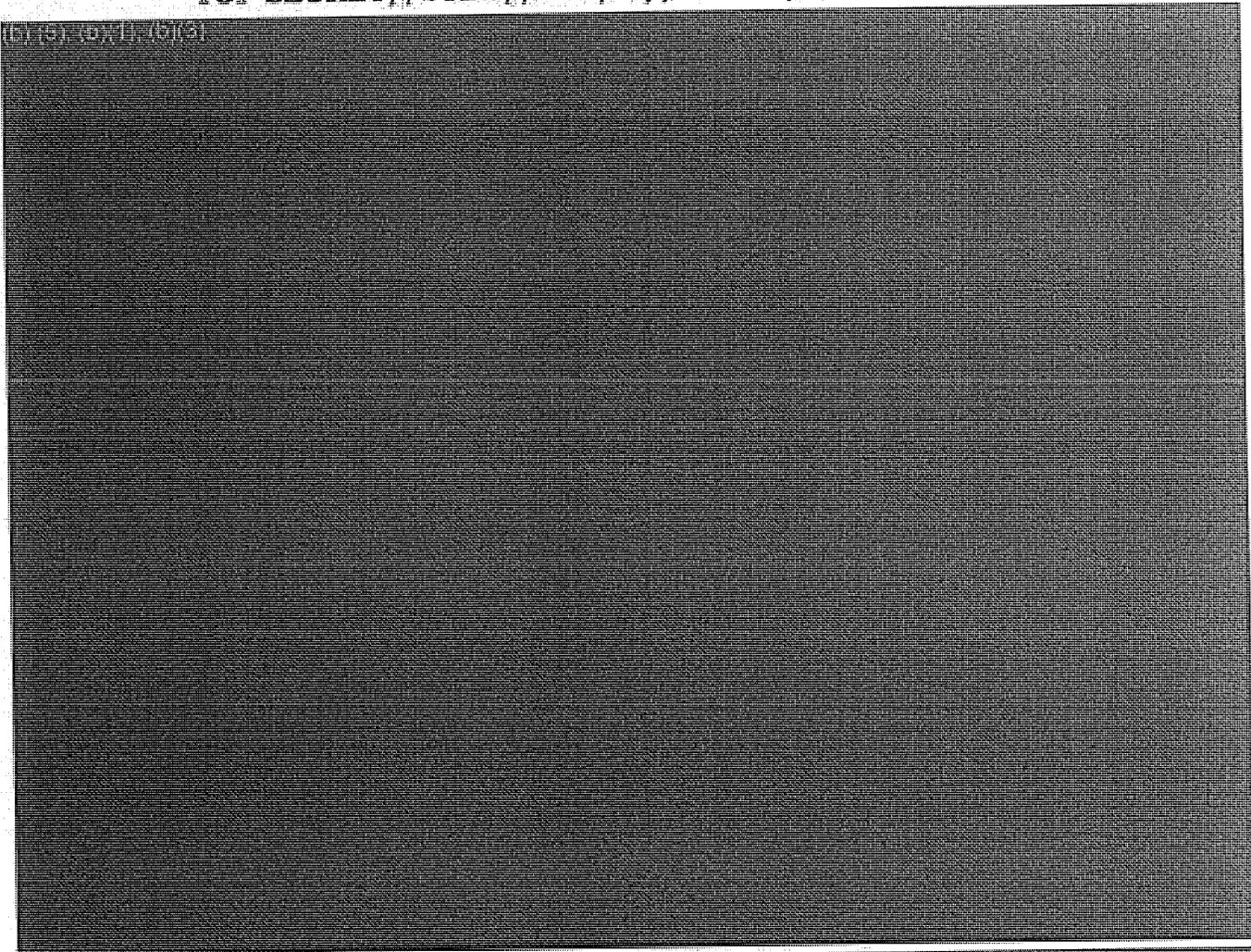
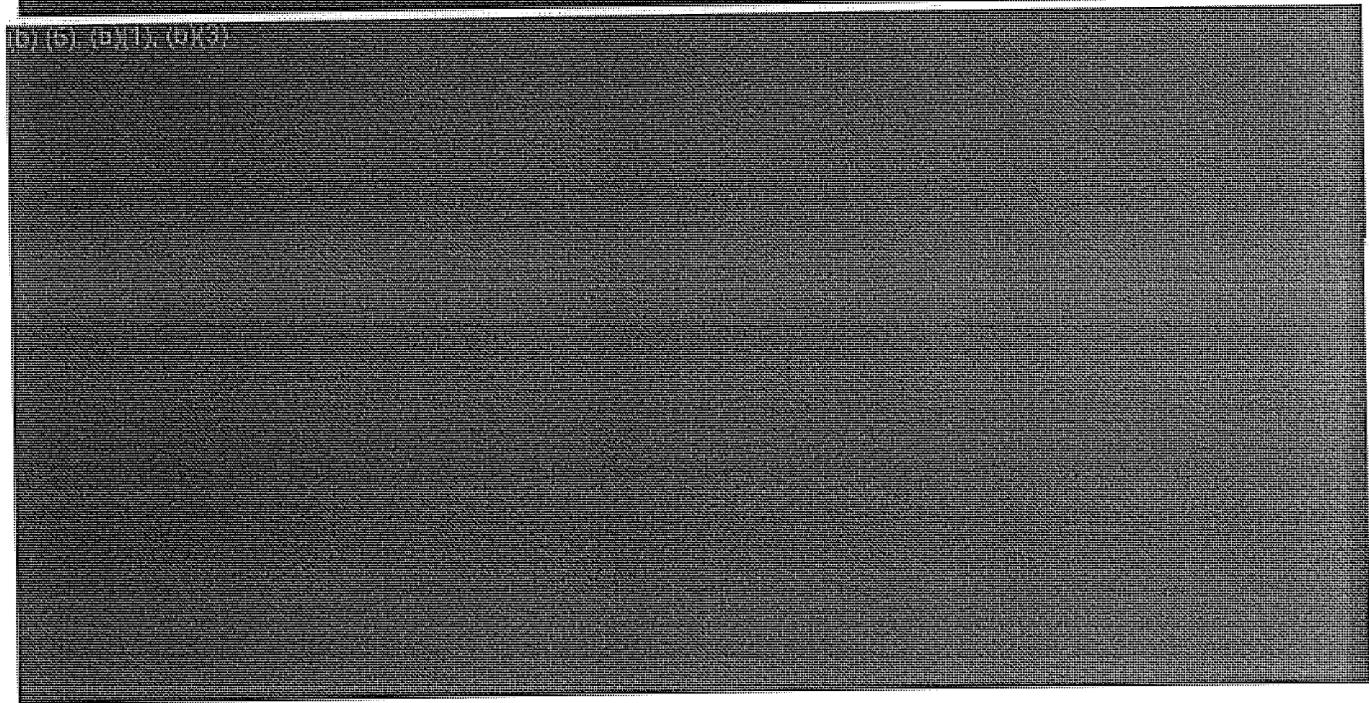


(b) (5), (b) (1), (b) (3)



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



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

Goldsmith told us that during his presentation of the legal analysis at the March 14 meeting he received "tough but fair and appropriate" questions from Mueller and Olson with respect to why the

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

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

Goldsmith told us that the March 14 meeting was designed to achieve full consensus among the principals on the issues, and that the meeting was successful in this regard. (U)

That evening, Mueller called Gonzales to report that progress had been made, although legal support for (b) (5), (b) (1), (b) (3) still had not been found. Mueller also told Gonzales that in the future Gonzales should speak directly with Comey on these matters.

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

**6. Comey Determines that Ashcroft Remains "Absent or Disabled" (U)**

Attorney General Ashcroft was released from the hospital at noon on March 14, 2004. The next day, Comey advised Ayres by memorandum that Ashcroft's doctor believed that Ashcroft required additional time to recuperate at home and was not yet ready to resume his responsibilities as Attorney General. Comey's memorandum noted that the doctor intended to reassess Ashcroft's condition on March 24, 2004. Comey's memorandum stated that, based on these circumstances, Comey continued to believe that Ashcroft was "absent or disabled" within the meaning of 28 U.S.C. § 508(a). Comey's memorandum concluded:

As before, notwithstanding my continued temporary capacity as Acting Attorney General, I intend, where possible, to exercise "all the power and authority of the Attorney General" pursuant to the authority that 28 C.F.R. § 0.15(a) delegates to me in my regular capacity as Deputy Attorney General. (U)

A copy of the memorandum was sent to Gonzales at the White House and to senior Department officials.<sup>189</sup> (U)

**7. Judge Kollar-Kotelly Briefed on Lack of Attorney General Certification (U)**

As discussed earlier in this report, the extent to which OIPR could use Stellar Wind-derived information in FISA applications had been limited by Judge Kollar-Kotelly, the FISA Court's Presiding Judge. After her read-in to the program in May 2002, Judge Kollar-Kotelly had directed OIPR to continue, with some modifications, the "scrubbing" procedures for FISA applications in place at that time. ~~(TS//STLW//SI//OC/NF)~~

According to an OLC memorandum, on March 14, 2004, Judge Kollar-Kotelly was informed that the President had reauthorized the Stellar Wind program, but that the latest Authorization lacked the Attorney General's certification as to form and legality.<sup>190</sup> The memorandum indicated that as a result of Judge Kollar-Kotelly's uncertainty about the implications of this development, she intended to insist on a complete separation of any information derived from Stellar Wind, whether directly or indirectly, from all FISA applications presented to the FISA Court. The memorandum noted that "[b]ecause of the way tips get worked into (and lost in) the mix of intelligence information, that standard would have virtually crippled all counter-terrorism FISAs." ~~(TS//STLW//SI//OC/NF)~~

**8. Comey and Gonzales Exchange Documents Asserting Conflicting Positions (U)**

According to Mueller's program log, on the morning of Monday, March 15, 2004, following the daily threat briefing in the White House Situation Room, President Bush remarked to Mueller that he understood "progress had been made," referring to the discussions on the legal basis for the Stellar Wind program. Mueller called Comey shortly thereafter to convey the President's remark. Mueller suggested to Comey that additional briefings on the program should be given to Congress, including to both the House and Senate Judiciary Committees. ~~(TS//SI//NF)~~

Also on March 15, Goldsmith drafted for Comey a 3-page memorandum summarizing OLC's views with respect to the legality of the program. The memorandum recast in narrative form Goldsmith's outline of

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<sup>189</sup> As discussed below, Ashcroft's doctors later cleared Ashcroft to resume his duties as Attorney General as of March 31. (U)

<sup>190</sup> The memorandum was prepared in anticipation of a briefing for the Attorney General on March 30, 2004. (U)

March 14, 2004 (discussed above), and noted that OLC had not reached any "final conclusions and [was] not yet prepared to issue a final opinion on the program." The memorandum also stated that the Stellar Wind program potentially implicated various congressional and intra-Executive Branch reporting requirements imposed both by statute and Executive Order. The memorandum stated that OLC was only beginning to analyze these reporting issues. (TS//SI//NF)

Goldsmith and Philbin went to see Gonzales on the afternoon of March 15 to explain what OLC had determined in its legal analysis to that point, and also to notify Gonzales that he would be hearing from Comey shortly about the Department's position as to the program's legality. (U)

According to Philbin's contemporaneous notes on the events of the next two days, on March 16, 2004, following the morning threat briefing at the White House, Comey told President Bush that OLC had finished its preliminary legal analysis of the program.<sup>191</sup> Comey asked the President if Comey should convey the details of the analysis to Gonzales, and the President indicated that Comey should do so. (TS//SI//NF)

After Comey returned to the Department, he signed a short memorandum to Gonzales that he had drafted the night before. In the memorandum, Comey first recounted how the President on March 12, 2004, had directed the Justice Department to continue its analysis of the Stellar Wind program and to "provide its best advice concerning ways to change the program to conform with the Justice Department's understanding of the applicable law." Comey then described the composition of the working group convened to accomplish this objective and how the group's efforts had resulted in Goldsmith's 3-page analysis, which Comey attached to his memorandum. (TS//SI//NF)

Comey then set out his advice to the President. According to the memorandum, Comey advised that the President may lawfully continue

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

(b)(1), (b)(3) Comey wrote that (b)(1), (b)(3) involved "close legal questions, requiring legally aggressive - indeed, novel - supporting arguments . . . ." Comey further wrote that the Department remained unable to find a legal basis to support (b)(1), (b)(3) Accordingly, Comey advised that such

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

<sup>191</sup> Philbin told the OIG he kept notes of these events because Comey had asked him to "keep a record." (U)

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

Finally, Comey cautioned that he believed the ongoing collection of (b)(1), (b)(3) raised "serious issues" about congressional notification, "particularly where the legal basis for the program is the President's decision to assert his authority to override an otherwise applicable Act of Congress." Comey wrote that the Department would continue to explore the notification issue.

