

Goldsmith said Gonzales tried first to persuade him that he and Philbin were wrong to conclude that Yoo's memoranda did not provide sufficient legal justification to cover the parts of the program that OLC had identified as problematic, but that Gonzales did not persuade him on this point. Gonzales next argued for a "30-day bridge" to get past the upcoming March 11, 2004, Authorization. Gonzales reasoned that Ashcroft, who was still hospitalized, was not in any condition to sign the upcoming Authorization, and that a "30-day bridge" would move the situation to a point where Ashcroft would be well enough to approve the program. Goldsmith told Gonzales he could not agree to recommend an extension.

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

Goldsmith said Gonzales noted that Ashcroft had certified the program as to form and legality for the previous two and a half years, yet now Comey was the Acting Attorney General. Goldsmith said the implication of Gonzales's statement was that not approving the March 11, 2004, Authorization would "undercut" Ashcroft. Goldsmith said he made clear to Gonzales that Ashcroft was "supportive" of his and Philbin's analysis. Goldsmith's notes from the meeting also indicate that Gonzales stated that he did not "want to face" Ashcroft in the hospital. Goldsmith told us he recommended to Gonzales that he not visit Ashcroft.<sup>150</sup>

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

Goldsmith said his discussion with Gonzales lasted about 1 hour. Philbin was then brought into Gonzales's office and the issues were discussed again. According to Goldsmith's chronology, nothing was resolved during the meeting. (U)

At noon that day, another meeting was held in Andrew Card's office at the White House. According to Director Mueller's program log, Mueller, Chief of Staff Card, Vice President Cheney, CIA Deputy Director John McLaughlin, Hayden, Gonzales, and other unspecified officials were present. Comey, Goldsmith, and Philbin were not invited to this meeting. Mueller described this gathering as a "pre-meeting" in anticipation of another meeting that was to be held later that afternoon in which the Justice Department officials (Comey, Goldsmith, and Philbin) would be participating.<sup>151</sup> (U)

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<sup>150</sup> At noon on March 9, 2004, Attorney General Ashcroft underwent surgery at the George Washington University Hospital. The surgery was completed by 2:30 p.m. (U)

<sup>151</sup> Mueller prepared for this meeting by meeting earlier that morning with Michael Fedarcyk, the Chief of the FBI's Communications Exploitation Section; General Counsel Valerie Caproni; and possibly others. Mueller's program log indicates that Fedarcyk "appears unaware of details of how [REDACTED] is collected." ~~(TS//SI//NF)~~

According to Mueller's notes, a presentation on the value of the Stellar Wind program was given by CIA and NSA representatives.<sup>152</sup> It was then explained to the group that Comey "has problems" with [REDACTED] (b)(1), (b)(3)

[REDACTED] Mueller's notes state that Vice President Cheney suggested that "the President may have to reauthorize without [the] blessing of DOJ," to which Mueller responded, "I could have a problem with that," and that the FBI would "have to review legality of continued participation in the program." ~~(TS//STLW//SI//OC/NF)~~

A third meeting was held at the White House that afternoon, at 4:00 p.m. The meeting included Comey, Goldsmith, and Philbin, in addition to Vice President Cheney, Card, Addington, Gonzales, Hayden, Mueller, CIA General Counsel Muller, McLaughlin, and approximately 10 NSA analysts. Gonzales told us the meeting was held to make sure that Comey understood what was at stake with the program and to demonstrate its value. ~~(S//NF)~~

At the beginning of the meeting the NSA analysts made a presentation to Comey, Goldsmith, and Philbin. Comey said the presentation consisted of charts showing the chaining [REDACTED] (b)(1), (b)(3) capabilities that could be generated from Stellar Wind-derived information, as well as a description of "success stories" resulting from the program. Comey told us that the cases the analysts highlighted were not in his view the Stellar Wind successes that the analysts claimed, and that he felt "the NSA had no good stories to tell about the program."<sup>153</sup> Comey also told us that the collection of content communications under Stellar Wind was somewhat duplicative of existing FISA coverage, and that only the meta data collection under baskets 2 and 3 represented truly new capabilities. However, Comey said he did not challenge the analysts on the assertion that Stellar Wind was a critical anti-terrorism tool because the value of the program was not his primary concern. Rather, Comey said he was willing to concede the program's value, and that his concern was with its legality. ~~(TS//STLW//SI//OC/NF)~~

Goldsmith told us that he did not believe it was his place to judge the value of the program from an intelligence-gathering standpoint. Goldsmith told us he found persuasive a remark by Hayden that even though there may not have been major successes under the program to date, the program still could produce successes in the future. However, both Goldsmith and

<sup>152</sup> Mueller's notes indicate that [REDACTED] were cited as examples during the presentation. We discuss [REDACTED] briefly in this chapter and [REDACTED] in Chapter Six. ~~(TS//STLW//SI//OC/NF)~~

b1, b3, b6,  
b7E, b7C

<sup>153</sup> Comey specifically questioned whether the [REDACTED] case was a legitimate "success story" under the Stellar Wind program. The [REDACTED] case, as well as other cases cited as successes under Stellar Wind, is discussed in Chapter Six.

b1, b3, b6,  
b7E, b7C

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

Philbin told us that they believed that identifiable successes under the program

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

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

The NSA analysts were excused after their presentation and the meeting continued. Comey said Vice President Cheney stressed that the program was "critically important" and warned that Comey would risk "thousands" of lives if Comey did not agree to recertify it. Comey said he told those at the meeting that he, as the Deputy Attorney General exercising the powers of the Attorney General, could support reauthorizing

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

154. However, he told the group "we can't

get there" on (b)(1), (b)(3)

According to Comey, the White House said it could not agree to that modification. ~~(TS//STLW//SI//OC/NF)~~

Comey also told us he was certain the White House understood him to be the acting in Attorney General Ashcroft's stead during this meeting. (U)

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

Gonzales told us that he came away from the meeting with the understanding that Comey (b)(1), (b)(3)

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

### 6. Conflict Ensues between Department and White House (U)

Each of the Department witnesses we interviewed concerning the Department's discussions with the White House during this time period

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

emphasized the sense of pressure and anxiety that pervaded the discussions in March 2004. For instance, Comey said discussions during the meeting at the White House on March 9 became heated as he sought to convey to everyone how difficult it was for the Department to take the position it was taking, and how hard the Department officials were working to find a solution. Comey also stated that Vice President Cheney was "understandably frustrated" because the Department was changing its advice to the White House about the program. (U)

Goldsmith also recalled that at one point during these meetings with the White House, Addington told him that if he narrowed the Stellar Wind program Goldsmith "will have the blood of 100,000 American lives on his hands." ~~(S//NF)~~

Goldsmith observed to us that from the White House's point of view, due to the timing of the events, and in particular with Ashcroft in the hospital, it appeared to the White House that a "palace coup" was taking place at the Department of Justice. Goldsmith said that this perception was somewhat understandable under the circumstances. (U)

Philbin also stated that tensions were high during this period and that the Department and White House "started to divide into camps." Philbin added that Department and White House officials were "starting to attribute motives" to each other. Philbin said he thought Addington came to believe that Comey was opposed to recertifying the program for "political reasons," and that Comey wanted to be on the "politically right" side of the dispute. (U)

Comey said that his dealings with Gonzales, Card, Addington, and others at the White House were generally civil. Comey acknowledged that there was tension between the Department and the White House during the March 2004 period, but believed that it resulted primarily from differences in legal perspectives. (U)

## **II. White House Continues Program without Justice Department's Certification** ~~(TS//SI//NF)~~

The Presidential Authorization under which the program was operating during early 2004 was set to expire on March 11, 2004. As described in the preceding section, Comey concurred with the views of Goldsmith and Philbin, and as the Deputy Attorney General exercising the powers of the Attorney General Comey refused to certify the program as to form and legality. He conveyed this decision to the White House during the meeting on the afternoon of March 9, 2004. In response, as described below, the President decided to reauthorize the program without the Justice

Department's support, precipitating a serious confrontation between White House and Department officials. ~~(TS//STLW//SI//OC/NF)~~

**A. White House Counsel Gonzales Certifies March 11, 2004, Presidential Authorization ~~(TS//SI//NF)~~**

**1. March 10, 2004: Office of Legal Counsel Presses for Solicitor General to be Read into Program (U)**

Goldsmith, Philbin, and Comey met in the early afternoon of March 10, 2004, to discuss the meeting at the White House the day before and how the Department should proceed. Goldsmith and Philbin reconfirmed their position to Comey that collection under ~~(b) (5), (b)(1), (b)(3)~~

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

Goldsmith and Philbin also recommended to Comey that Solicitor General Theodore Olson be read into the program. Goldsmith told us that Olson had been at the Department for a long time and had valuable experience and credibility. Goldsmith said that given the importance of the decisions being made at the Department concerning the program at this time, he believed it was imperative to have Olson read in. (U)

Comey agreed with Goldsmith and Philbin, and he directed Goldsmith to call Gonzales to reaffirm the Department's position on the program and also to request that Olson be read in. (U)

Goldsmith called Gonzales at 2:20 p.m. on March 10 to tell him that the Department could not support the legality of ~~(b)(1), (b)(3), (b)(5)~~ as then being implemented under the program. Goldsmith also told Gonzales of the "urgent need" for approval to read Olson into the program. Goldsmith's notes indicate that he called Gonzales twice that day with the request to have Olson read in, but by early evening had not heard back from Gonzales. ~~(TS//STLW//SI//OC/NF)~~

**2. March 10, 2004: Congressional Leaders Briefed on Situation (U)**

Gonzales told us that after President Bush was advised of the results of the March 9, 2004, meeting, the President instructed Vice President Cheney on the morning of Wednesday, March 10, to call a meeting with congressional leaders to advise them of the impasse with the Justice Department. On the afternoon of March 10, at approximately 4:00 or 5:00 p.m., Gonzales and other White House and intelligence agency officials, including Vice President Cheney, Card, Hayden, McLaughlin, and Director of Central Intelligence George Tenet, convened an "emergency meeting" with Congressional leaders in the White House Situation Room. The

congressional leaders in attendance were Senate Majority and Minority Leaders Bill Frist and Tom Daschle; Senate Select Committee on Intelligence Chairman Pat Roberts and Vice Chairman Jay Rockefeller; Speaker of the House Dennis Hastert and House Minority Leader Nancy Pelosi; and House Permanent Select Committee on Intelligence Chair Porter Goss and Ranking Member Jane Harman. This congressional group was known informally as the "Gang of Eight." (U)

