) the Department of Defense may obtain and retain header/router/addressing-type information, including telecommunications dialing-type data, (b)(1), (b)(3) [REDACTED] provided that search and retrieval from such obtained header/router/addressing-type information, including telecommunications dialing-type data, shall occur only in accordance with this authorization; and

(ii) header/router/addressing-type information, including telecommunications dialing-type data, is "acquired" for purposes of subparagraph 4(b) above when, and only when, the Department of Defense has searched for and retrieved such header/router/addressing-type information, including telecommunications dialing-type data (and not when the Department obtains such header/router/addressing-type information, including telecommunications dialing-type data, such as (b)(1), (b)(3) [REDACTED] for retention). [Id. at para. 4(b)(i) & (ii).]

~~(TS//STLW//SI//OC/NF)~~ The 11 March 2004 authorization for the first time sought to make clear that the NSA could "obtain and retain" telephony and Internet metadata in bulk (b)(1), (b)(3) [REDACTED] but the metadata collected could only be queried ("acquired") in accordance with any of the three conditions set forth in paragraph 4(b). The language clarifying what the term "acquire" meant was included in every successive Presidential Authorization for the remainder of the program. [REDACTED]

(S) (S), (b)(1), (b)(3) [REDACTED]

~~(TS//SI//NF)~~ The third departure from prior authorizations was the inclusion of a statement that "the Attorney General of the United States approved as to form and legality [all prior Presidential Authorizations] authorizing the same activities as are extended by this authorization," (Id. at para. 10.)¹⁴

~~(TS//SI//NF)~~ Card informed Comey by telephone on the morning of 11 March 2004 that the President had signed the new authorization that morning. At approximately 12:00, Gonzales called Goldsmith to inform him that the President, in issuing the authorization, had made an interpretation of law concerning his authorities and that DoJ should not act in contradiction of the President's determinations.

~~(TS//SI//NF)~~ Also at 12:00 on 11 March, Mueller met with Card at the White House. According to Mueller's notes, Card summoned Mueller to his office to bring Mueller up-to-date on the events of the preceding 24 hours, including the briefing of the Congressional leaders the prior afternoon and the President's issuance of the new authorization without DoJ's certification as to legality. In addition, Card told Mueller that if no "legislative fix" could be found by 6 May 2004, when the 11 March 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 11 March 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 that he told Card that the failure to have DoJ 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.

~~(S//NF)~~ Several senior DoJ and FBI officials, including Comey, Goldsmith, and Mueller considered resigning after the 11 March 2004 Presidential Authorization was signed without DoJ's concurrence. These officials cited as reasons for considering resignation the manner in which the White House had handled its dispute with DoJ and the treatment of Ashcroft, among other reasons.

~~(S//NF)~~ On 12 March 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.

14
(S) (5)


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, but that based on subsequent events his resignation was not necessary.

~~(TS//SI//NF)~~ Mueller sent Comey a memorandum seeking guidance on how the FBI should proceed in light of developments related to the Presidential Authorizations. The memorandum asked whether FBI agents detailed to the NSA to work on the PSP should be recalled; whether the FBI should continue to receive and investigate tips based on (b)(1), (b)(3) and whether (b)(1), (b)(3)

b1, b3,
b7E

(U) On the morning of 12 March, Comey and Mueller attended 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." Comey told the President of DoJ's legal concerns regarding the PSP. According to Comey, the President's response indicated that he had not been fully informed of these concerns. Comey told the President that the President's staff had been advised of these issues "for weeks." 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."

~~(TS//SI//NF)~~ The President next met with Mueller. 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 directed Mueller to meet with Comey and other PSP principals to address the legal concerns so that the FBI could continue participating in the program "as appropriate under the law." Comey decided not to direct the FBI to cease cooperating with the NSA in conjunction with the PSP. Comey's decision is documented in a one-page memorandum from Goldsmith to Comey in which Goldsmith explained 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 the PSP, 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.

