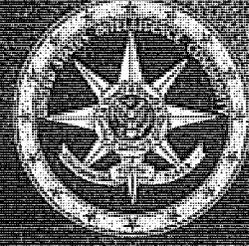


(U) ANNEX TO THE REPORT ON THE
PRESIDENT'S SURVEILLANCE PROGRAM

VOLUME III

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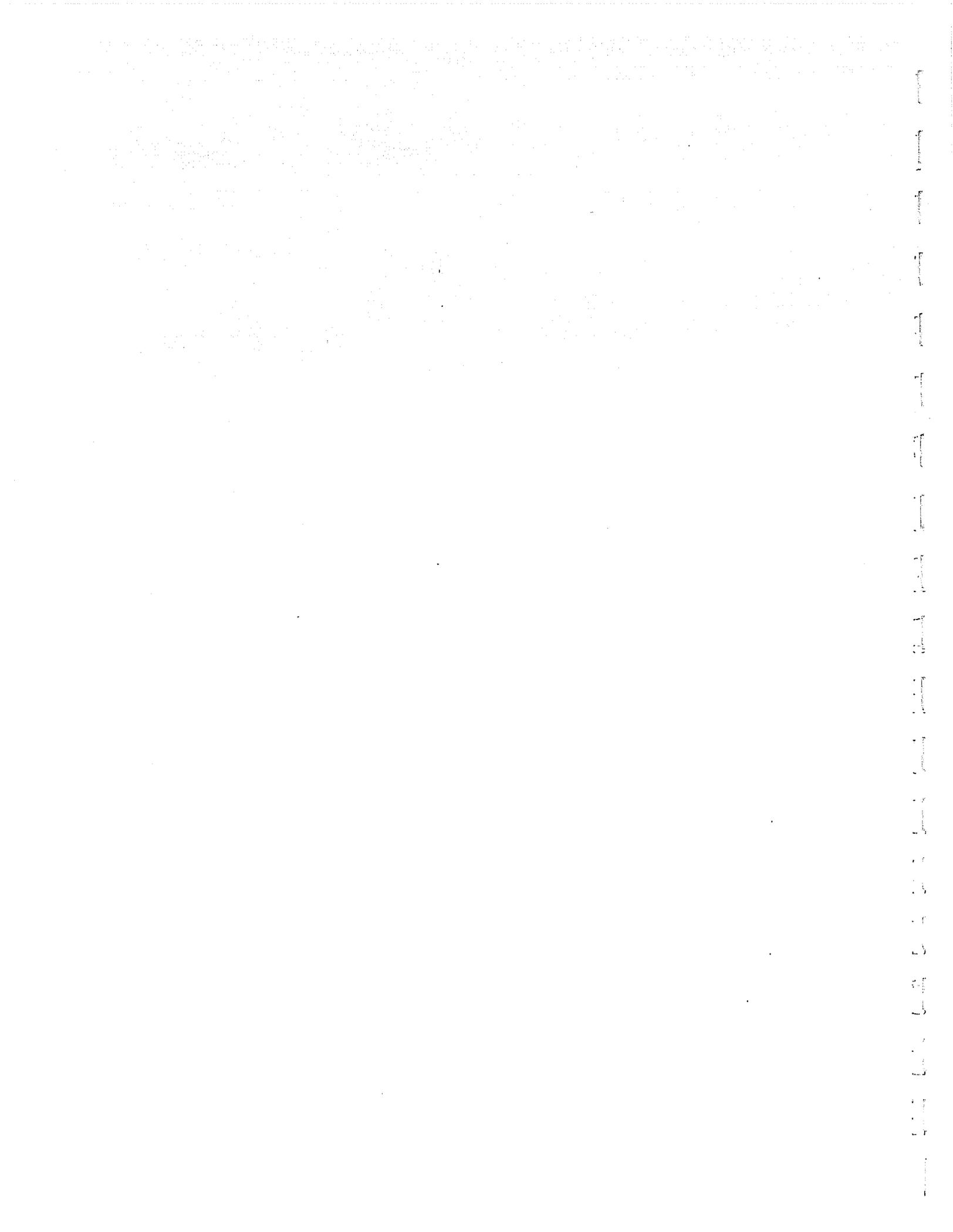


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OF THE
DEPARTMENT OF DEFENSE
DEPARTMENT OF JUSTICE
CENTRAL INTELLIGENCE AGENCY
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~~TOP SECRET//STLW//HCS//SI//ORCON/NOFORN~~

U.S. Department of Justice
Office of the Inspector General

A Review of the Department of Justice's Involvement with the President's Surveillance Program (U)



Department of Justice
Office of the Inspector General
Oversight and Review Division
July 2009

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

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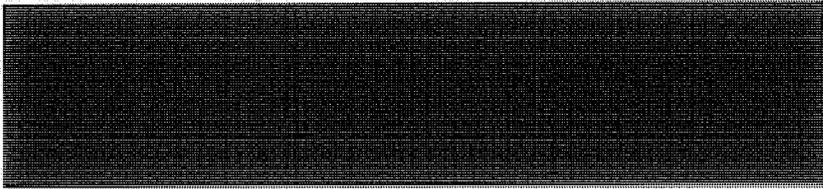
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CHAPTER ONE INTRODUCTION (U)