No officials from the Department were present at the meeting. When we asked Gonzales whether the White House had given any consideration to inviting Department officials to attend, Gonzales declined to answer on the advice of the Special Counsel to the President, who was present during Gonzales's interview with the OIG.<sup>155</sup> (U)

Gonzales told us that President Bush also directed him to "memorialize" the meeting, although Gonzales said he could not recall whether the President directed him to do so before or after the meeting. Gonzales did not take notes during the meeting. Rather, he said he wrote down his recollection of the meeting within a few days of Wednesday, March 10, probably, according to him, the following weekend.<sup>156</sup> Gonzales said that, with the exception of a single phrase discussed below, he wrote his notes in one sitting in his White House office. (U)

The notes indicate that President Bush appeared briefly at the start of the meeting to explain how important the meeting was. Vice President Cheney, who chaired the meeting, gave a general explanation of the program and indicated that the purpose of the meeting was to "discuss potential legislation to continue the program." According to Gonzales's notes, Hayden then explained the collection of "telephone content and meta data (sic)" under the program. (b) (1), (b) (3)

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<sup>155</sup> However, when Gonzales commented on a draft of this report, he stated that the Department was not invited to the meeting because the purpose of the meeting was to advise the congressional leaders that a legislative fix was necessary, not to describe or resolve the legal dispute between the Department and the White House. (U//FOUO)

<sup>156</sup> Gonzales's handling of his notes from this meeting later became the subject of a separate OIG misconduct investigation. The OIG found that when Gonzales became the Attorney General in 2005, he took the notes, which contained TS/SCI information relating to the Stellar Wind program, from the White House and improperly stored these notes at his residence for an indeterminate period. When he brought the notes to the Justice Department, he kept them in a safe near his office that was not cleared for storage of TS/SCI material. The OIG also determined through this investigation that Gonzales improperly stored several other TS/SCI documents in the safe near his office, many of which concerned Stellar Wind. The OIG's report, entitled "Report of Investigation Regarding Allegations of Mishandling of Classified Documents by Attorney General Alberto Gonzales," was released by the OIG on September 2, 2008, and can be found at <http://www.usdoj.gov/oig/special/s0809/index.htm>. (S//NF)

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

<sup>157</sup> According to Gonzales's notes, the briefers then left the meeting and the remaining participants discussed the need for legislation so that the program's intelligence collection activities could continue. ~~(TS//STLW//SI//OC/NF)~~

Gonzales's notes indicate that when he was asked at the meeting why Comey was "reluctant" to sign the Authorization, Gonzales responded, "I said it was not really my place to represent [Comey's] position, but I believed that he did not feel that the President's Constitutional authority would not [sic] override FISA." The notes do not indicate what else was discussed about the basis for the Department's concerns about the legal support for the program. ~~(TS//STLW//SI//OC/NF)~~

The notes indicate that Andrew Card stated that "it would be hard to explain if another attack occurred and we could have stopped it with this tool." Gonzales's notes then state:

- Andy asked if anyone had any reservation and no one spoke up raising an objection
- The VP said that what I am hearing is that we should go forward with the program for a period of 30-45 days and see if there was a legislative fix. ~~(TS//SI//NF)~~

The notes indicate that Vice President Cheney read aloud proposed language of new legislation. However, the notes do not describe the proposed legislation that was discussed. (U)

According to Gonzales's notes, the reactions and comments of the congressional leaders were as follows: Both Hastert and Roberts "said they now felt an obligation to use the tool," although according to the notes Hastert "kept coming back to the (b)(1), (b)(3)

(b)(1), (b)(3) Roberts said that if Comey would not certify the Authorization "he should be fired." Harman suggested that another branch of government "should have some role, checks and balances on the program" and raised the possibility of involving the FISA Court. According to the notes, Gonzales responded to Harman's suggestion by volunteering that it would be possible to have the Presiding Judge of the FISA Court "approve or develop the guidelines to protect privacy rights." The notes state that Daschle felt it would be "impossible to get [new legislation] passed

<sup>157</sup> Gonzales told us he was unable to recall (b)(1), (b)(3) he was referring to in the notes, and said he did not recall whether it had to do with (b)(1), (b)(3) (U)

without it becoming very public." Rockefeller was "concerned about privacy safeguards" and was advised of "the 39 steps followed [by the NSA] to make sure privacy concerns were addressed." According to the notes, Pelosi expressed concern about giving "total discretion" to the President and discussed the need for the proposed legislation to be periodically renewed by Congress and that it not be permanent. ~~(TS//STLW//SI//OC/NF)~~

Gonzales told us he initially left a gap in one section of the notes where he described Pelosi's comments. He stated that a day or so later, after recalling what she had said at the meeting, he filled in the gap with the following italicized language: "Pelosi said *tell DAG that everyone is comfortable* and the program should go forward."<sup>158</sup> (U)

### 3. March 10, 2004: Hospital Visit (U)

Gonzales told us that following the meeting with the congressional leaders during the afternoon of March 10, President Bush instructed him and Card to go to the George Washington University Hospital to speak to Ashcroft, who was recovering from surgery in the intensive care unit. The events that followed, which are recounted below, are based on notes from Ashcroft's FBI security detail, Goldsmith's notes, and Mueller's program log; the OIG's interviews of Gonzales, Comey, Goldsmith, Philbin, and Mueller; and Comey and Gonzales's congressional testimony.<sup>159</sup> (U)

At 6:20 p.m. on March 10, Card called the hospital and spoke with an agent in Ashcroft's FBI security detail, advising the agent that President Bush would be calling shortly to speak with Ashcroft. Ashcroft's wife told

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<sup>158</sup> When Gonzales testified before the Senate Judiciary Committee on July 24, 2007, he essentially described the congressional leaders' reactions to the March 10, 2004, Gang of Eight briefing as he did in his handwritten notes of the briefing, stating, "The consensus in the room from the congressional leadership is that we should continue the activities, at least for now." However, after Gonzales testified, Representative Pelosi, Senator Rockefeller, and Senator Daschle issued statements to the media sharply disputing Gonzales's characterization of their statements at the March 10, 2004, briefing, and stating that there was no consensus at the meeting that the program should proceed. See "Gonzales, Senators Spar on Credibility," by Dan Eggen and Paul Kane, *The Washington Post* (July 25, 2007). Pelosi's office also issued a statement that she "made clear my disagreement with what the White House was asking" concerning the program. See "Gonzales Comes Under New Bipartisan Attack in Senate," by James Rowley, *Bloomberg.com* (July 24, 2007). We did not attempt to interview the congressional leaders and obtain their recollections as to what was said at this meeting, because this was beyond the scope of our review. (U)

<sup>159</sup> Comey described the events surrounding the hospital visit in testimony before the Senate Judiciary Committee on May 15, 2007. Gonzales testified about these issues before the Senate Judiciary Committee on July 24, 2007. As noted above, Attorney General Ashcroft and Card declined our request to be interviewed. Ayres, Ashcroft's Chief of Staff at the time, also declined our request for an interview. (U)

the agent that Ashcroft would not accept the call. Ten minutes later, the agent called Ashcroft's Chief of Staff David Ayres through the Justice Command Center to request that Ayres speak with Card about the President's intention to call Ashcroft. The agent conveyed to Ayres Mrs. Ashcroft's desire that no calls be made to Ashcroft for another day or two.<sup>160</sup> Ayres told the agent he would relay this message to Card. (U)

However, at 6:45 p.m., Card and the President called the hospital and, according to the agent's notes, "insisted on speaking [with Attorney General Ashcroft]." According to the agent's notes, Mrs. Ashcroft, rather than Attorney General Ashcroft, took the call from Card and the President. According to the agent's notes, she was informed that Gonzales and Card were coming to the hospital to see Ashcroft regarding a matter involving national security. (U)

At approximately 7:00 p.m., Ayres was advised, either by Mrs. Ashcroft or a member of the Attorney General's security detail that Gonzales and Card were on their way to the hospital. Ayres then called Comey, who at the time was being driven home by his security detail, and told Comey that Gonzales and Card were on their way to the hospital. Comey told his driver to rush him to the hospital. According to Comey, his driver activated the emergency lights on the vehicle and headed to the hospital. (U)

According to his congressional testimony, Comey then called his Chief of Staff, Chuck Rosenberg, and directed him to "get as many of my people as possible to the hospital immediately." Comey then called FBI Director Mueller, who was having dinner with his wife and daughter at a restaurant, and told him that Gonzales and Card were on their way to the hospital to see Ashcroft, and that Ashcroft was in no condition to receive guests, much less make a decision about whether to continue the program. According to Mueller's program log, Comey asked Mueller to come to the hospital to "witness [the] condition of AG." Mueller told Comey he would go to the hospital right away. (U)

At 7:05 p.m., Ayres was notified by an agent on Ashcroft's security detail that Comey was en route to the hospital. Ayres called the agent back at approximately 7:20 p.m. and told the agent that "things may get 'a little weird'" when Gonzales and Card arrived. Ayres instructed Ashcroft's security detail, which was composed of FBI agents, to give its "full support" to Comey and to follow Comey's instructions. Ayres also told the agent that the security detail should not allow the U.S. Secret Service agents who

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<sup>160</sup> Ashcroft was recovering from his gallbladder surgery the prior day. He was described by those who saw him that night as being very weak and appearing heavily medicated. Philbin told us that Ashcroft was "on morphine" on the evening of March 10. (U)

would be accompanying Gonzales and Card to remove Comey from Ashcroft's room. The FBI agent told Ayres that the Attorney General's security detail would "fully back" Comey and that "this is 'our scene'." (U)

Philbin said he was leaving work that evening when he received a call from Comey, who said that Philbin needed to get to the hospital right away because Gonzales and Card were on their way there "to get Ashcroft to sign something." Comey also directed Philbin to call Goldsmith and tell him what was happening at the hospital. Philbin called Goldsmith from a taxi on his way to the hospital. Goldsmith told us he was home having dinner when he received Philbin's call telling him to go immediately to the hospital. (U)