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

Comey instructed Goldsmith and Philbin to hand deliver the memoranda to Gonzales at the White House, which they did. Philbin also delivered copies to Solicitor General Olson. Philbin's notes indicate that Olson was "annoyed" that Comey had sent the memoranda to the White House without consulting him, and asked Philbin several times, "What's my role supposed to be here?" Olson also said to Philbin that he thought the memoranda were a "poke in the eye" to the White House. Philbin wrote that Olson's reaction "raised concerns that [Comey] may have gotten himself too far out there alone" by not bringing Olson in on the Department's legal opinion in advance. (U)

Comey told us that he knew his memorandum would anger people at the White House because he had put in writing the arguments questioning the legality of aspects of the program and that the memorandum and Goldsmith's attachment would become a part of the Presidential records and would be discovered later by historians. He stated he believed it was important to "make a record." (U)

According to Mueller's program log, Gonzales called Mueller at 1:45 p.m. on March 16 to discuss the situation. Gonzales explained to Mueller that, in view of the Department's tentative conclusion that legal support for (b)(1), (b)(3) was still lacking, Gonzales would have to make a recommendation to the President on how to proceed. Gonzales told Mueller he needed to know whether Mueller would resign if the President decided (b)(1), (b)(3). Mueller responded that he would have to take time to consider his actions, but that he "would have to give it serious consideration if the President decided to go ahead in the face of DOJ's finding." ~~(TS//STLW//SI//OC/NF)~~

Later that afternoon on March 16, Card called Comey to the White House for a meeting. According to Philbin's notes, "the back channel word from Judge Gonzales" was that President Bush might be willing to (b)(1), (b)(3). Prior to the meeting, Comey, Goldsmith, and Philbin agreed that Comey should be ready to convey to the White House that the Department would support (b)(1), (b)(3).

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

Philbin's notes indicate that at the meeting Card told Comey that the President was "wrestling" with the issue of whether to (b)(1), (b)(3) and would decide "very soon." Card also expressed to Comey his displeasure that Comey had put in writing the Department's position on the legality of the program. ~~(TS//STLW//SI//OC/NF)~~

That evening, while attending a farewell dinner for a Department colleague at a local restaurant, Philbin received a call from David Addington indicating that he wanted to deliver a letter Gonzales had written to Comey. Philbin met Addington at the Department at 8:30 p.m. that night to accept the letter. Philbin's notes also indicate that Gonzales had called Comey in advance to tell Comey "not to get too overheated by the letter." (U)

Comey told us he recalled that Gonzales told him in the call that the White House would agree to work with the Department to fix the program and that Comey should not "overreact" to Gonzales's letter. Comey said he believed Addington, and not Gonzales, had actually drafted the letter, and that Gonzales sent it only to counter Comey's memorandum and to make a record on behalf of the White House. (U)

Gonzales's letter stated that the President had directed him to respond to Comey's memorandum. The letter stated:

Your memorandum appears to have been based on a misunderstanding of the President's expectations regarding the conduct of the Department of Justice. While the President was, and remains, interested in any thoughts the Department of Justice may have on alternative ways to achieve effectively the goals of the activities authorized by the Presidential Authorization of March 11, 2004, the President has addressed definitively for the Executive Branch in the Presidential Authorization the interpretation of the law.<sup>192</sup>

The letter also excerpted the language of paragraph 10 from the March 11, 2004, Authorization, which recited the bases on which the President acted to reauthorize the program, and then concluded: "Please ensure that the

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<sup>192</sup> Gonzales's letter also addressed Comey's comments about congressional notification. Citing *Department of the Navy v. Egan*, 484 U.S. 518 (1988) and a 2003 OLC opinion, Gonzales's letter stated that the President has the constitutional authority to define and control access to the nation's secrets, "including authority to determine the extent to which disclosure may be made outside the Executive Branch."  
~~(TS//STLW//SI//OC/NF)~~

Department of Justice complies with the direction given in the Presidential Authorization."<sup>193</sup> ~~(TS//STLW//SI//OC/NF)~~

C. **White House Agrees to** (b)(1), (b)(3)  
[REDACTED]  
~~(TS//STLW//SI//OC/NF)~~

Notwithstanding Gonzales's letter, on March 17, 2004, the President decided to (b)(1), (b)(3)

[REDACTED] effective at midnight on March 26, 2004. According to Mueller's program log, Gonzales called Comey to advise him of the President's decision on March 17, 2004, and Comey passed this information to Mueller later that day. Comey, in an e-mail dated March 17, expressed relief at the President's decision, writing:

Today, in a remarkable development, we stepped back from the brink of disaster. All seems well in the Government. The right thing was done. ~~(TS//STLW//SI//OC/NF)~~

Gonzales told the OIG during his interview that he could not say whether the prospect of resignations at the Department and the FBI may have had an impact on the President's decision.<sup>194</sup> We were not able to interview others at the White House to determine what specifically caused the program to be modified in accord with the Department's legal position. (U)

The President's directive was expressed in two modifications to the March 11, 2004, Presidential Authorization. These modifications, as well as the operational and legal implications of the President's decision for the Department and the FBI, are described in the next sections. ~~(TS//SI//NF)~~

### 1. **March 19, 2004, Modification (U)**

On March 19, 2004, the President signed, and Gonzales certified as to form and legality, a Modification of the March 11, 2004, Presidential

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<sup>193</sup> Comey stated that he did not believe Gonzales wrote this letter. He stated that "Addington was the flame-thrower" and that Gonzales was generally more reasonable and moderate. Comey said that Gonzales had later apologized to both Comey and Ashcroft for his conduct during the March 10 incident at the hospital and had even come around to agree with Philbin and Goldsmith's analysis regarding the program. Gonzales told the OIG that he did not apologize to Ashcroft for the incident in the hospital because he had been instructed by the President to go there, but stated that he "regretted" the incident. (U)

<sup>194</sup> However, when Gonzales commented on a draft of this report, he told the OIG that the prospect of resignations at the Department and the FBI were not the reason for the President's decision. Gonzales stated that he could not elaborate on this statement due to executive privilege considerations. (U)

Authorization. The first paragraph of the Modification stated that "this memorandum, as a policy matter, modifies the Presidential Authorization of March 11, 2004 as set forth below . . . and (b)(1), (b)(3) granted by all the Presidential Authorizations to the extent set forth [in the Modification]." The March 19 Modification made two significant changes to the existing Authorization and a third important change affecting all Authorizations. To allow for a (b)(1), (b)(3) these changes were to become effective beginning at midnight on March 26, 2004.

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

First, the March 19 Modification inserted language to narrow content collection (basket 1) to al Qaeda and affiliated terrorist groups, as the Department had advised. The new content collection authority in paragraph 4(a) of the March 11 Authorization, with the new language from the March 19 Modification indicated in italics, was:

acquire a communication (including but not limited to a wire communication carried into or out of the United States by cable) for which, based on the factual and practical considerations of everyday life on which reasonable and prudent persons act, there are reasonable grounds to believe such communication originated or terminated outside the United States and a party to such communication is a group engaged in international terrorism, or activities in preparation therefor, or any agent of such a group, *provided that such group is al Qa'ida, is a group affiliated with al Qa'ida, or is another group that I determine for purposes of this Presidential Authorization is in armed conflict with the United States and poses a threat of hostile action within the United States[.]* (TS//STLW//SI//OC/NF)

Modification, March 19, 2004, para. 2(a)(italics and brackets added). This additional language resulted in (b)(1), (b)(3)

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

Second, the Modification (b)(1), (b)(3)

The language, with the deleted language in brackets and the insertion indicated in italics, was:

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

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

Modification, March 19, 2004

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

Third, the March 19 Modification

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

Modification, March 19, 2004

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

Each Presidential Authorization had contained a directive to the Secretary of Defense not to disclose the program outside the Executive Branch without the President's approval. The Modification reiterated that any change was not intended to reverse the President's control over access to the program. ~~(TS//STLW//SI//OC/NF)~~

(b)(1)

<sup>105</sup> The ultimate disposition of this previously obtained (b)(1), (b)(3) was subsequently addressed in an April 2, 2004, Modification, and thereafter in an August 2004 Presidential memorandum to the Secretary of Defense, as described below in subsection 6. ~~(TS//STLW//SI//OC/NF)~~

(b) (5) 196 The President's  
decision to  
(b) (5) (b) (7) (C)  
~~(TS//STLW//SI//OC/NF)~~

(b) (5) (b) (7) (C)

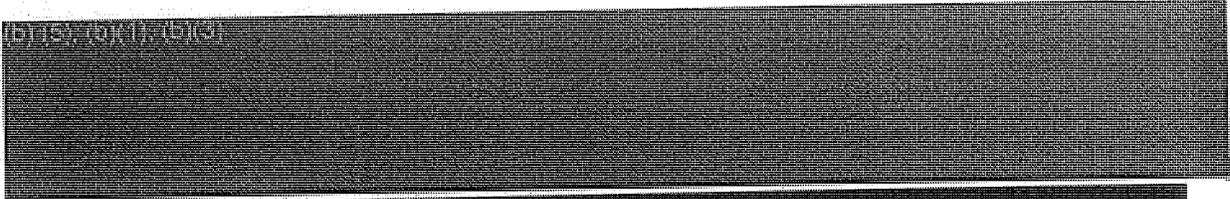
b1,  
b3,  
b7E

<sup>196</sup> Bradbury was nominated to be Assistant Attorney General for OLC in June 2005. He was not confirmed for this position, and told us that after exhausting the time period for use of the "Acting" title under the Vacancies Reform Act of 1998 (see 5 U.S.C. § 3345 et seq.) in April 2007, he reverted to Principal Deputy Assistant Attorney General, the position he had held prior to his nomination. As head of OLC, Bradbury became responsible for briefing members of Congress on OLC's legal analyses concerning the program as well as on the Presidential Authorizations. Bradbury's access to these documents and the officials responsible for drafting them provided him significant background information on the changes to the program. (U)