On October 4, 2001, three weeks after the terrorist attacks of September 11, 2001, the President issued a Top Secret Presidential Authorization to the Secretary of Defense directing that the signals intelligence capabilities of the National Security Agency (NSA) be used to detect and prevent further attacks in the United States. The Presidential Authorization stated that an extraordinary emergency existed permitting the use of electronic surveillance within the United States for counterterrorism purposes, without a court order, under certain circumstances. For over 6 years, this Presidential Authorization was renewed at approximately 30 to 45 day intervals to authorize the highly classified NSA surveillance program, which was given the cover term "Stellar Wind."¹ ~~(TS//STLW//SI//OC/NF)~~

Under these Presidential Authorizations and subsequently obtained Foreign Intelligence Surveillance Court (FISA Court) orders, the NSA intercepted the content of international telephone and e-mail communications of both U.S. and non-U.S. persons when certain criteria were met. In addition, the NSA collected vast amounts of telephony and e-mail meta data – that is, communications signaling information showing contacts between and among telephone numbers and e-mail addresses, but not including the contents of the communications. 

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

Within the Department of Justice (Department or Justice Department) and the Intelligence Community, the different types of information collected under the NSA program came to be referred to as three different "baskets" of information. The collection of the content of telephone and e-mail

¹ This program is also known as the President's Surveillance Program (PSP). In Title III of the Foreign Intelligence Surveillance Act Amendments Act of 2008 (FISA Amendments Act), the President's Surveillance Program is defined as

the intelligence activity involving communications that was authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007, including the program referred to by the President in a radio address on December 17, 2005 (commonly known as the Terrorist Surveillance Program).

FISA Amendments Act, Title III, Sec. 301(a)(3). (U)

communications was referred to as basket 1. The collection of telephone meta data – including information on the date, time, and duration of the telephone call, the telephone number of the caller, and the number receiving the call – was referred to as basket 2. The collection of e-mail meta data – including the “to,” “from,” “cc,” “bcc,” and “sent” lines of an e-mail, but not the “subject” line or content of the e-mail – was referred to as basket 3.

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

The content and meta data information was used by the NSA, working with other members of the Intelligence Community, to generate intelligence reports.

[REDACTED]

By March 2006, over [REDACTED] individual U.S. telephone numbers and [REDACTED] e-mail addresses had been “tipped” to the FBI as leads, the vast majority of which were disseminated to FBI field offices for investigation or other action. Some Stellar Wind-derived information also was disseminated to the larger Intelligence Community through traditional intelligence reporting channels.³ ~~(TS//STLW//SI//OC/NF)~~

In addition to the FBI’s receipt of information from the program, the Justice Department was involved in the program in other ways. Most significantly, the Department’s Office of Legal Counsel (OLC) provided advice to the White House and the Attorney General on the overall legality of the Stellar Wind program. In addition, the Department’s Office of Intelligence Policy and Review (now called the Office of Intelligence in the Department’s National Security Division) worked with the FBI and NSA to justify the inclusion of Stellar Wind-derived information in applications seeking orders under the Foreign Intelligence Surveillance Act (FISA), and when unable to do so, to exclude such information from the applications. The Department’s National Security Division (NSD) also submitted classified *ex parte* legal filings in federal courts to address any Stellar Wind reporting concerning defendants during discovery in international terrorism prosecutions.

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

Beginning in December 2005, aspects of the Stellar Wind program were publicly disclosed in media reports, originally in a series of articles by The New York Times. After these articles disclosed the telephone and e-mail content collection (basket 1), the President, Attorney General Alberto Gonzales, and other Administration officials publicly confirmed the

³ The larger Intelligence Community also includes components within other Departments, such as the Departments of Homeland Security, Treasury, Defense, and State. (U)

existence of this part of the program. However, the other aspects of the program – the collection of telephone and e-mail meta data – have not been publicly confirmed. ~~(TS//STLW//SI//OC/NF)~~

The President and other Administration officials labeled the NSA collection of information that was publicly disclosed as “the Terrorist Surveillance Program,” although this name was sometimes used within the Intelligence Community to refer to the entire Stellar Wind program. The program was also referred to by other names, such as the “Warrantless Wiretapping Program” or the “NSA Surveillance Program.” As discussed above, the technical name for the program, and the term we generally use throughout this report, is the Stellar Wind program.⁴ ~~(S//NF)~~

This report describes the Office of the Inspector General’s (OIG) review of the Department’s role in the Stellar Wind program. Our review discusses the evolution of the Stellar Wind program, including the changes in the Department’s legal analyses of the program, the operational changes to the program, and the eventual transition of the program from presidential authority to statutory authority under FISA. The report also assesses the FBI’s use of information derived from the Stellar Wind program, including the impact of the information in FBI counterterrorism investigations.