Comey arrived at the hospital between 7:10 and 7:30 p.m.<sup>161</sup> In his congressional testimony, Comey said he ran up the stairs with his security detail to Ashcroft's floor, and he entered Ashcroft's room, which he described as darkened, with Ashcroft lying in bed and his wife standing by the bed. Comey said he began speaking to Ashcroft, "trying to orient him as to time and place, and try to see if he could focus on what was happening." Comey said it was not clear that Ashcroft could focus and that he "seemed pretty bad off[.]" Comey stepped out of the room into the hallway and telephoned Mueller, who was on his way to the hospital. With Mueller still on the line, Comey gave his phone to an FBI agent on Ashcroft's security detail, and according to Comey Mueller instructed the agent not to allow Comey to be removed from Ashcroft's room "under any circumstances." (U)

Goldsmith and Philbin arrived at the hospital within a few minutes of each other. Comey, Goldsmith, and Philbin met briefly in an FBI "command post" that had been set up in a room adjacent to Ashcroft's room. Moments later, word was received at the command post that Card and Gonzales had arrived at the hospital and were on their way upstairs to see Ashcroft. Philbin told us the FBI agents in the command post called down to the checkpoint at the hospital entrance to ask whether Card and Gonzales were accompanied by Secret Service agents, which Philbin said indicated concern that a "stand-off" between the FBI agents and the Secret Service agents might ensue. (U)

Comey, Goldsmith, and Philbin entered Ashcroft's room. Goldsmith described Ashcroft's appearance as "weak" and "frail," and observed that his breathing was shallow. Philbin said he was shocked by Ashcroft's appearance and said he "looked terrible." Philbin said that Ashcroft

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<sup>161</sup> There is a discrepancy in the Attorney General's security detail log on the time. One agent wrote that Comey arrived at 7:10. Another agent wrote that Comey arrived at 7:30. (U)

appeared to have lost a lot of weight, was "gray in the face," and was "almost out of it" because he was on morphine. Comey stated that Ashcroft was "clearly medicated." (U)

Comey testified that he sat in an armchair by the head of Ashcroft's bed, with Goldsmith and Philbin standing behind him; Mrs. Ashcroft stood on the other side of the bed holding Ashcroft's arm. No security or medical personnel were present. (U)

Goldsmith's notes indicate that at this point Comey and the others advised Ashcroft "not to sign anything." (U)

Gonzales and Card, unaccompanied by Secret Service agents, entered Ashcroft's hospital room at 7:35 p.m., according to the FBI agent's notes.<sup>162</sup> The two stood across from Mrs. Ashcroft at the head of the bed, with Comey, Goldsmith, and Philbin behind them. (U)

Gonzales stated that when he entered the hospital room, Ashcroft was in the bed and his wife was "at the 11:00 position." Gonzales said to us that he was unaware that Comey, Goldsmith, and Philbin were also present in the room until Card told him this later. Gonzales told us that he could "sense" that others were in the room, but that he was not sure who, because his focus was on Ashcroft. Gonzales said he carried with him in a manila envelope the March 11, 2004, Presidential Authorization for Ashcroft to sign. (U)

According to Philbin, Gonzales first asked Ashcroft how he was feeling. Ashcroft replied, "Not well." Gonzales then said words to the effect, "You know, there's a reauthorization that has to be renewed . . ." (U)

Goldsmith told the OIG that Gonzales next reminded Ashcroft that he had been certifying the program for the past 2 years. Comey told us that Gonzales told Ashcroft, "We have arranged for a legislative remediation; we're going to get Congress to fix it," and that more time was needed to accomplish this. Comey told us he did not know what Gonzales meant by "legislative remediation." (U)

Gonzales told us that he did not recall telling Ashcroft that a legislative remediation had been arranged, but rather may have told Ashcroft that White House officials had met with congressional leaders "to pursue a legislative fix." (U)

Comey testified to the Senate Judiciary Committee about what happened next:

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<sup>162</sup> Gonzales told us he and Card arrived in Ashcroft's hospital room at 7:20. (U)

. . . Attorney General Ashcroft then stunned me. He lifted his head off the pillow and in very strong terms expressed his view of the matter, rich in both substance and fact, which stunned me, drawn from the hourlong meeting we'd had a week earlier, and in very strong terms expressed himself, and then laid his head back down on the pillow. He seemed spent. . . . And as he laid back down, he said, "But that doesn't matter, because I'm not the Attorney General. There is the Attorney General," and he pointed to me - I was just to his left. The two men [Gonzales and Card] did not acknowledge me; they turned and walked from the room. (U)

Comey also testified that "I thought I had just witnessed an effort to take advantage of a very sick man, who did not have the powers of the Attorney General because they had been transferred to me." (U)

Philbin described to us Ashcroft's statements to Gonzales and Card in the hospital room, stating that Ashcroft "rallied and held forth for two minutes" about problems with the program as had been explained to him by Comey, and that Ashcroft agreed with Comey. Gonzales told us that he did not recall Ashcroft stating that he agreed with Comey. Goldsmith's notes indicate that Ashcroft argued in particular that NSA's collection activities exceeded the scope of the Authorizations and the OLC memoranda, stating that he was troubled by [REDACTED]<sup>163</sup>. According to Goldsmith's notes Ashcroft also said that it was "very troubling that [REDACTED] people in other agencies" had been read into the program, but that Ashcroft's own Chief of Staff, and until recently the Deputy Attorney General, had not been allowed to be read in. Gonzales told us he responded to Ashcroft that this was the President's decision. ~~(TS//SI//NF)~~

According to Goldsmith's notes, Ashcroft also complained that the White House had "not returned phone calls," and that the Department had been "treated badly and cut out of [the] whole affair." Ashcroft told Gonzales that he was "not prepared to sign anything." (U)

When we interviewed Gonzales about the hospital visit, he stated that these were "extraordinary circumstances," that the program had been reauthorized over the past two years, and that the sentiment of the

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<sup>163</sup> As discussed in Chapter Three, Ashcroft was present for the January 31, 2002, briefing of Presiding Judge of the FISA Court Royce Lamberth about the program. According to an outline of information to be covered during that briefing, NSA Director Hayden would have explained how the program functioned operationally. Because Ashcroft did not agree to be interviewed, we were unable to determine what Ashcroft understood about the [REDACTED] collection prior to Philbin and Goldsmith's explanation to him of this aspect of the program in late 2003. ~~(TS//STLW//SI//OC/NF)~~

congressional leadership was that it should continue. Gonzales said he therefore felt it was very important that Ashcroft be told what was happening, adding "If I were the Attorney General I would damn sure want to know." (U)

In his July 2007 congressional testimony, Gonzales also explained the visit to the hospital by stating that it was "important that the Attorney General knew about the views and recommendations of the congressional leadership; that as a former member of Congress and as someone who had authorized these activities for over two years, that it might be important for him to hear this information. That was the reason that Mr. Card and I went to the hospital." Gonzales further testified, "We didn't know whether or not he knew of Mr. Comey's position and, if he did know, whether or not he agreed with it." Gonzales also disputed Goldsmith's account that Ashcroft stated that he was "not prepared to sign anything," and referred us to his July 2007 testimony where he stated: (U)

My recollection, Senator [Feinstein], is – and, of course, this happened some time ago and people's recollections are going to differ. My recollection is that Mr. Ashcroft did most of the talking. At the end, my recollection is, he said, "I've been told it would be improvident for me to sign. But that doesn't matter, because I'm no longer the Attorney General." (U)

Gonzales told us that he and Card would not have gone to the hospital if they believed Ashcroft did not have the authority to certify the Authorization and told us that as soon as Ashcroft stated he no longer retained authority to act, Gonzales decided not ask Ashcroft to sign the Authorization. In his congressional testimony Gonzales stated, "Obviously there was concern about General Ashcroft's condition . . . [W]e knew, of course, that he was ill, that he'd had surgery." Gonzales also stated that "We would not have sought nor did we intend to get any approval from General Ashcroft if in fact he wasn't fully competent to make that decision." He also testified, "There's no governing legal principle that says that Mr. Ashcroft [ . . . ] If he decided he felt better, could decide, 'I'm feeling better and I can make this decision, and I'm going to make this decision.'"<sup>164</sup> (U)

The Attorney General security detail's logs indicate that Gonzales and Card left Ashcroft's room at 7:40 p.m. (U)

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<sup>164</sup> Hearing before Senate Judiciary Committee, July 24, 2007. Gonzales also told us that he would not have gone to the hospital solely over the dispute concerning the scope

Moments after Gonzales and Card departed, Mueller arrived at the hospital. According to Mueller's notes, outside the hospital room Comey informed him of the exchange that had occurred in Ashcroft's room, and in particular that Ashcroft had stated that Comey was the Acting Attorney General, that "all matters" were to be taken to Comey, but that Ashcroft supported Comey's position regarding the program. Mueller's notes also state: "The AG also told [Gonzales and Card] that he was barred from obtaining the advice he needed on the program by the strict compartmentalization rules of the [White House]." (U)

Mueller's notes indicate that Comey asked Mueller to witness Ashcroft's condition, and requested Mueller to inform the FBI security detail that no visitors, other than family, be allowed to see Ashcroft without Mueller's consent. Both Mueller's notes and the security detail log indicate that Mueller instructed the detail that under no circumstances was anyone to be allowed into Ashcroft's room without express approval from either Mrs. Ashcroft or Mueller. (U)

At approximately 8:00 p.m. Mueller went into Ashcroft's room for 5 to 10 minutes. Mueller wrote in his program log: "AG in chair; is feeble, barely articulate, clearly stressed." (U)

#### **4. March 10, 2004: Olson is Read into the Program (U)**

According to Comey's congressional testimony, while he was speaking with Mueller prior to Mueller's departure from the hospital, an FBI agent interrupted, stating that Comey had an urgent telephone call from Card. Comey testified that he then spoke with Card, who was very upset and demanded that Comey come to the White House immediately. Comey testified that he told Card that based on the conduct Comey had just witnessed at the hospital, he would not meet with Card without a witness present. Comey testified that Card replied, "What conduct? We were just there to wish him well." Comey reiterated his condition that he would only meet Card with a witness present, and that he intended the witness to be Solicitor General Olson. Comey testified that until he could "connect" with Olson, he was not going to meet with Card. Card asked if Comey was refusing to come to the White House, and Comey responded that he was not refusing and would be there, but that he had to go back to the Justice Department first. (U)

Comey and the other Department officials left the hospital at 8:10 p.m. Philbin stated that he returned to the Department with Comey in Comey's vehicle, and that the emergency lights were again activated. Goldsmith also left the hospital and went to the Department. At the Department Comey, Goldsmith, and Philbin were joined by Olson, who had come to the Justice Department after being contacted at a dinner party.

