

[REDACTED]

[REDACTED] and provided the date or dates of the contacts, or the period of time in which contact was made. ~~(TS//STLW//SI//OC/NP)~~

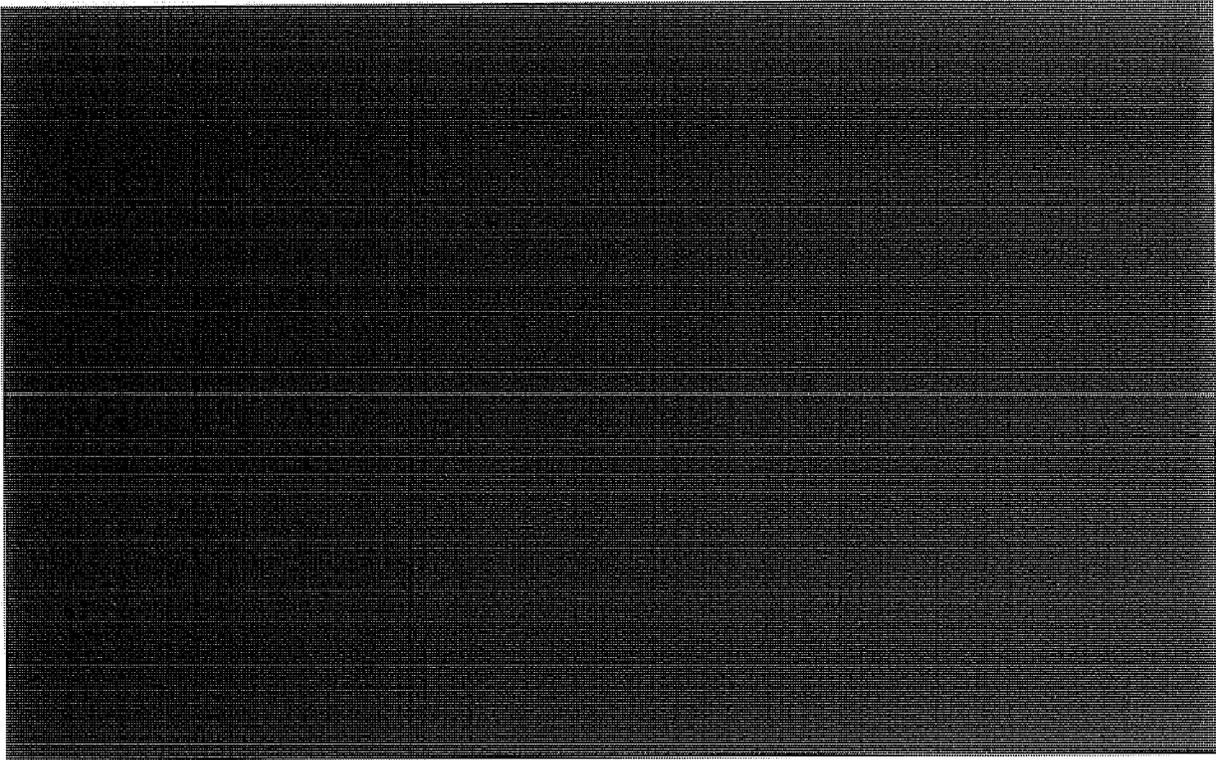
During the first several months of the Stellar Wind program, nearly all reports based on telephone or e-mail meta data analysis designated each of the tippers as [REDACTED]

[REDACTED]

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

As examples, the following Stellar Wind reports were among those disseminated to the FBI in November 2001. We have excerpted only the information below the tearline, which is often referred to simply as "tearline information." In addition, we did not provide the actual telephone numbers provided by the NSA to the FBI. ~~(TS//SI//NF)~~

[REDACTED]



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III. FBI's Early Participation in the Stellar Wind Program ~~(S//NF)~~

Stellar Wind was not an FBI program, nor was the FBI involved in the program's creation. However, as the lead agency for counterterrorism in the United States, the FBI received much intelligence produced under Stellar Wind. In the following sections, we describe how the FBI became involved in the Stellar Wind program, the personnel resources allocated to handle Stellar Wind information, and the initial procedures the FBI established to receive, control, and disseminate the program information.

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

⁶⁹ In addition to the queries the NSA conducted on a case-by-case basis, the NSA also maintained a list of foreign and domestic telephone numbers and e-mail addresses for which, based on NSA analysts' assessments, there was a reasonable basis to believe were associated with international terrorism. These selectors, called "alerts," were queried against the incoming meta data automatically on a daily basis, and any contacts with a domestic telephone number or e-mail address were directed to NSA analysts for review and possible reporting to the FBI. The NSA regularly updated the alert list by adding or removing selectors, depending on the available intelligence. As we discuss in Chapter Five in connection with the transition of Stellar Wind's bulk meta data collection from presidential authority to FISA authority, the FISA Court found that the NSA's use of the alert list to query incoming telephone meta data did not comply with terms of the Court's Order. ~~(TS//STLW//SI//OC/NF)~~

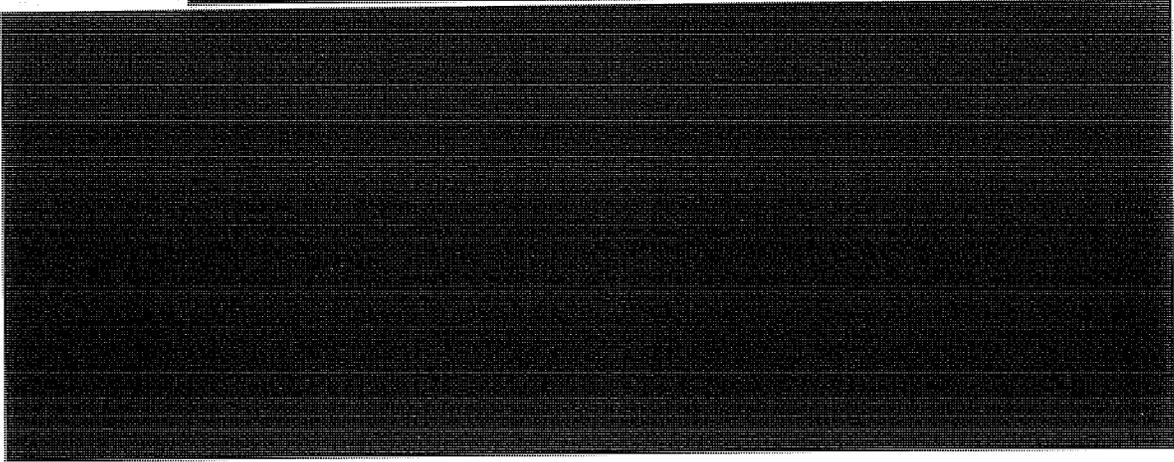
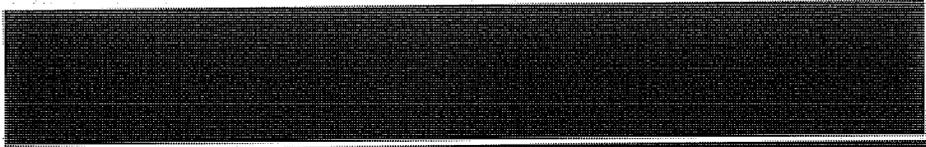
**A. FBI Director First Informed of Stellar Wind Program
(U//FOUO)**

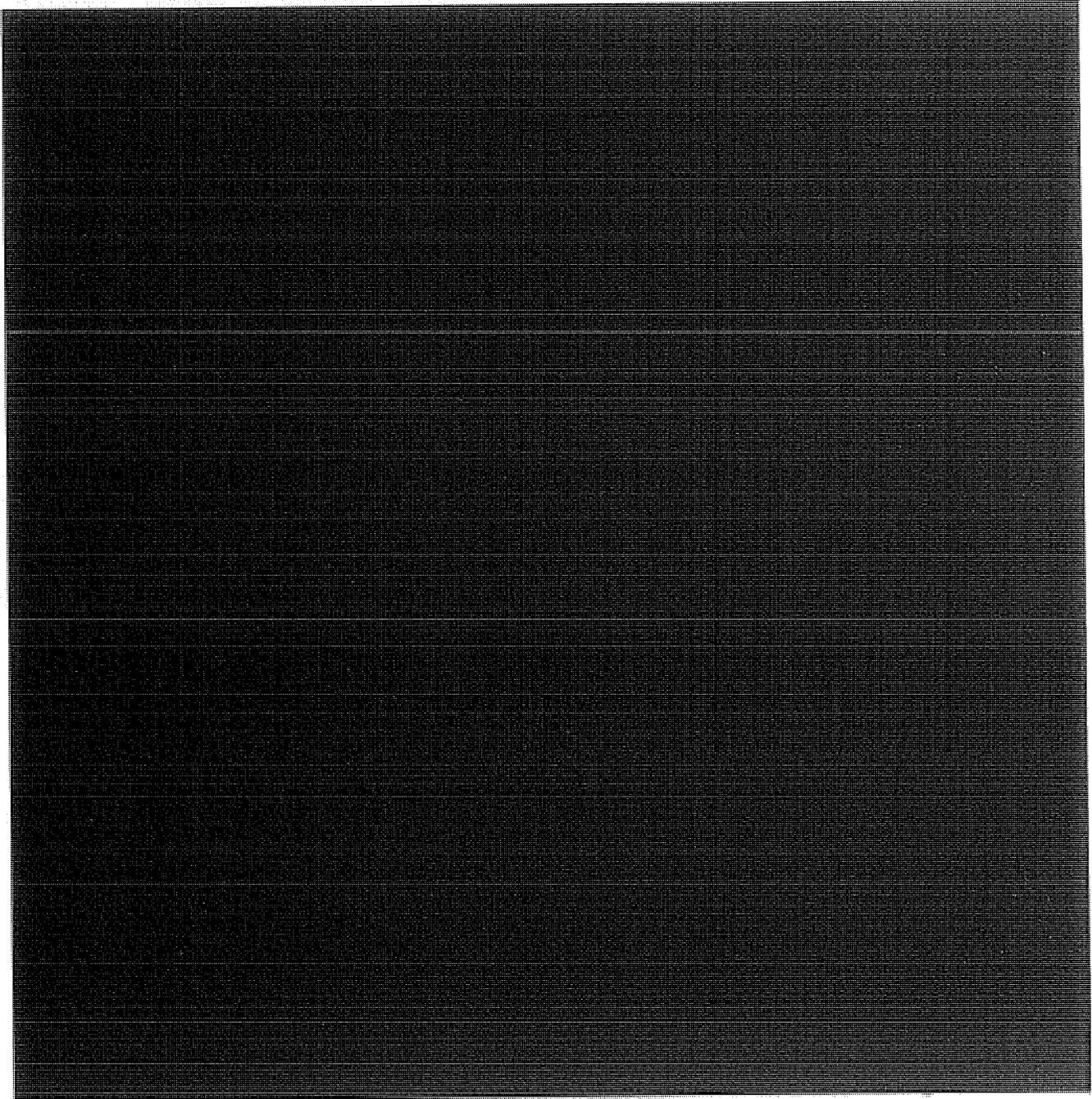
Director Mueller told us that his earliest recollection of the Stellar Wind program was a meeting he attended at the White House with Attorney General Ashcroft, which occurred either after the decision had been made to move forward with the presidentially authorized program or shortly after the October 4, 2001, Authorization was issued. Mueller told us the meeting was "more than a formal read-in" and that Director Hayden may have attended. Mueller said that at or around this time he also briefly reviewed the October 4, 2001, Presidential Authorization, which he characterized as "relatively complex." ~~(TS//SI//OC/NF)~~