~~(TS//SI//NF)~~ The same day, an interagency working group was convened to continue reanalyzing the legality of the PSP. In accordance with the President's directive to Mueller, officials from the FBI, NSA, and CIA were brought into the process, although the OLC maintained the lead role. On 16 March 2004, Comey drafted a memorandum to Gonzales setting out Comey's advice to the President regarding the PSP. Comey advised that the President may lawfully continue (b)(1), (b)(3)

Comey further

wrote that DoJ remained unable to find a legal basis to support (b)(1), (b)(3) and he advised that such (b)(1), (b)(3)

Finally, Comey cautioned that he believed the ongoing collection of (b)(1), (b)(3) 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."

(U) Gonzales replied by letter on the evening of 16 March. The letter stated, in part:

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.

~~(TS//SI//NF)~~ White House Address to (b)(1), (b)(3)

~~(TS//SI//NF)~~ Notwithstanding Gonzales's letter, on 17 March 2004 the President decided to (b)(1), (b)(3)

The President's directive was expressed in two modifications to the 11 March 2004 Presidential Authorization.

~~(TS//STLW//SI//OC/NF)~~ On 19 March 2004, the President signed, and Gonzales certified as to form and legality, a modification of the 11 March 2004 Presidential Authorization. The modification made two significant changes to the current authorization and a third important change affecting all subsequent authorizations. First, the modification (b)(1), (b)(3)

Second, the modification (b)(1), (b)(3)

(b)(1), (b)(3) Third, the modification authorized

~~(TS//STLW//SI//OC/NF)~~ On 2 April 2004, President Bush signed, and Gonzales certified as to form and legality, a second modification of the 11 March 2004, Presidential Authorization. This modification addressed only (b)(1), (b)(3) of the PSP.

(b)(1), (b)(3)

~~(S//NF)~~ On 6 May 2004, Goldsmith and Philbin completed an OLC legal memorandum assessing the legality of the PSP as it was then operating. The memorandum stated that the AUMF passed by Congress shortly after the attacks of 11 September 2001 gave the President authority to use both domestically and abroad "all necessary and appropriate force," including SIGINT 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-Qa'ida and its affiliates, the entities responsible for attacking the United States, thereby supporting the President's directives to conduct these activities under the PSP. Much of the legal reasoning in the 6 May 2004 OLC memorandum was publicly released by DoJ in a "White Paper"—"Legal Authorities Supporting the Activities of the National Security Agency Described by the President"—issued on 19 January 2006 after the content

(b) (5), (b) (1), (b) (3)

(b)(1), (b)(3)

collection portion of the program was revealed in *The New York Times* and publicly confirmed by the President in December 2005.

**(U) Restrictions on Access to the
President's Surveillance Program
Impeded Department of Justice Legal Review**

~~(TS//SI//OC/NF)~~ The DoJ IG found it extraordinary and inappropriate that a single DoJ attorney, John Yoo, was relied upon to conduct the initial legal assessment of the PSP, and that the lack of oversight and review of Yoo's work, which was contrary to the customary practice of OLC, contributed to a legal analysis of the PSP that, at a minimum, was factually flawed. Deficiencies in the legal memorandums became apparent once additional DoJ attorneys were read into the program in 2003 and those attorneys sought a greater understanding of the PSP's operation. The White House's strict controls over access to the PSP undermined DoJ's ability to provide the President the best available advice about the program. The DoJ IG also concluded that the circumstances plainly called for additional DoJ 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. However, the DoJ OIG could not determine whether Ashcroft aggressively sought additional read-ins to assist with DoJ's legal review of the program prior to 2003 because Ashcroft did not agree to be interviewed.

**(U) TRANSITION OF PRESIDENT'S SURVEILLANCE
PROGRAM ACTIVITIES TO FOREIGN INTELLIGENCE
SURVEILLANCE ACT AUTHORITY**

~~(TS//SI//NF)~~ Internet Metadata Collection
Transition to Operation Under FISA Authority

~~(TS//SI//OC/NF)~~
(b)(1), (b)(3)



~~(TS//SI//NF)~~ The government's FISA application, entitled "Application for Pen Registers and Trap and Trace Devices for Foreign Intelligence Purposes," was filed

(b)(1), (b)(3)



The application package included:

- A proposed order authorizing the collection activity and secondary orders mandating carriers to cooperate.
- A declaration by Hayden explaining the technical aspects of the proposed Internet metadata collection and identifying the government official