Comey told us that he believed there was an urgent need to have Olson read into the program because he was confident Olson would agree with Comey and the others that Yoo's legal analysis was flawed and that Olson would be a strong ally in the matter because of Olson's respected intellect and credibility. (U)

During this meeting at the Justice Department, a call came from Vice President Cheney for Olson, which Olson took on a secure line in Comey's office while Comey waited outside. Comey told us he believes Vice President Cheney effectively read Olson into the program during that conversation. (U)

Comey and Olson then went to the White House at about 11:00 p.m., and met with Gonzales and Card that evening. Comey testified that Card would not allow Olson to enter his office. Comey relented and spoke to Card alone for about 15 minutes. At that point, Gonzales arrived and brought Olson into the room. According to Comey, he communicated the Department's views on the dispute and that the dispute was not resolved in this discussion. Comey stated that Card was concerned that he had heard reports that there was to be a large number of resignations at the Department. (U)

Gonzales told us that he recalled that Comey met first with him and Card while Olson waited outside the office, and that Olson joined them shortly thereafter. Gonzales said that little more was achieved than a general acknowledgement that a "situation" continued to exist because of the disagreement between the Department and the White House regarding the program.<sup>165</sup> (U)

#### **5. March 11, 2004: Goldsmith Proposes Compromise Solution (U)**

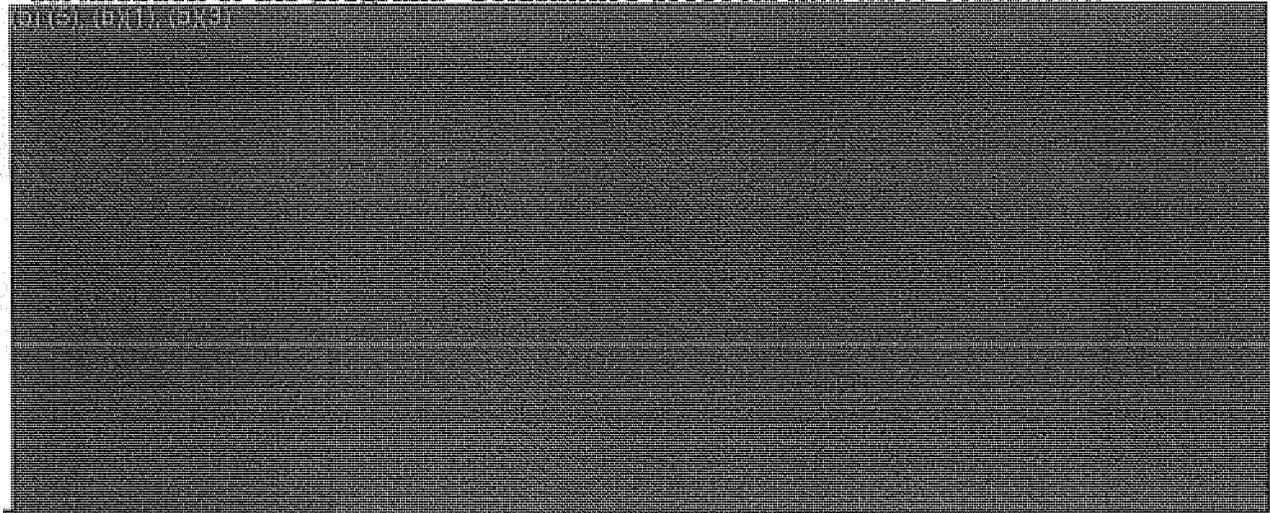
According to a memorandum to the file drafted by Goldsmith, he met with Gonzales at 6:30 a.m. the next morning, March 11, 2004, at the White House to discuss a proposal under which the Department could support

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<sup>165</sup> Comey stated that Olson did not become deeply involved in analyzing the Stellar Wind program in the days that followed because he was preparing for a major argument before the Supreme Court. Comey told us that Deputy Solicitor General Paul Clement was read into the program on March 12, 2004, and reviewed all of the OLC memoranda that weekend. Comey said Clement agreed with Goldsmith and Philbin's analysis "one hundred percent" and later worked with the OLC on drafting a new memorandum on the legality of the program, which is discussed below. However, Bradbury told us that Comey's characterization of Clement's view of the analysis was exaggerated. Bradbury told us that Clement had remarked to him after these events transpired that Goldsmith and Philbin's analysis "sounded reasonable to me at the time," and that Clement's view of the analysis was based only on a limited review of it. ~~(TS//SI//NF)~~

certification of the program. Goldsmith's proposal had three conditions.

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



(S//STLW//SI//OC/NP)

Goldsmith told us that he did not specifically recall this meeting. Gonzales told us that he recalled conveying to Goldsmith and Philbin at some point during this day that the President had decided he had the constitutional authority to continue the program. Gonzales said he also expressed to Department officials the sentiment that the Department should continue seeking a way to "get comfortable" with the President's decision. (U)

**6. March 11, 2004: White House Asserts that Comey's Status as Acting Attorney General was Unclear (U)**

Goldsmith told the OIG that later during the morning of March 11, 2004, he received a call from Deputy White House Counsel David Leitch. Goldsmith said Leitch was "yelling and screaming" about the White House not being informed that Comey was the Acting Attorney General. Goldsmith told the OIG that Leitch made two specific complaints. First, Leitch claimed that the White House had never received a determination from OLC on Comey's assumption of Ashcroft's powers and duties. Goldsmith told us that to rebut this charge, OLC Deputy Assistant Attorney General Edward Whelan was sent to the Justice Command Center to retrieve from a waste basket the facsimile transmittal confirmation sheet from the March 5, 2004, memorandum Goldsmith had sent to Gonzales entitled "Determination that Attorney General is absent or disabled." This confirmation sheet subsequently was sent to Leitch.<sup>166</sup> (U)

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<sup>166</sup> In a March 12, 2004, e-mail to Ayres, Comey, Goldsmith, Philbin, and others (including a copy to Gonzales), Leitch offered a "clarification," asserting that the White House had in fact received the Goldsmith memoranda of March 5, as well as the

(Cont'd.)

Leitch's second claim was that the OLC memorandum was ambiguous because it did not specify whether the Attorney General was determined to be "absent" or "disabled," a difference for purposes of the Attorney General's authority. According to Goldsmith, if the Attorney General was "absent," the Deputy Attorney General could act as the Attorney General, although the Attorney General would retain his authority and technically could overrule the Deputy. If the Attorney General was "disabled," the Attorney General was divested of all authority. Goldsmith said he responded to Leitch by noting the inconsistency of the White House making this second claim because, according to Leitch, it had not received Goldsmith's memorandum in the first instance. (U)

Goldsmith said he also told Leitch to "lay off" the complaints, but that Leitch did not. Goldsmith said he therefore reluctantly sent a detailed e-mail to Leitch on March 11 to support the Department's contention that it had properly informed the White House of Ashcroft's status. Goldsmith stated that in the e-mail he also made the point that his conversation with Gonzales on March 9, 2004 (discussed above) was premised on Gonzales's knowledge that Ashcroft was ill and that Comey needed to authorize a "30-day bridge" until Ashcroft was well enough to sign the Authorizations again.<sup>167</sup> (U)

Gonzales told us that he had no recollection of having seen OLC's March 5, 2004, memorandum entitled "Determination that Attorney General is absent or disabled." As described above, Gonzales stated that he and Card would not have gone to the hospital if they believed Ashcroft did not have the authority to certify the Authorization as to form and legality. Gonzales also said that while he believed Comey would be making the decision to recertify the program, this did not mean that Ashcroft had relinquished his authority or had been "recused" from making the decision. Gonzales said he believed that Ashcroft retained the authority if he was competent to exercise it and was inclined to do so.<sup>168</sup> ~~(TS//SI//NF)~~

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memorandum from Comey's Chief of Staff Chuck Rosenberg memorializing Comey's decision that the Attorney General was "absent or disabled" within the meaning of 28 U.S.C. § 508(a). Leitch's clarification stated that the Rosenberg memorandum had been in draft form. (U)

<sup>167</sup> The OIG searched for but was unable to find this e-mail from Goldsmith to Leitch. (U)

<sup>168</sup> During his July 24, 2007, testimony before the Senate Judiciary Committee, however, Gonzales stated that he thought there had been newspaper accounts of Comey's assumption of the Attorney General's duties and stated that "the fact that Mr. Comey was the acting Attorney General is probably something that I knew of." Gonzales testified that he was aware that Ashcroft was ill and had undergone surgery, but Gonzales stated that Ashcroft "could always reclaim" his authority. (U)

7. **March 11, 2004: Gonzales Certifies Presidential Authorization as to Form and Legality (TS//SI//NF)**

On the morning of March 11, 2004, with the Presidential Authorization set to expire, President Bush signed a new Authorization.<sup>169</sup> In a departure from the past practice of having the Attorney General certify the Authorization as to form and legality, the March 11 Authorization was certified by White House Counsel Gonzales. The March 11 Authorization also differed markedly from prior Authorizations in three other respects. ~~(TS//STLW//SI//OC/NF)~~

The first significant difference between the March 11, 2004, Presidential Authorization and prior Authorizations was the President's explicit assertion that the exercise of his Article II Commander-in-Chief authority "displace[s] the provisions of law, including the Foreign Intelligence Surveillance Act and chapter 119 of Title 18 of the United States Code (including 18 U.S.C. §2511(f) relating to exclusive means), to the extent of any conflict between the provisions and such exercises under Article II[.]" As discussed above, FISA and the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521 (generally referred to as Title III) are by their terms the "exclusive means by which electronic surveillance, as defined in [FISA], and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f). This new language was based on the same legal rationale Yoo first advanced in support of the Stellar Wind program – that FISA cannot be read to infringe upon the President's Commander-in-Chief authority under Article II of the Constitution during wartime. ~~(TS//STLW//SI//OC/NF)~~

Subsequent Presidential Authorizations did not include this language discussing the legal bases for the program. Steven Bradbury told the OIG that he believed the language was included in the March 11 Authorization as a way of indicating that the President did not agree with Goldsmith and Philbin's analysis, and to protect those who had been implementing the program under the prior OLC opinions. ~~(TS//SI//NF)~~