Director Mueller said his impression at the time was that the terms of the Presidential Authorization might allow for collecting purely domestic telephone and e-mail communications. Mueller said he discussed the matter with Ashcroft and asked whether OLC had issued an opinion on the program. Mueller said that he recalled being told that OLC might have opined orally on the program and Mueller said he suggested to Ashcroft that OLC issue a formal written opinion. Mueller told us that he did not think the NSA ever exercised authority under the Authorization to collect purely domestic communications. ~~(TS//STLW//SI//OC/NF)~~

Mueller stated that based on the meeting he attended at the White House and his brief review of the October 4, 2001, Presidential Authorization, he understood the FBI's role in the Stellar Wind program was to be a "recipient" of intelligence generated by the NSA, and to provide any technical support to the NSA as necessary to support the program. ~~(TS//SI//NF)~~

B.

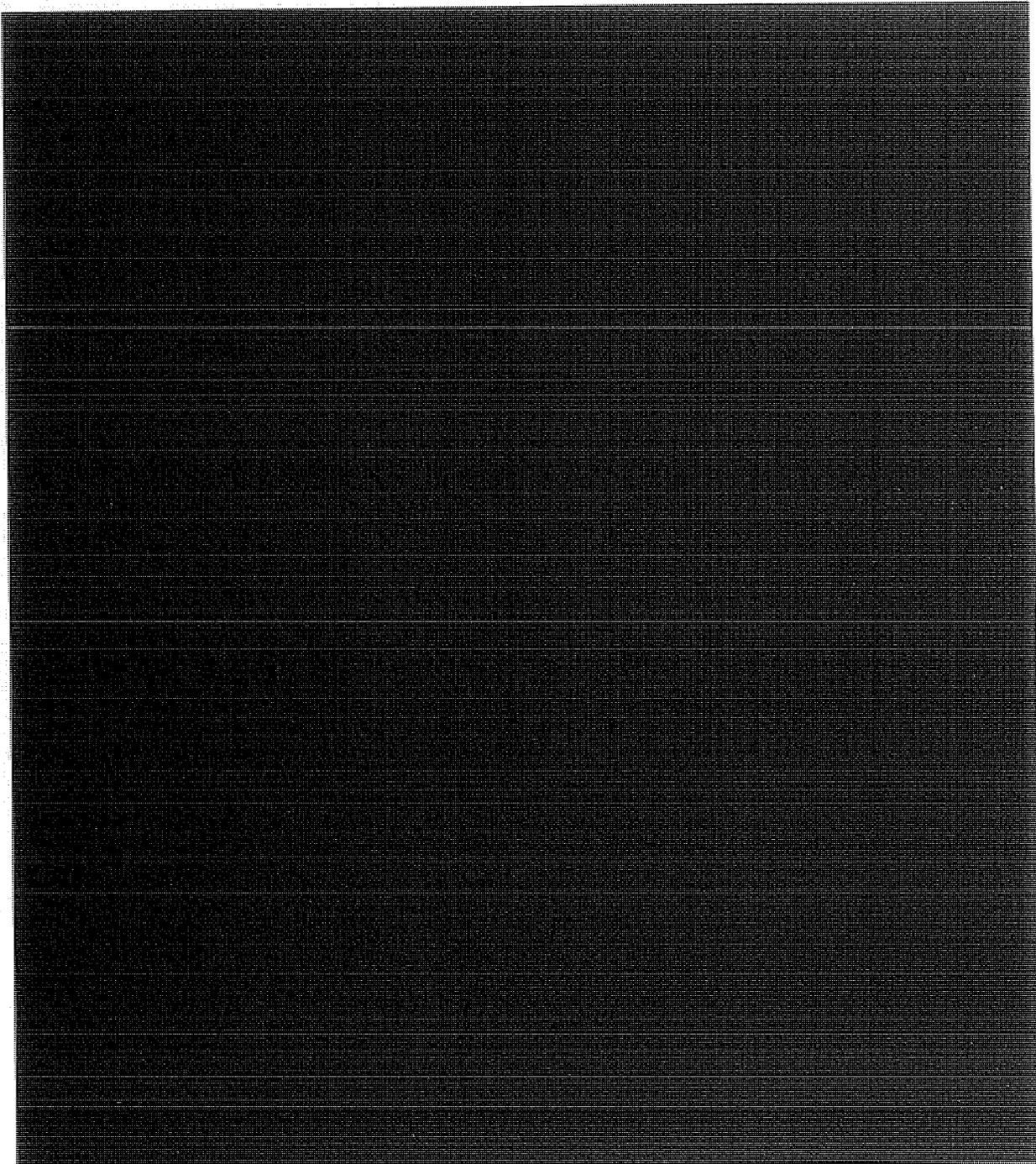




⁷⁰ Executive Order 12333 authorizes the FBI to provide operational support to the Intelligence Community. (U)



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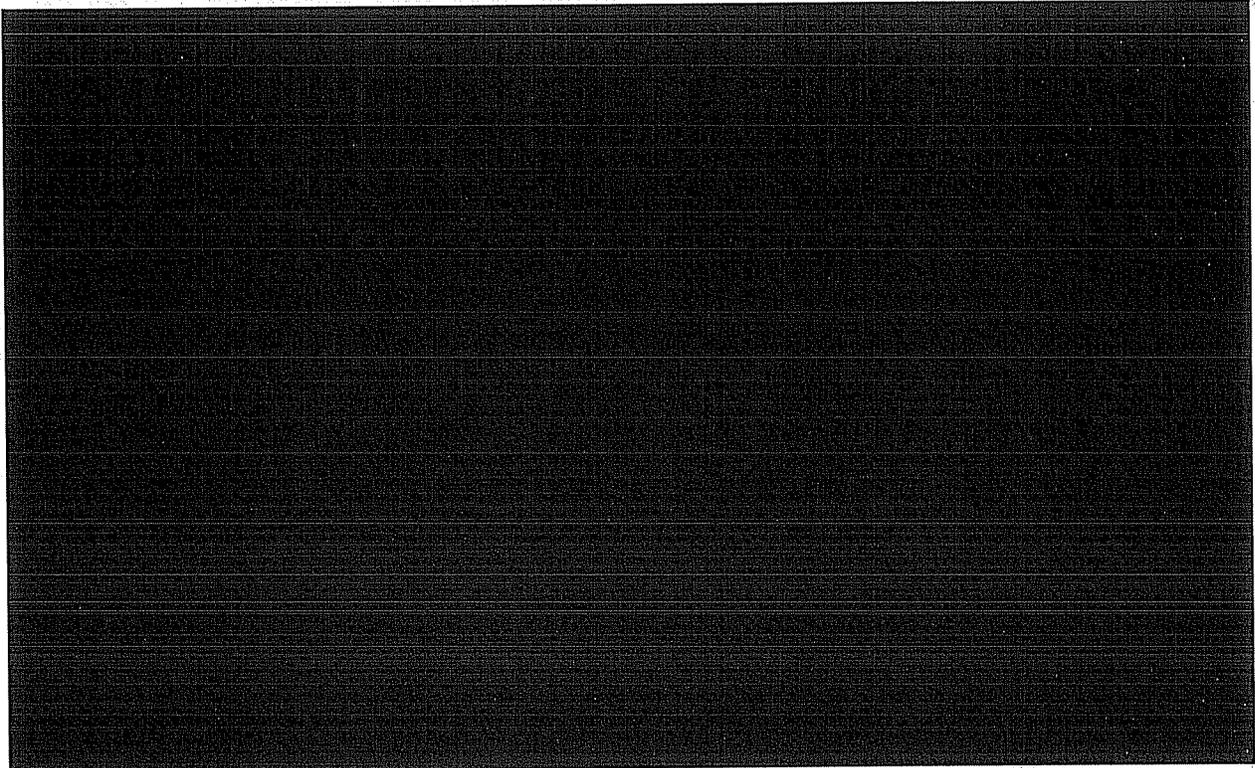
Mueller said he therefore decided to request an order from the

Attorney General formally directing the FBI to support the NSA program. Mueller said that he also requested the order because he wanted a "record as to our participation." ~~(TS//STLW//SI//OC/NF)~~

In response, on October 20, 2001, Attorney General Ashcroft sent a memorandum to Director Mueller stating:

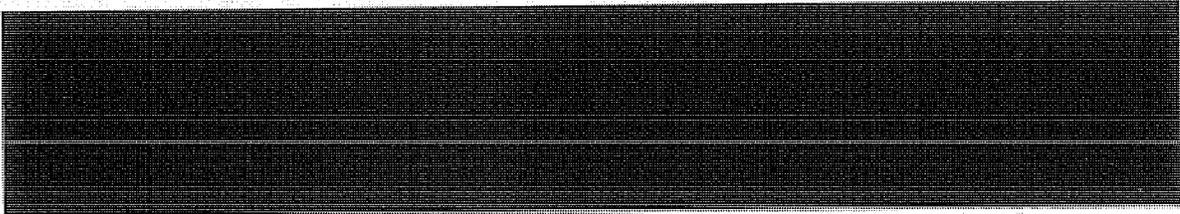
As part of the Nation's self defense activities, the National Security Agency (NSA) is engaged in certain additional collection activities, the details of which you are aware. Those activities are legal and have been appropriately authorized, and the Federal Bureau of Investigation should cooperate with NSA as necessary for it to conduct those activities. ~~(TS//SI//NF)~~

According to Mueller, the combination of this memorandum from the Attorney General and the November 2, 2001, memorandum prepared by the Department's Office of Legal Counsel regarding the legality of Stellar Wind gave him comfort at that time with the FBI's participation in the program. ~~(TS//SI//NF)~~



