

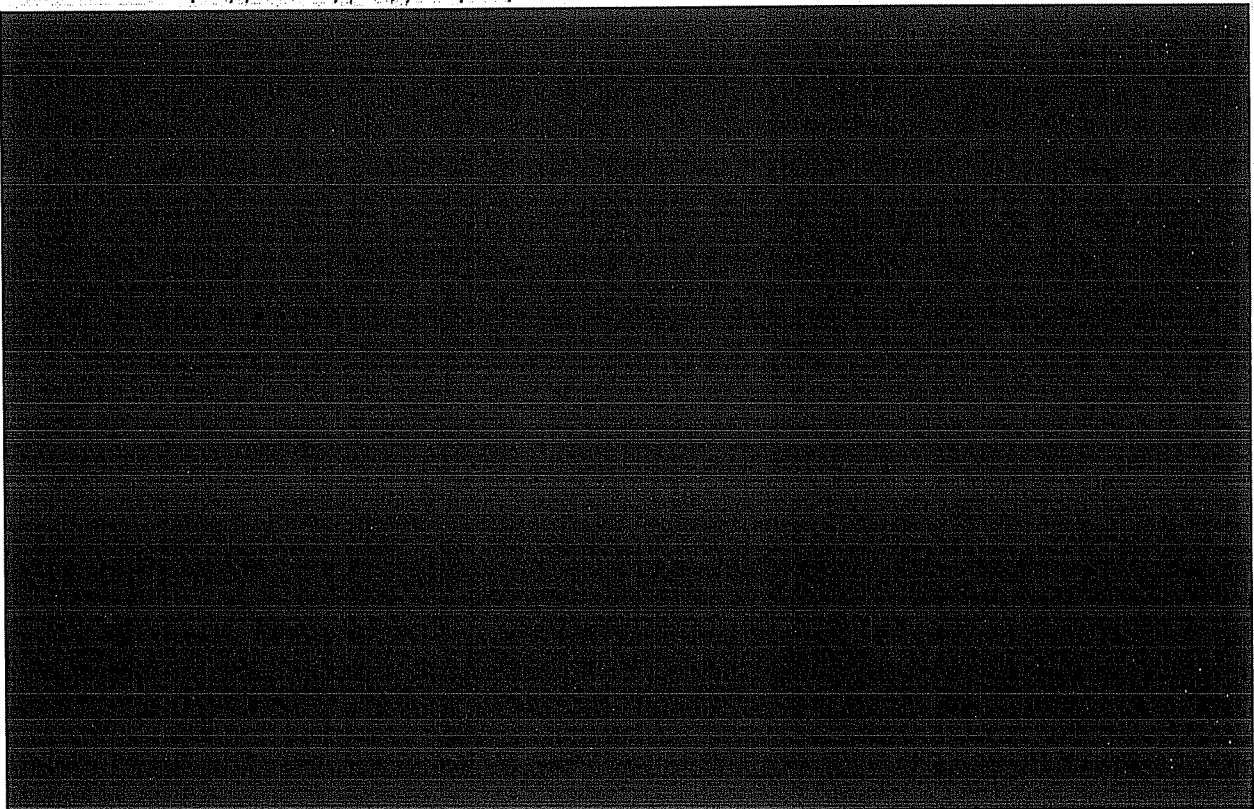
disseminated from a subfile associated with the FBI's international terrorism investigation of the September 11 attacks. In the EC requesting that a control file be opened for Stellar Wind information, the CAU Unit Chief wrote that "a dedicated control file for this project will better serve the specific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

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

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

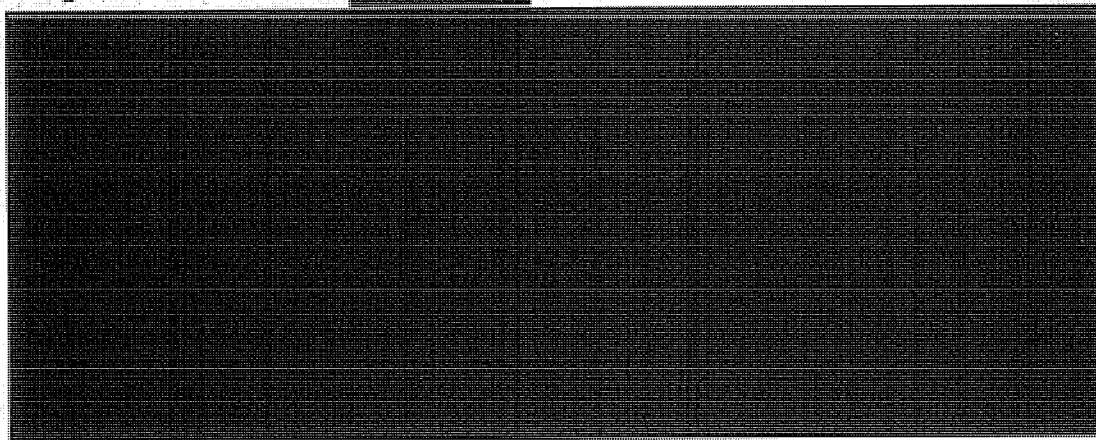
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Several months later, in January 2003, the CAU Unit Chief sent an EC to all FBI field offices seeking "to clarify the mission of [CAU] . . . as well as to describe this unit's distinct role in the FBI's participation in the global war on terror." The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