Second, to narrow the gap between the authority given on the face of prior Authorizations and the actual operation of the program by the NSA, the terms governing the collection of telephony and e-mail meta data were clarified. The underlying language for "acquiring" both telephony and e-mail meta data remained as it had been, giving the NSA authority to:

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<sup>169</sup> The March 11, 2004, Presidential Authorization stated that it would expire on May 6, 2004. ~~(TS//SI//NF)~~

acquire, with respect to a communication, header/router/addressing-type information, including telecommunications dialing-type data, but not the contents of the communication, when (i) at least one party to such communication is outside the United States, (ii) no party to such communication is known to be a citizen of the United States, or (iii) based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are specific and articulable facts giving reason to believe that such communication relates to international terrorism, or activities in preparation therefor. ~~(TS//STLW//SI//OC/NF)~~

Presidential Authorization, March 11, 2004, para. 4(b). However, this language was now qualified by the following two subparagraphs:

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

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

Id. at para. 4(b)(i) & (ii). ~~(TS//STLW//SI//OC/NF)~~

In essence, the March 11, 2004, Authorization for the first time sought to make clear that the NSA could "obtain and retain" telephony and e-mail meta data (baskets 2 and 3) ~~(b)(1), (b)(3)~~ but the meta data collected could only be queried ("acquired") in accordance with any of the three conditions set forth in paragraph 4(b).<sup>170</sup> This language clarifying what the term "acquire"

<sup>170</sup> The term "obtain," as first introduced in the March 11, 2004, Presidential Authorization, was meant to be synonymous with the term "collect." ~~(TS//SI//NF)~~

meant was included in every successive Presidential Authorization for the remainder of the program. ~~(TS//STLW//SI//OC/NF)~~

Moreover, the President asserted in the March 11 Authorization that the newly drafted distinction between "obtaining and retaining" meta data versus "acquiring" the meta data "reflects the consistent course of conduct under such Presidential Authorizations that has been known to and authorized by me, and shall be deemed to have been a part of such Presidential Authorizations as if [paragraph 4(b)(i) & (ii)] had been explicitly included in each such Presidential Authorization at the time of presidential signature; any action taken prior to presidential signature of this authorization that is consistent with the preceding sentence is ratified and confirmed."<sup>171</sup> Id. at para. 4(b). ~~(TS//STLW//SI//OC/NF)~~

According to Comey and Philbin, this new language was Addington's "fix."<sup>172</sup> Philbin said he believed the new language was "sufficient" to address the Department's concern that the Authorizations did not adequately describe the ~~(b) (5), (b)(1), (b)(3)~~ being carried out by the NSA, although he believed the new language was "cumbersome." ~~(b) (5)~~

~~(b) (5)~~

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

In his OIG interview, Gonzales declined to explain the significance of this new language, based on an assertion from the Special Counsel to the President that his answer would reveal internal White House deliberations.

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

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

<sup>171</sup> ~~(b) (5), (b)(1), (b)(3)~~

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

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

<sup>172</sup> Hayden and Philbin both told the OIG that Addington drafted the Presidential Authorizations. In his OIG interview, we asked Gonzales who drafted the March 11, 2004, Authorization. On the advice of the Special Counsel to the President, Gonzales declined to answer. ~~(TS//SI//NF)~~

The March 11 Presidential Authorization did not

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

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

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

(b) (5)

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

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

However, Gonzales told us that he found it "hard to believe" that no one at the Department understood that the NSA was

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

Gonzales said he was aware that Philbin had been to the NSA several times and had met with NSA officials to gain an understanding of how the program was actually implemented. (TS//STLW//SI//OC/NF)

~~(S)~~ ~~(U)~~ ~~(F)~~ ~~(O)~~ ~~(U)~~

We asked Gonzales why he signed the March 11, 2004, Presidential Authorization even though the Department could not support it. On the advice of the Special Counsel to the President, Gonzales declined to answer. However, Gonzales stated that the White House Counsel, like OLC, provides legal advice to the President and that his signature on the Authorization simply represented his advice as to its form and legality. ~~(TS//SI//NF)~~

NSA Director Hayden told us that Addington asked him whether the NSA would be willing to continue the Stellar Wind program without the Justice Department's certification of the Presidential Authorization. Hayden said this was a "tough question" and that he consulted with his leadership team at the NSA before making a decision. Hayden said that three considerations persuaded him to continue the program. First, the congressional members briefed on the situation on March 10, 2004, were supportive of continuing the program without Comey's certification. Second, the program had been operating for the previous two and a half years with Department approval. Third, the NSA General Counsel's office told him the program was legal. Hayden said he was unsure whether proceeding without the Department's certification was a sustainable approach, but that he was comfortable doing so when the issue arose in March 2004. ~~(TS//SI//NF)~~

**B. Department and FBI Officials React to Issuance of March 11, 2004, Authorization** ~~(TS//SI//NF)~~

Several Department and FBI leadership officials considered resigning after the Presidential Authorization was signed despite the Deputy Attorney General's refusal to certify the program based on the Department's determination that certain activities it authorized were without adequate legal support. Many of the Department, FBI, and White House officials we interviewed characterized the events immediately surrounding the issuance

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<sup>174</sup> In a closed session of the Senate Select Committee on Intelligence on June 26, 2007, Comey described his belief regarding the new language, stating, "[T]here were some additions to the text that were an effort by someone to try and fix the record in some respect." (U//FOUO)

of the March 11, 2004, Presidential Authorization in dramatic, sharp terms. Several of the Department witnesses described the impasse as a "crisis" and described a sense of distrust and anger that permeated their relations with White House officials during this period. In a letter of resignation that Comey wrote but did not send, he described this period as an "apocalyptic situation." (TS//SI//NF)

In this section, we describe the reactions of Department, FBI, and White House officials to the White House decision to continue the program without the support of the Justice Department. (U)

### 1. Initial Responses of Department and FBI Officials (U)

White House Chief of Staff Card informed Comey by telephone on the morning of March 11, 2004, that the President had signed the new Authorization that morning. At approximately noon, Gonzales called Goldsmith to inform him that the President, in issuing the Authorization, had made an interpretation of law concerning his authorities and that the Department should not act in contradiction of his determinations. Goldsmith took notes on the call. According to his notes, Goldsmith asked Gonzales, "What were those determinations?" and Gonzales responded that he would let Goldsmith know. (TS//SI//NF)

Later that day, Gonzales called Goldsmith again and told him that OLC should continue working on its legal analysis of the program. In a third call that day, however, Gonzales directed Goldsmith to suspend work on the legal analysis and to decline a request from the CIA General Counsel to review a draft of the new OLC memorandum. (TS//SI//NF)

Goldsmith followed up this series of calls with a letter to Gonzales seeking clarification on Gonzales's instructions. Goldsmith wrote that he interpreted the March 11, 2004, Authorization signed by the President to mean that "the President has determined the legality of [the program] in all respects based upon the advice and analysis of your office, and that officers of the Department of Justice should refrain from calling into question the legality of [the program], or from undertaking further legal analysis of it." In the letter Goldsmith recounted how Gonzales had then called him to advise that OLC should continue its legal analysis of the program, adding, "I am now uncertain about your direction based on the President's exercise of his authority." Goldsmith concluded his letter by reiterating OLC's position that its existing legal memoranda "should not be relied upon in support for the entire program." Goldsmith described the document he wrote as a "for the record" letter.<sup>175</sup> As described below, Goldsmith and Philbin delivered

<sup>175</sup> Goldsmith said he discussed a draft of the letter with Comey, Rosenberg, Ayres, Olson, and others and edited it based on their suggestions. (U)

this letter to Gonzales at his residence at approximately 11:00 p.m. that night. (TS//SI//NF)

At noon on March 11, 2004, Director Mueller met with Card at the White House. According to Mueller's program log, Card summoned Mueller to his office to bring Mueller up to date on the events of the preceding 24 hours. Card recounted for Mueller the briefing of the congressional leaders the prior afternoon and the President's issuance of the new Authorization without the Department's approval. In addition, Card told Mueller that if no "legislative fix" could be found by May 6, 2004, when the current Authorization was set to expire, the program would be discontinued. (TS//SI//NF)

According to Mueller's notes, Card acknowledged to Mueller that President Bush had sent him and Gonzales to the hospital to seek Ashcroft's certification for the March 11, 2004, Authorization, but that Ashcroft had said he was too ill to make the determination and that Comey was the Acting Attorney General. Mueller wrote in his program log that he told Card that the failure to have Department of Justice representation at the congressional briefing and the attempt to have Ashcroft certify the Authorization without going through Comey "gave the strong perception that the [White House] was trying to do an end run around the Acting [Attorney General] whom they knew to have serious concerns as to the legality of portions of the program." Card responded that he and Gonzales were unaware at the time of the hospital visit that Comey was the Acting Attorney General, and that they had only been following the directions of the President. (TS//SI//NF)

Mueller reminded Card that Mueller had told Vice President Cheney during their March 9, 2004, noon meeting that Mueller could have problems with the FBI's continued involvement in the program if the White House issued an Authorization without the Department's approval. Card said he understood Mueller's concern and told him to stop by Gonzales's office to pick up a copy of the March 11, 2004, Authorization, which Mueller did. (TS//SI//NF)

Mueller met with Comey at 1:15 p.m. to review the Authorization, and he left a copy of it with Comey. During this meeting, Mueller told Comey he would be submitting a letter to Comey requesting advice on the legality of the FBI's continued participation in the program.<sup>176</sup> (TS//SI//NF)

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<sup>176</sup> According to the Mueller's program log, Gonzales called Mueller at 2:50 p.m. to tell him to "assure security of copy of President's order." (U)

Later that day, Mueller sent Comey a memorandum, prepared by FBI General Counsel Valerie Caproni and an FBI Deputy General Counsel, seeking guidance on how the FBI should proceed in light of recent developments. The memorandum asked whether FBI agents detailed to the NSA to work on Stellar Wind should be recalled; whether the FBI should continue to receive and investigate tips based on [REDACTED] and whether [REDACTED]

[REDACTED] (TS//STLW//SI//OC/NF)

Office of Intelligence Policy and Review (OIPR) Counsel James Baker also expressed his concern about the White House's action. On the evening of March 11, 2004, he drafted a memorandum to Comey containing what he later described as a series of "loaded questions" concerning whether it was "lawful and ethical" for OIPR to continue filing applications with the FISA Court under the circumstances.<sup>177</sup> ~~(TS//SI//NF)~~

