



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



On  Yoo orally recommended to Ashcroft that the Justice Department not disclose the Stellar Wind program intercepts to the  Yoo subsequently memorialized his advice in a memorandum. ~~(TS//STLW//SI//OC/NF)~~

b1, b3, b6,
b7C, b7E

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



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b3,
b6,
b7C,
b7E

[REDACTED]

Yoo finished his written memorandum regarding [REDACTED]

410

(b)(1), (b)(3), (b)(5) - NSD AWP and A/C

[REDACTED]

b1,
b3,
b6,
b7C,
b7E

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

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

[REDACTED]

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b3,
b6,
b7C,
b7E

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

[REDACTED]

b1, b3,
b6, b7C,
b7E

(b) (5)

411

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

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

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b6,
b7C,
b7E

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

As a final point, Yoo wrote,

(b) (5)

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

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

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b6,
b7C,
b7E

411

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

b1, b3,
b6, b7C,
b7E

412 At the time Yoo wrote the ~~(b)(1), (b)(3)~~ memorandum, he, Baker, and Ashcroft were the only non-FBI Justice Department officials read into the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

b1, b3, b7E

413

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

b1,
b3,
b7E

414

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

(Cont'd.)

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

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b7E

In another internal Justice Department review of his actions, Yoo has acknowledged that he is not well versed in criminal law. During an interview with the Department's Office of Professional Responsibility (OPR) in connection with its investigation concerning his legal opinions in support of a detainee interrogation program, Yoo stated that "criminal prosecution process in the Department was not my specialty," and "criminal law was not my area."⁴¹⁵ ~~(TS//SI//OC/NF)~~

III. Criminal Division Examines Discovery Issues (U)

Following ~~(b)(1), (b)(3)~~ the Justice Department's Criminal Division was tasked with developing procedures for handling Rule 16 disclosure issues because the issues fell within its area of expertise. As a result, in ~~(b)(1), (b)(3)~~ Patrick Rowan, a senior counsel in the Criminal Division, was read into the program to deal with Stellar Wind-related discovery issues. Rowan's supervisor, Criminal Division Assistant Attorney General Christopher Wray, was also read into the program at the same time.

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b7C, b7E

(b)(5)

b1, b3,
b6, b7C,
b7E

⁴¹⁵ The OPR investigation concerned a Top Secret compartmented program relating to detainee interrogations. Yoo drafted legal opinions for this program while in the Office of Legal Counsel. However, as discussed in Chapter Four, in contrast with the Stellar Wind program at least four other OLC attorneys assisted Yoo with drafting the legal memoranda. Yoo was also able to consult with Criminal Division attorneys and the client agency on this matter. ~~(TS//STLW//SI//OC/NF)~~

Wray and Rowan were the first Department attorneys with Criminal Division-level responsibility for terrorism prosecutions to be read into the program. ~~(TS//STLW//SI//OC/NF)~~

Wray told the OIG that after his and Rowan's read-in, they "were kind of left on our own." He said that no one directed him or Rowan to continue studying the Rule 16 issues or the government's *Brady* obligations in connection with international terrorism prosecutions, nor did anyone tell them to develop any judgments or opinions on the subject. (U)

Wray told us that at some point after his read-in he may have read Yoo's ~~(b)(1), (b)(3)~~ memorandum on the Department's discovery obligations in ~~(b)(1), (b)(3)~~ and he instructed Rowan to review the memorandum. Rowan told us that he was familiar with Yoo's memorandum, but stated that he could not recall whether the purpose of Yoo's memorandum was to lay out in general the pertinent legal issues or to document how ~~(b)(1), (b)(3)~~ in particular was to be handled. Rowan told us that he did not recall having any problems with the conclusions Yoo reached. ~~(TS//STLW//SI//OC/NF)~~

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b6, b7C,
b7E

A. The "Informal Process" for Treating Discovery Issues in International Terrorism Cases (U)

During his OIG interview, Rowan described the processes at the Department prior to the December 2005 disclosure of aspects of the Stellar Wind program in The New York Times to address discovery obligations with respect to Stellar Wind-derived information. He said that the NSA was generally aware of the Justice Department's international terrorism criminal cases, at least in part due to NSA's ongoing contacts with Patrick Philbin and others in the Department. According to Rowan, the NSA's general awareness of the Department's international terrorism docket amounted to an "informal process" for spotting cases that may present discovery issues. Rowan stated that prosecutors in U.S. Attorney's Offices typically would request the NSA to perform "prudential searches" of its databases for any relevant information concerning their prosecutions, including for discovery purposes, although this did not happen in every international terrorism case. Rowan stated that if the NSA located any responsive but classified information, it would be expected to notify senior Justice Department officials with the requisite clearances about the information. Rowan said he was confident that if *Brady* information were known to the NSA, it would be brought to the attention of the Department and steps would have been taken to dismiss the case or otherwise ensure the program was not disclosed. ~~(TS//STLW//SI//OC/NF)~~

In addition to these routine communications between Department prosecutors and the NSA in criminal prosecutions, Rowan described other

measures that were in place to keep Stellar Wind-derived information out of the criminal prosecution process. He stated that the FBI had "walled off" any evidence it collected from inclusion in criminal cases by tipping out Stellar Wind-derived information under [REDACTED] with a caveat that the information in the tipper was "for lead purposes only." Rowan noted that OIPR also had in place a scrubbing process to delete program-derived information from FISA applications. Rowan expressed confidence that these mechanisms ensured that no program information was used in international terrorism prosecutions.⁴¹⁶ Finally, Rowan stated that the FBI is "very quick to get FISAs up," thereby minimizing the likelihood that the NSA's Stellar Wind database would be the sole repository of *Brady* material. (TS//STLW//SI//OC/NF)

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b7E

B. (b) (5) [REDACTED] Memorandum Analyzing Discovery Issues Raised by the Stellar Wind Program (TS//STLW//SI//OC/NF)

At the direction of Assistant Attorney General Wray, Rowan memorialized his research regarding these discovery issues in a memorandum entitled [REDACTED]
(b) (5)

[REDACTED] Rowan said he worked on the memorandum largely alone, consulting occasionally with Wray. Rowan said it was very difficult to work on the matter because of the secrecy surrounding the program and the other demands of his job.⁴¹⁷ (TS//STLW//SI//OC/NF)

In his (b) (5) memorandum, [REDACTED]
(b) (5)

⁴¹⁶ As discussed in Chapter Six, the caveats were intended to exclude at the outset any Stellar Wind-derived information from FISA applications and other criminal pleadings. The scrubbing process acts as a second check against including this information in FISA applications. However, neither the caveats nor the scrubbing process relieved the government of its obligations under *Brady* to disclose evidence in the government's possession favorable to the defendant and material to either guilt or punishment. (TS//STLW//SI//OC/NF)

⁴¹⁷ The memorandum noted, "Because there were no additional attorneys within the Criminal Division who were read into the program (and very few in the Department generally), we have been unable to assign work to others or to fully consult with others within the Division." (TS//SI//NF)

(b) (5)

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(b) (5)



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b3,
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(b) (5)



b1,
b3,
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Rowan's memorandum also referred to guidance in the United States Attorney's Manual (USAM). For cases in which the Intelligence Community had no active involvement in the criminal investigation, the USAM stated that there are two circumstances in which the prosecutor must conduct a "suitable search" of Intelligence Community files: (1) where the prosecutor has "direct or reliable knowledge" that the Intelligence Community

b1, b3, b6,
b7C, b7E

(b) (5)



possesses potential *Brady* or other discovery material; or, (2) in the absence of such knowledge, where "there nonetheless exists any reliable indication suggesting" that the Intelligence Community possesses such material. USAM, Criminal Resources Manual § 2052 (2002). The USAM stated that, as a general rule, a prosecutor should not seek access to Intelligence Community files unless there is an affirmative obligation to do so. However, it noted that certain types of cases, including terrorism prosecutions, fall outside this general rule. In such cases, the USAM advised that the prosecutor should conduct a "prudential search." *Id.*

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

Rowan wrote that the practice in several sections within the Criminal Division was to "generally go beyond both the legal obligations outlined [in his memorandum] and the general rule outlined in the USAM, initiating searches out of prudence, rather than a legal obligation." For instance, Rowan reported that the practice of the Criminal Division's Counterespionage Section (CES) was to search Intelligence Community files in almost every case, even in instances in which the Intelligence Community had no involvement in the investigation or prosecution [REDACTED]

(b) (5)

420

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

(b) (5)

421 In cases involving the NSA, the typical practice

420 The OIG interviewed John Dion, the Chief of CES, which became part of the National Security Division in 2006. [REDACTED]