197

b1,  
b3,  
b7E

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



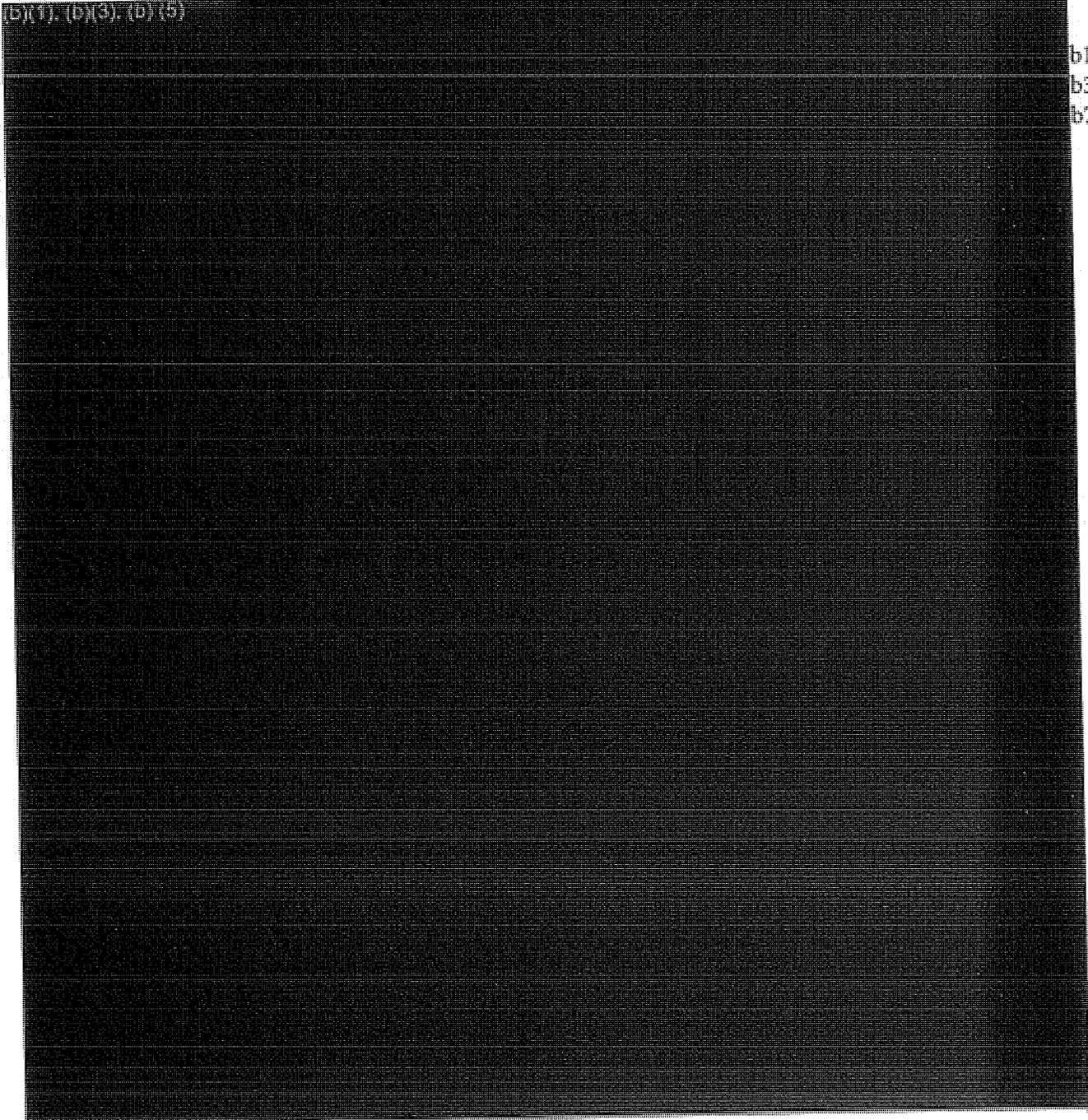
2.

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



b1, b3,  
b7E

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



b1,  
b3,  
b7E

b1, b3,  
b7E

[REDACTED]

3.

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

[REDACTED]

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

[REDACTED]

[REDACTED]

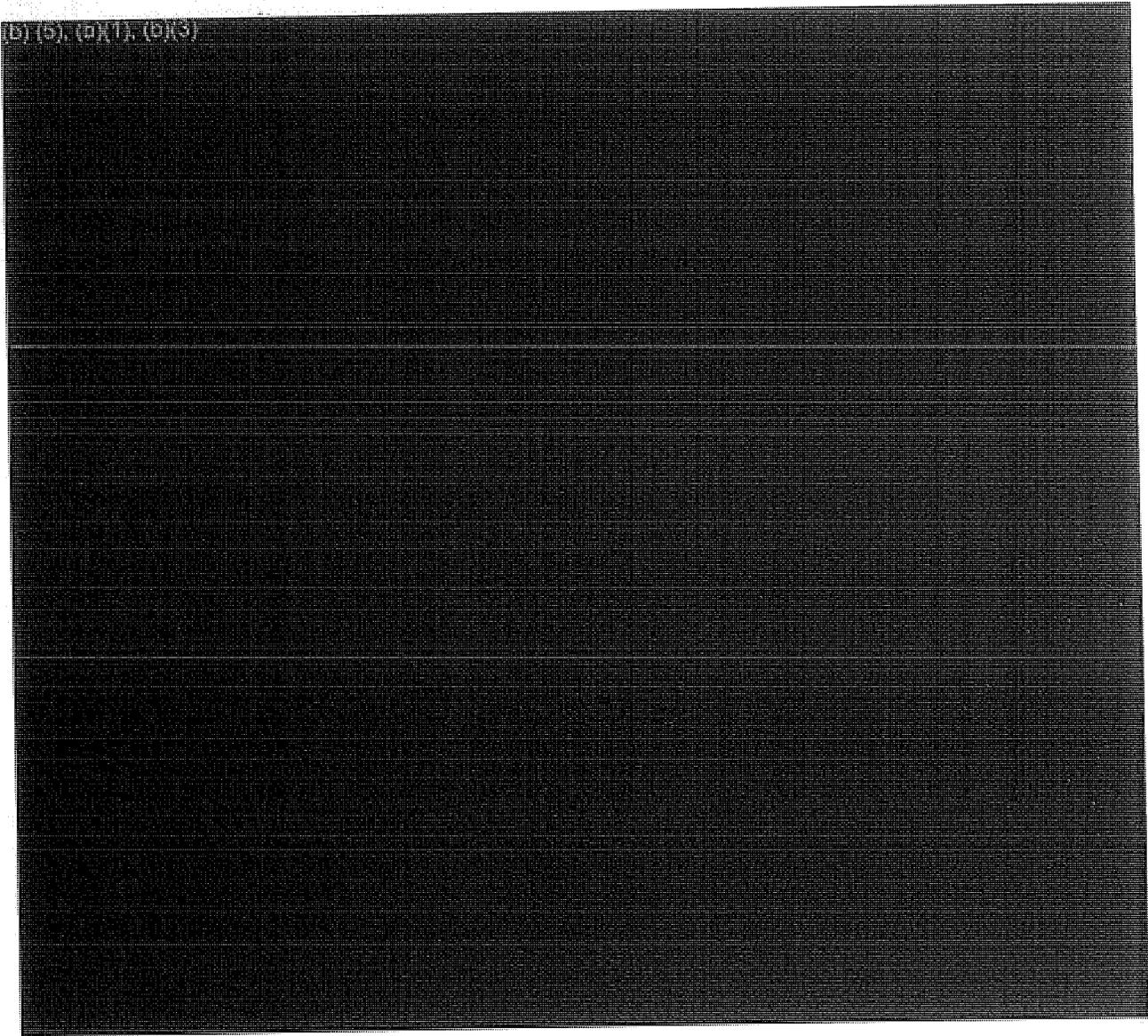
b1,  
b3,  
b7E

[REDACTED]

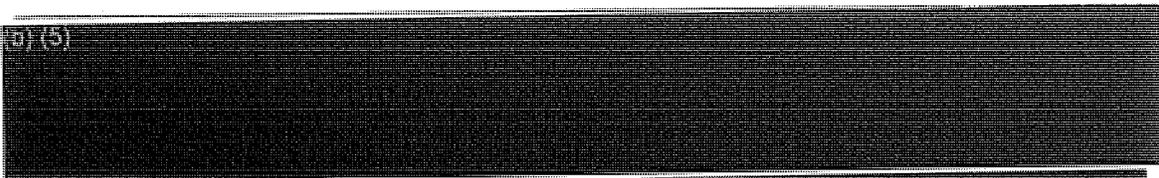
[REDACTED]

(Cont'd.)

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

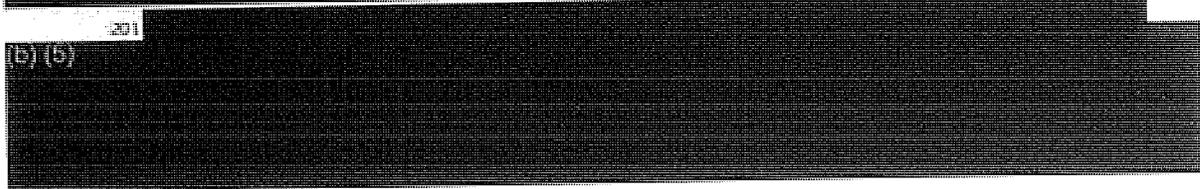


(b) (5)



201

(b) (5)



4.

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

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

b1,  
b3,  
b7E

5. Judge Kollar-Kotelly is Presented with the OLC Legal Analysis Regarding (b)(1), (b)(3), (b)(5)

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

As noted above, Judge Kollar-Kotelly was made aware on March 14, 2004, that the March 11 Authorization had been signed by the President

but had not been certified as to form and legality by the Justice Department. On March 18, 2004, Goldsmith, Philbin, Baker, and Gonzales met with Judge Kollar-Kotelly to further brief her on the status of the program. According to an internal OLC memorandum, they advised her that forthcoming legal opinions from OLC would allay her concerns about the use of program-derived information in FISA applications.<sup>202</sup>

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

The OIG reviewed a handwritten letter from Judge Kollar-Kotelly to OIPR Counsel Baker, which appeared to have been written just after the initiation of (b)(1), (b)(3) mandated in the March 19, 2004, Modification. Baker told us that the handwritten letter should be viewed as an informal draft designed to convey Judge Kollar-Kotelly's preliminary understanding of the issues raised by the changes to the Stellar Wind program. In the letter, Judge Kollar-Kotelly reiterated her position that Stellar Wind-derived information should be excluded from FISA applications, writing, "so there is no misunderstanding, I will not sign a FISA application which contains any information derived from and/or obtained from the [Stellar Wind] program," including applications in which a Stellar Wind tip "was the sole or principal factor in starting an investigation by any of the agencies, even if the investigation was conducted independently of the tip from [Stellar Wind]." Judge Kollar-Kotelly also requested, as a precondition to her agreeing to sign FISA applications in the future, that OIPR clarify in writing its proposal for reviewing FISA applications to ensure that all Stellar Wind-derived information had been excluded. Baker told us that he had a lot of "verbal back and forth" with Judge Kollar-Kotelly to explain OIPR's scrubbing procedures.