Goldsmith and Philbin called Gonzales late in the evening of March 11 to ask if they could visit him at his residence to deliver the letter Goldsmith had written earlier in the day. As described above, Goldsmith sought to make a record of his earlier conversations with Gonzales in which Goldsmith believed Gonzales had conveyed conflicting instructions regarding how OLC should proceed in light of the President's issuance of the March 11 Authorization. ~~(TS//SI//NF)~~

Gonzales told us that Goldsmith drafted the letter because Goldsmith was "confused" about whether OLC should continue working on its legal analysis of the program. Gonzales said he recalled that Goldsmith and Philbin were "somber" during the meeting at his house. Gonzales said that he told them that the President had decided to go forward with the program, but that they should continue working to resolve the outstanding legal questions they had and try to find a solution. He said he tried to convey to them his confidence that everyone would "get through this." ~~(TS//SI//NF)~~

Goldsmith and Philbin told us that Gonzales was very cordial during the meeting and expressed regret for having gone to Ashcroft's hospital room that evening. Philbin stated that initially he believed that Gonzales had instructed him and Goldsmith "not to do our job, not to determine what the law is," but that it became evident to him that Gonzales "wanted to do the legally right thing." Goldsmith also stated that as a general proposition

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<sup>177</sup> These issues are described in Section II C of this chapter in connection with the Department's meetings with FISA Court Presiding Judge Kollar-Kotelly to discuss the use in FISA applications of information derived from [REDACTED] collected under the program following the March 11, 2004, Presidential Authorization and its subsequent modifications. ~~(TS//STLW//SI//OC/NF)~~

he encountered more "pushback" from Addington than from Gonzales, and that Gonzales "wanted to do the right thing." ~~(TS//SI//NF)~~

## 2. Department and FBI Officials Consider Resigning (U)

Comey told us he drafted a letter of resignation shortly after the incident in Ashcroft's hospital room on March 10. Comey said he drafted the letter because he believed it was impossible for him to remain with the Department if the President would do something the Department said was not legally supportable.<sup>178</sup> (U)

Comey also testified that Ashcroft's Chief of Staff David Ayres believed Ashcroft also was likely to resign and urged Comey to wait until Ashcroft was well enough to resign with him. In written responses to Senator Charles Schumer following his testimony, Comey wrote that he believed the following individuals also were prepared to resign: Goldsmith, Philbin, Chuck Rosenberg, Daniel Levin, James Baker, David Ayres, Deputy Chief of Staff to the Attorney General David Israelite, and Director Mueller. Comey also responded to the question that he believed that "a large portion" of his staff also would have resigned if he had. (U)

Goldsmith told us he was "completely disgusted" by his recent meetings with White House officials in connection with the Stellar Wind program and that he drafted a resignation letter at around the same time as Comey. The OIG obtained a handwritten list Goldsmith had compiled as these events were taking place to memorialize his grievances with the White House's actions during this period. The list includes:

- the "[s]hoddiness of the whole thing," which Goldsmith told us referred to his belief that both the process by which the program was implemented and the substantive analysis underpinning it represented the extreme opposite of how to manage a program as important as the White House claimed Stellar Wind to be;

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<sup>178</sup> The letter was addressed to President Bush. Also, at 5:46 p.m. on the evening of March 11, 2004, Comey sent an e-mail to two Department colleagues stating in part:

I have been through the roughest patch of my professional life in the last 24 hours. You would not believe what has gone on . . . I am hugely upset about the conduct of certain members of the executive branch. But I am also hugely proud of the Department of Justice, including SG, Associate AG, OLC, Ayres, my staff, the AG, and even Mrs. Ashcroft. I believe this has been our finest hour, although it is not over yet. . . I suspect I will either be fired by the President or quit, but I will have done the right thing for my country. (U)

- “[o]ver-secrecy,” both in terms of not reading in attorneys at the Justice Department and other agencies, and not keeping Congress informed;
- the hospital incident, which Goldsmith described as “shameful”; “[d]isregard of law” on the part of the White House (a reference Goldsmith did not expand upon with more specificity during his interview with the OIG); and
- the White House’s claim that a legislative fix could be achieved, which Goldsmith regarded as “irresponsible” because he believed at the time that a legislative remedy was not a viable option. ~~(TS//SI//NF)~~

Goldsmith described three additional items on the list in particular as “false representations” by the White House:

- “[l]ies re shutting down,” referring to the White House’s assurances to Goldsmith on several occasions that it would shut down the program if the Office of Legal Counsel could not find legal support for it;
- “[l]ies re telling [the President] of problem,” referring to representations that the President had been kept informed of the Department’s concerns about the program; and
- assertions by White House officials that they “[d]idn’t know AG was incapacitated”. ~~(TS//SI//NF)~~

Goldsmith stated that on Thursday, March 11, Ayres asked him not to resign because the Attorney General should have the chance to do so first once he had fully recovered from his surgery. Goldsmith said he was still “on the fence” the following Monday or Tuesday about resigning and that there was great concern that his and other resignations would “spark a panic” that might lead to the program being revealed publicly.<sup>179</sup> (U)

Philbin told us that there was an “eerie silence” at the Department on March 11 as he and others awaited word from the White House on the fate of the program. Philbin said he and others believed they would have to resign. Philbin said his primary concern was that the White House planned to go forward with the Presidential Authorization and continue the program

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<sup>179</sup> Goldsmith ultimately tendered his resignation in June 2004, effective July 30, 2004. Goldsmith told us he resigned in part because he did not believe he could be an effective head of the Office of Legal Counsel after his “unprecedented” withdrawal of several legal memoranda, including those drafted by Yoo. Goldsmith added that he also resigned because he was “exhausted” from his work in OLC and had recently been offered a teaching position at Harvard Law School. (U)

despite the flaws that the Office of Legal Counsel had identified in its legal analysis. Philbin said he was "absolutely serious" about resigning, adding, "[If] they're going to try to strong-arm the guy on morphine, what else are they going to do?" ~~(TS//SI//NF)~~

Baker told us that he also considered resigning after the President signed the Authorization but ultimately decided to remain in his position, in part because of his fear that if the White House was willing to tolerate mass resignations of senior government officials rather than revise the Stellar Wind program, "I don't know what this means in terms of the rule of law in this country." Baker also stated that he knew he had certain protections from removal for a period of time because he was a career official and that he wanted to remain as Chief of OIPR to protect the government's relationship with the FISA Court and to protect the attorneys in his office. ~~(TS//SI//NF)~~

Levin said he was willing to resign over the matter, and he gave a signed resignation letter to Comey to be used by him "however [he] felt appropriate." Levin said he did so "if it would help to get the White House to change its mind." Levin said that even though he was not certain he shared Goldsmith's view that the [REDACTED] was legally without support, he thought the White House's conduct during the incident at the hospital had been "outrageous" and he was willing to resign on that basis alone. ~~(TS//STLW//SI//OC/NF)~~

FBI General Counsel Caproni told us that she also was prepared to resign. She said that the FBI's primary concern regarding the impasse between the Department and the White House over the program was not with issues of privacy and civil liberties, but rather with "the rule of law." ~~(TS//SI//NF)~~

At approximately 1:30 a.m. on March 12, 2004, Mueller drafted by hand a letter stating, in part: "[A]fter reviewing the plain language of the FISA statute, and the order issued yesterday by the President . . . and in the absence of further clarification of the legality of the program from the Attorney General, I am forced to withdraw the FBI from participation in the program. Further, should the President order the continuation of the FBI's participation in the program, and in the absence of further legal advice from the AG, I would be constrained to resign as Director of the FBI." Mueller told us he planned on having the letter typed and then tendering it, along with his March 11, 2004, memorandum to Comey, but that based on subsequent events his resignation was not necessary. ~~(TS//SI//NF)~~

### 3. **Comey and Mueller Meet with President Bush (U)**

On the morning of March 12, 2004, Comey and Mueller went to the White House to attend the regular daily threat briefing with the President in the Oval Office. Comey said that following the briefing President Bush called him into the President's private study for an "unscheduled meeting."  
(U)

Comey told us that President Bush said to him, "You look burdened." Comey told the President that he did feel burdened, to which the President responded, "Let me lift that burden from you." Comey told the President that he felt as if he were standing on railroad tracks with a train coming toward him to run over his career and "I can't get off the tracks." (U)

Comey said he then explained to the President the three baskets of Stellar Wind collection and the issues and problems associated with each. President Bush responded with words to the effect, "You whipped this on me" all of a sudden, that he was hearing about these problems at the last minute, and that the President not being told of these developments regarding the program was "not fair to the American people." Comey responded that the President's staff had been advised of these issues "for weeks," and that the President was being "poorly served" and "misled" by his advisors. Comey also said to the President, "The American people are going to freak when they hear what collection is going on." President Bush responded, "That's for me to worry about." ~~(TS//STLW//SI//OC/NF)~~

According to Comey, the President said that he just needed until May 6 (the date of the next Authorization), and that if he could not get Congress to fix FISA by then he would shut down the program. The President emphasized the importance of the program and that it "saves lives." Comey told the President that while he understood the President's position he still could not agree to certify the program. Comey said he then quoted Martin Luther to the President: "Here I stand, I can do no other." At the end of the conversation, Comey told the President, "You should know that Bob Mueller is going to resign this morning." The President thanked Comey for telling him that and said he would speak with Mueller next.  
~~(TS//STLW//SI//OC/NF)~~

Comey said his conversation with the President lasted approximately 15 minutes. Following the conversation, Comey went to Mueller, who was waiting in the West Wing, and started discussing his meeting with the

President. Word was then sent to Mueller through a Secret Service agent that the President wanted to meet with him.<sup>180</sup> (U)

Mueller later made notes in his program log about his meeting with President Bush. According to his notes, the President told Mueller that he was "tremendously concerned" about another terrorist attack and that he had been informed that the Stellar Wind program was essential to protecting against another attack. The President cited an ongoing investigation

 The President said he believed that he would be "justly held accountable" if he did not do everything possible to prevent another attack. The President explained to Mueller that for these reasons he had authorized the continuation of the program even without the concurrence of the Attorney General as to the legality of "various aspects of the program." ~~(TS//STLW//SI//OC/NF)~~

b1, b3,  
b7E

According to the notes, the President told Mueller that the congressional leadership had been briefed on the President's action to extend the program and was "understanding and supportive of the President's position." The President also told Mueller that he had urged Comey to agree to extend the program until May 6 and that he hoped for a legislative fix by that time, but that if no legislative solution could be found and the legality of the program was still in question by that time, he "would shut it down." ~~(TS//SI//NF)~~

According to Mueller's notes, Mueller told the President of his concerns regarding the FBI's continued participation in the program without an opinion from the Attorney General as to its legality, and that he was considering resigning if the FBI were directed to continue to participate without the concurrence of the Attorney General. The President responded that he "wished to relieve any burden [Mueller] may be laboring under" and that he did not want Mueller to resign. Mueller said he explained to the President that he had an "independent obligation to the FBI and to the Justice Department to assure the legality of actions we undertook, and that a presidential order alone could not do that." ~~(TS//SI//NF)~~

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<sup>180</sup> At this point (9:27 a.m.), Comey sent an e-mail from his Blackberry to Goldsmith, Philbin, Ayres, Levin, and others, stating:

President just took me into his private office for 15 minute one on one talk. Told him he was being misled and poorly served. We had a very full and frank exchange. Don't know that either of us can see a way out. He promised that he would shut down 5/6 if Congress didn't fix FISA. Told him Mueller was about to resign. He just pulled Bob into his office.