(b) (5)

[REDACTED] Dion stated that such searches are conducted in cases in which there is likely to be intelligence collection concerning the defendant as "suggested by the facts of the matter." He added that the searches were requested for a variety of reasons, including for purposes of meeting discovery obligations. Dion said that searches also were requested to determine whether the defendant has a "relationship" with an intelligence agency. He noted that CES does not request prudential searches as a matter of course to avoid making spurious requests. ~~(S//NF)~~

421 [REDACTED]

(b) (5)

[REDACTED] Dion said CES was a proponent of the position that line prosecutors with whom CES co-prosecutes cases should have the same knowledge as CES concerning the "national security equities" involved in each case. Dion said this arrangement also allows for the AUSA, who is often the prosecutor most familiar with the case and the jurisdictional practices, to review any Intelligence Community material for Rule 16 and *Brady* purposes. Dion acknowledged the limitations to this arrangement concerning strictly compartmented programs such as Stellar Wind, where the NSA understandably would be reluctant to read in line prosecutors for the limited purpose of screening defense discovery requests. ~~(TS//STLW//SI//OC/NF)~~

was for the CES attorney to use the provisions of CIPA to prevent disclosure of sensitive material. Rowan noted that other sections within the Criminal Division also relied on CIPA to protect Intelligence Community files found during searches. ~~(TS//SI//OC/NF)~~

(b) (5)



(b) (5)



Thus, although Rowan's memorandum did not contain a proposal for handling discovery requests in cases involving Stellar Wind, it identified key legal issues that would have to be addressed as a part of any such proposal.

(b) (5)



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

⁴²² When Rowan became principally responsible for coordinating the Department's responses to defense discovery requests as a Deputy Assistant Attorney General in the (Cont'd.)

C. Office of Legal Counsel and Discovery Issue (U)

Shortly before Rowan finished his memorandum in (b) (5) OLC Principal Deputy Assistant Attorney General Steve Bradbury became the acting head of OLC. Bradbury told us that he recalled having some discussion with Rowan about how discovery matters should be handled in connection with the Stellar Wind program. Bradbury said that John Eisenberg, later a Deputy in OLC, also may have discussed the matter with Rowan. Bradbury stated that he did not believe that OLC followed up on Rowan's request that it continue researching these issues.

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

Eisenberg told us that he discussed the Rule 16 issue with Rowan at some point, but did not recall whether they discussed the *Brady* issue. He recalled discussing Yoo's (b) (1), (b) (3) memorandum with Rowan and said he believes the Justice Department took the position that the Yoo memorandum was correct, at least with respect to Yoo's legal analysis in (b) (1), (b) (3).

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b6, b7C,
b7E

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

When we showed Eisenberg a copy of Rowan's (b) (5) memorandum, Eisenberg stated that he had not previously seen it. Eisenberg told us that OLC would not typically be responsible for addressing the discovery issues presented in Rowan's memorandum and that he was not aware of any OLC opinion on the subject other than Yoo's memorandum. Eisenberg also said he was not aware of any formal procedures for handling Rule 16 disclosure requests or the government's affirmative *Brady* obligations other than the *ex parte* in camera motions practice pursued by the National Security Division, discussed below.

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

CES Chief Dion agreed that OLC would not be the appropriate entity to review discovery procedures in the context of Stellar Wind, in part because OLC attorneys generally do not have criminal litigation expertise. Dion suggested that if the Department were to develop procedures for handling discovery of Intelligence Community files, it should be done by the Department's National Security Division in coordination with United States Attorneys' Offices, and it should be binding only on those two entities. Rowan, while generally agreeing with Dion, told the OIG that he believed the OLC appropriately could have analyzed the legal issue of what impact a

National Security Division in 2006. (b) (5)

The results of these searches were produced to the courts *ex parte*, in camera, pursuant to CIPA. ~~(TS//STLW//SI//OC/NF)~~

guilty plea would have on the government's *Brady* obligations.

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

Wray also told us that there was no organized Departmental effort to establish formal procedures for reviewing international terrorism prosecutions to comply with Rule 16 disclosure requests and *Brady* obligations. He said "the thinking was" that the Rowan memorandum was the "first step" toward devising "some kind of systematized process" for such reviews. However, we found no indication that OLC followed up on Rowan's request to further study these discovery issues with any kind of written product. ~~(TS//STLW//SI//OC/NF)~~

IV. Use of the Classified Information Procedures Act (CIPA) to Respond to Discovery Requests (U)

After publication of The New York Times articles in December 2005, the Justice Department received numerous discovery requests in connection with international terrorism prosecutions throughout the country. After these articles, additional officials in the Criminal Division were read into the Stellar Wind program, including the new Assistant Attorney General Alice Fisher and other senior officials, both to assist with the Criminal Division's investigation into the leak of information to The New York Times and to handle the discovery requests following the public confirmation of the program by the President and other Administration officials in December 2005.⁴²³ After the National Security Division was created in September 2006, it assumed much of the responsibility for handling the responses to discovery requests. ~~(TS//STLW//SI//OC/NF)~~

Typically, the defense motions sought to compel the government to produce information concerning a defendant that had been derived from the "Terrorist Surveillance Program," the term sometimes used by the government to refer to what the President confirmed after publication of The New York Times articles. The government responded to the discovery requests by filing *ex parte* in camera responses requesting to "delete items" from material to be produced in discovery pursuant to CIPA. ~~(S//NF)~~

In the following sections we provide a brief overview of CIPA and its use in international terrorism cases potentially involving Stellar Wind-derived intelligence. ~~(TS//STLW//SI//OC/NF)~~

423
~~(b)(3)~~

A. Overview of CIPA (U)

The Classified Information Procedures Act, 18 U.S.C. App. 3, was enacted in 1980 to provide procedures for protecting classified information in federal criminal prosecutions. When a party to a criminal proceeding notifies the court that classified information will be used in the course of the proceeding, CIPA requires the court to initiate procedures to "determine the use, relevance, or admissibility of the classified information that would otherwise be made during the trial or pretrial proceeding." 18 U.S.C. App. 3 § 6(a). Where the government holds the classified information, it may bring the matter before the court *ex parte*, but it also must provide notice to the defense that classified information is at issue. *Id.* at § 6(b)(1). (U)

Protective procedures generally are established through a CIPA hearing with both parties present. The hearing may be conducted in camera if the government certifies that an in camera hearing is necessary to protect the classified information. *Id.* at § 6(a). Typically, the government seeks an order to protect against the disclosure of any classified information to the defense. The government may also seek to withhold production of the classified information in one of three ways: (1) deletion of the classified items from the material disclosed to the defendant, (2) summarization of the classified information, or (3) admission of certain facts that the classified information would tend to prove. *Id.* at § 4. Based on the OIG's review of CIPA filings related to the Stellar Wind program, the government has only used option 1 (deleting classified items from material to be disclosed to the defendant) in response to defense motions for Stellar Wind information.

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

To prevent the disclosure of classified information, the government may make an *ex parte* showing to the court. To do so the government must submit "an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information." *Id.* at § 6(c)(2). If the court decides that the defendant's right to access to the evidence outweighs the government's national security interests, the government can choose to dismiss the indictment rather than make a disclosure. *United States v. Moussaoui*, 382 F.3d 453, 466 n. 18, 474-76 (4th Cir. 2004). (U)

B. Use of CIPA in International Terrorism Prosecutions Alleged to Involve Stellar Wind-Derived Information

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

We reviewed the CIPA pleadings files maintained in the National Security Division relating to the Stellar Wind program. In almost every instance, the CIPA litigation was handled by the National Security Division

without the involvement of the line prosecutors in the U.S. Attorney's Offices who handled the underlying prosecutions but who were not read into the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

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

Rowan, who became the National Security Division Acting Assistant Attorney General in April 2008 and was confirmed as the Assistant Attorney General in September 2008, told us that

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

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

The scope and nature of the defense motions initiating the CIPA litigation varied, depending on the procedural posture of the case. For instance, some defense motions sought to compel discovery of NSA surveillance information, while others sought to suppress all government evidence and, in the alternative, have the government's case dismissed on the theory that illegal electronic surveillance caused the government to initiate its criminal investigation in the first instance.

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

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

Regardless of the varying procedural posture of the cases and the scope and nature of the defense motions, the government responses we examined were fairly uniform, consisting of a motion to delete items from discovery, a legal memorandum in support of the motion, declarations from senior FBI and NSA officials, and a proposed order.