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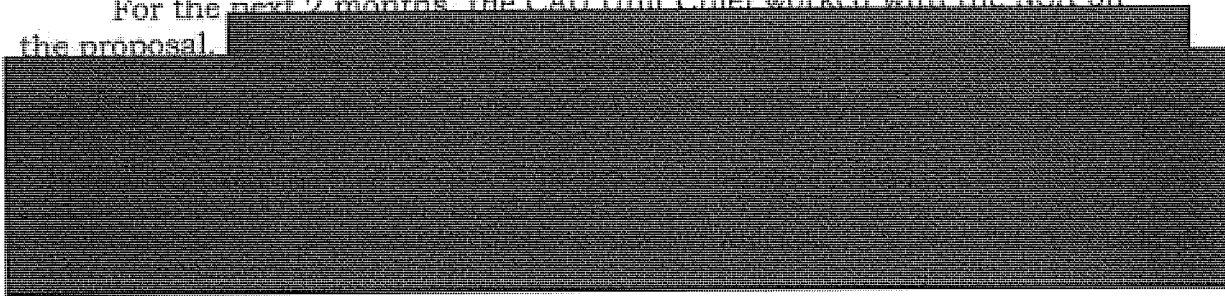
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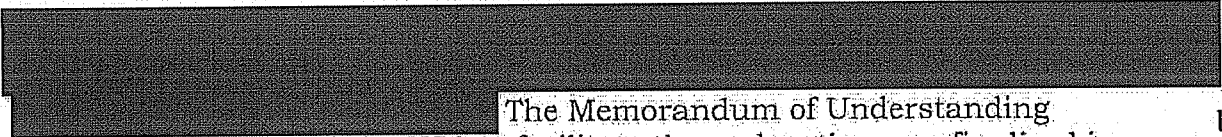
C. FBI Assigns CAU Personnel to NSA on Full-Time Basis
~~(S//NF)~~

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

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



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

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b7E

VI. OIG Analysis (U)

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

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

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

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

September 2001 through May 2003.¹⁰⁹ As described in Chapter Four, Department officials who succeeded Yoo concluded that the analysis Yoo produced was significantly flawed and found the legal basis for aspects of the program to be lacking. We believe that reading in only one Department attorney to analyze the legality of the program impeded the Department's ability to conduct a thorough and factually accurate legal analysis, and undermined the Department's early role in the program. In Chapter Four we discuss the harm that resulted in late 2003 and early 2004 from the Department's highly restricted access to the program. ~~(TS//SI//NF)~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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b7E

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

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

~~TOP SECRET//STLW//HCS/SI//ORCON/NOFORN~~

~~TOP SECRET//STLW//HCS/SI//ORCON/NOFORN~~

CHAPTER FOUR

LEGAL REASSESSMENT OF STELLAR WIND

(MAY 2003 THROUGH MAY 2004) ~~(TS//SI//NF)~~

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

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

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

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

A. Overview of Office of Legal Counsel (U)

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

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

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

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

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

On September 11, 2001, and through November 2001, Daniel Koffsky was the Acting Assistant Attorney General for OLC. Koffsky was not read into the Stellar Wind program. Jay Bybee served as Assistant Attorney General for OLC from November 2001 until March 2003, when he became a judge on the U.S. Court of Appeals for the Ninth Circuit.¹¹² Bybee also was never read into the Stellar Wind program. As discussed in Chapter Three, John Yoo, a Deputy Assistant Attorney General in OLC, had sole responsibility within that office and within the Department of Justice for developing the legal analysis relating to the Stellar Wind program until May 2003.¹¹³ Bybee told us he was not aware at the time that Yoo was drafting legal opinions in connection with a compartmented program. ~~(TS//SI//NF)~~

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

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

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

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

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

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

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

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

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

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

(Cont'd.)