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

I. Methodology of OIG Review (U)

During the course of this review, the OIG conducted approximately 80 interviews. Among the individuals we interviewed were former White House Counsel and Attorney General Gonzales; former Deputy Attorney General James Comey; former NSA Director Michael Hayden; FBI Director Robert Mueller, III; former Counsel for Intelligence Policy James Baker; former Assistant Attorneys General for OLC Jay Bybee and Jack Goldsmith; former Principal Deputy and Acting Assistant Attorney General for OLC Steven Bradbury; former Deputy Assistant Attorney General for OLC and Associate Deputy Attorney General Patrick Philbin; and former Assistant Attorneys General for the NSD Kenneth Wainstein and Patrick Rowan. We also interviewed senior FBI Counterterrorism Division officials, the FBI General Counsel and other FBI attorneys, FBI special agents and intelligence analysts, and senior officials in the Department’s Criminal and National Security Divisions.⁵ (U)

⁴ Stellar Wind is classified as a Top Secret/Sensitive Compartmented Information program. ~~(S//NF)~~

⁵ Although the FBI is a component of the Department of Justice, references in this report to Department officials generally mean non-FBI Department officials. This

(Cont’d.)

We attempted to interview former Attorney General John Ashcroft, but he declined our request for an interview. (U)

In addition, we attempted to interview former Deputy Assistant Attorney General for OLC John Yoo, who drafted the early legal memoranda supporting the legality of the Stellar Wind program. Yoo, through his counsel, declined our request for an interview. ~~(TS//SI//NF)~~

We also attempted to interview White House officials regarding the program, including Andrew Card, former Chief of Staff to President George W. Bush. We made our request for an interview of Card both directly to Card and through the Office of the Counsel to the President (White House Counsel's Office). Card did not grant our request for an interview. Similarly, we attempted to interview David Addington, former Counsel to Vice President Richard B. Cheney. We contacted the Office of the Vice President, but that office did not respond to our request for an interview of Addington. (U)

We believe that we were able to obtain a full picture of the evolution of the program and the theories supporting its legality. However, the refusal by White House officials, former Attorney General Ashcroft, and former Deputy Assistant Attorney General Yoo to be interviewed hampered our ability to fully investigate the process by which the White House and the Justice Department arrived at the initial legal rationale to support the program. In addition, because of our inability to interview Ashcroft, we could not fully determine what efforts the Department took to press the White House for additional Department attorneys to be read into Stellar Wind to work on the legal analysis of the program during its first two years of operation. ~~(TS//SI//NF)~~

In our review, we also examined thousands of electronic and hard copy documents, including the Presidential Authorizations and threat assessments, OLC legal memoranda supporting the program, contemporaneous notes and e-mails of various senior Department and FBI officials, and FISA Court pleadings and orders. We also reviewed NSA materials, including NSA OIG reports on the Stellar Wind program and correspondence between the NSA Office of General Counsel and the Department. ~~(TS//SI//NF)~~

In addition, we received from the FBI an electronic database of its collection of Electronic Communications (EC) that were used to disseminate

distinction is especially relevant to our discussion of the number of Department personnel read into the Stellar Wind program, as distinguished from the number of FBI personnel read into the program. (U//~~FOUO~~)

Stellar Wind-derived leads to FBI field offices. This database contained approximately [REDACTED] ECs, including leads to the FBI's 56 field offices, and responses from those field offices, among other documents. The OIG used this database to confirm information it obtained through interviews and to assist in our analysis of FBI investigations that were based on Stellar Wind information. ~~(TS//STLW//SI//OC/NF)~~

II. Organization of this Report (U)

Chapter Two of this report provides an overview of the primary legal authorities that are relevant to the Stellar Wind program. This chapter also discusses the Presidential Authorizations that were issued to approve the program. (U//~~FOUO~~)

Chapter Three describes the inception and early implementation of the Stellar Wind program from September 2001 through April 2003. This chapter includes a description of the early OLC legal memoranda on the legality of Stellar Wind, how the program was technically implemented, the FBI's early participation in the program, and the FISA Court's first awareness of the program. ~~(TS//SI//NF)~~

Chapter Four covers the period from May 2003 through May 2004 when the legal rationale for the program was substantially reconsidered by the Justice Department. This chapter details in particular the events of March 2004 when the White House decided to continue the program without the Department's certification of a Presidential Authorization. During this time, Attorney General Ashcroft was hospitalized and Deputy Attorney General Comey temporarily exercised the powers of the Attorney General in his capacity as Deputy Attorney General. Comey declined to recertify the Presidential Authorization approving the program based on legal advice he received from OLC Assistant Attorney General Jack Goldsmith, who questioned the adequacy of the legal support for aspects of the program. Comey's decision prompted a significant dispute between the White House and the Justice Department, which resulted in White House Counsel Gonzales and White House Chief of Staff Card visiting Ashcroft in his hospital room in an unsuccessful attempt to have Ashcroft recertify the program. This chapter also describes the background to the dispute, the events related to the hospital visit, the threat by Department officials to resign over the dispute, and the eventual resolution of the dispute. ~~(TS//SI//NF)~~

Chapter Five discusses the transition, in stages, from a program based on Presidential Authorizations to collection activities authorized under the FISA statute. This transition took place in stages between July 2004 and January 2007. This chapter also summarizes legislation in 2007

and 2008 designed to modernize certain provisions of FISA.