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

(b)(3)

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

The government's CIPA submissions asserted that the information at issue in the discovery litigation was classified and subject to the national security privilege as codified in CIPA. They generally described the types of information its searches of intelligence databases (including Stellar Wind) might reveal. (b)(3)

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



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



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

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The government's responses we reviewed uniformly stated that information in the NSA's intelligence reports had not been or would not be used as evidence, and that there was no causal connection between the information in the reports and any evidence used or to be used at trial, or was too attenuated from the evidence to be discoverable. The government argued that because the facts concerning the NSA's reporting would not aid the defense, the court need not explore the sources and methods used to acquire the information. The submissions also argued that the information collected by the NSA was not included in the government's FISA application, and therefore was too attenuated from the trial evidence to merit a review of the means by which the intelligence information was gathered. The government asserted that the "causal connection" between discovery of the derivative evidence and the alleged illegal search "may have become so attenuated as to dissipate the taint."⁴²⁵ It is important to note that the government did not argue in the CIPA responses we reviewed that [REDACTED]

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

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C. Government Arguments in Specific Cases (U)

In this section we describe [REDACTED] cases that illustrate the arguments made by the government in CIPA litigation with respect to defendant's requests for discovery of Stellar Wind-derived information.

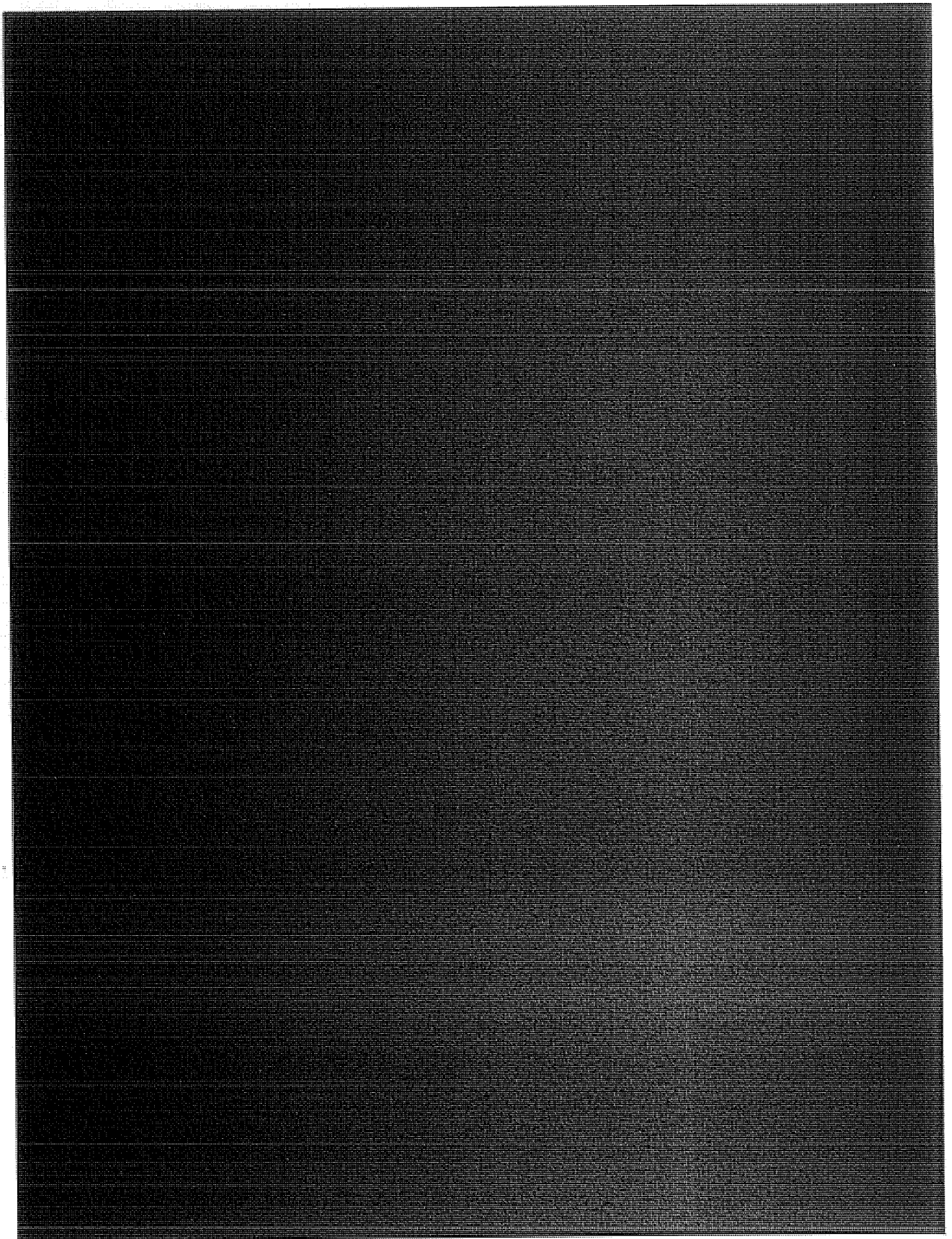
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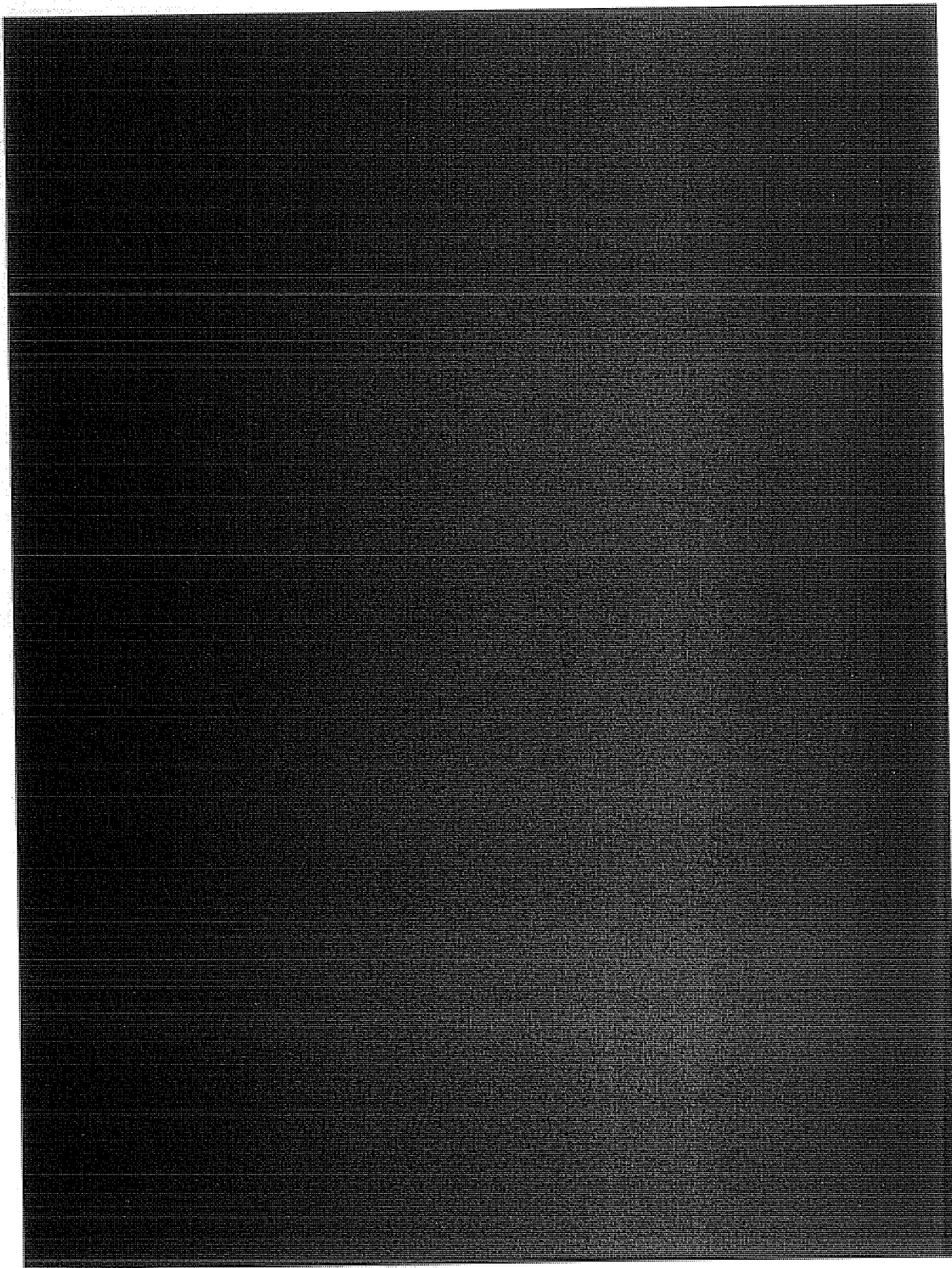
⁴²⁵ In several instances, the Stellar Wind information was disseminated within the FBI after the FBI already had obtained a FISA order to conduct electronic surveillance of the defendant, thus allowing the government to argue that the NSA reporting played no role in its acquisition of the evidence used or planned to be used against the defendant.