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

In late March 2004, OLC provided Judge Kollar-Kotelly with a draft analysis discussing

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

<sup>202</sup> As described below, these legal opinions, which addressed the legality of (b)(1), (b)(3) were provided to Judge Kollar-Kotelly in late March and early April 2004. ~~(TS//STLW//SI//OC/NF)~~

<sup>203</sup> Chapter Three, Section II B contains a description of this process. (U)

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

On March 26, 2004, OLC completed a draft memorandum for Baker entitled "Use or Disclosure of Certain Stellar Wind Information in Applications Under FISA." This memorandum addressed the inclusion in FISA applications of information derived indirectly from (b)(1), (b)(3), (b)(5),<sup>205</sup> OLC also provided Judge Kollar-Kotelly with a copy of its draft legal analysis.<sup>206</sup> ~~(TS//STLW//SI//OC/NF)~~

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

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

<sup>204</sup> This argument is discussed below in connection with Goldsmith's May 6, 2004, legal analysis. (U)

<sup>205</sup> With respect to (b)(1), (b)(3), (b)(5) the memorandum stated that the Department did not believe the acquisition of such information was subject to any constitutional restraints or statutory restrictions, but that "[t]o the extent Judge Kollar-Kotelly has concerns about those conclusions, we note that the analysis in this memorandum independently demonstrates that there are no legal restrictions on the use of information indirectly derived from (b)(1), (b)(3), (b)(5) tipsters in FISA applications." ~~(TS//STLW//SI//OC/NF)~~

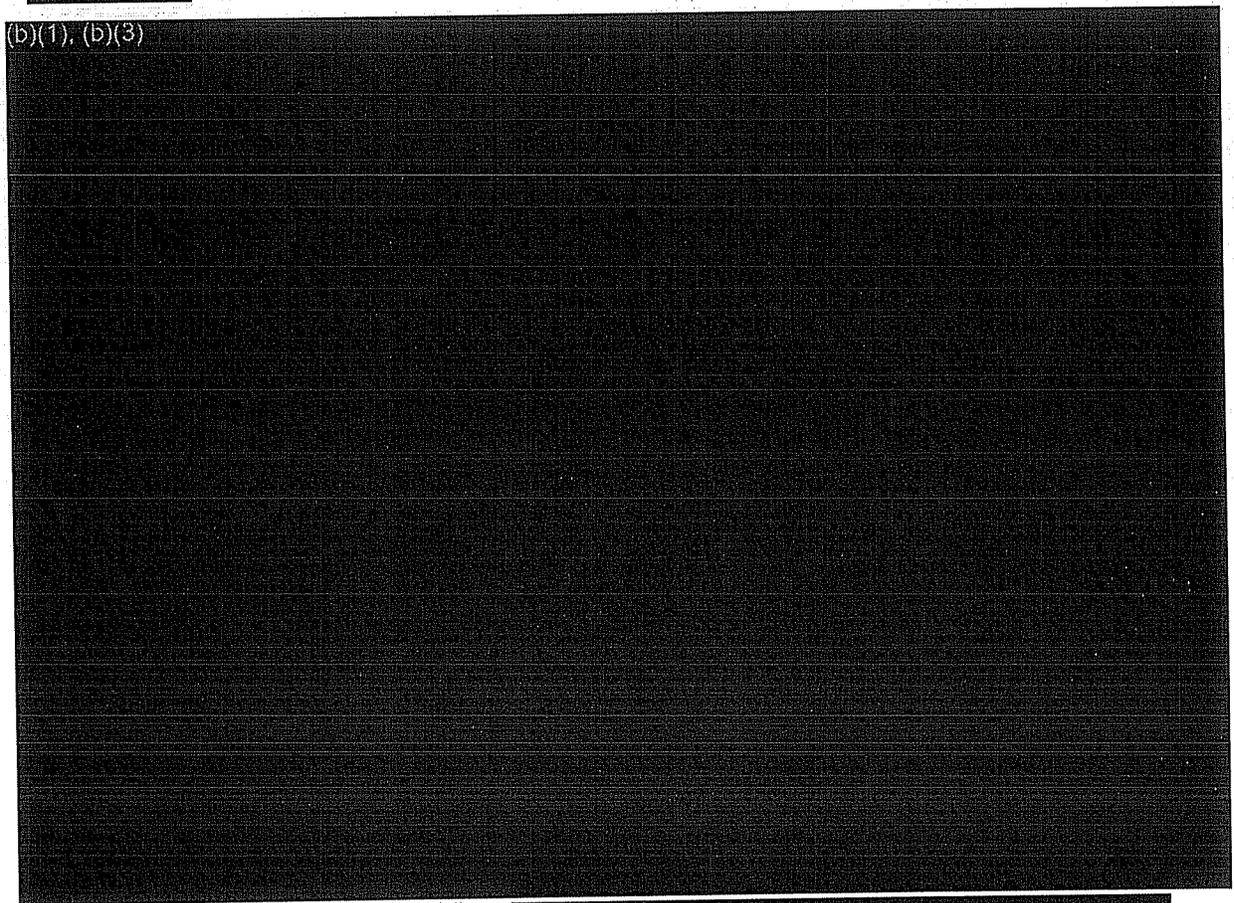
<sup>206</sup> The draft memorandum did not address inclusion in FISA applications of information derived *directly* from the program because OIPR had successfully managed to address Judge Kollar-Kotelly's order to exclude such information. ~~(TS//STLW//SI//OC/NF)~~

6. April 2, 2004, Modification (U)

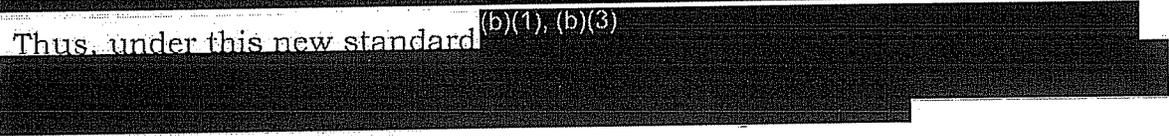
Attorney General Ashcroft's doctors cleared him to resume his duties as Attorney General as of March 31. Comey advised Ayres in a March 30, 2004, memorandum that as of 7:00 a.m. on March 31, the Attorney General was no longer "absent or disabled" within the meaning of 28 U.S.C. § 508(a), and that as of that time Comey could no longer exercise the duties of the Office of Attorney General pursuant to the statute. A copy of the memorandum was sent to White House Counsel Gonzales and other senior Department officials. (U)

On April 2, 2004, President Bush signed, and Gonzales certified as to form and legality, a second Modification of the March 11, 2004, Presidential Authorization. This modification addressed only (b)(1), (b)(3) activities of the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

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

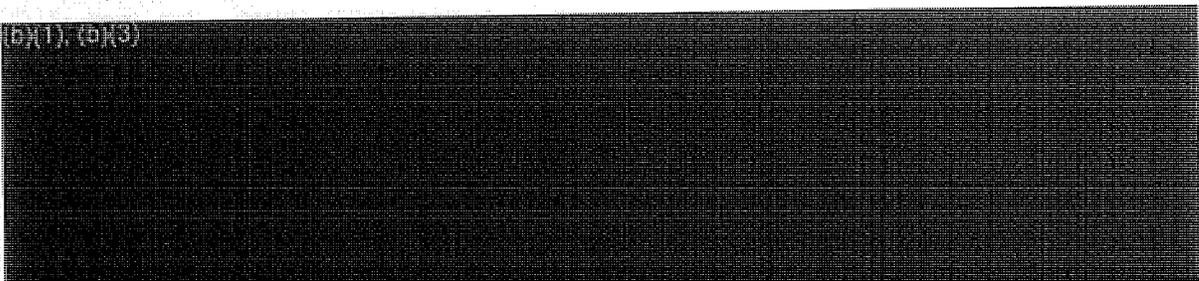


Thus, under this new standard (b)(1), (b)(3)

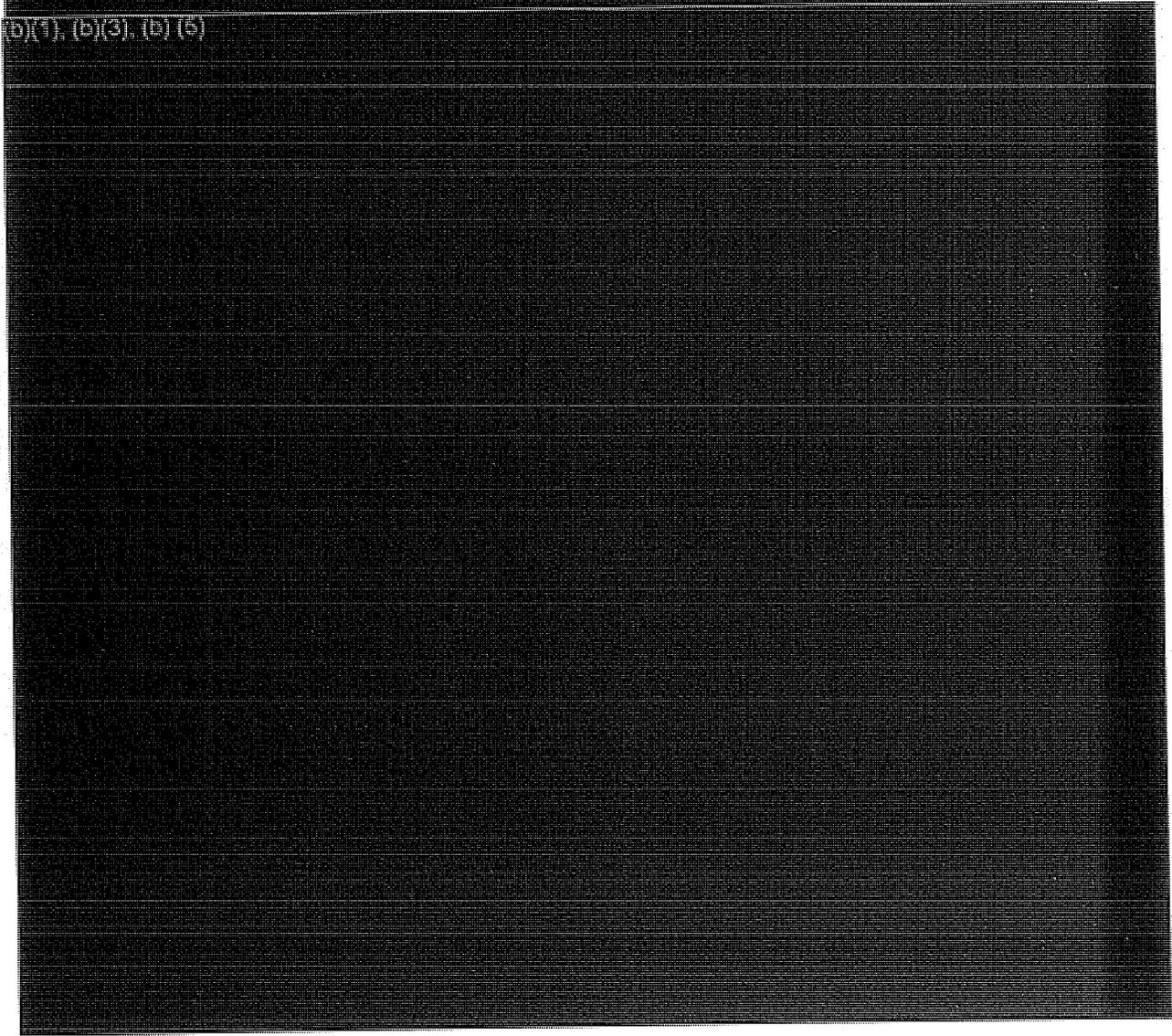


~~(TS//STLW//SI//OC/NF)~~

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



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



207 An April 5, 2004, Goldsmith memorandum to file stated that OLC worked with Addington to craft the new (b)(1), (b)(3), (b)(5) standard.