Bowman also told us that the White House officials primarily responsible for Stellar Wind, who he identified as the Vice President and Addington, were "amateurs" when it came to intelligence work. Bowman stated that one of the potential consequences of severely limiting the number of individuals read into a program is that uncleared personnel who

occupy positions placing them in close proximity to program-related activities might construe certain actions as questionable or illegal and report that activity, thereby potentially compromising the activities. Bowman said that this is what occurred with Stellar Wind. For this reason and others, Bowman did not agree with the decision to so severely limit access to the program. ~~(TS//STLW//SI//OC/NF)~~



C. FBI Begins to Receive and Disseminate Stellar Wind "Tippers" ~~(S//NF)~~

In the immediate aftermath of the September 11 terrorist attacks, the FBI had created a task force of agents and analysts to analyze the flood of telephone numbers it received from multiple sources, including agencies within the U.S. Intelligence Community, foreign intelligence services, and concerned citizens. The task force, called the Telephone Analysis Unit (TAU), was located at FBI Headquarters and consisted of approximately 50 FBI employees working on shift rotations 24 hours per day, 6 days per week. The operation was supervised by FBI supervisors working out of the FBI's Strategic Information and Operations Center. As described below, personnel assigned to this task force were among the first at the FBI to handle Stellar Wind-derived information. ~~(TS//STLW//SI//OC/NF)~~

1. FBI Initiates [REDACTED] ~~(S//NF)~~

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In October or November 2001, several TAU analysts were assigned to what came to be called the [REDACTED] which was the FBI's effort to manage the Stellar Wind-derived information being received from the NSA. The information, referred to as Stellar Wind "tippers," consisted of telephone numbers and e-mail accounts derived from NSA meta data analysis, and sometimes content intercepted from particular telephone and e-mail communications. The essential purpose of the [REDACTED] was to receive Stellar Wind tippers from the NSA and disseminate the information to FBI field offices for investigation in a manner that did not reveal the source of the information or the methods by which it was collected. ~~(TS//STLW//SI//OC/NF)~~

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Working alternating shifts in the FBI's Strategic Information and Operations Center, two FBI analysts were primarily responsible for managing Stellar Wind tippers in the initial months of the program. These analysts told the OIG that until December 2001, the Stellar Wind tippers

consisted nearly exclusively of telephone numbers. According to the analysts, the process for handling Stellar Wind tippers began when the NSA liaison co-located at FBI Headquarters provided one of the analysts the information below the tearline from a Stellar Wind report containing one or more tippers. The analyst then queried FBI databases for any information about each tipper, such as whether the tipper appeared in any pending or closed FBI investigations. The analyst also queried the tipper against the FBI's [REDACTED] database, which is the FBI's central repository for telephone subscriber data acquired during the course of investigations. In addition, the analyst checked each tipper against public source databases for relevant information, such as the identity of a telephone number subscriber. (TS//STLW//SI//OC/NF)

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After completing these database checks, the analyst drafted an Electronic Communication, or EC, from FBI Headquarters to the appropriate FBI field office. The EC described the tearline information about the tipper contained in the Stellar Wind report together with any additional information the analyst was able to locate. (TS//STLW//SI//OC/NF)

The [REDACTED] ECs disseminated to field offices included several features concerning the nature of the information and how it could be used. First, the ECs advised the field offices that the information being provided was "derived from an established and reliable source" and that it was "being addressed by the TAU as the [REDACTED]"⁷² (S//NF)

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Second, the ECs included a caveat about the use of the information being provided, stating that the information "is for lead purposes only and is intended solely for the background information of recipients in developing their own collateral leads. It cannot be used in affidavits, court proceedings, subpoenas, or for other legal or judicial purposes." The FBI said this language was included in each EC to protect the source of the information and the methods by which it was collected. (S//NF)

Third, the ECs provided an explanation about the qualitative rankings assigned to the tippers. As described previously, the NSA assigned each tipper a [REDACTED] ranking [REDACTED]

⁷³ (TS//SI//NF)

[REDACTED] (S//NF) [REDACTED]

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(Cont'd.)

Fourth, the ECs instructed the field offices how the tippers should be addressed. These instructions were provided as "leads," for which the FBI had three categories: Action, Discretionary, and For Information. An Action lead instructed a field office to take a particular action in response to the EC. An Action lead was "covered" when the field office took the specified action or conducted appropriate investigation to address the information in the EC. A Discretionary lead allowed the field office to take whatever action it deemed appropriate. A field office that receives a "For Information" lead was not expected to take any specific action in response to the EC other than possibly route the communication to the office personnel whose investigations or duties the information concerned. ~~(S//NF)~~

After the FBI analyst completed this process and drafted the EC, an FBI Supervisory Special Agent read into the Stellar Wind program reviewed the EC, in part to ensure that it did not reveal the source of the information or the method by which the information was obtained. Once approved, the analyst entered the EC into the FBI's Automated Case Management System and the receiving field offices were notified electronically to review the communication. ~~(TS//SI//NF)~~

Each [REDACTED] EC typically contained multiple tippers and therefore was distributed to multiple field offices. The receiving field offices were responsible for handling the leads that concerned tippers falling in their respective geographic jurisdictions. ~~(S//NF)~~

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Most of the [REDACTED] leads that disseminated Stellar Wind tippers were designated Action leads. As noted, during this period the tippers were almost exclusively telephone numbers. Accordingly, the typical lead instructed the field office to [REDACTED]

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[REDACTED] The lead also instructed the field office to report the investigative results to the Telephone Analysis Unit.

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

The two [REDACTED] analysts told us that the focus of their work in the first months after the September 11 attacks was to detect what many believed was an imminent second attack. During this period, nearly all of the Stellar Wind tippers the FBI received were disseminated to a field office for investigation as quickly as possible. ~~(S//NF)~~

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In addition to tippers containing the content of intercepted telephone and e-mail communications (content tippers), in approximately December

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

2001 the NSA began providing the FBI tippers derived from the NSA's e-mail meta data analysis (e-mail tippers). These e-mail tippers initially were routed to the same two analysts who were managing the telephone tippers. The analysts told us that the e-mail tippers were processed and disseminated in the same manner as the telephone tippers. Content tippers, which according to the analysts were received very infrequently during this early period, generally were also disseminated by EC to the appropriate field offices, but little if any research regarding the information was conducted. The analysts said they considered the content tippers particularly time-sensitive and for that reason occasionally transmitted the ECs directly to the appropriate field offices or called the offices to advise that the information was being loaded into the FBI's Automated Case Management System. In 2002, responsibility for e-mail tippers was reassigned to the Electronic Communications Analysis Unit.

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

In February 2002, one of the two FBI analysts left the [REDACTED] [REDACTED] after being selected for a management position in a different analytical section within the FBI's Counterterrorism Division. The remaining analyst became solely responsible for managing the Stellar Wind tippers under the [REDACTED] a situation that continued for approximately the next 12 months. The analyst told us that while her work hours during this period were "ridiculous," she did not feel there was any pressure to add analysts to the project because "the process was working well." ~~(TS//SI//NF)~~

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In early 2002, FBI management instructed the lone [REDACTED] [REDACTED] analyst to conduct some of her work while physically located in the NSA Headquarters at Fort Meade, Maryland. This created an unusual arrangement for the analyst. The analyst continued to receive the NSA's daily Stellar Wind reports at FBI Headquarters, and she would then drive to the NSA with the reports to draft the ECs (the analyst had remote access to FBI databases from an NSA workstation). The analyst told us that interaction with NSA counterparts during these daily visits was minimal. After the ECs were drafted, the analyst returned to FBI Headquarters to obtain approval to disseminate the communications to the FBI's field offices. The analyst's impression was that FBI management created this unusual arrangement "for show" and that its purpose was to establish an FBI "presence" at the NSA in connection with Stellar Wind.

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

The analyst continued working on Stellar Wind matters until approximately February 2003, when a small team of FBI personnel were

assigned permanently to the NSA to manage the FBI's participation in the Stellar Wind program.⁷⁴ ~~(S//NF)~~

2. FBI Field Offices' Response to [REDACTED] Leads ~~(S//NF)~~

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According to the two FBI analysts responsible for managing Stellar Wind information under the [REDACTED] from approximately October 2001 to February 2003, some agents in FBI field offices grew frustrated with the information they were receiving under the program. Because the [REDACTED] ECs that disseminated the tippers to the field offices assigned most of them as Action leads, this required that the leads be covered expeditiously. ~~(S//NF)~~

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Under ordinary operating procedures, investigative leads for international terrorism matters are set by FBI Headquarters' International Terrorism Operations Section. In addition, the ECs assigning international terrorism leads typically identified a Supervisory Special Agent within ITOS as the point-of-contact for any questions field offices might have. Because the Stellar Wind program was so tightly compartmented, the leads sent during this early period by the [REDACTED] were not coordinated with ITOS, and the FBI Headquarters point-of-contact identified in the ECs for any questions generally was one of the two [REDACTED] analysts. ~~(S//NF)~~

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According to one of the [REDACTED] analysts, agents responsible for covering the Action leads complained that the lack of background information provided in the ECs about the tippers made it difficult to determine what investigative steps could or should be taken.