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

⁴²⁶ *Nardone v. United States*, 308 U.S. 338, 341 (1939). The government also argued in its submissions that suppressing its evidence would not serve any deterrence purpose. The government argued that the NSA acquires, processes, and disseminates intelligence not to produce criminal prosecutions, but to protect the national security. It asserted that any suppression of evidence would therefore frustrate a criminal prosecution and create an incentive for the intelligence community not to share information with law enforcement, thereby harming national security. (TS//SI//OC/NF)



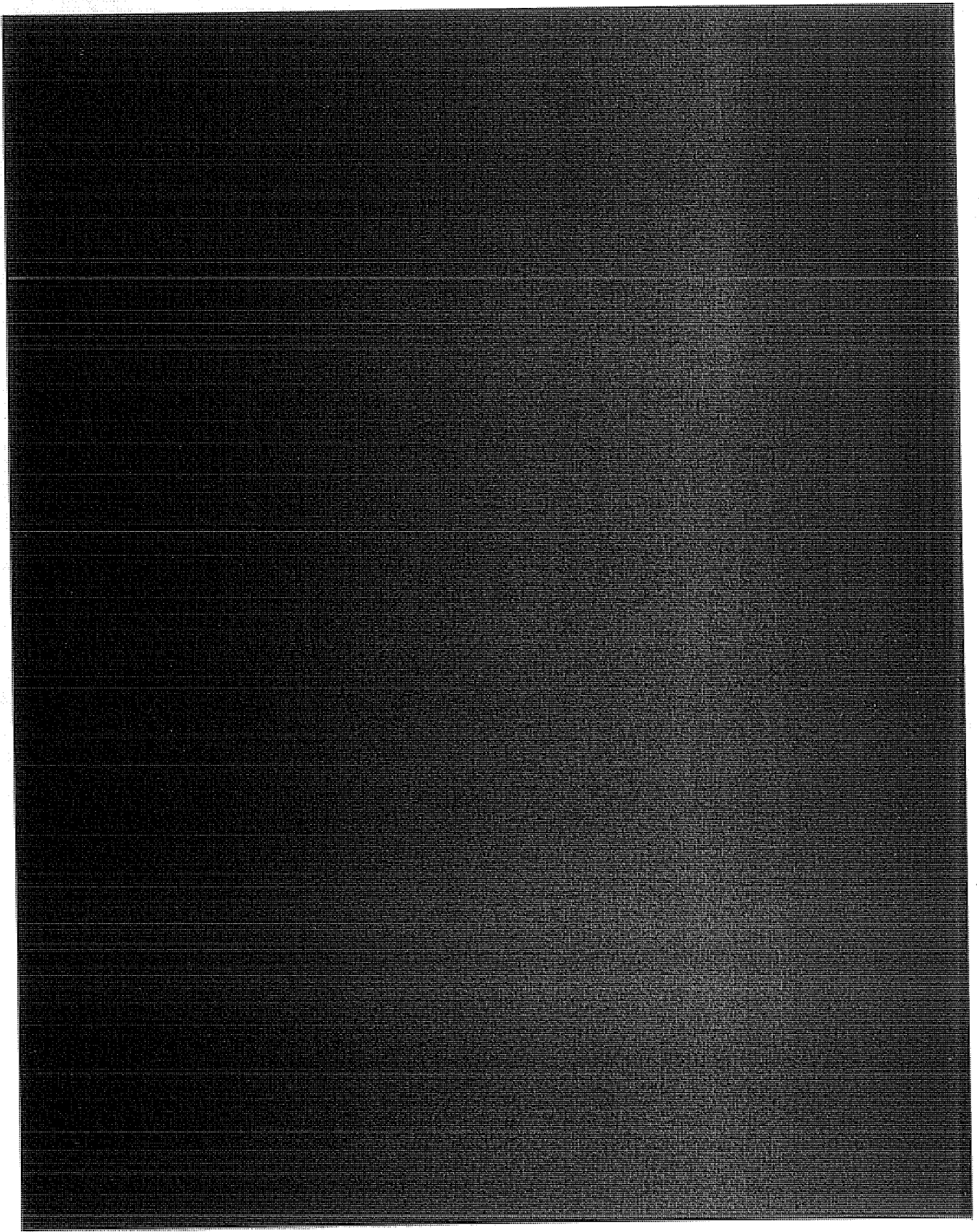
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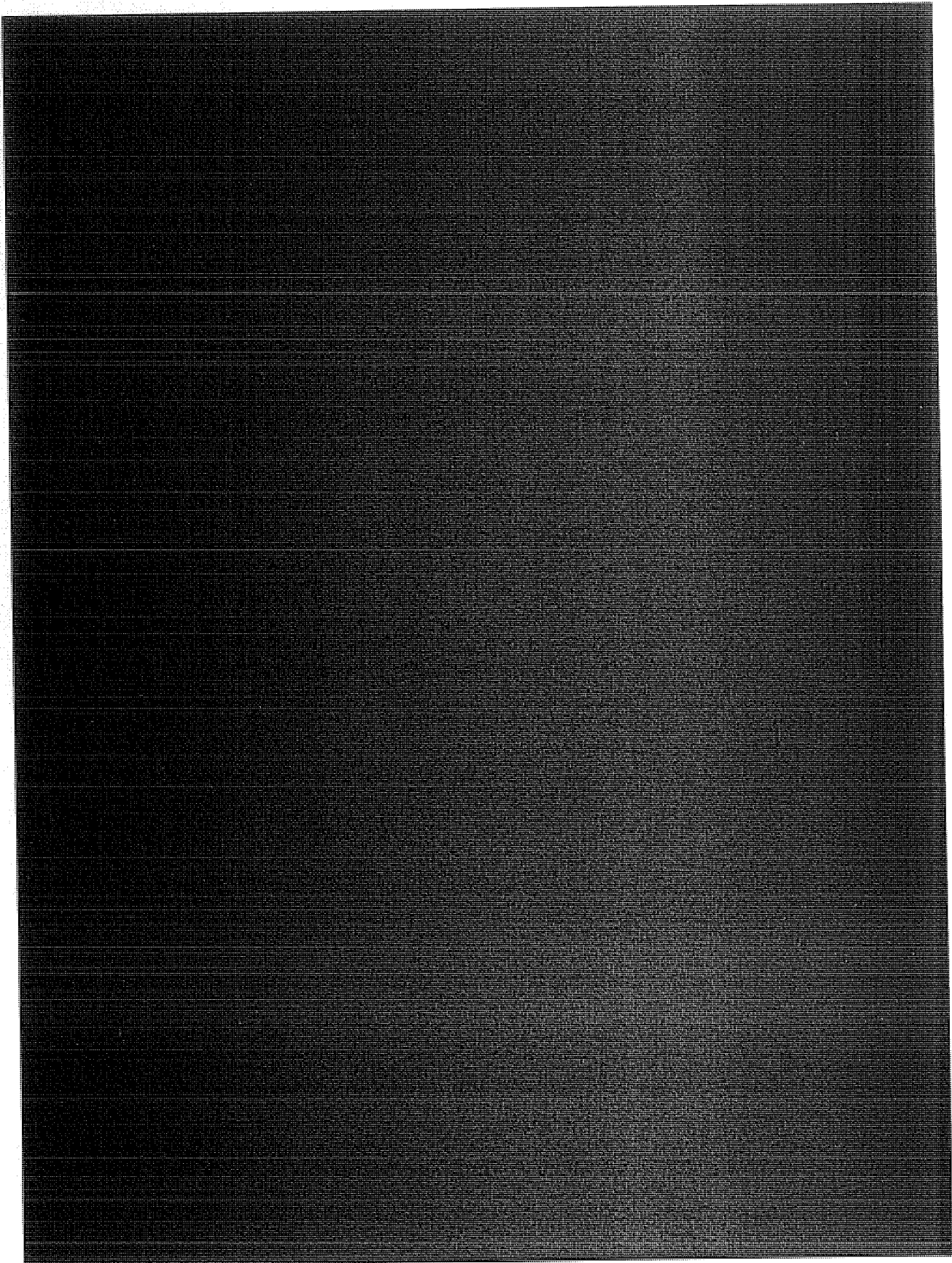
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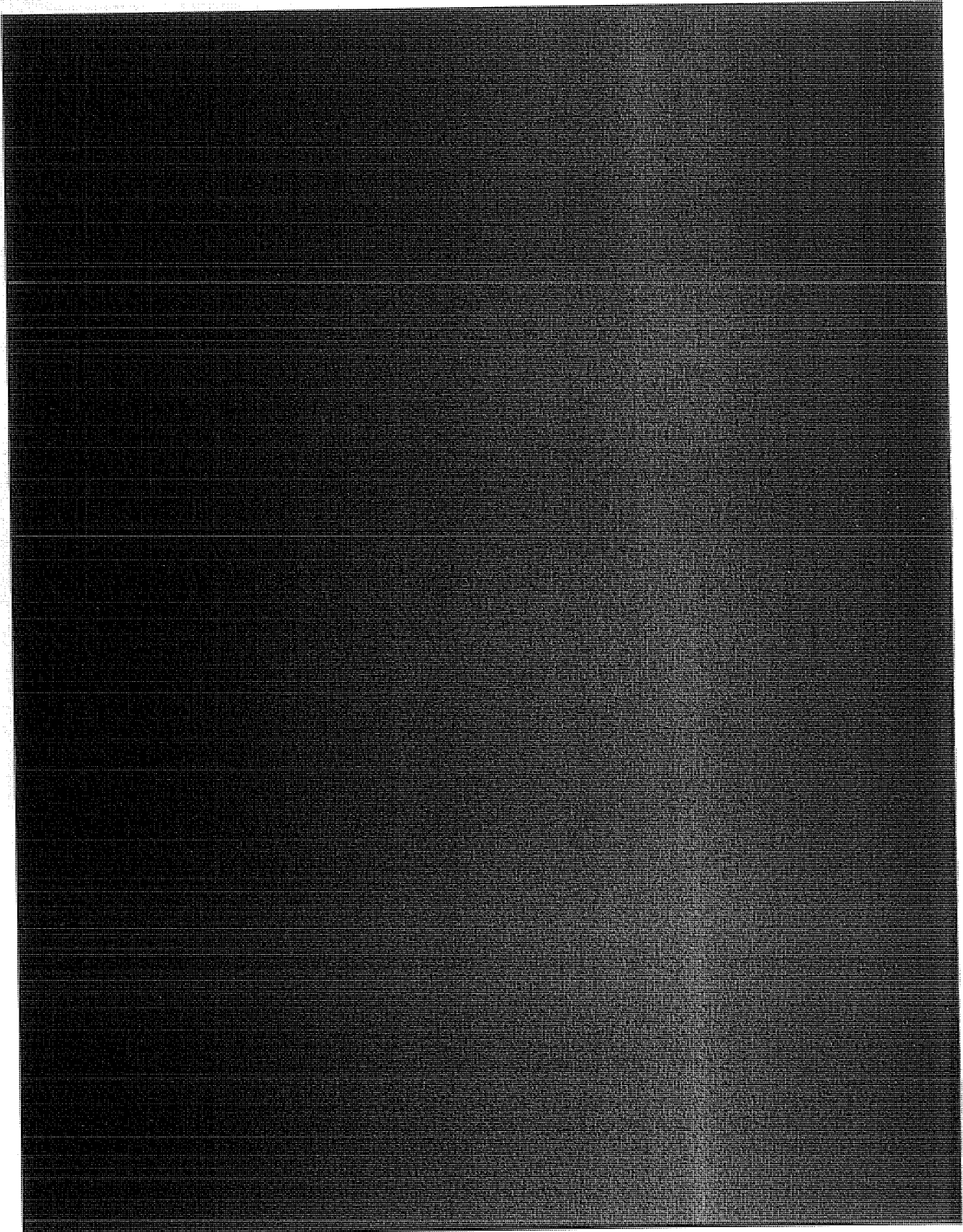
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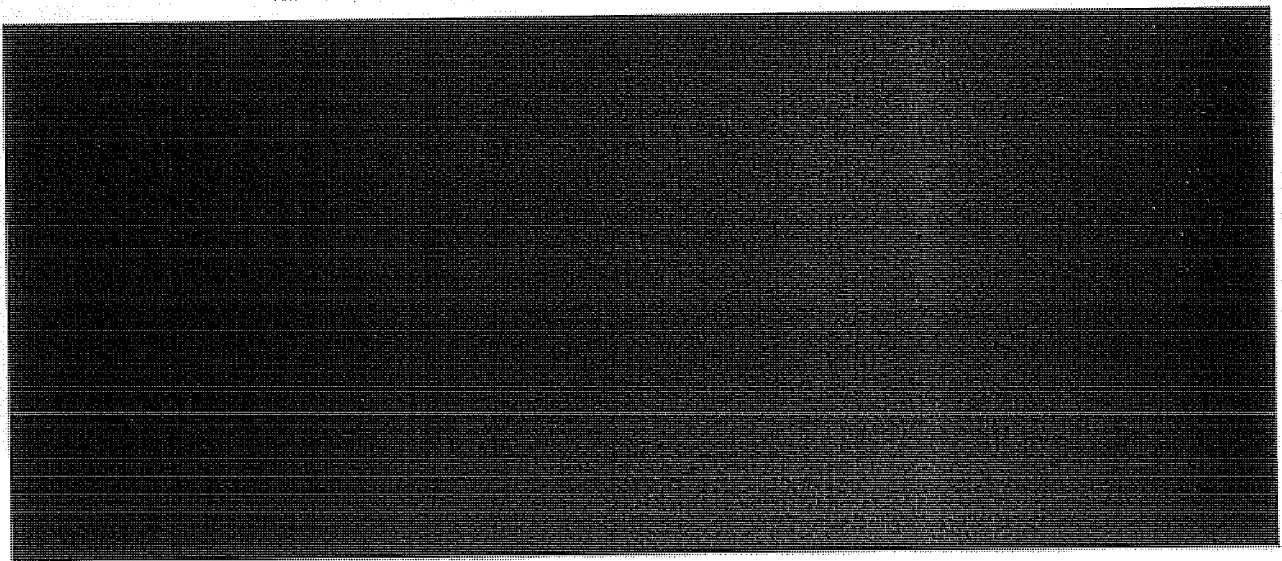
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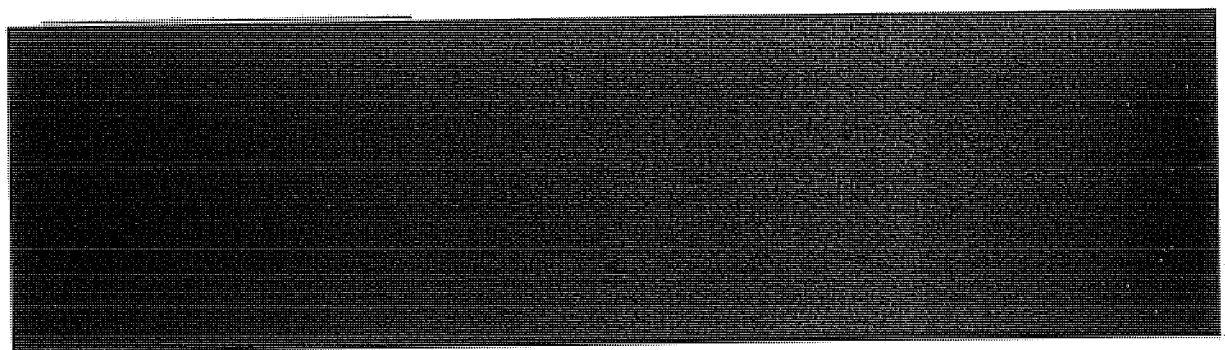