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

208 Bradbury distinguished the limitation on (b)(1), (b)(3), (b)(5)



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

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

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

7.

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

Standard is Conveyed to the FBI ~~(TS//SI//NF)~~

The OIG sought to determine how the presidentially authorized limitations on (b)(1), (b)(3) in the Modifications and subsequent Authorizations were communicated to FBI employees responsible for tipping Stellar Wind information to the field.

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

A former Unit Chief in the Communications Analysis Unit (CAU) within the FBI's Communications Exploitation Section (CXS) of the Counterterrorism Division told us he became aware that at some point the scope of collection under Stellar Wind was narrowed to include only (b)(1), (b)(3)

(b)(1), (b)(3) He said this information was passed along to him and others at the FBI during either a monthly or quarterly meeting with NSA representatives. He said the (b)(1), (b)(3) practice was "taken very seriously" by the NSA. As an example, he said that Requests for Information (RFI) from the FBI to the NSA on numbers not associated with (b)(1), (b)(3)

were rejected by the NSA as outside the scope of the revised Authorization. ~~(TS//STLW//SI//OC/NF)~~

An FBI Supervisory Special Agent in the CAU's unit co-located at the NSA (called Team 10), told us that when he first began collection and analysis work under the program, (b)(1), (b)(3) were "fair game." He recalled that at some later point the scope of collection (b)(1), (b)(3) He said that (b)(1), (b)(3) was rigorously adhered to and was "scrutinized very closely." He said that when the FBI requested that the NSA collect information on a particular number, the NSA closely analyzed the number and requested supporting information from the FBI before querying the Stellar Wind database. This supervisor also stated that the NSA did a good job of keeping the co-located FBI personnel informed of changes to the scope of collections. He said this information typically would be conveyed to appropriate personnel during the daily "all hands meetings."

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

#### 8. Office of Legal Counsel Assesses NSA's Compliance with New Collection Standards ~~(TS//SI//NF)~~

Goldsmith told us that during the week of March 29, 2004, he and Philbin conducted an "audit" of the Stellar Wind program to ensure that the querying of (b)(1), (b)(3) was being conducted in accordance with the Presidential Authorizations. ~~(TS//STLW//SI//OC/NF)~~

Goldsmith said that while resources were not available to conduct a "professional" audit, he visited the NSA and reviewed with relevant NSA officials the legal parameters for querying [REDACTED] which as discussed above required a showing of reasonable articulable suspicion that the target belonged to a group that was engaged in international terrorism.<sup>209</sup> Goldsmith told the OIG that as part of the review, he and Philbin familiarized the NSA with the new collection parameters [REDACTED] (TS//STLW//SI//OC/NF)

To conduct their review, Goldsmith and Philbin requested that the NSA [REDACTED]

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

On April 15, 2004, Goldsmith reported the results of his and Philbin's review to [REDACTED] the Assistant General Counsel for Operations in the NSA's Office of General Counsel. On April 22, 2004, Goldsmith memorialized his conversation with [REDACTED] in a memorandum to file. In the memorandum, Goldsmith noted four types of problems he and Philbin found in their review. [REDACTED]

[REDACTED] The memorandum stated that Goldsmith also conveyed this advice to Vito Potenza, the NSA's Acting General Counsel at the time. (TS//STLW//SI//OC/NF)

9. May 5, 2004, Presidential Authorization (TS//SI//NF)

As noted above, the March 11, 2004, Presidential Authorization, as modified, was set to expire on May 6, 2004. On May 5, the President signed another Authorization extending the Stellar Wind program through June 24, 2004. Unlike the March 11 Authorization and the two modifications that

followed it, the May 5 Authorization was certified as to form and legality by Attorney General Ashcroft. ~~(TS//SI//NF)~~

The May 5, Authorization contained the language from the March 11 Authorization narrowing the scope of ~~(b)(1), (b)(3)~~

~~(b)(1), (b)(3)~~ The May 5 Authorization also included the paragraph defining the scope of ~~(b)(1), (b)(3)~~ as modified on March 19 to encompass only ~~(b)(1), (b)(3)~~

~~(b)(1), (b)(3)~~ the May 5 Authorization reiterated the new collection standard set forth in the April 2, 2004, Modification, which required that ~~(b)(1), (b)(3)~~

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

With minor variations, the collection standards and other language set forth in the May 5, 2004, Presidential Authorization remained unchanged in all of the subsequent Authorizations.<sup>211</sup>

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

#### 10. May 6, 2004, OLC Memorandum ~~(TS//SI//NF)~~

On May 6, 2004, Goldsmith completed a revised OLC memorandum on the legality of the Stellar Wind program. The 108-page document stated that it was written for the Attorney General in response to his request for OLC "to undertake a thorough reexamination of the Stellar Wind program as it is currently operated to confirm that the actions that the President has directed the Department of Defense to undertake through the National Security Agency (NSA) are lawful." ~~(TS//SI//NF)~~

The memorandum traced the history of the program and analyzed the legality of each of the three collection baskets in light of applicable statutes, Executive Orders, cases, and constitutional provisions.

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

<sup>210</sup> This Authorization also dropped the language describing the legal bases on which the President relied in ordering the continuation of the program in the March 11, 2004, Authorization. ~~(TS//SI//NF)~~

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

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

The memorandum noted that Section 111 of FISA, 50 U.S.C. § 1811, providing that the President “may authorize electronic surveillance without a court order . . . to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by Congress,” made it clear that FISA expressly addresses electronic surveillance during wartime.<sup>212</sup> The memorandum stated that the Authorization for Use of Military Force (AUMF) passed by Congress shortly after the attacks of September 11, 2001, gave the President authority to use both domestically and abroad “all necessary and appropriate force,” including signals intelligence capabilities, to prevent future acts of international terrorism against the United States. According to the memorandum, the AUMF was properly read as an express authorization to conduct targeted electronic surveillance against al Qaeda and its affiliates, the entities responsible for attacking the United States. ~~(TS//STLW//SI//OC/NF)~~

The memorandum noted that the legislative history of FISA indicates that the 15-day window was “thought sufficient for the President to secure legislation easing the restrictions of FISA for the conflict at hand.” Quoting H.R. Conf. Rep. No. 95-1720, at 34, reprinted in U.S.C.C.A.N. 4048, 4063 (“[T]he conferees intend that this period will allow time for consideration of any amendment to this act that may be appropriate during a wartime emergency”). According to the OLC memorandum, “The Congressional Authorization functions as precisely such legislation: it is emergency legislation passed to address a specific armed conflict and expressly designed to authorize whatever military actions the Executive deems appropriate to safeguard the United States.” ~~(TS//SI//NF)~~

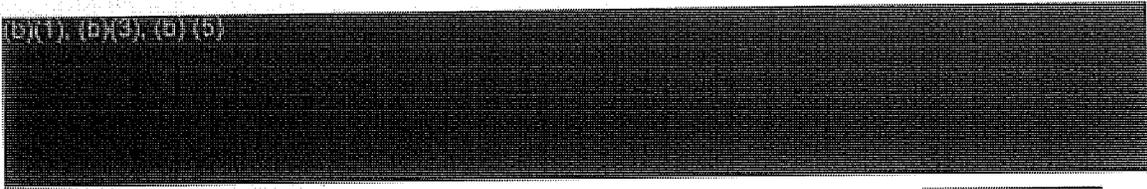
The memorandum concluded that at a minimum the AUMF made the application of FISA in a wartime context sufficiently ambiguous that the doctrine of constitutional avoidance properly applied to avoid a conflict between FISA and the presidentially authorized Stellar Wind program. Alternatively, the memorandum argued that FISA, as applied in the particular circumstances of a President directing surveillance of the enemy to prevent future attacks upon the nation, represented an unconstitutional infringement on the President’s Article II Commander-in-Chief powers. ~~(TS//STLW//SI//OC/NF)~~

These two arguments also were cited in support of

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

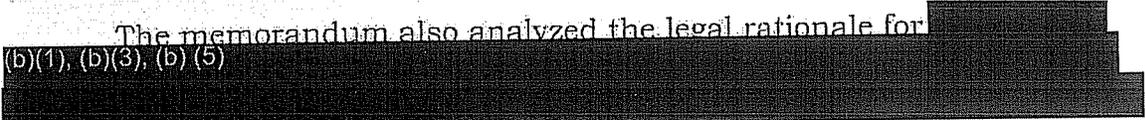
<sup>212</sup> As discussed in section I of this chapter, the legal implications of this provision of FISA was not addressed in the memoranda John Yoo had drafted in support of the program in late 2001. ~~(TS//SI//NF)~~