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

Chapter Six discusses the use of Stellar Wind information by the FBI. It describes the process by which the FBI disseminated Stellar Wind-derived leads to FBI field offices under a program called ██████████ as well as the impact and effectiveness of the Stellar Wind program to the FBI's counterterrorism efforts. ~~(TS//STLW//SI//OC/NF)~~

Chapter Seven examines the Department's handling of discovery issues related to Stellar Wind-derived information in international terrorism prosecutions. ~~(TS//STLW//SI//OC/NF)~~

Chapter Eight analyzes testimony and public statements about aspects of the Stellar Wind program by Attorney General Gonzales. We assess whether the Attorney General's statements, particularly his testimony to the Senate Judiciary Committee in February 2006 and July 2007, were false, inaccurate, or misleading. ~~(S//NF)~~

Chapter Nine contains our conclusions and recommendations. (U)

CHAPTER TWO LEGAL AUTHORITIES (U)

This chapter summarizes the primary legal authorities referred to throughout this report concerning the Stellar Wind program. These authorities include Article II, Section 2 of the Constitution; the Fourth Amendment to the Constitution; the Foreign Intelligence Surveillance Act; the Authorization for Use of Military Force Joint Resolution (AUMF) passed by Congress after the terrorist attacks of September 11, 2001; Executive Order 12333; and the Presidential Authorizations specifically authorizing the Stellar Wind program. Other authorities, including relevant criminal statutes and judicial opinions, are discussed throughout the report.

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

I. Constitutional, Statutory, and Executive Order Authorities (U)

A. Article II, Section 2 of the Constitution (U)

Article II, Section 2 of the Constitution, which was one of the primary authorities cited in the Presidential Authorizations in support of the legality of the Stellar Wind program, provides in relevant part:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices ~~(TS//SI//NF)~~

B. The Fourth Amendment (U)

The Fourth Amendment to the Constitution, which also was raised as an important factor in the analysis of the legality of the Stellar Wind program, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. ~~(TS//SI//NF)~~

C. The Foreign Intelligence Surveillance Act (FISA)⁶ (U)

The Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801, et seq., was enacted in 1978 to “provide legislative authorization and regulation for all electronic surveillance conducted within the United States for foreign intelligence purposes.” S. Rep. No. 95-701, at 9 (1978), reprinted in 1978 U.S.C.C.A.N. 3973, 3977. Three major FISA issues are covered in this report. First, as discussed in Chapter Four, FISA was central to a controversy that arose in late 2003 and early 2004 when officials in the Office of Legal Counsel (OLC) and others viewed FISA as potentially in conflict with the legal rationale for at least one aspect of the Stellar Wind program. OLC officials reasoned that if courts viewed FISA in isolation, they might conclude that Congress intended to regulate the President’s power to conduct electronic surveillance during wartime, thereby raising questions about the legality of aspects of the program. ~~(TS//STLW//SI//OC/NF)~~

Second, after the FISA Court was informed about the Stellar Wind program in January 2002, it required the government to carefully scrutinize each FISA application to ensure that no Stellar Wind-derived information was relied upon in support of a FISA application without the Court’s knowledge, and later without its consent. This process, known as “scrubbing,” is discussed in Chapters Three and Six.

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

Third, beginning in July 2004, the Stellar Wind program was brought under FISA authority in stages, with the entire program brought under FISA authority by January 2007. In August 2007 and again in July 2008, FISA was amended, and

 The migration of the Stellar Wind program from presidential authority to FISA authority, as well as legislation subsequently enacted to modernize FISA, is discussed in Chapter Five.

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

In the following sections, we summarize relevant provisions of FISA as they related to the Stellar Wind program. ~~(TS//SI//NF)~~

1. Overview of FISA (U)

FISA authorizes the federal government to engage in electronic surveillance and physical searches, to use pen register and trap and trace

⁶ Unless otherwise indicated, all references to FISA are to the statute as it existed prior to the Protect America Act of 2007 and the FISA Amendments Act of 2008. (U)

devices, and to obtain business records to acquire inside the United States foreign intelligence information by, in some instances, targeting foreign powers and agents of foreign powers.⁷ FISA also permits the targeting of foreign powers and their agents who are located outside the United States. As a general rule, the FISA Court must first approve an application by the government before the government initiates electronic surveillance. FISA applications must identify or describe the "target" of the surveillance, and must establish probable cause to believe that the target is a "foreign power" or "agent of a foreign power" and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power."⁸ 50 U.S.C. § 1804(a)(4)(A) & (B). ~~(TS//SI//NF)~~

FISA provides four exceptions to the requirement of obtaining judicial approval prior to conducting electronic surveillance: (1) for electronic surveillance directed at certain facilities where the Attorney General certifies that the electronic surveillance is solely directed at communications transmitted by means used exclusively between or among foreign powers or from property under the open and exclusive control of a foreign power, 50 U.S.C. § 1802; (2) where the Attorney General determines an emergency exists and authorizes emergency surveillance until the information sought is obtained, the after-filed application for an order is denied, or the expiration of 72 hours from the time of Attorney General authorization, 50 U.S.C. § 1805(f); (3) for training and testing purposes, 50 U.S.C. § 1805(g); and (4) for 15 days following a congressional declaration of war, 50 U.S.C. § 1811.⁹ (U)