V. OIG ANALYSIS (U)

We found that the Department made little effort to understand and comply with its discovery obligations in connection with Stellar Wind-derived information for the first several years of the program. The Department's limited initial effort was also hampered by the limited number of attorneys who were read into the program. As a result, OLC attorney John Yoo alone initially analyzed the government's discovery obligations in one early case, and he produced a legal analysis that was based on an incorrect understanding of the facts of the case to which it applied. When other attorneys from the Department's Criminal Division eventually were read into the program, (b) (5)

At that point, the Department eventually took steps to address its discovery obligations. However, in our view, those steps are not complete and do not fully ensure that the government has met its discovery obligations regarding information obtained through the Stellar Wind program. (TS//STLW//SI//OC/NF)

As described in this chapter, in 2002 the Department first recognized that the Stellar Wind program could have implications for discovery obligations in terrorism cases. OIPR Counsel Baker raised with Department



and FBI officials the question of how the government would meet its discovery obligations regarding Stellar Wind information. Despite awareness of this issue, the Department took no action at this time to ensure that it was in compliance with Rule 16 or *Brady* with respect to Stellar Wind-derived information. We believe that at this point senior Department officials were on notice that, at a minimum, the discovery issue merited attention. However, no concrete action was taken until early [REDACTED] in the context of [REDACTED] when the Department had to address how to handle Stellar Wind information that was not also obtained under FISA and that could be material to the defense under Rule 16. This issue was assigned to Yoo, who concluded [REDACTED]

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As with other aspects of the Stellar Wind program, we believe the error in Yoo's legal analysis may have resulted in part from the failure to subject his memorandum to typical OLC and Department review and scrutiny. Because other Department attorneys were not read into the Stellar Wind program, the risk that the Department would produce a factually flawed and inadequate legal analysis of these important discovery issues was escalated. As we concluded in Chapters Three and Four, we believe the lack of sufficient legal resources at the Department during this early phase of the Stellar Wind program hampered its legal analysis of important issues related to the program. We believe that Yoo's (b)(1), (b)(3) memorandum is one more manifestation of this problem.