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



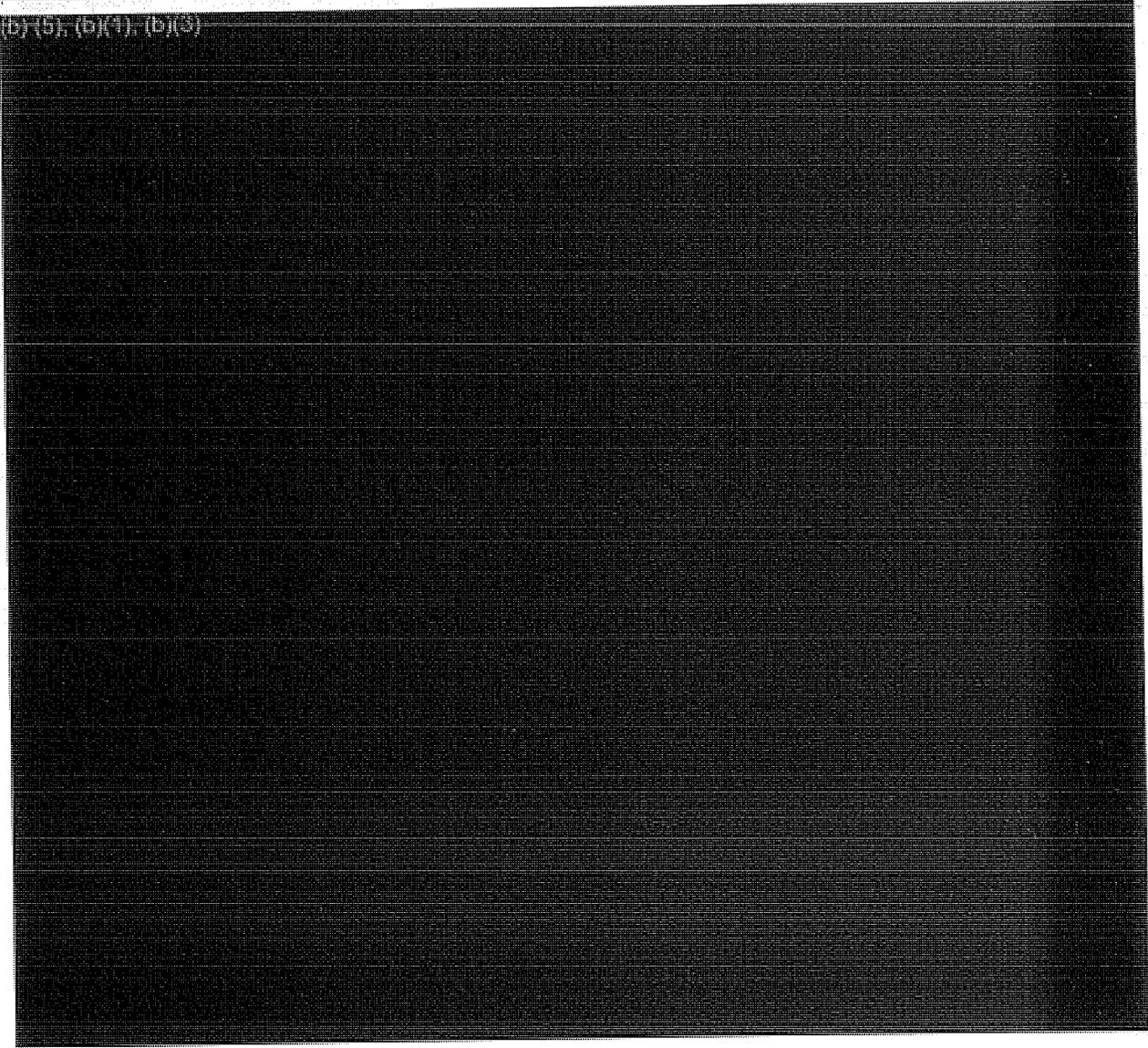
The memorandum also analyzed the legal rationale for

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



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

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

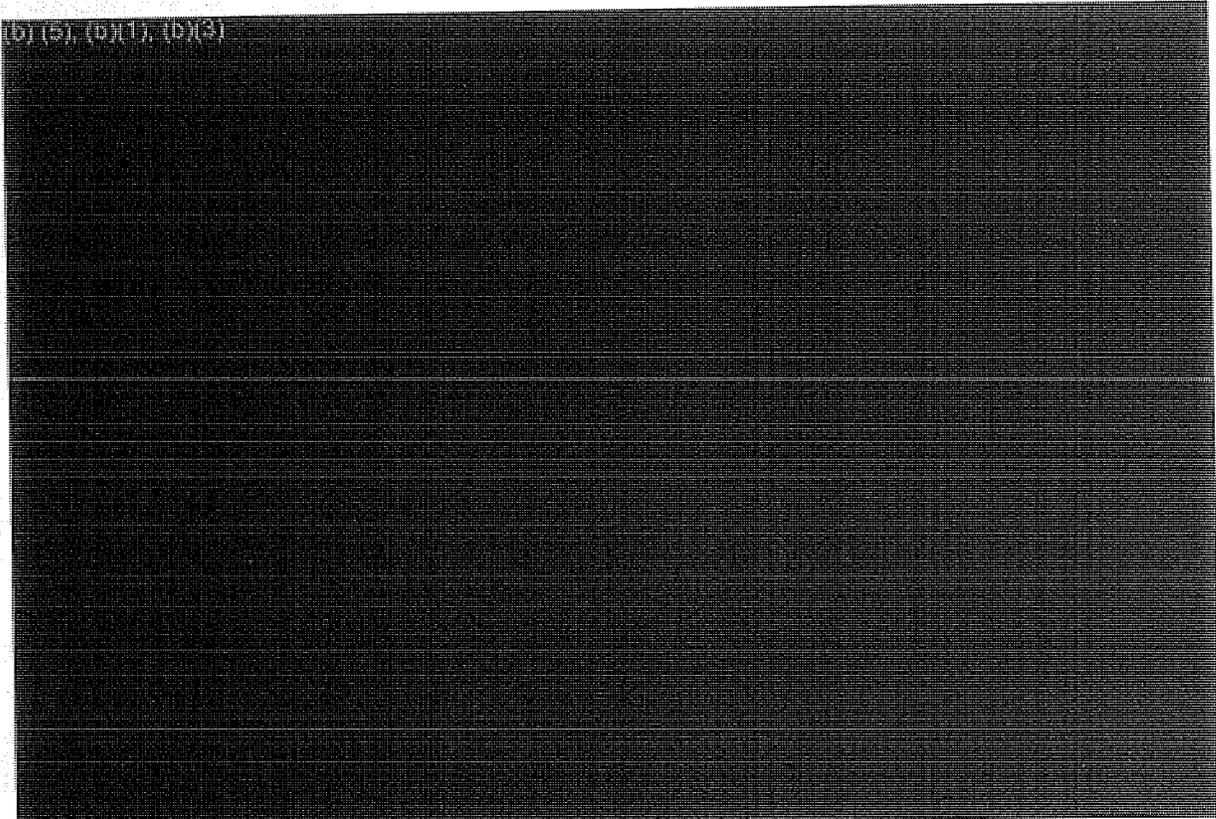


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(b)(5), (b)(1), (b)(3)



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



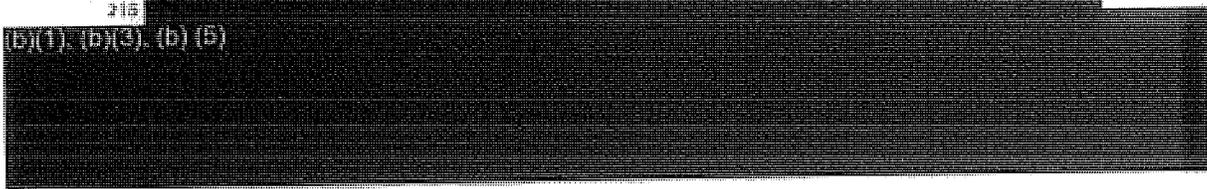
Finally, the memorandum discussed the Fourth Amendment implications of the Stellar Wind program. To determine whether interception of (b) (1), (b) (3), (b) (5) violated the Fourth Amendment's prohibition against unreasonable searches, the memorandum analyzed whether the importance of the government's interest in this collection outweighed the individual privacy interests at stake. Citing various authorities, including Supreme Court opinions, the Federalist Papers, (b) (1), (b) (3) and congressional testimony, the memorandum concluded that "the government's overwhelming interest in detecting and thwarting further al Qaeda attacks is easily sufficient to make reasonable the intrusion into privacy involved in intercepting selected communications." The memorandum noted that the weight of the

114 (b) (5)



115

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



government's interest in this regard could change over time if the threat from al Qaeda were deemed to recede. ~~(TS//STLW//SI//OC/NF)~~

The memorandum also analyzed telephone and e-mail meta data collection under the Fourth Amendment. The memorandum concluded, based on the Supreme Court's holding in *Smith v. Maryland*, 442 U.S. 735, 742 (1979), that there is no legitimate expectation of privacy in the numbers dialed to place telephone calls. Referring to cases holding that no expectation of privacy attached to the address information on either letter mail or e-mail, the memorandum concluded that no Fourth Amendment privacy interests were implicated in the collection of e-mail meta data. ~~(TS//STLW//SI//OC/NF)~~

In sum, the May 6 memorandum was the most comprehensive assessment of the Stellar Wind program drafted by the Office of Legal Counsel. ~~(b)(1), (b)(3), (b)(5)~~

[REDACTED]

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

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

[REDACTED]

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

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

### III. **OIG Analysis (U)**

#### A. **Department's Access to and Legal Review of Stellar Wind Program Through May 2004** ~~(TS//SI//NF)~~

The Justice Department's access to the Stellar Wind program was controlled by the White House, and Gonzales told the OIG that the President decided whether non-operational personnel, including Department lawyers, could be read into the program. Department and FBI officials told us that obtaining approval to read in Department officials and FISA Court judges involved justifying the requests to Addington and Gonzales, who effectively acted as gatekeepers to the read-in process for non-operational officials. In contrast, according to the NSA, operational personnel at the NSA, CIA, and the FBI were read into the program on the authority of the NSA Director, who at some point delegated this authority to the Stellar Wind Program Manager. ~~(TS//SI//NF)~~

Various officials we interviewed about the issue uniformly agreed that the White House sought to strictly limit overall access to the Stellar Wind program. We believe that this policy was applied at the Department in an unnecessarily restrictive manner prior to March 2004, and was detrimental to the Department's role in the operation of the program through that period. We also believe that Attorney General Ashcroft, as head of the Department, was responsible for seeking to ensure that the Department had adequate attorney resources to conduct a thorough and accurate review of the legality of the program. Because Ashcroft did not agree to be interviewed for this investigation, we were unable to determine the extent of his efforts to press the White House to read in additional Department officials between the program's inception in October 2001 and the critical events of March 2004. (TS//SI//NF)

In Chapter Three we described how the Department's early involvement in the Stellar Wind program was limited to the participation of only three attorneys – Attorney General Ashcroft, OLC Deputy Assistant Attorney General John Yoo, and Counsel for Intelligence Policy James Baker.<sup>216</sup> Working alone, Yoo drafted several legal memoranda in 2001 and 2002 advising the Attorney General and the White House that the program was legally supported. In reliance on Yoo's advice, Attorney General Ashcroft certified the legality of the Presidential Authorizations to implement the program. (TS//SI//NF)

Because Yoo worked alone, his legal analysis was not reviewed by other attorneys, either in OLC or elsewhere in the Department.<sup>217</sup> Even

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<sup>216</sup> Counsel for Intelligence Policy James Baker was read into the program in either late 2001 or January 2002. But Baker appears to have been read in only because he inadvertently came across information that suggested such a program existed. While Baker had involvement in several aspects of the program, he had no involvement in drafting or reviewing Yoo's legal memoranda supporting the program. Daniel Levin, who served as both Chief of Staff to FBI Director Mueller and briefly as a national security counselor to Ashcroft, also was read into Stellar Wind at the inception of the program. However, Levin only served for two months at the Department during this early phase of Stellar Wind and had very limited involvement in the program during this period. Levin told us he was read into Stellar Wind along with Director Mueller at the FBI and that he understood that he was being cleared into the program as an FBI official. We therefore consider Levin to be an FBI read-in, not a Department read-in. (TS//STLW//SI//OC/NF)

<sup>217</sup> Gonzales told us that he thought Yoo may have assigned discrete tasks to other attorneys in connection with his work on the Stellar Wind legal memoranda. Because Yoo declined our request for an interview, we were unable to confirm this. In any event, no other attorneys were read into Stellar Wind and therefore would not have been permitted to work on or review those portions of the memoranda that contained Top Secret/Sensitive Compartmented Information (TS/SCI) related to the Stellar Wind program. By contrast, Yoo had at least one other OLC attorney to assist him in drafting other OLC legal memoranda on the detainee interrogation program during the 2001 to 2003 period, and these memoranda were reviewed by another OLC Deputy Assistant Attorney General