The 15-day war declaration exception to FISA's warrant requirement was particularly relevant to the events of 2004, when OLC reassessed its prior opinions concerning the legality of the Stellar Wind program. ~~(TS//SI//NF)~~

⁷ This report is primarily concerned with the provisions of FISA that authorize electronic surveillance, pen register and trap and trace devices, and access to certain business records. ~~(TS//SI//NF)~~

⁸ The terms "foreign power" and "agent of a foreign power" are defined in FISA at 50 U.S.C. § 1801(a) & (b). "Foreign power" is defined, inter alia, as "a group engaged in international terrorism or activities in preparation therefor; . . ." 50 U.S.C. § 1801(a)(4). An "agent of a foreign power" may be a U.S. person, defined at 50 U.S.C. § 1801(i) to mean, inter alia, a United States citizen or permanent resident alien. The term "facilities" is not defined in FISA. (U)

⁹ The Attorney General's emergency surveillance authority under 50 U.S.C. § 1805(f) was extended to 7 days under Section 105(a) of the FISA Amendments Act of 2008. (U)

As discussed in Chapter Four

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

Another FISA provision prohibits persons from intentionally engaging in electronic surveillance “under color of law except as authorized by statute[.]” 50 U.S.C. § 1809(a)(1). As discussed in Chapter Eight, in 2006 the Justice Department asserted in a publicly released legal analysis that this provision did not preclude certain warrantless electronic surveillance activities because such surveillance was “authorized by” subsequent legislative enactments – principally the AUMF. The Department also asserted that the AUMF “confirms and supplements the President’s constitutional authority” to conduct warrantless electronic surveillance against the enemy during wartime. (U)

2. FISA Applications and Orders (U)

FISA applications were presented to the FISA Court by the Department’s Office of Intelligence Policy and Review (OIPR).¹⁰ Department and FBI officials familiar with the preparation and presentation of FISA applications described this process as extremely time-consuming and labor intensive. (U)

Each application must be approved and signed by the Attorney General (or Acting Attorney General) or Deputy Attorney General and must include the certification of a federal officer identifying or describing the target of the electronic surveillance; a “statement of the facts and circumstances relied upon by the applicant to justify his belief” that the target is a foreign power or agent of a foreign power and that the electronic surveillance is directed at the facilities or places used or to be used by the target; a statement of proposed minimization procedures; and a detailed description of the nature of the information sought and the type of communication or activities to be subjected to the surveillance. 50 U.S.C. § 1804(a)(1)-(6).¹¹ The application must also include the certification of a

¹⁰ The Office of Intelligence Policy and Review became a part of the Department’s National Security Division, which was created in September 2006. As of April 2008, the Office of Intelligence Policy and Review was renamed the Office of Intelligence. This organizational change did not affect the FISA application process. (U)

¹¹ FISA defines minimization procedures as

[s]pecific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the

(Cont’d.)

high-ranking executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense that the information sought is deemed to be foreign intelligence information, that such information "cannot reasonably be obtained by normal investigative techniques," and that a "significant purpose" of the surveillance is to obtain foreign intelligence information.¹² Id. at § 1804(a)(7). (U)

FISA orders authorize electronic surveillance of U.S. persons for 90 days. FISA orders may be renewed upon the same basis as the underlying order. 50 U.S.C. § 1805(e). As noted, FISA also provides for the emergency use of electronic surveillance. When the Attorney General reasonably determines that an emergency situation exists, the use of electronic surveillance may be approved for a period of up to 72 hours (and under the FISA Amendments Act of 2008, up to 7 days) without a FISA order. 50 U.S.C. § 1805(f). (U)

3. FISA Court (U)

The FISA statute established the FISA Court to review applications and issue orders. The FISA Court initially was composed of seven U.S. District Court judges designated by the Chief Justice of the U.S. Supreme Court to serve staggered, non-renewable 7-year terms.¹³ 50 U.S.C.

particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information

50 U.S.C. § 1801(h)(1). (U)

¹² As initially enacted, FISA required officials to certify that "the purpose" of the surveillance was to obtain "foreign intelligence information." However, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the USA PATRIOT Act) was enacted in October 2001 and amended this language in FISA to require only that officials certify that "a significant purpose" of the surveillance was to obtain foreign intelligence information. 50 U.S.C. § 1804(a)(7)(B). This amendment, along with post-September 11 changes to Attorney General guidelines on intelligence sharing procedures and a ruling by the FISA Court of Review, removed the so-called "wall" that had existed between intelligence-gathering activities and criminal investigations. See Memorandum from the Attorney General to Director of the FBI, et al., entitled "Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI" (March 6, 2002); *In re Sealed Case*, 310 F.3d 717, 727 (For. Int. Surv. Ct. Rev. 2002)(FISA did not "preclude or limit the government's use or proposed use of foreign intelligence information, which included evidence of certain kinds of criminal activity, in a criminal prosecution."). (U)

¹³ To achieve staggered terms, the initial appointments ranged from one to seven years. 50 U.S.C. § 1803(d). (U)

§ 1803(a) & (d). The number of judges serving on the FISA Court was increased to 11 by the USA PATRIOT Act of 2001. (U)

D. Authorization for Use of Military Force (U)

On September 18, 2001, in response to the terrorist attacks of September 11, Congress approved an Authorization for Use of Military Force Joint Resolution (AUMF). In conjunction with the President's Commander-in-Chief authority under Article II of the Constitution, this legislation has been cited in support of the President's authority to conduct electronic surveillance without judicial approval. See, e.g., Legal Authorities Supporting the Activities of the National Security Agency Described by the President, January 19, 2006 (Justice Department White Paper), at 6-17. The AUMF states, in pertinent part:

To authorize the use of the United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

. . . .