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In July 2004, Patrick Rowan, a senior counsel in the Criminal Division, was read into the program and conducted a more systemic analysis of the Department's discovery obligations with regard to Stellar Wind information. [REDACTED]

(b) (5)

(b) (5)

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

(b) (5)

With his memorandum, Rowan initiated a request that the issue be further examined by OLC. ~~(TS//SI//NF)~~

However, other than in informal discussions with Rowan concerning Yoo's [redacted] memorandum, OLC did not further examine these issues or follow up on Rowan's recommendation. While we recognize that OLC was not responsible for developing litigative strategy on this issue, we believe that OLC or another appropriate Department component should have provided guidance on this important legal issue. ~~(TS//STLW//SI//OC/NF)~~

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We recommend that the Department conduct a comprehensive legal assessment of the important issues [redacted] that still remain unresolved [redacted] the legal ramifications of a guilty plea on the government's disclosure obligations under Rule 16 and in particular *Brady*. We believe the Department should 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. ~~(TS//SI//NF)~~

The Department took steps to respond, on a case-by-case basis, to discovery motions [redacted]

However, the Department's handling of these motions did not require the Department to identify the potentially discoverable information derived under the Stellar Wind program that may exist in other cases. We recommend that the Department, in coordination with the NSA, develop and implement a procedure for identifying Stellar Wind-derived information that may be associated with international terrorism cases, currently pending or likely to be brought in the future, and to evaluate such information in light of the government's discovery obligations under Rule 16 and *Brady*.

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CHAPTER EIGHT

PUBLIC STATEMENTS ABOUT THE SURVEILLANCE PROGRAM (U)

This chapter examines Attorney General Alberto Gonzales's testimony and public statements related to the Stellar Wind program. Aspects of this program were first disclosed publicly in a series of articles in The New York Times in December 2005. In response, the President publicly confirmed a portion of the Stellar Wind program – the interception of the content of international communications of people reasonably believed to have links to al Qaeda and related organizations. Subsequently, Attorney General Gonzales was questioned about the program in two hearings before the Senate Judiciary Committee in February 2006 and July 2007. ~~(S//NF)~~

In between those two hearings, former Deputy Attorney General James Comey testified before the Senate Judiciary Committee about the dispute between the Department and the White House concerning the program. Gonzales's and Comey's differing congressional testimony led to allegations that Gonzales had made misleading statements to Congress about the dispute and the program itself.⁴³⁴ (U)

In this chapter, we examine whether Attorney General Gonzales made false, inaccurate, or misleading statements related to the Stellar Wind program. (U//~~FOUO~~)

I. Summary of the Dispute about the Program (U)

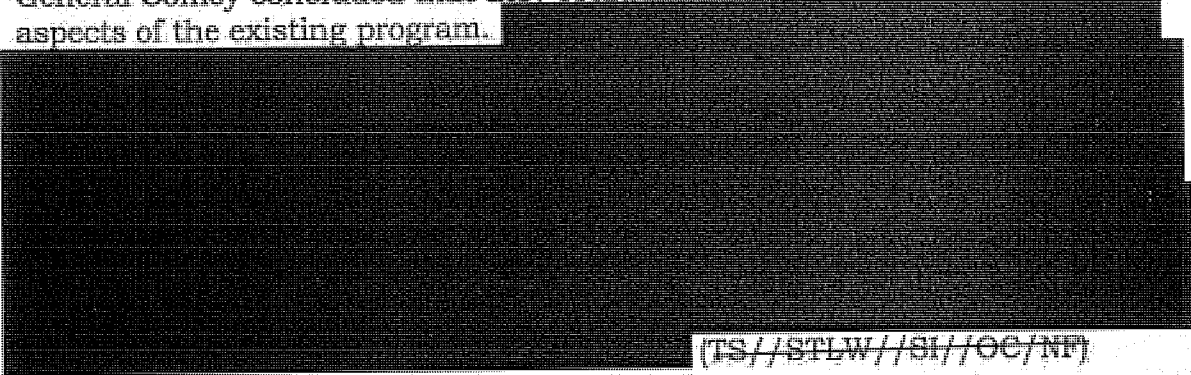
As described in detail in Chapters Three and Four, the Stellar Wind program is best understood as consisting of three types of collections, informally referred to as "baskets." Basket 1 related to the collection of e-mail and telephone content. Initially, the Stellar Wind program collected e-mail and telephone content when probable cause existed to believe one of the parties to the call or e-mail was outside the United States and at least one of the communicants was a member of an international terrorist group.

⁴³⁴ For example, Senator Arlen Specter stated at a Senate hearing on July 24, 2007, that he did not find Attorney General Gonzales's testimony to be credible and suggested to the Attorney General that he "review this transcript very, very carefully." After this hearing Senate Judiciary Committee Chairman Patrick Leahy sent a letter to the OIG, dated August 16, 2007, asking the OIG to review Gonzales's statements to determine whether they were intentionally false, misleading, or inappropriate. Gonzales testified several times before the Senate and House Judiciary and Intelligence Committees about the program. In this chapter, we focus on his February 2006 and July 2007 testimony in which he discussed the events of March 2004. (U)

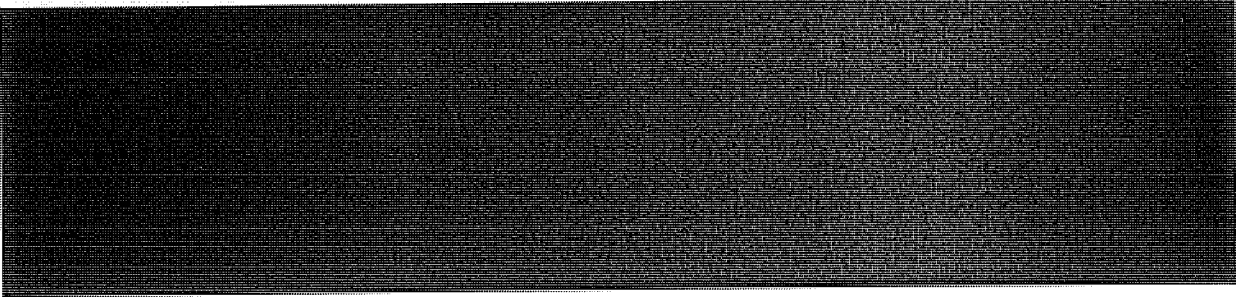
Basket 2 involved bulk collection of telephony meta data, and basket 3 involved bulk collection of e-mail meta data. (TS//STLW//SI//OC/NF)

These collections were authorized by a Presidential Authorization that was re-issued at approximately 30 to 45-day intervals. Each Authorization was certified as to form and legality by the Attorney General. The Attorney General's certifications were initially supported by legal opinions from OLC attorney John Yoo affirming the legality of the program. (TS//STLW//SI//OC/NF)

As discussed in Chapter Four, after Jack Goldsmith was confirmed as Assistant Attorney General for OLC in October 2003, he, along with Associate Deputy Attorney General Patrick Philbin, conducted an analysis of the legal basis underlying each basket in the Stellar Wind program. As a result of this review, he, Philbin, and recently confirmed Deputy Attorney General Comey concluded that they could find no legal support for several aspects of the existing program.