(Cont'd.)

when Jay Bybee became the OLC Assistant Attorney General in November 2001, and was therefore Yoo's supervisor, Bybee was not read into the program.<sup>218</sup> Bybee told us he also was unaware that Yoo was providing advice to the Attorney General and the White House on the legal basis to support the program. ~~(TS//SI//NF)~~

We believe that even before Patrick Philbin voiced his initial concerns with Yoo's analysis in 2003, the circumstances in 2001 and 2002 plainly called for additional Department resources to be applied to the legal review of the program and that it was the Attorney General's responsibility to be aware of this need and to take steps to address it. Moreover, because Ashcroft met frequently with the President on national security matters, he would have been well-positioned to request additional legal resources if he believed they were necessary. ~~(TS//SI//NF)~~

The facts suggest that Ashcroft had some awareness and concern that Yoo was working on the legal justification for the Stellar Wind program without any Department assistance or oversight, and possibly was advising the White House directly of his findings. Based on accounts of the incident in Ashcroft's hospital room in March 2004, Ashcroft made specific complaints to Gonzales and Card about insufficient legal resources at the Department and that the Department had been "cut out of the whole affair." He had also expressed frustration to Comey months earlier about being "in a box" with Yoo. Further, according to Goldsmith, when Goldsmith first interviewed for the position of Assistant Attorney General for OLC in 2003, Ashcroft and his Chief of Staff alluded to concerns over being kept informed of matters the Office of Legal Counsel was working on and the importance of keeping the Attorney General "in the loop." We also note that Yoo's November 2, 2001, memorandum to Ashcroft indicated that "[b]ecause of the highly sensitive nature of this subject and the time pressures involved, this memorandum has not undergone the usual editing and review process for opinions that issue from our Office [OLC]." ~~(TS//SI//NF)~~

While we believe that Ashcroft may have been aware that Yoo was working alone on the Stellar Wind analysis and had concerns about this, we do not know whether or how hard he pressed the White House to read in additional attorneys to assist or supervise Yoo. At the same time, however,

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(Philbin) and approved by the OLC Assistant Attorney General (Bybee). The detainee interrogation program also was classified as TS/SCI. We also note that Philbin's background in telecommunications law would have made him a logical choice to assist Yoo on the Stellar Wind legal analysis. ~~(TS//SI//NF)~~

<sup>218</sup> In contrast, Bybee was allowed to supervise Yoo's work drafting legal memoranda concerning a detainee interrogation program during the same time period. ~~(TS//SI//NF)~~

we cannot assume that any requests by Ashcroft for additional attorney read-ins would have been granted by the White House. Gonzales told us that Ashcroft had requested that Deputy Attorney General Larry Thompson and Ashcroft's Chief of Staff David Ayres be read in. However, neither request was approved.<sup>219</sup> Gonzales stated that he did not recall Ashcroft requesting additional read-ins beyond Thompson and Ayres. (U)

In analyzing the read-in situation at the Department during Yoo's tenure, we also considered that Ashcroft certified the program as to its legality each time the program came up for renewal, and did so at a time when Yoo's legal advice was the only Department guidance available concerning the program's legality. We believe the fact that only three Department attorneys were read into Stellar Wind through mid-2003 may have been due at least in part to Ashcroft's routine recertifications of the Presidential Authorizations during this period. As noted in Chapter Three, Gonzales told us that it was up to the Attorney General to decide how to satisfy his legal obligations as Attorney General, and that if Ashcroft believed more attorneys were needed for this purpose, he could have asked the President to approve additional Department read-ins. Gonzales also told us that Ashcroft's continued certifications of the Presidential Authorizations supported Gonzales's belief that Ashcroft was satisfied with the quality of the legal advice he was receiving at the time within the Department.  
(TS//SI//NF)

There is evidence as well that Gonzales, as White House Counsel, was satisfied with Yoo's legal memoranda supporting the program. Gonzales told us that although he did not believe Yoo's first two memoranda fully addressed the White House's understanding of the Stellar Wind program, Gonzales believed that they described as lawful activities that were broader than those carried out under Stellar Wind, and that Yoo's memoranda therefore "covered" the program.<sup>220</sup> (TS//SI//NF)

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<sup>219</sup> Deputy Attorney General Thompson resigned from the Department in August 2003, so Ashcroft's request to have him read into the program would have been made before that time. That neither Thompson nor Ayres was read in contrasts with the decision to allow in the case of [REDACTED] to be [REDACTED] briefed about the program in 2002, and [REDACTED] to be read into the program in 2003. The OIG does not know who authorized these read-ins. (TS//SI//NF)

<sup>220</sup> We were troubled by Gonzales's suggestion that Yoo's memoranda covered the program because the memoranda determined to be lawful a range of "hypothetical" activities that were interpreted by Gonzales to be broader than those actually carried out under Stellar Wind. Such an approach, if deemed acceptable by the "client" (in this case the White House), would encourage the Office of Legal Counsel to draft broad and imprecise  
(Cont'd.)

However, even apart from the limited number of Department read-ins, we believe that the White House imposed excessively strict controls over access to the program in other ways that were detrimental to the Department's ability to provide the White House with the soundest possible legal advice. For instance, we found no indication that Yoo coordinated his legal analysis with the NSA. According to Michael Hayden, the Director of the NSA when Stellar Wind began, the NSA relied on its Office of General Counsel, and not the Department of Justice, for advice as to the legality of the program when it was created. However, we found that the NSA's Office of General Counsel did not coordinate its legal advice with the Department, and even as late as 2003 the NSA General Counsel was prevented by the White House from reviewing the Department's legal opinions on the program.<sup>221</sup> Hayden also told the OIG that he was "surprised with a small 's'" that the Department did not participate in the early meetings with him and White House officials when Stellar Wind was first conceived. In addition, Addington instructed Philbin not to discuss the program with Baker, who as Counsel for Intelligence Policy was responsible for representing the government before the FISA Court.<sup>222</sup> ~~(TS//SI//NF)~~

We believe that that White House should have allowed and even encouraged coordination between the Department and the NSA regarding the development of the legal analysis of the program, especially as this analysis was first being formulated in late 2001. Such interaction between the Department and other Executive agencies is a mainstay of traditional OLC practice, and we believe its absence here contributed to factual errors in Yoo's opinions regarding the operation of the program. ~~(TS//SI//NF)~~

Although we could not determine exactly why Yoo remained the only Department attorney assigned to assess the program's legality from 2001 until his departure in May 2003, we discuss below our belief that this practice represented an extraordinary and inappropriate departure from OLC's traditional review and oversight procedures and resulted in significant harm to the Department's role in the program. ~~(TS//SI//NF)~~

When Yoo left the Department in May 2003, he was replaced by Patrick Philbin, who was read into the program to advise Ashcroft whether he could continue to certify the Presidential Authorizations as to their form

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legal analysis and would discourage the type of careful scholarship to which the OLC traditionally aspires. ~~(TS//SI//NF)~~

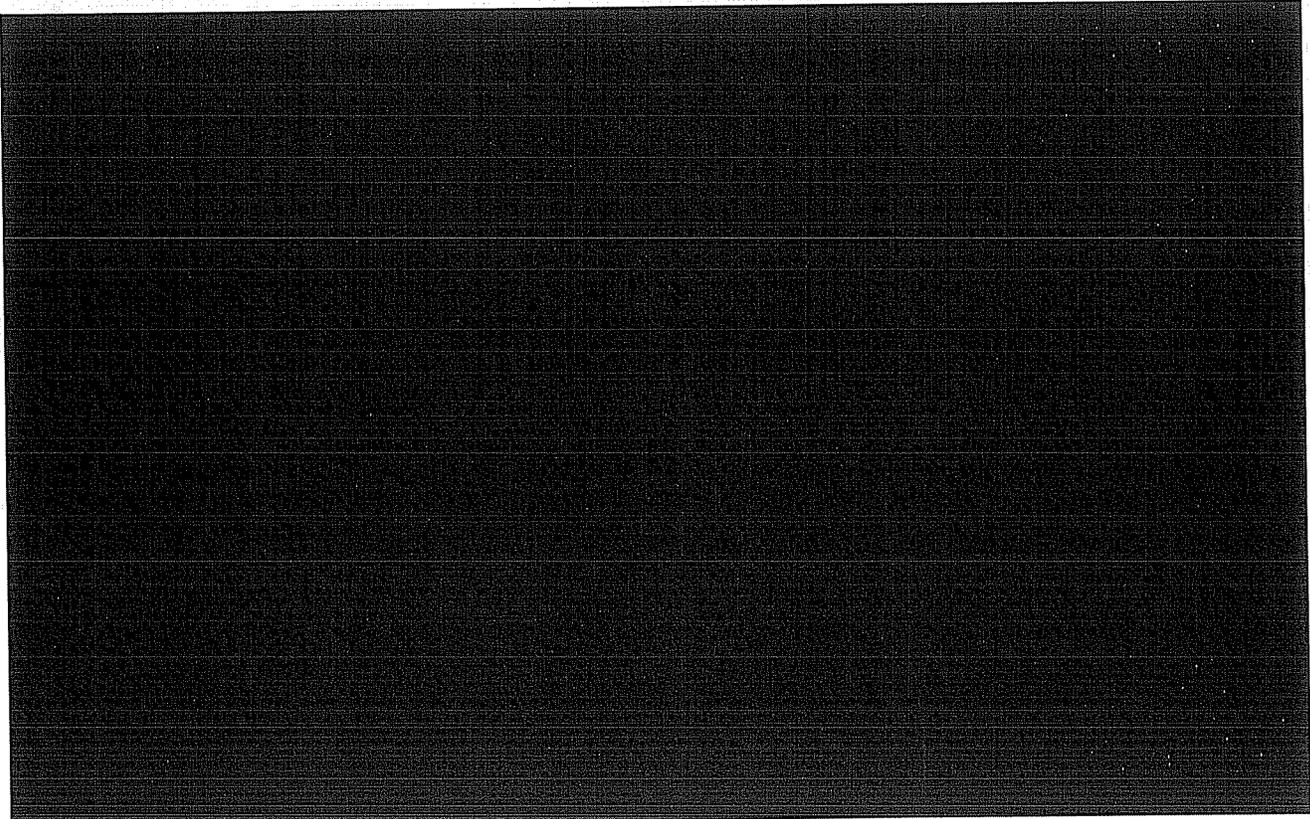
<sup>221</sup> In addition, the NSA Office of the Inspector General, which wanted to conduct an internal audit of the program during this period, was prevented by Addington from reviewing the Justice Department's legal memoranda supporting the program. ~~(U//FOUO)~~

<sup>222</sup> Philbin told the OIG that he spoke with Baker about the program despite Addington's instruction not to. (U)

and legality. When Goldsmith became the OLC Assistant Attorney General in October 2003, Philbin pressed Addington to have Goldsmith read in, and Goldsmith became the first head of OLC to be read into the program. As noted, Goldsmith's predecessor Jay Bybee was never read into the program. ~~(TS//SI//NF)~~