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[REDACTED]

⁷⁵ Consequently, the analyst

⁷⁴ This co-location of FBI personnel at the NSA is discussed below. ~~(S//NF)~~

⁷⁵ To open a full investigation, the FBI was required to [REDACTED]

[REDACTED] A preliminary inquiry required See Attorney General only a showing of Guidelines for [REDACTED]

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The FBI's practice of issuing national security letters based on Stellar Wind-derived information is discussed in Chapter Six of this report. ~~(S//NF)~~

received calls from agents requesting additional information about the source of the intelligence provided in the ECs to help the agents decide whether there was sufficient predication to open an investigation on the telephone number or to issue a national security letter for subscriber information. ~~(TS//SI//NF)~~

The analyst stated that in response to these calls he could only reiterate to the agents that the information was provided by a reliable, sensitive source. The analyst said this situation produced a "dichotomy" with the tipplers. On the one hand, there was a demand in the International Terrorism Operations Section and field offices for the telephone numbers because of their priority [redacted] status and the prevailing concern that there would be a second terrorist attack; on the other hand, the limited and vague information contained in the [redacted] ECs caused some confusion and frustration among agents investigating the lead. ~~(S//NF)~~

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Agents also complained that many tipplers were already known to the FBI from past or pending investigations and that the [redacted] ECs were providing "circular reporting."⁷⁶ However, according to one [redacted] analyst, this generally did not occur. The analyst explained that an agent in the field assigned to cover a lead on a telephone number did not know the NSA was the source of the intelligence. Consequently, when the agent discovered that the number was identical to a number the agent was already investigating or was aware of, it appeared to the agent that the [redacted] simply had identified a previously known number, conducted some additional research that the field office likely had already done, and disseminated the information back to the field as new reporting. Because the analysts could not fully explain the source of the intelligence, the agent did not realize the [redacted] reporting in fact reflected a new foreign connection to the telephone number. ~~(TS//STLW//SI//OC/NF)~~

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Another frustration voiced by agents to the [redacted] analysts was that leads disseminated under the project that were designated "Action leads" frequently did not yield significant investigative results, such as identifying new persons of interest or contributing to an active investigation. [redacted]

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⁷⁶ For example, circular reporting might have occurred when the FBI passed a Stellar Wind-derived telephone number or e-mail address to another agency within the U.S. Intelligence Community, that agency in turn requested the NSA to analyze the information, and the NSA subsequently disseminated the results back to the FBI in a Stellar Wind report. ~~(TS//STLW//SI//OC/NF)~~

[REDACTED]

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

The NSA responded to this frustration by implementing the [REDACTED] rankings described earlier to provide the agents some guidance on prioritizing the tippers. In addition, the FBI analysts told us that they became more adept at telephone analysis and "got better at their game" by eliminating low value tippers [REDACTED] from being disseminated to field offices. According to FBI documents, the FBI also sought additional information from the NSA about tippers ranked [REDACTED] before the FBI disseminated these tippers to the field for investigation.

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

3. FBI's Efforts to Track Stellar Wind Tippers and Update Executive Management on Status of [REDACTED] Leads (S//NF)

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Typically, FBI ECs originate from a specific investigative or administrative case file number. A file number is also required for an EC to be loaded into the FBI's Automated Case Management System and to enable the sending office to assign a lead to the receiving office. However, FBI Headquarters did not initially open an investigative file for the [REDACTED] ECs that disseminated Stellar Wind tippers to field offices. One of the original analysts assigned to the project told the OIG that he was familiar with a telephone analysis project in the FBI's drug program and that as a result he decided to issue the first Stellar Wind-related EC from that drug investigative file. This confused some field offices receiving the earliest ECs because counterterrorism leads were being disseminated under a drug investigation file number. ~~(TS//STLW//SI//OC/NF)~~

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In mid-October 2001, the FBI created a subfile under the FBI's investigation of the September 11 terrorist attacks to disseminate Stellar Wind information. The FBI used this subfile, referred to as the [REDACTED] until September 2002, when a more formal program for disseminating Stellar Wind information, called [REDACTED] was created.⁷⁷

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

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The [REDACTED] analysts also told us that they created a database to attempt to track the status of leads disseminated to the field offices. The database identified each tipper by field office and the status of the lead that was assigned. One analyst stated that the response rate from

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⁷⁷ We describe this more formal program in Chapter Six of this report. (U)

field offices was uneven during these early months, and their supervisors instructed the analysts at one point to contact the head of each field office to determine the status of the [REDACTED] leads for which each office was responsible. ~~(S//NF)~~

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The [REDACTED] analysts used the database they created to produce status reports for senior FBI officials who were read into the Stellar Wind program. These reports provided statistics regarding the quantity and rankings of disseminated tippers, as well as brief synopses of the status of the [REDACTED] leads. The Stellar Wind program was viewed as an emergency response to the September 11 attacks and these status reports were intended to provide FBI executives information about how the program was contributing to the FBI's counterterrorism efforts. ~~(TS//SI//NF)~~

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IV. Justice Department Office of Intelligence Policy and Review's (OIPR) and FISA Court's Early Role in Stellar Wind ~~(TS//STLW//SI//OC/NF)~~

When the President signed the first Authorization for the program on October 4, 2001, only two Department officials outside the FBI were read into the Stellar Wind program: Attorney General John Ashcroft, who certified the Authorization as to form and legality; and John Yoo, the Deputy Assistant Attorney General in the Office of Legal Counsel responsible for advising the Attorney General on the matter and for drafting the Department's first memorandum on the legality of the program.⁷⁸ The Department's Office of Intelligence Policy and Review (OIPR), despite its expertise in FISA matters, was not asked to consider how FISA might affect the program's legality or implementation, nor was OIPR asked to consider how the program might affect the Department's FISA operations.
~~(TS//SI//NF)~~

In this section, we provide an overview of OIPR, how James Baker, the head of OIPR, inadvertently came to learn about Stellar Wind soon after it was initiated, and the subsequent role that OIPR played in the program's operation. We also describe the circumstances surrounding the decision to have the FISA Court Presiding Judge and his successor read into the Stellar Wind program, and the Court's response to the program.
~~(TS//STLW//SI//OC/NF)~~

⁷⁸ Levin told us that he did not believe Yoo was read into Stellar Wind before the October 4, 2001, Presidential Authorization was signed, and we were not able to determine precisely when Yoo's read-in occurred. However, Yoo's November 2, 2001, memorandum analyzes the legality of the October 4, 2001, Authorization and the draft of the November 2, 2001, Authorization. Thus, it appears that Yoo was read into the program not later than November 2, 2001. ~~(TS//STLW//SI//OC/NF)~~

A. Overview of OIPR (U)

At the time of the implementation of the Stellar Wind program, OIPR was responsible for advising the Attorney General on matters relating to the national security activities of the United States.⁷⁹ Created shortly after enactment of the Foreign Intelligence Surveillance Act of 1978, OIPR reviewed executive orders, directives, and procedures relating to the intelligence community, and approved certain intelligence-gathering activities. OIPR also provided formal and informal legal advice to the Attorney General and U.S. intelligence agencies regarding questions of law and procedure relating to U.S. intelligence activities. In addition, OIPR advised the Attorney General and agencies such as the CIA, FBI, and Defense and State Departments concerning questions of law relating to U.S. national security activities and the legality of domestic and overseas intelligence operations. (U//~~FOUO~~)

OIPR also represented the United States before the FISA Court. OIPR was responsible for preparing and presenting applications to the FISA Court for orders authorizing electronic surveillance and physical searches by U.S. intelligence agencies for foreign intelligence purposes in investigations involving espionage and international terrorism. When evidence obtained under FISA was proposed to be used in criminal proceedings, OIPR sought the necessary authorization from the Attorney General, and in coordination with the Criminal Division and U.S. Attorney's Office prepared the motions and briefs required by the federal court whenever surveillance under FISA was challenged. (U)

The head of OIPR was referred to as the Counsel for Intelligence Policy and was supported by two Deputy Counsel and a staff of attorneys, paralegals, and administrative professionals. James Baker served as the Counsel for OIPR from May 2001 to January 2007.⁸⁰ (U)

B. OIPR Counsel Learns of Stellar Wind Program (U//~~FOUO~~)

Baker told us that while standing outside the Department one evening several weeks after the September 11 attacks, he was approached by an FBI colleague who said, "There is something spooky going on," that it appeared

⁷⁹ In September 2006, the Justice Department moved OIPR into the newly created National Security Division (NSD). In April 2008, NSD modified OIPR's structure and name. The new organization is called the Office of Intelligence and includes operations, oversight, and litigation sections. For purposes of this report we use the term OIPR to reflect the time period our review encompasses. (U)

⁸⁰ Baker served as Acting Counsel for OIPR from May 2001 to January 2002, and as Counsel from February 2002 until January 2007. Baker officially resigned from the Justice Department in October 2007. (U)

foreign-to-domestic collection was being conducted without a FISA order, and that some FBI personnel "were getting nervous." The FBI colleague asked Baker whether he knew anything about the activity, and Baker responded that he did not. ~~(TS//STLW//SI//OC/NF)~~

Baker said that while reviewing a FISA application several weeks after this conversation, a particular passage regarding international communications "leapt out at" him. According to Baker, the passage contained "strange, unattributed language" and information that was "not attributed in the usual way." Baker told the OIG that the information concerned connections between telephone numbers, but he could not recall if the information simply identified a link between individuals or also included the content of communications. ~~(TS//SI//NF)~~

Baker asked the OIPR attorney responsible for the application about the information in the passage, and the attorney responded that nobody at the FBI would disclose where the information had come from, only that it was part of a "special collection." Baker therefore contacted the FBI about the application. Unable to obtain any answers to his questions, Baker informed the FBI that he would not allow the application to be filed with the FISA Court. Baker said that, to the best of his recollection, he did not believe the application was filed with the Court. ~~(TS//SI//NF)~~

Soon thereafter, Baker spoke with Daniel Levin, who at that time was serving as both Counselor to the Attorney General and Chief of Staff to the FBI Director. Levin told Baker that approval from the White House was needed before he could tell Baker about the special collection. Levin told us that he successfully pressed the White House for Baker to be read into Stellar Wind. Baker stated that David Addington, counselor to Vice President Cheney, was the individual who approved his clearance into the program. ~~(TS//STLW//SI//OC/NF)~~

According to NSA records, Baker was read into Stellar Wind in January 2002.⁸¹ He said his read in essentially consisted of Levin providing him a short briefing and a copy of Yoo's November 2, 2001, memorandum regarding the legality of the program. Baker told us that his initial reaction was that the program, and Yoo's memorandum, were flawed legally. Baker said he did not consider himself a constitutional law scholar, but was

⁸¹ Baker told us that he initially was read into the program in December 2001 by Levin. Baker said he later received a more formal briefing on the program at the NSA, where he was allowed to read the Presidential Authorizations and discuss the program with NSA attorneys. This formal briefing appears to be the event that the NSA considers Baker's official read-in, which according to NSA records occurred on January 11, 2002. We used this date for purposes of calculating the number of Justice Department employees read into the program. (U//FOUO)

nevertheless surprised that while Stellar Wind was in his view "overriding a criminal statute" on the basis of the President's power as Commander in Chief, Yoo's memorandum did not even cite an important U.S. Supreme Court opinion on presidential authority during wartime, *Youngstown Sheet & Tube Co.* Baker said he believed that it is important to exercise some "humility" when dealing with national security matters because of the complexity and importance of the issues, and he therefore reserved final judgment on the memorandum until he researched the legal issues further. Yet, Baker said his initial opinion that the memorandum was flawed legally did not change over time. ~~(TS//STLW//SI//OC/NF)~~

We asked Baker whether at the time he thought the collection authorized under Stellar Wind could have been accomplished under FISA. Baker said that his thinking on this issue has evolved over time, but that he staunchly believed that "FISA works in wartime." He stated that although it is difficult to do, FISA can be made to work under the circumstances that existed following the September 11 attacks, but that it also was easy to "make FISA not work" under these circumstances.
~~(TS//STLW//SI//OC/NF)~~