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

According to Mueller's notes, the President expressed understanding for Mueller's position and asked what needed to be done to address Mueller's concerns. Mueller responded that Comey, the Office of Legal Counsel, the CIA, and the NSA "needed to sit down immediately" and assess the legal status of the program in light of OLC's doubts about the existing legal rationale and the March 11, 2004, Authorization. Mueller wrote:

The President questioned me closely on the impact on national security from discontinuing elements of the program. [REDACTED]

[REDACTED]

According to Mueller's notes, the President then directed Mueller to meet with Comey and other principals to address the legal concerns so that the FBI could continue participating in the program "as appropriate under the law." ~~(TS//SI//NF)~~

Mueller told us he met with Comey an hour later to begin coordinating that effort. At 4:50 p.m. that afternoon, Mueller called Gonzales to request that additional Department lawyers be read into the program.<sup>181</sup> Mueller told us that this request originated with Comey and that Mueller was merely acting as an "intermediary." (U)

The President's direction to Mueller to meet with Comey and other principals to address the legal concerns averted the mass resignations at the Department and the FBI. According to Comey and other Department officials, the White House's decision to seek a legal solution and allow more attorneys to be read into the program was a significant step toward resolving the dispute, and in the words of one Department official provided a way of "stepping back from the brink." As we describe below, these Department officials still faced the challenge of finding a legal and operational remedy for the program that would address the concerns of the White House, the NSA, and Department. ~~(TS//SI//NF)~~

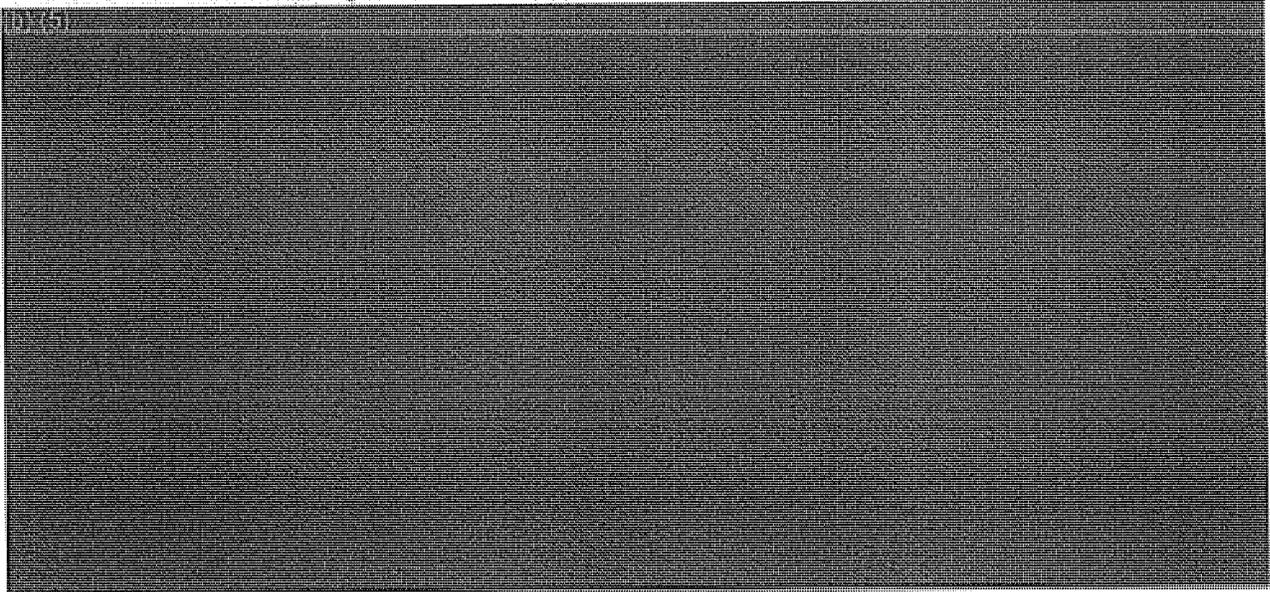
#### 4. Comey Directs Continued Cooperation with NSA (U)

On the morning of March 12, 2004, Comey decided not to direct OIPR and the FBI to cease cooperating with the NSA in conjunction with the program. Comey's decision is documented in a 1-page memorandum from

<sup>181</sup> At least three additional Department attorneys were read into the program on March 12, 2004, including OIPR Acting Deputy Counsel for Intelligence Operations Peggy Skelly-Nolen and two OLC attorneys. (U)

Goldsmith to Comey in which Goldsmith explained why Comey's action was legal. (S//NF)-

In his memorandum, Goldsmith stated that the President, as Commander-in-Chief and Chief Executive with the constitutional duty to "take care that the laws are faithfully executed," made a determination that Stellar Wind, as practiced, was lawful. Goldsmith concluded that this determination was binding on the entire Executive Branch, including Comey in his exercise of the powers of the Attorney General.<sup>182</sup> (TS//SI//NF)



## 5. Department Conducts Additional Legal Analysis (U)

On March 12, 2004, an interagency working group was convened to continue the legal analysis of the program. In accordance with the President's directive to Mueller, officials from the FBI, NSA, and the CIA were brought into the process, although the OLC maintained the lead role. The working group included Deputy Solicitor General Clement, Baker, FBI General Counsel Caproni, Mueller, and several attorneys from OLC. Comey said CIA Director Tenet and his Deputy, McLaughlin, may have had limited participation as well. (TS//STLW//SI//OC/NF)-

On March 13, Mueller asked NSA Director Hayden to assist FBI General Counsel Caproni in assessing the value of the Stellar Wind program. Mueller said he wanted Caproni to become more familiar with the program and to understand how the FBI's view of the value of the program

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<sup>182</sup> Goldsmith told us his determination that the entire Executive Branch was bound by the President's interpretation of law was based on his discussions with several other Justice Department attorneys, as well as on long-standing OLC precedent. (U)

compared with that of the NSA.<sup>183</sup> Mueller said that Hayden provided slides highlighting cases in which the NSA believed Stellar Wind-derived information proved useful. ~~(S//NF)~~

Caproni told us that during this March 2004 period she and two other FBI officials made an effort to determine what value the FBI was getting from Stellar Wind-derived information. She explained that it was difficult to assess the value of the program during its early stages because FBI field offices at that time were not required to report back to FBI Headquarters with information about how information from the NSA program had been used.<sup>184</sup> ~~(S//NF)~~

On the afternoon of Sunday, March 14, 2004, the Department convened a large meeting in the Justice Command Center to review OLC's analysis on the legality of the program. Mueller, Comey, Goldsmith, Philbin, Baker, CIA General Counsel Muller, Caproni, Tenet, Hayden, Olson, Clement, and several NSA lawyers attended the meeting. ~~(TS//SI//NF)~~

Prior to the meeting, Goldsmith and Philbin prepared a detailed outline of OLC's current analysis, which Goldsmith described to us as his "most honest take" of the legal issues at that time. Goldsmith said he distributed the outline to meeting participants and used it to walk the group through the analysis. (U)

The outline highlights the evolution of OLC's analysis.