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES

(a) IN GENERAL - That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or

persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. (U)

Pursuant to this authority, the President ordered the U.S. armed forces to invade Afghanistan to combat al Qaeda terrorists and overthrow the Taliban government that had given them refuge. (U)

In 2004, OLC took the position that the AUMF was "expressly designed to authorize whatever military actions the Executive deems appropriate to safeguard the United States[,]" including the use of electronic surveillance to detect and prevent further attacks. See Office of Legal Counsel Memorandum, May 6, 2004, at 31, citing 50 U.S.C. § 1811. In addition, the Justice Department asserted in the 2006 White Paper that in enacting FISA Congress contemplated that a later legislative enactment could authorize electronic surveillance outside the procedures set forth in FISA itself, and cited the AUMF as such a legislative enactment. See Justice Department White Paper at 20-28, citing 50 U.S.C. § 1809(a)(1).

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

E. Executive Order 12333 (U)

On December 4, 1981, President Reagan signed Executive Order 12333 as part of a series of legal reforms that followed abuses of intelligence-gathering authority documented by the Church Commission in the 1970s.¹⁴ Executive Order 12333 placed restrictions on intelligence collection activities engaged in by Executive Branch agencies, including the NSA, while also seeking to foster "full and free exchange of information" among these agencies.¹⁵ Executive Order 12333 at 1.1. (U)

Executive Order 12333 provides that the Attorney General is authorized "to approve the use for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power." Id. at 2.5. Executive Order 12333 also provides that

¹⁴ See <http://www.aarclibrary.org/publib/church/reports/contents.htm>. Volumes 5 and 6 of the Church Commission report address abuses of intelligence-gathering authority by the NSA and the FBI. (U)

¹⁵ Executive Order 12333 was amended on July 30, 2008, by Executive Order 13470. This report refers to Executive Order 12333 as it existed prior to that amendment. (U)

electronic surveillance, as defined under FISA, must be conducted in accordance with FISA.¹⁶ (U)

Executive Order 12333 prohibits the collection of foreign intelligence information by "authorized [agencies] of the Intelligence Community . . . for the purpose of acquiring information concerning the domestic activities of United States persons." *Id.* at 2.3(b). (U)

However, in authorizing the Stellar Wind program, [REDACTED]

[REDACTED] As discussed previously, the legal rationale advanced for this exemption was that the Authorization for Use of Military Force and the President's Commander-in-Chief powers gave the President the authority to collect such information, notwithstanding the FISA statute. ~~(TS//STLW//SI//OC/NF)~~

II. Presidential Authorizations (U)

The Stellar Wind program was first authorized by the President on October 4, 2001, and periodically reauthorized by the President through a series of documents issued to the Secretary of Defense entitled "Presidential Authorization for Specified Electronic Surveillance Activities During a Limited Period to Detect and Prevent Acts of Terrorism Within the United States" (Presidential Authorization or Authorization). A total of 43 Presidential Authorizations, not including modifications and related presidential memoranda, were issued over the duration of the program from October 2001 through February 2007.¹⁷ Each Authorization directed the

¹⁶ Prior to September 11, 2001, Executive Order 12333 and FISA were generally viewed as the principal governing authorities for conducting electronic surveillance. For example, in 2000 the NSA reported to Congress that

(U) The applicable legal standards for the collection, retention, or dissemination of information concerning U.S. persons reflect a careful balancing between the needs of the government for such intelligence and the protection of the rights of U.S. persons, consistent with the reasonableness standard of the Fourth Amendment, as determined by factual circumstances.

(U) In the Foreign Intelligence Surveillance Act (FISA) and Executive Order (E.O.) 12333, Congress and the Executive have codified this balancing. (Citations omitted.)

NSA Report to Congress, *Legal Standards for the Intelligence Community in Conducting Electronic Surveillance* (2000). (U)

¹⁷ The Presidential Authorizations were issued on the following dates: October 4, 2001; November 2, 2001; November 30, 2001; January 9, 2002; March 14, 2002; April 18, 2002; May 22, 2002; June 24, 2002; July 30, 2002; September 10, 2002; October 15, 2002; November 18, 2002; January 8, 2003; February 7, 2003; March 17, 2003; April 22,

(Cont'd.)