Thus, by the end of 2003, a total of only 5 Department officials – Yoo, Ashcroft, Baker, Philbin, and Goldsmith – had been read into Stellar Wind. By comparison, and as shown in Chart 4.1 below, we determined that many other individuals throughout the government were read into the program. Through the same period, 

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



The assignment of only one Department attorney, John Yoo, to conduct a legal review of the program without assistance or oversight from anyone else at the Department, combined with the White House's decision to prevent the NSA from reviewing Yoo's work, resulted in legal opinions by Yoo that were later determined by OLC to be so inaccurate and incomplete

<sup>223</sup> This table was derived from NSA read-in information. Justice Department read-ins include  OIG personnel who were read into Stellar Wind in 2006. (U//~~FOUO~~)

as to be regarded as not covering key aspects of the Stellar Wind program. Given the enormously complex nature of the program from both a technical and legal perspective, coupled with the fact that he was working alone, it was not altogether surprising that Yoo's analysis contained inaccuracies and omitted critical elements, particularly given the pressure to generate a legal analysis within weeks of the program's implementation. However, Yoo's analysis did not change or include a more accurate description of the program's operation over the course of his 20-month tenure with the OLC.  
(TS//SI//NF)

After reviewing Yoo's legal opinions on the program, Goldsmith and Philbin quickly discovered what they characterized as serious flaws in Yoo's legal analysis. These flaws included Yoo's failure to describe [REDACTED] being conducted by the NSA under the Stellar Wind program and his failure to assess the legality of this and other activities as they were carried out by the NSA.  
(TS//STLW//SI//OC/NF)

Specifically, both Goldsmith and Philbin stated that Yoo mischaracterized in his memoranda the nature and scope of the NSA's [REDACTED]. They stated that Yoo's characterization of this activity in his 2001 and 2002 legal memoranda was factually flawed and that Yoo appears to have based his legal analysis of this aspect of the program on an incomplete and inaccurate description both of [REDACTED] and the [REDACTED].<sup>224</sup> Both Goldsmith and Philbin also acknowledged that they initially incorrectly believed the NSA's [REDACTED] was broader than it in fact was under the program. However, unlike Yoo, Goldsmith and Philbin accurately

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characterized the collection [REDACTED] and thus their legal advice was based on facts that more closely reflected the actual operation of the program.<sup>225</sup>  
(TS//STLW//SI//OC/NF)

In addition, Goldsmith and Philbin discovered that Yoo's assertion that the President had broad authority to conduct electronic surveillance without a warrant pursuant to his Commander-in-Chief powers under Article II of the Constitution, particularly during wartime, never addressed the FISA provision that expressly addressed electronic surveillance following a formal declaration of war. See 50 U.S.C. § 1811. Goldsmith also criticized Yoo's legal memoranda for failing to support Yoo's aggressive Article II Commander-in-Chief theory with a fully developed separation of powers analysis, and instead offering only sweeping conclusions. As an example, Goldsmith cited Yoo's assertion that reading FISA to be the "exclusive statutory means for conducting electronic surveillance for foreign intelligence" amounts to an "unconstitutional infringement on the President's Article II authorities."<sup>226</sup> Moreover, noted Goldsmith, Yoo omitted from his separation-of-powers discussion any analysis of how the Youngstown Steel Seizure Case, a seminal Supreme Court decision on the distribution of governmental powers between the Executive and Legislative Branches during wartime, would affect the legality of the President's actions with respect to Stellar Wind.<sup>227</sup> (TS//STLW//SI//OC/NF)

In reliance on Yoo's advice, the Attorney General certified the program "as to form and legality" some 20 times before Yoo's analysis was determined to be flawed by his successors in OLC and by attorneys in the Office of the Deputy Attorney General. We agree with many of the criticisms offered by Department officials regarding the practice of allowing a single Department attorney to develop the legal justification for the program

[REDACTED]

<sup>226</sup> See Yoo Memorandum, November 2, 2001, at 9. Yoo went on to state that

[REDACTED] Yoo concluded that FISA "represents a statutory procedure that creates a safe harbor for surveillance for foreign intelligence purposes." Id. (TS//SI//NF)

<sup>227</sup> The Department's Office of Professional Responsibility (OPR) intends to review whether Yoo's legal analysis concerning the Stellar Wind program violated any standards of professional conduct. OPR has similarly reviewed whether the legal analysis by Yoo and others concerning the detainee interrogation program violated standards of professional conduct. (TS//SI//NF)

during its early stage of operation. We summarize these criticisms below.  
~~(TS//SI//NF)~~

Goldsmith described as "crazy" and "outrageous" the assignment of an OLC Deputy Assistant Attorney General to provide legal advice to the White House without the knowledge or concurrence of the Senate-confirmed Assistant Attorney General for OLC, who is accountable for the legal positions taken by the office. (U)

Goldsmith said that not a single critical eye reviewed Yoo's work on a program that Goldsmith described as "flying in the face" of the conventional understanding of the law at the time. Goldsmith noted that Yoo's legal memoranda did not include facts about how the Stellar Wind program operated in practice, and he surmised that Yoo instead might have "keyed off" the Presidential Authorizations rather than NSA's actual collection practices in developing his analysis. Goldsmith also said it was "insane" that Yoo's memoranda were not shared with the NSA. Goldsmith said that had the NSA reviewed these memoranda Yoo's failure to accurately describe the nature and scope of the collection by the NSA and the resulting "mismatch" between the actual practice and the wording of the Presidential Authorizations might have been detected earlier. ~~(TS//SI//NF)~~

Similarly, Daniel Levin, who was one of the first FBI officials to be read into Stellar Wind and who would later become Acting Assistant Attorney General for OLC upon Goldsmith's departure in June 2004, criticized allowing a single attorney to be the sole voice of the OLC concerning a program such as Stellar Wind. Levin stated that OLC has a special role at the Department and within the government, especially with "highly secret programs where opinions may never see the light of day." Under such circumstances, according to Levin, it is very difficult not to say "yes" to the White House - OLC's client - in the face of national security threats. Levin stated that unlike situations where a court places limitations on the positions the government may take, there are no such limitations when OLC considers a position that will remain secret, and it is easier to be more aggressive and "cut some corners" under such circumstances.  
~~(TS//STLW//SI//OC/NF)~~

Levin stated that Yoo's memoranda justifying the program suffered from too little circulation and a lack of alternative views. He said that the OLC memoranda produced under Goldsmith's tenure were better, not because the authors were "smarter" than Yoo, but because the authors benefited from multiple viewpoints and input. Levin also said that he never understood why the Stellar Wind program was deemed so sensitive at the operational level. Levin said he appreciated that the program was politically sensitive, but added that it was a "huge mistake" to keep the program so closely held within the Department. ~~(TS//STLW//SI//OC/NF)~~

We believe that Goldsmith's and Levin's comments concerning the secrecy of Stellar Wind are especially relevant to the need for legally and factually sound OLC analysis with respect to classified national security programs. Because programs like Stellar Wind are not subject to the usual external checks and balances on Executive authority, OLC's advisory role is particularly critical to the Executive's understanding of potential statutory and Constitutional constraints on its actions. ~~(TS//STLW//SI//OC/NF)~~

Deputy Attorney General Comey also criticized the decision to allow a single person to assess the legality of the program on behalf of the Department. Comey told us that Goldsmith had once aptly described the Yoo situation to him as "the perfect storm" in which the following factors converged: the terrorist attacks of September 11, 2001; a "brilliant guy" at the Department who was "an aggressive advocate for executive power"; and a White House "determined to restore executive power." Comey expressed a degree of sympathy for Yoo, noting the extraordinary situation into which Yoo had been placed. Comey also observed that the response to September 11 essentially placed the policy burden on lawyers, who were now looked to by others for guidance as to what counterterrorism activities fell within the bounds of the law. However, Comey said that he believed White House officials "got what they ordered" by asking Yoo for opinions and restricting the number of persons with access to the program or the opinions.<sup>228</sup> ~~(TS//SI//NF)~~

Attorney General Ashcroft declined to be interviewed in our review, and we were thus unable to determine what his views were on the assignment of Yoo alone to conduct the legal review of the program. However, as noted above, witness accounts of his statements concerning the Yoo situation leave little doubt that Ashcroft was plainly upset with the White House for putting him "in a box" with Yoo. According to Goldsmith and Philbin, Ashcroft was direct about his grievances when Gonzales and Card came to see him in the hospital on March 10, 2004, including complaining that Ashcroft's Chief of Staff and until recently the Deputy Attorney General had not been allowed to be read into the program, and that he found it "very troubling that [redacted] people in other agencies" had been read into the program. What remains unclear is whether Ashcroft came to the realization that the Department had been given an insufficient number of read-ins only after Philbin and Goldsmith presented him with their concerns about the quality of Yoo's legal analysis, or at some point before. ~~(TS//SI//NF)~~

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<sup>228</sup> As noted in Chapter Three, Yoo had been given the national security portfolio when he first joined the OLC in July 2001, several months before the attacks of September 11, 2001, and the inception of Stellar Wind. (U//~~FOUO~~)

We sought to obtain Yoo's and the White House's perspective on his selection as the sole Justice Department attorney to be read into Stellar Wind to provide advice on the legality of the program. We were not able to interview Yoo, who declined our request, or Addington and Card, who did not respond to our requests. ~~(TS//SI//NF)~~

The OIG asked Gonzales about how the White House determined who in the Department could be read into the program, but on the advice of Special Counsel to the President, Gonzales limited his answer to his personal views and declined to discuss internal White House deliberations that may have factored into the read-in decisions. Gonzales stated that he believed it was necessary for national security reasons to limit the number of read-ins to those "who were absolutely essential." Gonzales also stated that there had to be sufficient operational personnel at the NSA, CIA, and FBI read in for the purpose of running the program, while reading in additional lawyers at the Department had comparatively less value because all lawyers will "have opinions" about the program. Yet, Gonzales also stressed to us that he welcomed the Department's reassessment of Yoo's opinions and encouraged Goldsmith and Philbin to re-examine the legal basis for the program in 2003 and 2004.<sup>229</sup> ~~(TS//SI//NF)~~

We think the proposition that the participation of Department attorneys to analyze the legality of a program as factually and legally complex as Stellar Wind should be limited for the reasons offered by Gonzales is shortsighted and counterproductive. First, it is evident that Stellar Wind was as legally complex as it was technically challenging. Just as a sufficient number of operational personnel were read into the program to assure its proper technical implementation, we think as many attorneys as necessary should have been read in to assure the soundness of the program's legal foundation. This was not done during the early phase of the program. ~~(TS//SI//NF)~~

The full history of the program also indicates that the program benefited from additional attorney read-ins. In this chapter, we described how Philbin and Goldsmith – who held differing opinions on which legal theory best supported the program – discovered serious deficiencies in Yoo's analysis and together drafted more factually accurate and legally thorough support for the program. In Chapters Five, Six, and Seven we further describe how reading in additional attorneys facilitated the grounding of the program on firmer legal footing under FISA, allowed the Department more efficiently to "scrub" Stellar Wind-derived information in FISA applications,

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<sup>229</sup> As discussed in this chapter, Comey, Goldsmith, and Philbin generally agreed that Gonzales supported the Department's legal reassessment of the program. They also characterized Addington as far less supportive of their work than Gonzales. ~~(TS//SI//NF)~~