Baker cited a lack of resources as the primary impediment to using the FISA process, rather than Stellar Wind, to collect foreign intelligence following the September 11 attacks. Baker said that he did not believe OIPR, as staffed in October 2001, had sufficient resources to process the volume of telephone numbers the NSA was tasking for content collection under Stellar Wind at that time. However, Baker explained that in his view FISA is "scalable" and that to some degree the statute's utility is limited by the resources allocated to OIPR.⁸² ~~(TS//STLW//SI//OC/NF)~~

Baker also observed that to bring Stellar Wind's content and meta data collections fully under FISA authority would have required a different approach to the statute. Baker said that developing such an approach would have been possible only by convening a working group to examine constitutional and practical issues. Baker, one of only three people in the Justice Department read into Stellar Wind as of January 2002, said he did not have the ability or the authority to do this himself.⁸³ Baker stated that his belief in this approach was informed by his own experience with and participation in a small, informal group composed of U.S. Intelligence Community officials that had worked periodically since shortly before the

⁸² Baker also observed that OIPR could have been staffed with detailees from the Department of Defense and other components within the Justice Department. (U)

⁸³ Baker also said that he did not have the legal resources within OIPR to "challenge" Yoo's November 2, 2001, legal analysis of the Stellar Wind program, although he believed it was flawed. ~~(TS//STLW//SI//OC/NF)~~

September 11 terrorist attacks to develop solutions to various foreign intelligence collection issues.⁸⁴ ~~(TS//STLW//SI//OC/NF)~~

C. FISA Court is Informed of Stellar Wind ~~(TS//SI//NF)~~

Baker told the OIG that sometime in the December 2001 to January 2002 time period he concluded, based on his awareness that information derived from Stellar Wind had been used to support at least one request for a FISA application, that the FISA Court also needed to be made aware of the Stellar Wind program. Baker said that the Department's counterterrorism efforts rely on good relations with the FISA Court and that candor and transparency are critical components of that relationship. According to Baker, OIPR had a policy of full disclosure with the Court that he said served the Department well when problematic issues arose. Baker also attributed the Department's record of success with FISA applications and the improved coordination between intelligence agents and prosecutors to the strong relationship that the Department had built with the Court. Baker believed it would be detrimental to this relationship if the Court learned later that information from Stellar Wind was included in FISA applications without notice to the Court. ~~(TS//STLW//SI//OC/NF)~~

Baker said he raised the issue of the FISA Court not being informed about Stellar Wind with Levin, who first responded by suggesting that the Attorney General order Baker not to disclose the program to the Court while the issue was being considered. Baker initially agreed to this approach and drafted a memorandum from Ashcroft to Baker to this effect. He said that Levin edited the document and presented it to Ashcroft, who signed it. The memorandum, dated January 17, 2002, stated that Ashcroft understood FISA Court applications would include information obtained or derived from Stellar Wind, and that these applications would seek authorizations to conduct surveillance of targets already subject to surveillance under Stellar Wind. Ashcroft's memorandum also stated that he was considering Baker's recommendation that the Department brief the FISA Court on the program. The memorandum stated further:

In the interim, I am directing you to file applications with the Foreign Intelligence Surveillance Court without informing the court of the existence of the Stellar Wind program or any aspect thereof. I am also directing you not to brief any other

⁸⁴ This type of collaborative effort ultimately developed the legal theories used to transition Stellar Wind's collection activities to FISA authority. However, as we discuss in Chapter Five, while the transition was successful with respect to bulk meta data collection, the legal theory to transition Stellar Wind's content collection, while initially approved by one FISA Court judge, subsequently was rejected by a second judge. ~~(TS//STLW//SI//OC/NF)~~

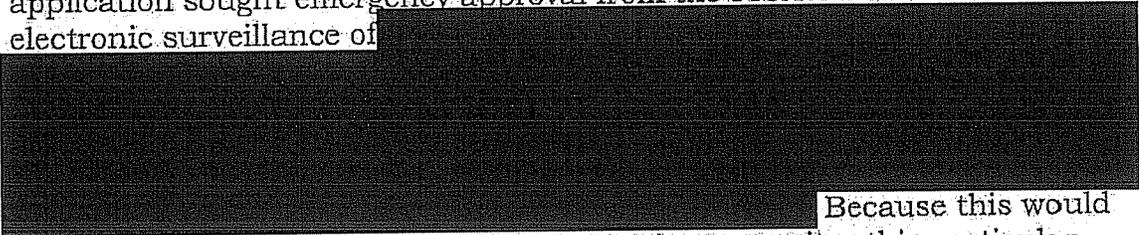
individuals in the Department of Justice, including the FBI, regarding Stellar Wind without my prior authorization.

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

Levin told us that he, as well as Ashcroft, soon came to agree with Baker that the FISA Court should be made aware of the program. Levin said he told Ashcroft during this time that Baker had done a "remarkable job" building a relationship with the FISA Court that greatly benefited the Department's counterintelligence and counterterrorism efforts. Levin said he advised Ashcroft, "We should do what Baker thinks is right." According to Levin, Ashcroft agreed. ~~(TS//STLW//SI//OC/NF)~~

Levin said that he informed Gonzales and Addington at some point of Baker's position that the FISA Court should be made aware of Stellar Wind, but said they initially rejected the idea of reading any judges into the program. Levin stated that he continued to press the issue without success. ~~(TS//STLW//SI//OC/NF)~~

However, the issue came to a head on a weekend in January 2002 when Baker reviewed a second FISA application that contained the "strange, unattributed language" Baker understood to indicate that the information referenced was obtained from the Stellar Wind program. This second FISA application sought emergency approval from the FISA Court to conduct electronic surveillance of



Because this would be the first application seeking FISA authority to monitor this particular subject's telephone communications, Baker recognized that the NSA had already engaged in some level of electronic surveillance in the United States of a domestic telephone number without a FISA order.

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

Although Baker viewed the memorandum from Ashcroft directing him not to inform the FISA Court about Stellar Wind as "cover" for him not to inform the FISA Court about Stellar Wind, he remained uncomfortable about filing an application that contained Stellar Wind information without informing the FISA Court. Baker therefore approached the Chief of the Justice Department's Professional Responsibility Advisory Office (PRAO) to discuss his ethical responsibilities to the FISA Court under circumstances where a FISA application contains certain information that is material to the Court's decision, but Baker was not authorized to disclose the source of the

information.⁸⁵ Baker stated that the PRAO Chief told him that he had an affirmative duty of candor to the Court, and that this duty of candor was heightened due to the *ex parte* nature of the FISA proceedings.⁸⁶ Baker concurred with this guidance, which Baker felt also was compelled by his position as a federal officer and officer of the Court. Baker said he therefore concluded, and informed Levin, that he would not sign the pending application or present it to the FISA Court, nor would he allow any OIPR attorney to do so. According to Baker, Levin spoke to David Addington about the situation, but Addington nevertheless declared that the Court would not be read into the program. ~~(TS//STLW//SI//OC/NF)~~

According to Baker, the White House, the Attorney General, and Levin then decided that Levin, rather than Baker, would sign the FISA application and present it to Judge Claude M. Hilton, the FISA Court judge responsible for hearing FISA matters that weekend.⁸⁷ Baker told us that he notified Judge Hilton in advance that the application was being handled in this manner. Levin said he brought the application to Judge Hilton's residence and explained that he, instead of the OIPR Counsel, was presenting the case because it involved a "special classified program." Levin told us that Judge Hilton approved the application without asking any questions. According to Levin, when he later told Addington how the matter was resolved, and that he agreed with Baker's position that the Court should be briefed into the program, Addington responded that Baker should be fired for insubordination for not signing the application. ~~(TS//STLW//SI//OC/NF)~~

According to Baker, a consensus formed after this episode among the Attorney General, the FBI, and the White House that future FISA matters could not be handled in the same fashion, particularly in view of the anticipated increase in FISA applications resulting from the intelligence collected and disseminated under Stellar Wind.⁸⁸ Baker said that the

⁸⁵ The Professional Responsibility Advisory Office provides advice to Department attorneys with respect to professional responsibility issues. (U)

⁸⁶ Baker cited Rule 3.3 of the American Bar Association's Model Rules of Professional Conduct as the specific rule implicated by the situation. That rule provides, in relevant part, that "in an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." Baker stated that he also consulted with two officials from the Office of the Deputy Attorney General on the matter and that they provided the same advice as PRAO. (U)

⁸⁷ Director Mueller and Attorney General Ashcroft already had signed the application. (U)

⁸⁸ We asked Baker whether he thought the FBI's restrictions on the use of Stellar Wind-derived leads disseminated to field offices, as described above, were sufficient to guard against including Stellar Wind information in FISA applications. Baker stated that his experience with FBI record-keeping practices did not give him a high degree of

(Cont'd.)

decision was therefore made to brief the FISA Court's Presiding Judge, Royce Lamberth.⁸⁹ ~~(TS//STLW//SI//OC/NF)~~

Judge Lamberth was read into Stellar Wind on January 31, 2002. The briefing was conducted in the Attorney General's office at the Department, and was attended by Ashcroft, Hayden, Mueller, Levin, Yoo, and Baker. According to a memorandum of talking points prepared for the briefing, Ashcroft provided Judge Lamberth a brief summary of the program's creation, explaining that the President had authorized a sensitive collection technique in response to the September 11 attacks in order to obtain foreign intelligence information necessary to protect the United States from future attacks and acts of international terrorism. Ashcroft said the NSA, at the instruction of the Secretary of Defense, implemented the collection, which was code named Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

According to the talking points, Ashcroft also discussed the factors the President considered in determining that an "extraordinary emergency exists" to support electronic surveillance without a warrant. The factors cited to Judge Lamberth paralleled those contained in the Presidential Authorizations, including "the magnitude and probability of death from terrorist attacks, the need to detect and prevent such attacks with secrecy, the possible intrusion into the privacy of American citizens, the absence of a more narrowly-tailored means to obtain the information, and the reasonableness of such intrusion in light of the magnitude of the potential threat of such terrorist acts and the probability of their occurrence." ~~(TS//STLW//SI//OC/NF)~~

According to the talking points, Ashcroft stated that he determined, based upon the advice of the Office of Legal Counsel, that the President's actions were lawful under the Constitution. Levin told us that Ashcroft emphasized to Judge Lamberth that the FISA Court was not being asked to approve the program. ~~(TS//STLW//SI//OC/NF)~~