Secretary of Defense to "use the capabilities of the Department of Defense, including but not limited to the signals intelligence capabilities of the National Security Agency, to collect foreign intelligence by electronic surveillance," provided the surveillance met certain criteria. The specific criteria are described in detail in Chapters Three and Four of this report. ~~(TS//STLW//SI//OC/NF)~~

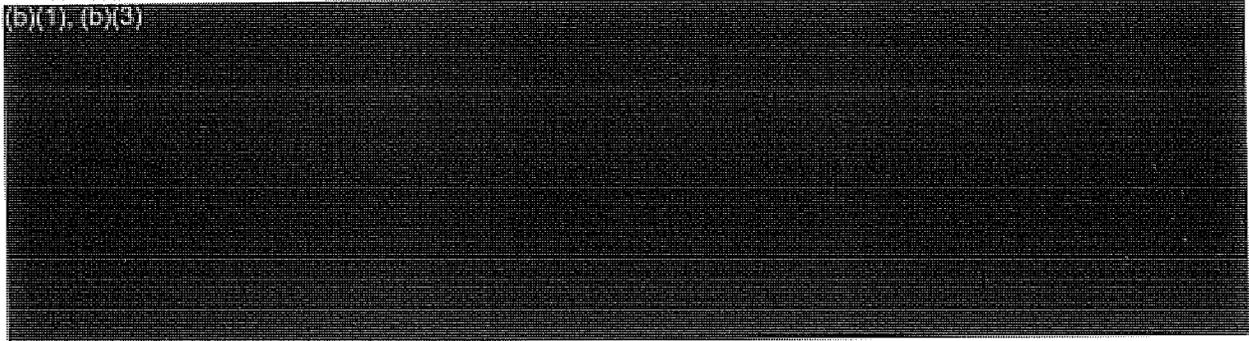
A. Types of Collection Authorized ~~(S//NF)~~

The scope of collection permitted under the Presidential Authorizations varied over time, but generally involved intercepting the content of certain telephone calls and e-mails, and the collection of bulk telephone and e-mail meta data. The term "meta data" has been described as "information about information." As used in the Stellar Wind program, for telephone calls, meta data generally refers to "dialing-type information" (the originating and terminating telephone numbers, and the date, time, and duration of the call), but not the content of the call. For e-mails, meta data generally refers to the "to," "from," "cc," "bcc," and "sent" lines of an e-mail, but not the "subject" line or content. ~~(TS//STLW//SI//OC/NF)~~

The information collected through the Stellar Wind program fell into three categories, often referred to as "baskets":

- Basket 1 (content of telephone and e-mail communications);
- Basket 2 (telephony meta data); and
- Basket 3 (e-mail meta data). ~~(TS//STLW//SI//OC/NF)~~

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



2003; June 11, 2003; July 14, 2003; September 10, 2003; October 15, 2003; December 9, 2003; January 14, 2004; March 11, 2004; May 5, 2004; June 23, 2004; August 9, 2004; September 17, 2004; November 17, 2004; January 11, 2005; March 1, 2005; April 19, 2005; June 14, 2005; July 26, 2005; September 10, 2005; October 26, 2005; December 13, 2005; January 27, 2006; March 21, 2006; May 16, 2006; July 6, 2006; September 6, 2006; October 24, 2006; and December 8, 2006. The last Presidential Authorization expired February 1, 2007. There were also two modifications of a Presidential Authorization and one Presidential memorandum to the Secretary of Defense issued in connection with the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

B. Findings and Primary Authorities (U)

In this section, we describe certain features common to all the Presidential Authorizations. Each of the Presidential Authorizations included a finding to the effect that terrorist groups of global reach possessed the intent and capability to attack the United States, that an extraordinary emergency continued to exist, and that these circumstances "constitute an urgent and compelling governmental interest permitting electronic surveillance within the United States for counterterrorism purposes, without a court order." (TS//STLW//SI//OC/NF)

The primary authorities cited for the legality of these electronic surveillance and related activities were Article II of the Constitution and the Authorization for Use of Military Force Joint Resolution. The Authorizations further provided that any limitation in Executive Order 12333 or any other Presidential directive inconsistent with the Presidential Authorizations shall not apply, to the extent of the inconsistency, to the electronic surveillance authorized under the Stellar Wind program. (TS//STLW//SI//OC/NF)

Each Authorization also included the President's determination that to assist in preserving the secrecy necessary to "detect and prevent acts of terrorism against the United States," the Secretary of Defense was to defer notification of the Authorizations outside of the Executive Branch and the activities carried out pursuant to them. The President also noted his intention to inform appropriate members of the Senate and the House of Representatives of the program "as soon as I judge that it can be done consistently with national defense needs." Some Presidential Authorizations described briefings given to members of Congress and FISA Court judges. (TS//STLW//SI//OC/NF)

C. The Reauthorization Process (U)

The Presidential Authorizations were issued at intervals of approximately 30 to 45 days. Department officials told the OIG that the intervals were designed to be somewhat flexible to assure the availability of the principals that had to sign the Authorizations and to reassess the reasonableness of the collection.¹⁸ Steven Bradbury, former Principal Deputy and Acting Assistant Attorney General for the Office of Legal Counsel (OLC), said that the main reason for periodically reauthorizing the program was to ensure that the Presidential Authorizations were reviewed frequently to assess the continued need for the program and the program's

¹⁸ The officials who signed the Authorizations included the Attorney General, the President, and the Secretary of Defense (or other high-ranking Department of Defense official). (U//FOUO)

value. As the period for each Presidential Authorization drew to a close, the Director of Central Intelligence (DCI), and as of June 3, 2005, the Director of National Intelligence (DNI) prepared a threat assessment memorandum for the President describing potential terrorist threats to the United States and outlining intelligence gathered through the Stellar Wind program and other means during the previous Authorization period. The DCI (and later the DNI) and the Secretary of Defense reviewed these memoranda and signed a recommendation that the program be reauthorized.