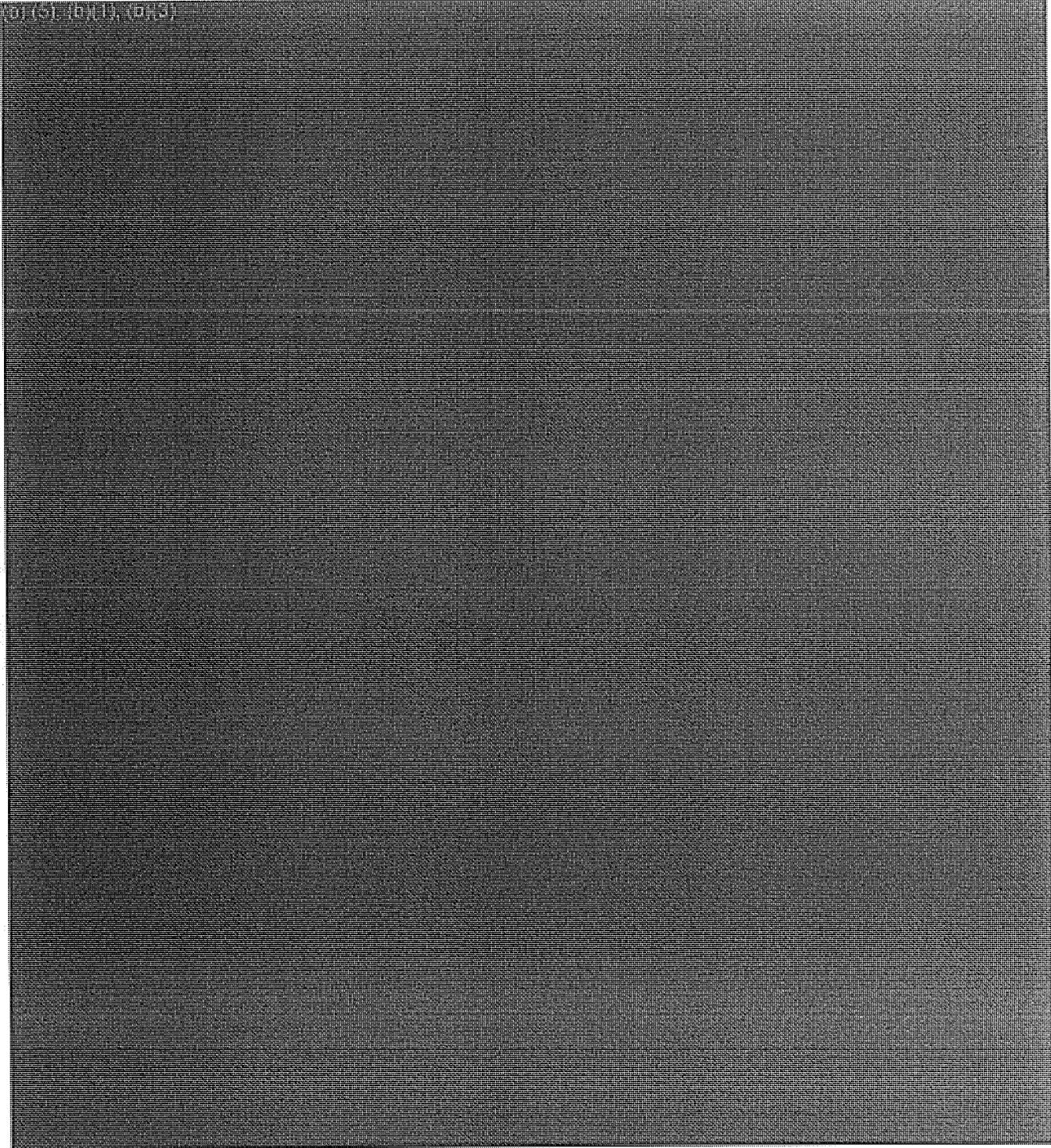
b) (S) (b) (1), (b) (3)

<sup>183</sup> Caproni had been appointed the FBI General Counsel in August 2003 and was read into the Stellar Wind program in September or October 2003. She told us she did not give much thought to the program at the time because OLC had determined that it was legal. She stated that in 2004 she learned that OLC was re-examining Yoo's legal analysis and had concerns with it. She told us she later spoke with Philbin, who confirmed to her that he and Goldsmith had problems with the legal support for the program and that he was frustrated because the program was so tightly compartmented that he could not talk to anybody about it. Caproni told us that at some point she obtained a copy of Yoo's legal opinion. She stated that after reading it she immediately understood Philbin's concerns because the opinion appeared to lack analysis and simply concluded that the program was legal. ~~(TS//SI//NF)~~

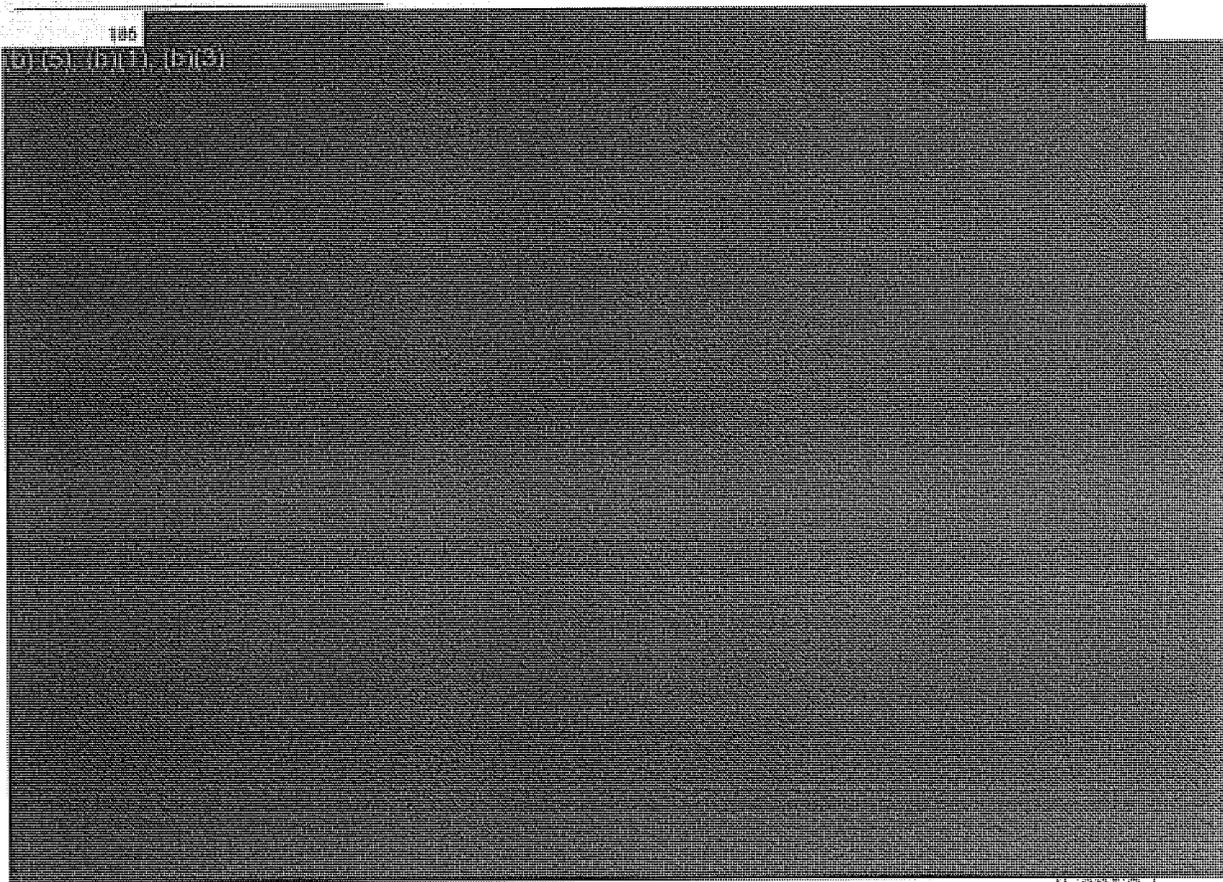
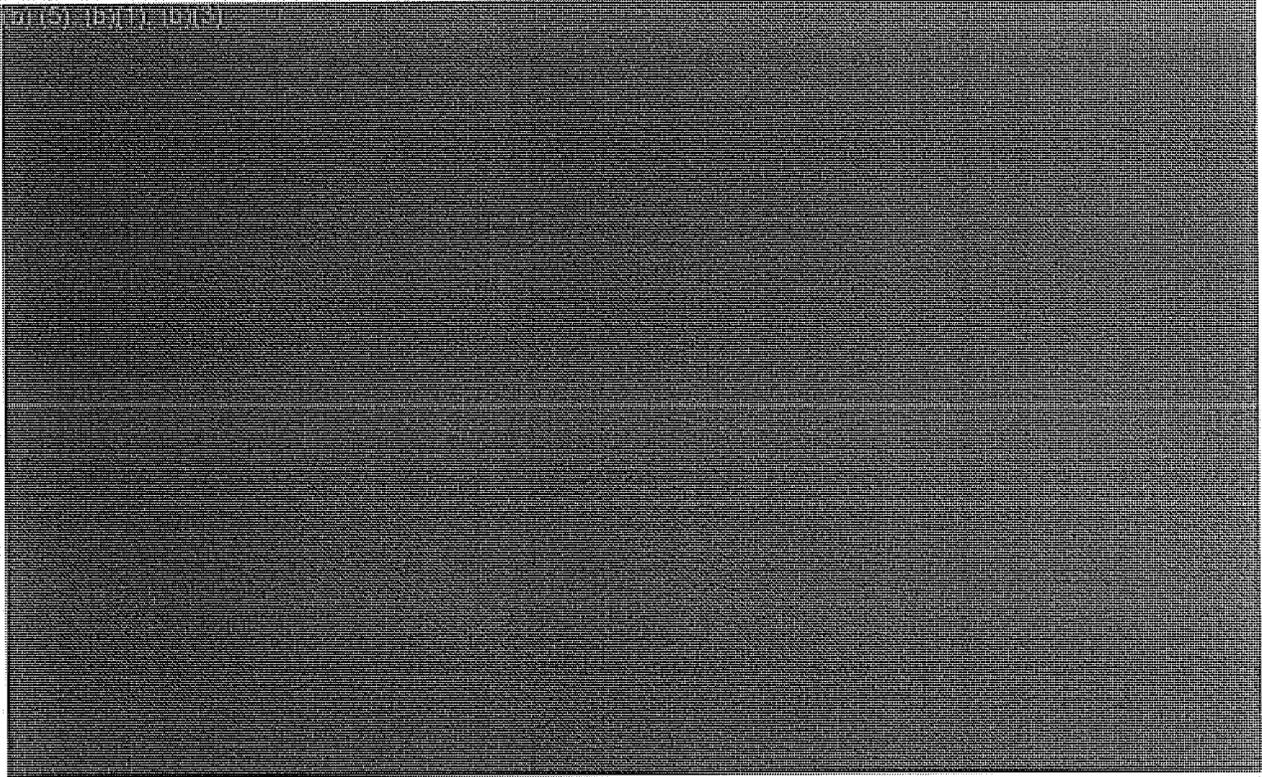
<sup>184</sup> The FBI's Electronic Communications Analysis Unit compiled a summary of known ~~(b)(1)~~ Stellar Wind tip results from January 1, 2003, through mid-December 2003. b1, b3 However, the data included in the summary was incomplete, and the summary did not contain any analysis of the effectiveness of these tips. Another study of the ~~(b)(1), (b)(3)~~ ~~(b)(1), (b)(3)~~ tipplers was conducted in 2006. The results of that study are discussed in Chapter Six of this report, along with the OIG's analysis of the effectiveness of the program.

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

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



<sup>185</sup> Goldsmith also noted that as of the March 14, 2004, meeting, the Attorney General had not yet reported to Congress on the program under 28 U.S.C. § 530D. However, as discussed above, the White House had briefed the congressional leadership about the program on March 10, 2004. In addition, the former Presiding Judge of the FISA Court, Royce Lamberth, and the current Presiding Judge, Colleen Kollar-Kotelly, had been read into the program by this time. (U)



(Cont'd.)