Following Ashcroft's summary, the briefing continued in three parts. First, Hayden described how the program worked operationally. Second, Yoo discussed legal aspects of the program. Third, Baker discussed a

confidence that such separation could be consistently maintained. In addition, Baker believed that the nature of FBI international terrorism investigations would make it difficult to track Stellar Wind-derived information. According the FBI OGC, Baker did not share with the FBI his concerns about whether its record-keeping practices would keep Stellar Wind information from being used in FISA applications. ~~(TS//STLW//SI//OC/NF)~~

⁸⁹ The Presiding Judge for the FISA Court is appointed to a 7-year term by the Chief Justice of the Supreme Court of the United States. Judge Lamberth was appointed as Presiding Judge in 1995. (U)

proposal for handling FISA applications that contained program-derived information. ~~(TS//STLW//SI//OC/NF)~~

Levin told us that when the briefing concluded, Lamberth acknowledged he was not being asked to approve the program and expressed his appreciation for being read in. According to Baker, Lamberth also remarked, "Well, it all depends on whether you can get five votes on the Supreme Court, but I'm comfortable with it." For the next 4 months, until the end of his term in May 2002, Judge Lamberth was the only FISA Court judge read into Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

D. OIPR Implements "Scrubbing" Procedures for Stellar Wind Information in International Terrorism FISA Applications
~~(TS//STLW//SI//OC/NF)~~

Following Judge Lamberth's read-in to the Stellar Wind program, Baker implemented procedures in OIPR to address two scenarios in which Stellar Wind could affect international terrorism FISA applications.⁹⁰ First, information obtained or derived from Stellar Wind might be included in a FISA application to establish probable cause that the target of the application is a foreign power or an agent of a foreign power and that the target is using or is about to use a particular "facility" (a term used in FISA generally to refer to a specific telephone number or e-mail address) at which the electronic surveillance is directed. Second, a FISA application might target facilities that were also targeted by Stellar Wind, a situation referred to as "dual coverage" because the targeted communications were collected under two separate authorities. Baker's procedures, referred to as "scrubbing" procedures, applied to initial FISA applications as well as to renewal applications seeking to continue existing coverage of targets (electronic surveillance under FISA generally is authorized for 90-day periods). ~~(TS//STLW//SI//OC/NF)~~

Judge Lamberth required that all applications that contained NSA information derived from Stellar Wind or that would produce dual coverage of a facility be filed with him only. Baker told the OIG that the scrubbing process was his idea, with Judge Lamberth's full concurrence, and that it had as its core principle OIPR's obligation to inform the Court of all material facts contained in a FISA application. According to Baker, the scrubbing

⁹⁰ The procedures implemented by Baker only applied to international terrorism FISA applications, not to counterintelligence FISA applications. As Baker later explained in a letter to Judge Lamberth's successor as FISA Presiding Judge, this limitation was based on the understanding that the Stellar Wind program targeted only certain international terrorist communications "and there is no reason to believe that the fruits of Stellar Wind collection would appear in a counterintelligence FISA application."

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

procedures were a means of implementing his ethical duty of candor to the Court without disclosing the existence of the Stellar Wind program to uncleared attorneys and judges. Baker also said that Judge Lamberth wanted to be informed of applications that contained Stellar Wind information and of dual coverage situations, and that Judge Lamberth believed that the procedures devised by Baker were an appropriate and acceptable means of accomplishing this. According to Baker, the scrubbing process made him and Judge Lamberth "comfortable the Court was being told what it needed to be told."⁹¹ ~~(TS//STLW//SI//OC/NF)~~

We describe below the initial two scrubbing procedures implemented by Baker as well as the difficulties they created for the FISA application process. ~~(TS//STLW//SI//OC/NF)~~

1. Initial Scrubbing Procedures ~~(TS//SI//NF)~~

Each international terrorism FISA application was "scrubbed" for Stellar Wind information and dual coverage before it was filed. However, Baker, as the only person in OIPR read into Stellar Wind, was unable to explain to his staff why the scrubbing was being conducted. With the NSA's cooperation, Baker initially scrubbed the applications without any assistance from OIPR staff. Baker said the time and effort he expended on this practice was not sustainable, and within weeks of beginning the scrubbing procedures Baker enlisted the assistance of OIPR's Acting Deputy Counsel for Intelligence Operations, Peggy Skelly-Nolen. Skelly-Nolen stated to the OIG that Baker told her at that time that he "needed to tell me something that he couldn't tell me," but was able to convey that he needed her and the office's assistance to process international terrorism FISA applications because the supporting declarations contained information that required special handling. ~~(TS//STLW//SI//OC/NF)~~

The scrubbing process, or "the program check" as it came to be known within OIPR, had two purposes. The first purpose was to identify draft applications that contained Stellar Wind-derived information in support of probable cause to believe that the target of the application was a foreign power or an agent of a foreign power and was using or was about to use a particular facility. The second purpose was to identify applications that targeted facilities that were already actively targeted under the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

⁹¹ The FBI OGC told us that Baker never disclosed to it that the FISA Court was concerned about risks presented by the inclusion of Stellar Wind information in FISA applications, nor did Baker inform the FBI that OIPR implemented procedures to address these concerns. ~~(TS//STLW//SI//OC/NF)~~

To accomplish the first purpose, OIPR attorneys were required to identify any information in applications attributed to the NSA, even if there was no suggestion the information was derived from a special program. The OIPR attorneys provided by e-mail the relevant excerpts from the applications to a designated OIPR legal assistant, who in turn compiled the information and transmitted it to the NSA by secure e-mail or facsimile. Upon receipt, the NSA conducted a check of the identified information against the Stellar Wind reports database, among others, to determine whether the information was derived or obtained from the program (as distinguished from being obtained by some other NSA signals collection activity). The NSA provided OIPR the results of its search by return e-mail or facsimile, writing next to each excerpt either "yes" or "no" to indicate whether the information was Stellar Wind-derived. Judge Lamberth did not require that Stellar Wind-derived information be removed from FISA applications, only that any such applications be filed with him exclusively and the Stellar Wind information identified to him orally.⁹²

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

The second purpose of the scrub - to identify dual collection applications - followed similar steps. On approximately a weekly basis, an OIPR legal assistant requested that OIPR attorneys transmit to him all facilities targeted for electronic surveillance in applications scheduled to be filed with the FISA Court that week. The legal assistant created a single list of all targeted telephone numbers and e-mail accounts and e-mailed or faxed the information to the NSA. The NSA in turn checked the Stellar Wind database to determine whether any of the listed facilities were tasked for content collection under the program. The NSA provided OIPR the results of this check by return e-mail or facsimile, writing next to each facility either "yes" or "no" to indicate whether the facility was tasked under Stellar Wind.

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

Baker proposed to Judge Lamberth that OIPR notify him of dual coverage cases by including in the applications a [REDACTED]

[REDACTED]

⁹² Baker said that only [REDACTED] international terrorism FISA applications presented to Judge Lamberth included Stellar Wind information to support the application.

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

[REDACTED]

(Cont'd.)

[REDACTED]
[REDACTED] Baker proposed to include this descriptive phrase in applications that, if approved, would result in dual coverage.

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

Beginning in early 2002, any FISA applications that included the descriptive phrase [REDACTED] were to be presented to Judge Lamberth,

[REDACTED]

[REDACTED] also would inform Judge Lamberth directly that it was a "Lamberth only" case to indicate it was connected to Stellar Wind.

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

2. Complications with Scrubbing Procedures

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

Skelly-Nolen told us that no one in OIPR, including her at that time, was aware that the checks Baker was requiring the office to make concerned a specific compartmented program. However, the scrubbing procedures generated questions from OIPR attorneys and FBI agents, particularly when Skelly-Nolen instructed an OIPR attorney to add to an application the descriptive phrase [REDACTED]. Skelly-Nolen told us that she was not able to provide a satisfactory response to the questions because she did not have the answers. ~~(TS//SI//NF)~~

Skelly-Nolen also stated that it was stressful to comply with the procedures, due in large part to the fact that the attorneys and agents responsible for the contents of the international terrorism applications were asked to follow certain procedures for filings but were not being provided an explanation for these measures. She said this stress was compounded by the concurrent anthrax scare and the prevailing belief that there would be another terrorist attack. Skelly-Nolen stated that OIPR staff was acting based on Baker's representations alone, and while Baker sought to assuage any concerns the OIPR attorneys had over these new procedures by

[REDACTED]

explaining to the office that he had spoken to the Attorney General and the FISA Court on the issue, some OIPR attorneys simply were not comfortable under these circumstances and Skelly-Nolen had to reassign the international terrorism cases these attorneys were handling. Baker stated that he regularly told attorneys that they did not have to sign applications that they were not comfortable with. ~~(TS//SI//NF)~~

The process for filing international terrorism FISA applications was further complicated by the fact that of the two Justice Department officials authorized to approve such applications – the Attorney General and the Deputy Attorney General – only Attorney General Ashcroft was read into Stellar Wind.⁹⁴ As mentioned previously, Larry Thompson, who served as Deputy Attorney General from May 2001 to August 2003, was never read into the Stellar Wind program. Alberto Gonzales, who served as White House Counsel from January 2000 to February 2005, stated to the OIG that he recalled that Ashcroft wanted Thompson, as well as Ashcroft's Chief of Staff, read into Stellar Wind, but that neither official ever was. Gonzales said Ashcroft complained that it was "inconvenient" not having these two officials read into the program.⁹⁵ ~~(TS//STLW//SI//OC/NF)~~

The situation with Thompson caused Associate Deputy Attorney General David Kris, who oversaw national security matters in the Office of the Deputy Attorney General during Thompson's tenure, to draft a memorandum on January 11, 2002, advising Baker that he should not send Kris any FISA applications that included information obtained or derived from the Stellar Wind program, and that Kris intended to advise Thompson not to review or approve any such applications.⁹⁶ The memorandum stated that Kris was aware of the existence of a "highly classified information-collection program that has the unclassified code name 'Stellar Wind,'" but that he was "wholly unaware of the nature and scope of the

⁹⁴ Each FISA application must be approved by the Attorney General, defined under § 1801(g) to include the Deputy Attorney General or Acting Attorney General, based on the Attorney General's finding that the application "satisfies the criteria and requirements of such application as set forth in [subchapter I concerning electronic surveillance]." 50 U.S.C. § 1804(a). (U)

⁹⁵ As noted above, Gonzales also told the OIG that he never got the sense from Ashcroft that the situation affected the quality of the legal advice the Department provided to the White House. However, as described in Chapter Four, others had a decidedly different impression of Ashcroft's opinion of the legal advice he received on Stellar Wind during this period. We were unable to interview Ashcroft about this issue. ~~(TS//SI//NF)~~

⁹⁶ Baker told the OIG that he had informed Kris about the existence of a classified program that he could not discuss further, and that it impacted FISA applications. Baker said he and Kris agreed that, under the circumstances, it was not appropriate for Thompson to sign applications if he was not fully informed about all of the material facts related to them. ~~(TS//SI//NF)~~

program." Kris also stated in the memorandum that his request for a briefing on the program had been denied and that he was aware Deputy Attorney General Thompson also had not been briefed on the program.⁹⁷

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

E. Judge Kollar-Kotelly Succeeds Judge Lamberth as FISA Court Presiding Judge (U)

Judge Lamberth's 7-year term on the FISA Court ended in May 2002. On May 19, 2002, Judge Colleen Kollar-Kotelly was appointed to the Court to replace Lamberth as the Presiding Judge. In connection with this appointment, Judge Kollar-Kotelly was read into the Stellar Wind program and provided an opportunity to examine the Department's analysis of the program's legality. Judge Kollar-Kotelly also spoke with Baker on numerous occasions about the scrubbing procedures he implemented to account for Stellar Wind information in international terrorism FISA applications and to identify applications that would result in dual coverage.