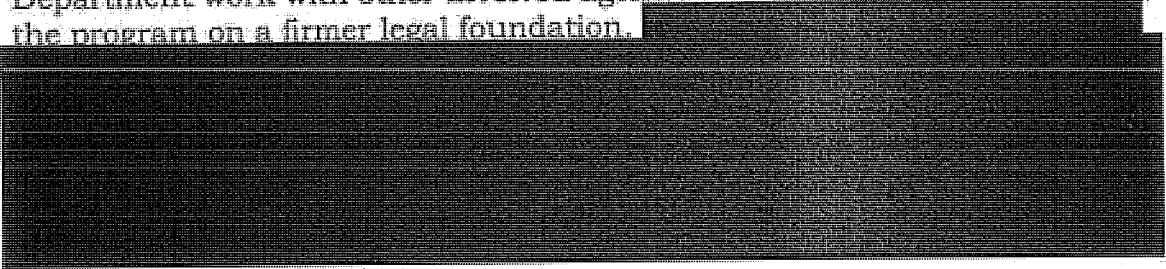
(TS//STLW//SI//OC/NF)



In early March 2004, the dispute between the Department and the White House over the Department's revised legal analysis of the Stellar Wind program came to a head. Deputy Attorney General Comey, who assumed the duties of the Attorney General when Attorney General Ashcroft was hospitalized, informed the White House that the Department could not recertify the program. This dispute culminated in the unsuccessful attempt by then-White House Counsel Gonzales and White House Chief of Staff Andrew Card to get Attorney General Ashcroft to overrule Comey and recertify the program while he was in the hospital. When Ashcroft refused to certify the program and said that Comey was acting as the Attorney General, not him, the President reauthorized the program without the

Attorney General's certification. Instead Gonzales, as White House Counsel, recertified the program. ~~(TS//SI//NF)~~

After the White House's actions to continue the program without Justice Department certification, Deputy Attorney General Comey, FBI Director Mueller, and many other senior Department officials considered resigning. When the President learned of this, he directed that the Department work with other involved agencies and the White House to place the program on a firmer legal foundation.



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

II. The New York Times Articles and President Bush's Confirmation Regarding NSA Activities (U)

In 2004, aspects of the Stellar Wind program were disclosed to two reporters for The New York Times. The reporters, James Risen and Eric Lichtblau, sought to publish an article about the program in late 2004. However, after a series of meetings with Administration officials who argued that publication of the story would harm the national security, The New York Times agreed to delay publishing the story. ~~(S//NF)~~

The New York Times eventually published a series of articles about the program on December 16 through 19, 2005. According to one of the reporters, the Times decided to publish the articles at least in part because the newspaper learned of serious concerns about the legality of the program that had "reached the highest levels of the Bush Administration."⁴³⁵ (U)

The first article, on December 16, 2005, was entitled, "Bush Lets U.S. Spy on Callers Without Courts." This article stated that "Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials." The article described in broad terms the content collection aspect of the NSA program (basket 1), stating that according to officials the NSA has "monitored the international telephone calls of hundreds, perhaps

⁴³⁵ See Eric Lichtblau, *Bush's Law* (2008), p. 203. (U)

thousands, of people inside the United States without warrants over the past three years in an effort to track possible 'dirty numbers' linked to al Qaeda." The article stated that the NSA continued to seek warrants to monitor purely domestic communications. ~~(TS//STLW//SI//OC/NF)~~

The article asserted that "reservations about aspects of the program" had also been expressed by Senator Jay Rockefeller (the Vice Chair of the Senate Select Committee on Intelligence) and a judge who presided over the FISA Court. The article added, "Some of the questions about the [NSA's] new powers led the administration to temporarily suspend the operation last year and impose more restrictions, officials said." The article also stated that "In mid-2004, concerns about the program expressed by national security officials, government lawyers and a judge prompted the Bush administration to suspend elements of the program and revamp it." However, the article incorrectly tied this suspension of the program to Judge Colleen Kollar-Kotelly's concerns that information gained from the program was also being used to seek FISA orders, rather than to the March 2004 dispute between Department officials and the White House about the legality of aspects of the program. ~~(TS//SI//NF)~~

On December 17, 2005, the day after The New York Times published the first article, President Bush publicly acknowledged the portion of the NSA program that was described in the article. President Bush described in broad terms these NSA electronic surveillance activities, stating:

In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks.

This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies. Yesterday the existence of this secret program was revealed in media reports, after being improperly provided to news organizations. As a result, our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country

The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our government and the

threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized the program more than 30 times since the September 11th attacks, and I intend to do so for as long as our nation faces a continuing threat from al Qaeda and related groups.⁴³⁶ (U)

III. Other Administration Statements (U)

On January 19, 2006, the Justice Department issued a document, informally referred to as a "White Paper," entitled "Legal Authorities Supporting the Activities of the National Security Agency Described by the President." The 42-page document addressed in an unclassified form the legal basis for the collection activities that were described in the December 16, 2005, New York Times article and other media reports and confirmed by President Bush. The White Paper stated that the President acknowledged that "he has authorized the NSA to intercept international communications into and out of the United States of persons linked to al Qaeda or other related terrorist organizations." (U)

The White Paper reiterated the legal theory advanced by the Department in Goldsmith's May 2004 memorandum about the revised NSA program, which concluded that the September 18, 2001, Congressional Authorization for the Use of Military Force authorized the President to employ "warrantless communications intelligence targeted at the enemy," a fundamental incident of the use of military force, pursuant to the President's Article II Commander-in-Chief powers. The White Paper also argued that the NSA's activities were consistent with FISA, as confirmed and supplemented by the AUMF. ~~(TS//SI//NF)~~

On January 22, 2006, the White House also issued a press release and memorandum to counter criticism of the NSA program by members of Congress. The press release was entitled "Setting the Record Straight: Democrats Continue to Attack the Terrorist Surveillance Program." This document was the first time we found any official use of the term "Terrorist Surveillance Program" to apply to the NSA program or aspects of the program.⁴³⁷ ~~(S//NF)~~

⁴³⁶ The full text of President Bush's December 17, 2005, radio address can be found at <http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html>. (U)

⁴³⁷ See <http://www.whitehouse.gov/news/releases/2006/01/20060122.html>. We found that the term was used in the media prior to this time. The first published reference

(Cont'd.)

The following day, on January 23, 2006, President Bush referred to the "terrorist surveillance program" during a speech at Kansas State University:

Let me talk about one other program . . . something that you've been reading about in the news lately. It's what I would call a terrorist surveillance program. (U)

In the speech, President Bush described the program as the interception "of certain communications emanating between somebody inside the United States and outside the United States; and one of the numbers would be reasonably suspected to be an al Qaeda link or affiliate." (U)

On January 24, 2006, Attorney General Gonzales delivered a speech at the Georgetown University Law Center which, according to his prepared remarks, began by stating that his remarks "speak only to those activities confirmed publicly by the President, and not to purported activities described in press reports." Gonzales referred to the program throughout his speech as either the "terrorist surveillance program" or "the NSA's terrorist surveillance program." (U)

IV. Testimony and Other Statements (U)

After the New York Times articles disclosed aspects of the NSA program, members of Congress expressed concern that the President had exceeded his authority by authorizing electronic surveillance activity without FISA orders, and congressional hearings were held on the issue. Gonzales testified before the Senate Judiciary Committee on February 6, 2006, and July 24, 2007, about the NSA's surveillance activities. We describe in the next sections his testimony and other statements he made about the NSA's activities, as well as testimony by former Deputy Attorney General Comey before the Senate Judiciary Committee on May 15, 2007.

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

we found to the "terrorist surveillance program" in connection with the NSA electronic surveillance activities was in NewsMax, an online news website, on December 22, 2005. (U) See "Barbara Boxer: Bush Spy Hearings Before Alito," NewsMax.com, December 22, 2005, <http://archive.newsmax.com/archives/ic/2005/12/22/173255.shtml>. On January 20, 2006, the term appeared again on another Internet blog called "RedState." See "Making the case for the NSA terrorist surveillance program," at <http://www.redstate.com/story/2006/1/20/92730/0977>. (U)

A. **Gonzales's February 6, 2006, Senate Judiciary Committee Testimony (U)**

In his opening statement before the Senate Judiciary Committee on February 6, 2006, Gonzales began by saying that his testimony would necessarily be limited:

Before going any further, I should make clear what I can discuss today. I am here to explain the Department's assessment that the President's terrorist surveillance program is consistent with our laws and Constitution. I am not here to discuss the operational details of that program, or any other classified activity. The President has described the terrorist surveillance program in response to certain leaks, and my discussion in this open forum must be limited to those facts the President has publicly confirmed – nothing more. Many operational details of our intelligence activities remain classified and unknown to our enemy – and it is vital that they remain so.
(U)

The questioning of Gonzales at this hearing focused primarily on the nature of the NSA surveillance activity and the legal basis for it.⁴³⁸ Senator Charles Schumer asked Gonzales specifically about accounts of a disagreement within the Justice Department over the NSA program:

SEN. SCHUMER: But it's not just Republican senators who seriously question the NSA program, but very high-ranking officials within the administration itself. Now, you've already acknowledged that there were lawyers in the administration who expressed reservations about the NSA program. There was dissent. Is that right?