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

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

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

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

Goldsmith also told us the White House had wanted Yoo to replace Bybee as the Assistant Attorney General for the Office of Legal Counsel following Bybee's confirmation as a judge on the Ninth Circuit, but that Ashcroft blocked the move. Yoo resigned from the Department in May 2003.¹¹⁶ (U)

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

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

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

(Cont'd.)

2. Philbin Replaces Yoo (U)

Patrick Philbin joined the Department as a Deputy Assistant Attorney General in the Office of Legal Counsel on September 4, 2001.¹¹⁷ He was read into the Stellar Wind program in late May 2003, just before Yoo left the Department. Philbin said that he, accompanied by Yoo, was read into the program by Addington in Addington's office in the Old Executive Office Building. Philbin told us that Addington provided an overview of the program, describing the two basic categories of collection as "content" and "meta data." Philbin said that later, based on his legal analysis of the Stellar Wind program, he developed the "three baskets" terminology to describe more specifically the three types of collections.

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

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

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

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

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

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

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

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

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

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

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

(b) (5) (b) (7) (b) (3)



(b) (5)

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

Second, and more significantly, Philbin stated that

(b) (5)

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

(b) (5)

(b) (5)

(b) (5)

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

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

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

¹²¹ In fact, as discussed in Chapter Five, the reasonable articulable suspicion standard was the only standard the government sought to apply to its authority to query the e-mail meta data collection after basket 3 of Stellar Wind was placed under FISA authority in July 2004. ~~(TS//STLW//SI//OC/NF)~~

(b) (5)

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

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

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

4. Problems with

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

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

In addition to the flaws Philbin identified in Yoo's legal analysis, Philbin told us he grew increasingly concerned that

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

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

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

(b) (5)



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



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

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



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

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

5. Other Collection Concerns (S//NF)

Philbin told us that during the summer of 2003 he identified other concerns about the Stellar Wind program. First, Philbin said he began to believe that the existing OLC memoranda failed to describe the

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

Philbin said he also had concerns over

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

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

6. Decision to Draft New OLC Memorandum (U)

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

¹²³ As described later in this chapter, the term "acquired" was not clarified until the March 11, 2004, Presidential Authorization. That Authorization stated that meta data was "acquired" . . . 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) for retention)."

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

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

¹²⁴

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

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

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

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

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

1. Goldsmith Becomes OLC Assistant Attorney General (U)

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

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

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

¹²⁵ Philbin said that he was not certain at the time that Ashcroft fully understood the ~~(b)(1), (b)(3)~~ because the subject matter was "difficult." Philbin also stated that for "client management" purposes, he needed to first make sure that he too fully understood the issues before raising his concerns to others. He said he did not just want to be "a naysayer" identifying problems, but also wanted to propose solutions. He said that the program would be examined by Congress one day and that the legal analysis had to be "carefully done to protect the President." Philbin said he therefore believed that the OLC legal memoranda had to be rewritten to achieve that objective. Philbin told us he also was concerned that the program not appear like a "rogue operation," but rather as a responsible approach to collecting intelligence with adequate controls and oversight. In this regard, Philbin emphasized that it would be important to demonstrate that the program had appropriate restrictions based on the law, and that the restrictions guarded against abuses. ~~(TS//SI//NF)~~

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

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

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

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

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

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

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

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

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

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

The OIG also interviewed (b) (6), (b) (3) the NSA's Associate General Counsel for Operations during Yoo's and Goldsmith's tenure in OLC. (b) (3), (b) (6) told us that he was not troubled by the fact that other senior NSA officials had been denied access to Yoo's legal memoranda, and that he felt no need to review them. (b) (3), (b) (6) stated that his primary concern with respect to the legality of the program was whether "Justice was comfortable with it." (b) (3), (b) (6) also stated that he assumed that the Justice Department would find the program legal by resolving the tension between FISA and the President's inherent Commander-in-Chief authority based upon the doctrine of constitutional avoidance. (TS//STLW//SI//OC/NF)

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

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

(TS//SI//NF)

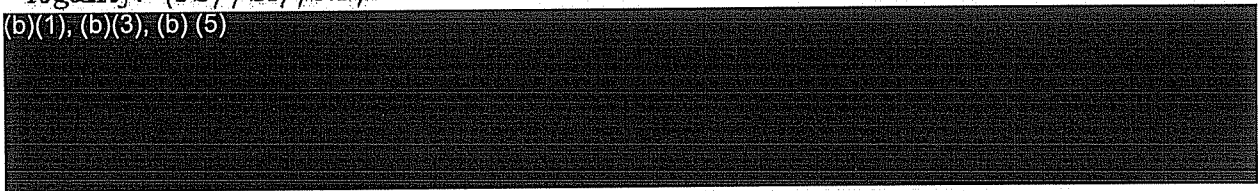
Goldsmith told us that upon becoming the Assistant Attorney General he intended to reverse the practice of keeping OLC memoranda closely held, and that he also decided he would seek client agency expertise in drafting these documents. (U)

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

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

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

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



¹²⁸
(b)(1), (b)(3), (b)(5)



(Cont'd.)