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

Each recommendation was then reviewed by the OLC to assess whether, based on the threat assessment and information gathered from other sources, there was "a sufficient factual basis demonstrating a threat of terrorist attacks in the United States for it to continue to be reasonable under the standards of the Fourth Amendment for the President to [continue] to authorize the warrantless searches involved" in the program. The OLC then advised the Attorney General whether the constitutional standard of reasonableness had been met and whether the Presidential Authorization could be certified "as to form and legality."

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

D. Approval "as to form and legality" (U)

As noted above, the Presidential Authorizations were "[a]pproved as to form and legality" by the Attorney General or other senior Department official, typically after the review and concurrence of the OLC. The lone exception to this practice was the March 11, 2004, Authorization which we discuss in Chapter Four. ~~(TS//SI//NF)~~

However, there was no legal requirement that the Authorizations be certified by the Attorney General or other Department official. Former senior Department official Patrick Philbin told us he thought one purpose for the certification was to give the program a sense of legitimacy so that it not "look like a rogue operation."

[REDACTED]

Bradbury told us that the Justice Department certifications served as official confirmation that the Department had determined that the activities carried out under the program were lawful.

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

Former Attorney General Gonzales told us that certification of the program as to form and legality was not required as a matter of law, but he believed that it "added value" to the Authorization for three reasons. First,

he said that the NSA was being asked to do something it had not done before, and it was important to assure the NSA that the Attorney General had approved the legality of the program. [REDACTED]

[REDACTED] Third, for "purely political considerations" the Attorney General's approval of the program would have value "prospectively" in the event of congressional or Inspector General reviews of the program.

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

CHAPTER THREE
INCEPTION AND EARLY OPERATION OF STELLAR WIND
(SEPTEMBER 2001 THROUGH APRIL 2003) ~~(S//NF)~~

This chapter describes the early operation of the Stellar Wind program. The five sections of the chapter cover the time period from September 2001 to April 2003. ~~(S//NF)~~

In Section I, we provide a brief overview of the National Security Agency (NSA) and the inception of the Stellar Wind program, including a description of the legal authorities relied upon to support the program and the scope of collection authorized under the Presidential Authorizations. In Section II, we describe key aspects of the NSA's implementation of the Presidential Authorizations.

~~_____~~ the technical operation of the program, and the initial process for analyzing and disseminating the information collected. In Sections III and IV, we describe the FBI's and the Office of Intelligence Policy and Review's early knowledge of and involvement in Stellar Wind. In Section V, we describe measures the FBI implemented to improve its management of information derived from the program that the FBI disseminated to its field offices.

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

I. Inception of the Stellar Wind Program (U//FOUO)

A. The National Security Agency (U)

The NSA was established on October 24, 1952, by President Truman as a separate agency within the Department of Defense under the direction, authority, and control of the Secretary of Defense. See Presidential Memorandum to the Secretary of State and the Secretary of Defense, October 24, 1952. By Executive Order 12333 (December 4, 1981), the NSA was given responsibility within the U.S. Intelligence Community for all signals intelligence, including the "collection of signals intelligence for national foreign intelligence purposes" and the processing and dissemination of such intelligence for counterintelligence purposes.¹⁹ (U)

¹⁹ Signals intelligence is defined as:

1. A category of intelligence comprising either individually or in combination all communications intelligence, electronic intelligence, and foreign instrumentation signals intelligence, however transmitted. (U)
2. Intelligence derived from communications, electronic, and foreign instrumentation signals. (U)

(Cont'd.)

The NSA's two primary missions are to protect U.S. government information systems and to collect, process, and disseminate foreign signals intelligence information. This twofold mission is reflected in the NSA's organizational structure, which consists of two operational directorates: The Information Assurance Directorate, which conducts defensive information operations to protect information infrastructures critical to the United States' national security interests, and the Signals Intelligence Directorate (SID), which controls foreign intelligence collection and processing activities for the United States. (U)

The SID is divided into three major components, two of which - Analysis and Production [REDACTED] and Data Acquisition [REDACTED] - are relevant to the Stellar Wind program. The work of these components with respect to the Stellar Wind program is discussed in more detail in Section II below.

~~(S//NF)~~

B. Implementation of the Program

(September 2001 through November 2001) ~~(S//NF)~~

Immediately following the September 11 terrorist attacks, the NSA modified how it conducted some of its traditional signals collection activities.

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

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

George Tenet, the Director of Central Intelligence at the time, mentioned the modification of these NSA collection activities during a meeting with Vice President Cheney shortly after the September 11 attacks to discuss the intelligence community's response. According to Hayden, who did not attend the meeting but was told about it by Tenet, Cheney asked Tenet to inquire from the NSA whether there were additional steps that could be taken with respect to enhancing signals intelligence capabilities. Tenet related this message to Hayden, who responded that there was nothing further the NSA could do without additional authority. According to Hayden, Tenet asked him a short time later what the NSA could do if additional authority was provided. ~~(TS//SI//NF)~~

Department of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, 484. (U)