ATTY GEN. GONZALES: Of course, Senator. As I indicated, this program implicates very difficult issues. The war on terror has generated several issues that are very, very complicated.

SEN. SCHUMER: Understood.

ATTY GEN. GONZALES: Lawyers disagree.

⁴³⁸ Neither the Chairman of the Senate Judiciary Committee at the time (Senator Specter), nor the Ranking Member (Senator Leahy), were read into the program or provided the underlying documents authorizing the program. Senator Leahy stated at the outset of the hearing that he and others had made a request to review the Presidential Authorizations and OLC memoranda about the program, but that these materials had not been provided to the Committee. (U)

SEN. SCHUMER: I concede all those points. Let me ask you about some specific reports. It's been reported by multiple news outlets that the former number two man in the Justice Department, the premier terrorism prosecutor, Jim Comey, expressed grave reservations about the NSA program, and at least once refused to give it his blessing. Is that true?

ATTY GEN. GONZALES: Senator, here's a response that I feel that I can give with respect to recent speculation or stories about disagreements. There has not been any serious disagreement, including – and I think this is accurate – there's not been any serious disagreement about the program that the President has confirmed.

There have been disagreements about other matters regarding operations, which I cannot get into. I will also say –

SEN. SCHUMER: But there was some – I'm sorry to cut you off. But there was some dissent within the administration, and Jim Comey did express at some point – that's all I asked you – some reservation.

ATTY GEN. GONZALES: The point I want to make is that, to my knowledge, none of the reservations dealt with the program that we're talking about today. They dealt with operational capabilities that we're not talking about today.

SEN. SCHUMER: I want to ask you again about – I'm just – we have limited time.

ATTY GEN. GONZALES: Yes, sir.

SEN. SCHUMER: It's also been reported that the head of the Office of Legal Counsel, Jack Goldsmith, a respected lawyer and professor at Harvard Law School, expressed reservations about the program. Is that true?

ATTY GEN. GONZALES: Senator, rather than going individual by individual –

SEN. SCHUMER: No, I think we're – this is –

ATTY GEN. GONZALES: – let me just say that I think differing views that have been the subject of some of these stories does not – did not deal with the program that I'm here testifying about today.

SEN. SCHUMER: But you are telling us that none of these people expressed any reservations about the ultimate program. Is that right?

ATTY GEN. GONZALES: Senator, I want to be very careful here, because, of course, I'm here only testifying about what the President has confirmed. And with respect to what the President has confirmed, I believe – I do not believe that these DOJ officials that you're identifying had concerns about this program. (U)

Throughout the hearing, other Senators asked Gonzales questions relating to various aspects of the NSA program, and Gonzales would often qualify his answers by stating that he was not discussing activities beyond what the President had confirmed. However, in doing so Gonzales sometimes suggested that the NSA's activities under the program were limited to what the President had confirmed. In one exchange with Senator Leahy, for example, Gonzales suggested that the electronic surveillance activities the President had publicly confirmed were the only activities the President had authorized to be conducted. Specifically, in response to a series of questions from Senator Leahy regarding what activities beyond warrantless electronic surveillance Gonzales would deem legal under the Authorization for the Use of Military Force, Gonzales stated,

Sir, I have tried to outline for you and the committee what the President has authorized, and that is all that he has authorized. . . . There is all kinds of wild speculation out there about what the President has authorized and what we're actually doing. And I'm not going to get into a discussion, Senator, about hypotheticals.⁴³⁹ ~~(S//NF)~~

⁴³⁹ On February 28, 2006, Gonzales wrote to Senator Specter to provide additional responses to questions that he had answered during his February 6 hearing and to clarify certain responses. Gonzales wrote that he confined his letter and testimony

to the specific NSA activities that have been publicly confirmed by the President. Those activities involve the interception by the NSA of the contents of communications in which one party is outside the United States where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (hereinafter, the "Terrorist Surveillance Program").

One response Gonzales sought to clarify was this response to Senator Leahy. Gonzales wrote:

First, as I emphasized in my opening statement, in all of my testimony at the hearing I addressed – with limited exceptions – only the legal underpinnings of the Terrorist Surveillance Program, as defined above. I did not and could not address operational aspects of the Program or any other classified intelligence activities. So, for example, when I testified in response to questions from Senator Leahy, "Sir, I have tried to outline for you and the Committee what the President has authorized, and that is all that he has authorized," Tr. at 53, I was confining my remarks to the Terrorist

(Cont'd.)

In response to Senator Sam Brownback's question about whether the FISA application process would include "even these sort of operations we've read about data mining operations? Would that include those sorts of operations, or are those totally a separate type of field?" (U)

Gonzales responded:

I'm not here to talk about that. Again, let me just caution everyone that you need to read these stories with caution. There is a lot of mumbling - I mean, mixing and mangling of activities that are totally unrelated to what the President has authorized under the terrorist surveillance program, and so I'm uncomfortable talking about other kinds of operations that might - that are unrelated to the terrorist surveillance program. (U)

B. Comey's May 15, 2007, Senate Judiciary Committee Testimony (U)

Former Deputy Attorney General Comey appeared before the Senate Judiciary Committee on May 15, 2007, in a hearing called to examine whether the Department had politicized the firing of U.S. Attorneys. Senator Schumer, who presided over the hearing, began the questioning by asking Comey about reports in the media that in March 2004 White House Counsel Gonzales and White House Chief of Staff Card had visited Attorney General Ashcroft in the hospital in an effort to override Comey's decision, made when he served as Acting Attorney General, not to certify a classified program. Comey was asked to recount the details of the incident. (U)

After prefacing his remarks by stating that he could not discuss classified information, Comey described the events of March 2004, including the confrontation between the Department and White House officials in Ashcroft's hospital room. In describing these events, Comey referred to a single classified program. For example, Comey testified that:

In the early part of 2004, the Department of Justice was engaged - the Office of Legal Counsel, under my supervision, in a reevaluation both factually and legally of a particular classified program. And it was a program that was renewed on a regular basis and required signature by the Attorney General

Surveillance Program as described by the President, the legality of which was the subject of the February 6th hearing.

Gonzales also attempted to clarify a response he had given to Senator Leahy about when the first Presidential Authorization was signed. Gonzales wrote that "The President first authorized the [Terrorist Surveillance] Program in October 2001" (U)

certifying to its legality. And the – and I remember the precise date; the program had to be renewed by March the 11th, which was a Thursday, of 2004. And we were engaged in a very intensive reevaluation of the matter. (U)

Comey also testified that “as Acting Attorney General, I would not certify the program as to its legality, and explained our reasoning in detail, which I will not go into here, nor am I confirming it’s any particular program.” As detailed in Chapter Four, Comey then described from his perspective the incident in the hospital room and testified that after that incident “[t]he program was reauthorized without us, without a signature from the Department of Justice attesting as to its legality” (U)

C. Gonzales’s June 5, 2007, Press Conference (U)

In light of Comey’s statements, questions were raised about the accuracy of Gonzales’s February 2006 testimony to the Senate Judiciary Committee. For example, in a press conference on June 5, 2007, called to announce the indictment of members of an international gang called MS-13, the first question a reporter asked Gonzales concerned Comey’s testimony:

REPORTER: Attorney General, last month Jim Comey testified about visits you and Andy Card made to John Ashcroft’s hospital bed. Can you tell us your side of the story? Why were you there and did Mr. Comey testify truthfully about it? Did he remember it correctly?

ATTY GEN. GONZALES: Mr. Comey’s testimony related to a highly classified program which the President confirmed to the American people some time ago. Because it’s on a classified program I’m not going to comment on his testimony. (U)

As discussed below, when later asked about this statement, Gonzales said that he had misspoke, and that he did not mean to say that Comey’s testimony related to the program that the President confirmed. (U)

D. Gonzales’s July 24, 2007, Senate Judiciary Committee Testimony (U)

Gonzales was again called to testify before the Senate Judiciary Committee on July 24, 2007. In advance of Gonzales’s July 24 appearance, Senator Leahy sent Gonzales a letter advising him of the questions that would be asked at the hearing.⁴⁴⁰ The letter referenced Gonzales’s

⁴⁴⁰ According to the letter, Senator Leahy took this step because in Gonzales’s appearance before the Senate Judiciary Committee on April 19, 2007, to discuss the removal of nine U.S. Attorneys, Gonzales had responded to an estimated 100 questions that

(Cont’d.)