(b) (5)



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

4. AUMF Becomes the Primary Legal Rationale
Supporting ~~(b) (5)~~ of the Stellar Wind
Program (TS//STLW//SI//OC/NF)

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



Goldsmith concluded the NSA's interception of ~~(b) (1), (b) (3)~~

~~(b) (5)~~ did not comply with FISA's requirement to obtain judicial authorization, and did not fall within any of the exceptions to this requirement. Goldsmith later wrote in his legal memorandum reassessing the legality of the program that a proper analysis

(b) (5)



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

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(b) (5)



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

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

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


(b) (5)



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

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



¹³¹ In his May 6, 2004, memorandum, Goldsmith concluded that if the  (b)(1), (b)(3) arguments under the AUMF did not create sufficient ambiguity as to trigger the doctrine of constitutional avoidance, FISA as applied would represent an unconstitutional infringement on the President's exclusive authority as Commander-in-Chief in wartime to protect the nation from attack. (TS//STLW//SI//OC/NF)

(b) (5), (b) (7), (b) (3)

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

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

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

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

(b) (5), (b) (7), (b) (3)

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

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

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

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

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

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

Philbin told us he recalled that Addington in particular was "annoyed" with the OLC's preliminary conclusion that [REDACTED]
(b) (5), (b) (1), (b) (3)

[REDACTED] Philbin said that Addington nevertheless told him and Goldsmith to continue analyzing the program and that if serious problems were found, the program would be shut down. ~~(TS//STLW//SI//OC/NF)~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

First, Goldsmith expressed his belief that the [REDACTED]
(b)(1), (b)(3), (b)(5)

Philbin said they explained to Addington and Gonzales the importance of briefing the President on this new legal approach to justifying the program.

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

Second [REDACTED]
(b)(5)

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

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

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



However, according to Gonzales, Goldsmith's conclusion
(b) (5), (b) (1), (b) (3)



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

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

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



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

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

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

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

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

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

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

Goldsmith's account of the response to Gonzales's request was similar. Goldsmith also stated that his and Philbin's conclusion that Yoo's memoranda failed to adequately describe the (b)(1), (b)(3) meant that OLC could not tell the White House that the program could continue under the authority of those legal memoranda. Goldsmith stated that he and Philbin realized at this point that the program had been conducted for 2 years without a proper OLC review. Specifically, both Goldsmith and Philbin stated that they had always viewed Yoo's legal analysis as poorly reasoned; however, they were now realizing that Yoo's factual description of the program was inaccurate and incomplete as well, and thus did not "cover" aspects of the program. Goldsmith said Gonzales's request for ratification of Yoo's memoranda "forced [the Office of Legal

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

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

On Saturday, March 6, 2004, Goldsmith and Philbin advised Comey that they believed the ~~(b) (5), (b)(1), (b)(3)~~

~~(b) (5), (b)(1), (b)(3)~~ Goldsmith also told Comey that the White House would have to be notified of this development. Comey agreed with this recommendation. ~~(TS//STLW//SI//OC/NF)~~

Later on March 6, Goldsmith and Philbin went to the White House to meet with Addington and Gonzales to convey their conclusions that the ~~(b) (5), (b)(1), (b)(3)~~

According to Goldsmith's chronology of these events, Addington and Gonzales "reacted calmly and said they would get back with us." Goldsmith told us that the White House was now worried that it was "out there," meaning that it was implementing a program without legal support. ~~(TS//STLW//SI//OC/NF)~~

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

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

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

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

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

(Cont'd.)

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

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

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

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

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

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

support for the program and [REDACTED] (b) (5), (b) (1), (b) (3). Flood objected to the question on relevancy grounds and advised Gonzales not to answer, and Gonzales did not provide us an answer. However, when Gonzales commented on a draft of this report, he stated that he would not have brought Goldsmith and Philbin's "concerns" to the attention of the President because there would have been nothing for the President to act upon at that point. Gonzales stated that this was especially true given that Ashcroft continued to certify the program as to legality during this period. Gonzales stated he generally would only bring matters to the President's attention if the President could make a decision about them. (TS//STLW//SI//OC/NF)

¹⁴⁸
(b) (5), (b) (1), (b) (3)

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