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

1. Judge Kollar-Kotelly Modifies OIPR Scrubbing Procedures ~~(TS//SI//NF)~~

Judge Kollar-Kotelly received her first briefing on the Stellar Wind program in the Attorney General's office on May 17, 2002, 2 days prior to being formally appointed Presiding Judge for the FISA Court. Baker, who attended the briefing, told us that the presentation was similar to the briefing initially provided to Judge Lamberth. Judge Kollar-Kotelly had several questions concerning the scope of the President's authority to conduct warrantless surveillance, and the Department responded that same day with a letter signed by OLC Deputy Assistant Attorney General Yoo that outlined the legal basis for the activity. The letter essentially replicated Yoo's November 2, 2001, memorandum regarding the legality of Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

According to Baker, Judge Kollar-Kotelly met at the White House with Addington, Gonzales, and Yoo to read Yoo's letter, but she was not permitted to retain a copy or take any notes. Judge Kollar-Kotelly later wrote in a letter to Baker that Yoo's letter "set out a broad overview of the legal authority for conducting [Stellar Wind], but did not analyze the specifics of the [Stellar Wind] program." ~~(TS//SI//NF)~~

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

Judge Kollar-Kotelly also requested an opportunity to review the Presidential Authorization initiating Stellar Wind. On August 12, 2002, she reviewed the October 4, 2001, Authorization. ~~(TS//SI//NF)~~

Baker said that he met with Judge Kollar-Kotelly on several occasions after her initial Stellar Wind briefing to discuss how OIPR had been handling Stellar Wind's impact on FISA applications. Baker described for her the existing procedures to account for NSA information contained in FISA applications derived from Stellar Wind, and to identify applications that, if approved, would produce dual coverage of a facility.

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

Judge Kollar-Kotelly also was interested in identifying whether a facility targeted in a FISA application had been tipped to the FBI as Stellar-Wind derived information. Baker told the OIG that at this time he did not believe the FBI and NSA had the ability to track Stellar Wind tips on a timely basis. Baker said he mistakenly believed that as tips passed from the NSA to FBI Headquarters, and from there to FBI field offices for investigation, it would be exceedingly difficult to trace the specific source of the information in a sufficiently timely manner for inclusion in a FISA application. Baker provided his understanding to Judge Kollar-Kotelly, likening the Stellar Wind information in tips to the FBI as "salt in soup" that is impossible to extract once added. Based on Baker's representations, Judge Kollar-Kotelly did not require the Department to identify whether a facility targeted in a FISA application was ever provided to the FBI under Stellar Wind.⁹⁸ ~~(TS//STLW//SI//OC/NF)~~

Judge Kollar-Kotelly decided that the scrubbing procedures implemented under Judge Lamberth should continue, but she directed OIPR to discontinue including in applications the descriptive phrase [REDACTED] as a means of notifying her that facilities targeted by the applications were also targeted under Stellar Wind. Baker said that while Judge Kollar-Kotelly understood that instances of dual coverage would occur, she did not want to appear to judicially sanction Stellar Wind coverage. Baker told us his impression was that Judge Kollar-Kotelly "did not want to rule on the legality of the program" by appearing to "authorize" the NSA's technique for collecting the same information the government was seeking to collect under FISA.⁹⁹

⁹⁸ Baker eventually learned that the FBI and the NSA in fact did have some ability to track Stellar Wind information. As discussed in Chapter Six, in March 2004 Judge Kollar-Kotelly added to the scrubbing process a check performed by the FBI to determine whether any telephone numbers or e-mail addresses contained in a FISA application had ever been provided to the FBI in a Stellar Wind report. ~~(TS//STLW//SI//OC/NF)~~

⁹⁹ Judge Kollar-Kotelly later wrote about the dual coverage issue, in a January 12, 2005, letter to Baker that discussed the "Stellar Wind Program and Practice Before the

(Cont'd.)

Baker said he believes Judge Kollar-Kotelly was trying to protect the FISA Court and did not want the legality of the Court's orders called into question. ~~(TS//STLW//SI//OC/NF)~~

Judge Kollar-Kotelly also directed OIPR to excise from FISA applications any information obtained or derived from Stellar Wind. Baker told Judge Kollar-Kotelly that OIPR could implement this requirement using the scrubbing procedures already in place, and that where the FBI included NSA information in an application determined to be Stellar Wind-derived, OIPR would excise it. ~~(TS//STLW//SI//OC/NF)~~

Judge Kollar-Kotelly also instructed Baker to alert her of any instances where an application's basis for the requisite probable cause showing under FISA was weakened by excising the Stellar Wind information. In such cases, Judge Kollar-Kotelly would then decide whether to approve the application with the knowledge that additional relevant information had been excised. ~~(TS//STLW//SI//OC/NF)~~

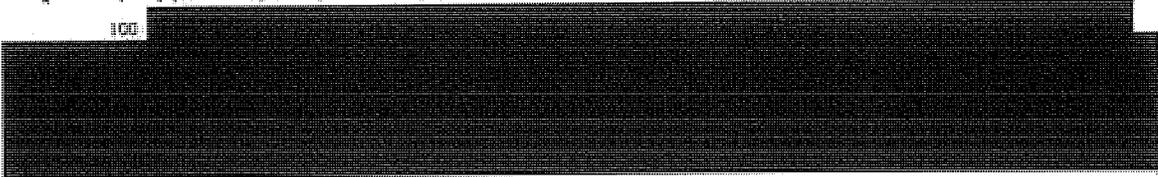
Even though Judge Kollar-Kotelly's scrubbing process was intended to eliminate all Stellar Wind information from international terrorism FISA applications, she still required that scrubbed applications be filed with her only. In time, Judge Kollar-Kotelly relaxed this requirement and permitted other judges on the Court to handle these applications, although only after first being filed with her.¹⁰⁰ ~~(TS//STLW//SI//OC/NF)~~

2. OIPR implements Judge Kollar-Kotelly's Scrubbing Procedure ~~(TS//SI//NF)~~

According to Baker and Skelly-Nolen, the mechanics within OIPR for determining whether an application contained Stellar Wind information or targeted a facility also targeted under Stellar Wind remained essentially unchanged after the transition from Judge Lamberth to Judge Kollar-Kotelly. However, the scrubbing process became more complex. For

FISC." The letter memorialized the information Judge Kollar-Kotelly received from the government about the program and how she requested the government to proceed in preparing and presenting applications. On the subject of dual coverage, Judge Kollar-Kotelly wrote, "Without opining on [Stellar Wind]-related legal issues, I have sought to protect the proper functioning of the FISA process, under which separate court authorities are granted to conduct foreign intelligence collection against a set of targets that overlaps the set of [Stellar Wind] targets." We discuss this letter in Chapter Four of this report. ~~(TS//STLW//SI//OC/NF)~~

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example, because only the Attorney General could sign the applications and Judge Kollar-Kotelly required that only she receive the applications (even after being scrubbed), Skelly-Nolen had to regularly visit the Attorney General's and Presiding Judge's residences with stacks of what Skelly-Nolen came to refer to as "AG-KK only" FISA applications.

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

The situation was further complicated when Ashcroft was on overseas travel and his signature was needed for a scrubbed application ready to be filed. When this occurred, the classification of the application's signature page was "downgraded" and then sent to Ashcroft by secure fax. The actual application was not faxed; instead, Skelly-Nolen typically included a statement from her or Baker with the signature page indicating that the application was proper and complied with the requirements of the FISA statute. Skelly-Nolen observed that in these cases Ashcroft essentially relied on her and Baker's assessments of the applications – even though Skelly-Nolen was not read into Stellar Wind at this time. Scrubbed applications were handled similarly when Ashcroft was traveling domestically, although in those instances the applications could be provided along with the signature page if requested.¹⁰¹ ~~(TS//STLW//SI//OC/NF)~~

Judge Kollar-Kotelly also required that hearings for the "AG-KK only" FISA applications and renewals be scheduled for late in the day or on the weekend, either in her courtroom chambers at the District Court for the District of Columbia or at her residence. According to Skelly-Nolen, Judge Kollar-Kotelly insisted on this practice so that the "AG-KK only" docket did not interfere with her regular court docket. From Skelly-Nolen's perspective, this practice proved to be an "enormous burden," particularly in cases involving applications to continue FISA coverage on targets of emergency authorizations.¹⁰² Skelly-Nolen explained that these authorizations were, for "no good operations reason" that she was aware of, routinely approved by the Attorney General on Fridays, meaning that a FISA application had to be filed with the Court within 72 hours – by Monday – to continue the emergency surveillance coverage. However, because Judge Kollar-Kotelly had a regular court docket on Mondays, she required that any scrubbed FISA application seeking authority to continue surveillance initiated under

¹⁰¹ Baker and Skelly-Nolen told the OIG that in their experience it was not unusual for an Attorney General or Deputy Attorney General to rely on OIPR's representations that the FISA applications presented for signature satisfied the statute's requirements, instead of reviewing the full contents of each application. (U//~~FOUO~~)

¹⁰² As previously described, under FISA during this time period, when the Attorney General reasonably determines that an emergency situation exists prior to obtaining a FISA order, the Attorney General may approve the use of electronic surveillance for a period of up to 72 hours without an order. (U)

emergency authorization be scheduled with her for Sunday. Skelly-Nolen stated that these cases would be in addition to the renewal applications that also had to be heard on Sundays so the authority for the surveillance in those cases did not expire and the coverage lapse.

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

Baker identified another issue that stemmed from Judge Kollar-Kotelly's requirement that only she receive dual coverage applications. The problem arose when Judge Kollar-Kotelly was out of town and unavailable to hear a dual coverage application. Baker's solution was either to fly the application to the place Judge Kollar-Kotelly was located, or to contact the NSA and request that it "de-task" the facilities that the FISA application was targeting. In this way, the application could be presented to an alternative FISA Court judge because it no longer targeted facilities that were also targeted under Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

For example, Baker described a situation where the FBI was urgently interested in a particular individual whose telephone was currently tasked by the NSA under Stellar Wind. In this case, Baker instructed the NSA to de-task the telephone number so the FBI's FISA application could be presented to a judge other than Judge Kollar-Kotelly. To prevent any gap in coverage between the time the NSA detasked the telephone number and the Court approved the FBI's application, surveillance was initiated under FISA's emergency authorization provision and then presented to a FISA Court judge within the requisite 72 hours. According to Baker, proceeding in this fashion "made everyone comfortable," including the NSA. Baker told us that this situation occurred a couple of times each year.

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

According to Baker and Skelly-Nolen, these examples illustrate how having only the Attorney General and a single judge on the FISA Court read into Stellar Wind complicated the FISA process. Baker said that "fairly early on" after being read into the program, Judge Kollar-Kotelly made several requests for other FISA Court judges to be read into the program. Baker told the OIG that these requests were generally made through him, orally and in writing, but was aware that on at least one occasion Judge Kollar-Kotelly made the request directly to Attorney General Ashcroft. Baker said that sometime prior to March 2004 he personally advised Ashcroft of Judge Kollar-Kotelly's concerns, and that Ashcroft responded with words to the effect that the White House would not allow more judges to be read into Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

In a January 12, 2005, letter to Baker, Judge Kollar-Kotelly summarized the situation, stating, "I have repeatedly asked that the other members of the FISC be given access to the same information that I have received regarding the [Stellar Wind] program. To date, the executive

branch has declined to do so, citing a need to maintain the strictest secrecy regarding [Stellar Wind].” ~~(TS//STLW//SI//OC/NF)~~

As a consequence of only Judge Kollar-Kotelly being read into Stellar Wind and her insistence that she alone handle applications scrubbed of Stellar Wind information or that involved tasking telephone numbers or e-mail addresses already tasked under Stellar Wind (dual coverage), by November 2004 she was handling approximately [redacted] percent of all FISA applications. Judge Kollar-Kotelly also tended to hear successive applications regarding the same targeted facilities. She discontinued this practice in November 2004 and permitted other judges to hear scrubbed applications. Judge Kollar-Kotelly later wrote that her decision was “based on the operational systems” OIPR had in place to scrub applications and that she assured her colleagues “that they could properly decide [the cases] based on the information in each application, without the additional information on which I have been briefed, but which, to date, the other judges have not received.” ~~(TS//STLW//SI//OC/NF)~~

V. FBI Initiates Measures to Improve the Management of Stellar Wind Information ~~(S//NF)~~

Following the terrorist attacks of September 11, the FBI had reallocated personnel and resources to counterterrorism operations, and established the Telephone Analysis Unit (TAU) to exploit telephone communications data. We described above how a small team of agents and analysts from this unit was reassigned to the [redacted] which was responsible for handling the Stellar Wind reports provided by the NSA. ~~(S//NF)~~

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In approximately May 2002, the TAU was renamed the Communications Analysis Unit (CAU) and became one of the units within the newly created Communications Exploitation Section (CXS). According to the first Acting CAU Unit Chief, the FBI’s vision for the unit was that it would support FBI international terrorism investigations by [redacted]. The Stellar Wind program was one source for obtaining this [redacted]. ~~(S//NF)~~

In this section, we describe changes the FBI implemented in late 2002 and early 2003 to manage the intelligence it received under Stellar Wind. These changes included attempts to improve coordination with the NSA, implement a more formal program to receive intelligence from the NSA and disseminate it to FBI field offices, educate the FBI field offices about the value of the intelligence and FBI Headquarters’ expectations concerning its use, and assign a small team of FBI personnel to work full-time at the NSA on Stellar Wind. ~~(S//NF)~~

A. CAU Acting Unit Chief Evaluates FBI Response to Stellar Wind ~~(S//NF)~~

When the first CAU Unit Chief arrived at FBI Headquarters in September 2002, CXS was newly established and most of the Section's 15-20 staff was there on temporary duty assignments. The CAU was staffed similarly at this time, but also contained some professional support employees from other divisions at FBI Headquarters. ~~(S//NF)~~

The CAU Unit Chief said that the CAU's mission was to support FBI international terrorism investigations – al Qaeda investigations in particular – by analyzing telephone calling activity and e-mail communications. He explained that prior to September 11, 2001, the FBI analyzed telephone numbers received by field offices or other sources by querying the numbers against the FBI's [REDACTED] database, the FBI's central repository for telephone subscriber data. However, he said the FBI's database at that time was relatively small and had limited analytical capability. In the wake of the September 11 attacks, the FBI gained access to additional tools and began to utilize more sophisticated analytical techniques. Stellar Wind was one of those new tools.

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The CAU Unit Chief said that after he was read into Stellar Wind in late September 2002, it was clear to him based on conversations with the CXS Acting Section Chief that the FBI wanted to increase its participation in the Stellar Wind program. As a counterterrorism agent in the FBI's Chicago field office, the Unit Chief had some exposure to Stellar Wind in the form of [REDACTED] leads. He told us that he had recalled thinking the leads were "stupid" and "not sensible." He also said that he had been critical of the leads because they did not provide any context to the information, such as how it was obtained. He stated that the leads did not adequately explain the [REDACTED] rankings associated with the telephone numbers, and the leads were not sufficiently specific as to what action the field office was expected to take. In his view, the intelligence disseminated by the [REDACTED] ECs was not "actionable." The Unit Chief told us that he could not figure out why FBI Headquarters was "pushing this stuff out" after September 11, and that other agents in the field shared his views.¹⁰³ ~~(TS//STLW//SI//OC/NF)~~

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¹⁰³ As previously described, former NSA Director Hayden told us that immediately following the September 11 terrorist attacks the NSA modified the agency's collection [REDACTED]

and that this resulted in a flood of telephone numbers to the FBI. Thus, it is possible that

(Cont'd.)

After becoming the acting Unit Chief for the CAU and reviewing how the FBI was handling the Stellar Wind information, he learned that there was no unit that oversaw the [REDACTED] and no guidance for how the NSA information should be processed by FBI analysts. He also said that the process in place – essentially re-typing into ECs the tearline information contained in Stellar Wind reports – merely “regurgitated” information that, by itself, was not actionable. He was not critical of the FBI analysts responsible for drafting the ECs, who simply performed this task as directed. Rather, he believed the process suffered from a lack of leadership. He described the FBI’s involvement in Stellar Wind up to this point as “happenstance” and said the FBI did not have “a real good handle on it.” He said that the deficiencies he identified were attributable in part to the significant resource challenges the FBI encountered after September 11, but he nevertheless considered the FBI’s effort to respond to the Stellar Wind information as “half-baked.” He said he therefore set about implementing changes within the CAU to better organize this effort, which he believed would improve the quality of the intelligence disseminated to FBI field offices. ~~(TS//STLW//SI//OC/NF)~~

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B. FBI Increases Cooperation with NSA and Initiates [REDACTED] Project to Manage Stellar Wind Information
~~(TS//STLW//SI//OC/NF)~~

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The CAU Unit Chief said that the first step he took to improve the FBI’s involvement in Stellar Wind was to detail to the NSA one of CAU’s temporary duty special agents. He instructed the agent to form a working group at the NSA to identify any problems and evaluate the quality of the information provided in the NSA’s Stellar Wind reports, as well as the information that the FBI reported back to the NSA about tips.¹⁰⁴ The CAU Unit Chief said he took this step so that the NSA gained a “case agent’s perspective” on the type of information useful to FBI field offices, and also to explain to the NSA that the information that could be disseminated about the tippers should include “context” and “clarity” sufficient to justify the FBI conducting an inquiry under the FBI’s investigative guidelines.¹⁰⁵ He said he did not believe that the NSA’s interest in obscuring the “sources and methods” associated with the information had to compromise the quality of the information provided to the FBI. He also said that the NSA needed to

FBI agents’ early frustration with leads that provided telephone numbers was attributable in part to the leads generated under this NSA collection activity. ~~(TS//STLW//SI//OC/NF)~~

¹⁰⁴ The CAU Unit Chief recalled that the NSA had expressed frustration that the FBI never provided the NSA any responses to the tipped information. ~~(S//NF)~~

¹⁰⁵ FBI international terrorism investigations at this time were governed by the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations. (U)

understand how the FBI investigated intelligence that it received, and that FBI agents did not have to know the specific sources and methods used to acquire information in order to effectively investigate the information.

~~(S//NF)~~

The CAU Unit Chief said that this liaison effort occurred over a couple of weeks, with the temporary duty agent driving to the NSA daily. According to the Unit Chief, the agent explained to NSA personnel what the FBI was permitted to do with certain types of information and that the NSA would receive more feedback from the FBI if the quality of the disseminable information about the tippers improved. The Unit Chief told us that following this exchange the NSA improved the Stellar Wind reports by providing better information in both the compartmented and tearline portions of the reports. ~~(S//NF)~~

In addition, the CAU Unit Chief told us that he took steps to increase cooperation within the FBI between CAU, which was part of an analytical section that supported counterterrorism investigations, and FBI Headquarters' International Terrorism Operations Section, which was responsible for overseeing FBI counterterrorism investigations. The Unit Chief said that based on his experience in the field working counterterrorism cases, he believed it was important that the CAU analysts consult with agents in the operational section about leads the CAU proposed to set in the ECs. While he was confident the CAU analysts could identify logical investigative steps, he thought they should nevertheless coordinate with the operational personnel to see if there was agreement and to determine whether a lead potentially could affect any ongoing operations that the CAU was not aware of. He also noted that his CAU Unit Chief successors discontinued this practice, a decision he disagreed with and complained about to the Section Chief for CXS because he believed the program risked losing a measure of effectiveness and efficiency as a consequence. ~~(S//NF)~~

Another step the CAU Unit Chief took relating to the FBI's management of Stellar Wind information was to open an administrative file, or "control file," to serve as the repository for all communications that the CAU sent to the field offices containing Stellar Wind information, as well as all communications the CAU received from field offices reporting the results of the investigative activity taken in response to assigned leads.¹⁰⁶ As explained previously, the [REDACTED] communications had been

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