

V. **OIG Analysis (U)**

As discussed in this chapter, the government's effort to transition Stellar Wind from presidential authority to FISA, which began in March 2004, eventually resulted in all three baskets of collection being authorized by FISA. While the legal theories supporting this transition were aggressive, we believe that the Department could have and should have pursued transition to FISA as a viable legal alternative earlier than it did, rather than operate aspects of the Stellar Wind program solely under presidential authority for several years. ~~(TS//STLW//SI//OC/NF)~~

In Chapters Three and Four we discussed John Yoo's 2001 and 2002 memoranda concerning the legality of Stellar Wind and his contention that FISA represented an unconstitutional infringement on the President's Commander-in-Chief authority under Article II of the Constitution to conduct electronic surveillance during wartime. We recognize that Yoo's analysis was to some extent a response to the extraordinary circumstances that confronted the federal government immediately after the September 11 terrorist attacks and its effort to take emergency steps to thwart what many officials believed was an imminent second wave of attacks. Yet, even if one agrees with Yoo's Article II analysis and supports the decision to enhance outside the judicial or legislative process the NSA's signals intelligence collection capabilities, we believe there are strong countervailing considerations that favored attempting to transition the program to FISA, especially as Stellar Wind became less a temporary response to the September 11 attacks and more a permanent surveillance tool. ~~(TS//STLW//SI//OC/NF)~~

Chief among these considerations was the Stellar Wind program's substantial effect on privacy interests of U.S. persons. Under Stellar Wind, the government engaged in an unprecedented collection of information concerning U.S. persons. The President authorized the NSA to intercept, without judicial approval or oversight, the content of international communications involving many U.S. persons and the NSA collected large amounts of non-content data about U.S. persons' domestic and international telephone calls and to a lesser extent e-mail communications for possible analysis consistent with the extant Presidential Authorization. We believe the FISA Court, as an Article III court and the judicial authority charged by statute to oversee U.S.-based electronic surveillance and other collection activities affecting U.S. persons for foreign intelligence purposes, was the appropriate entity to monitor and approve such broad acquisitions

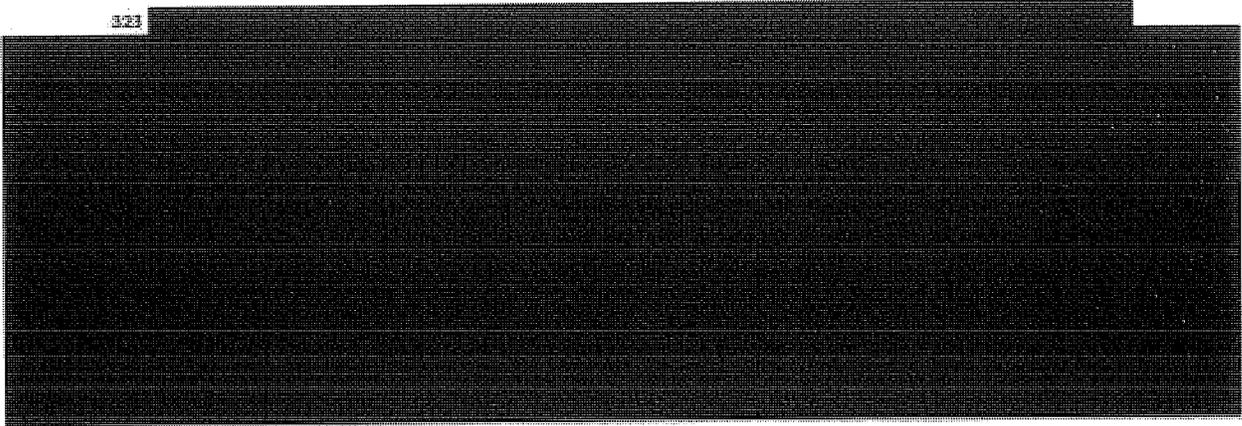
of U.S.-person information conducted under Stellar Wind.³²²
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Second, as several Justice Department and NSA officials commented, the FISA statute offered a “firmer footing” for the NSA’s collection activities under Stellar Wind. As discussed in Chapter Three and Four, the aggressive assertion of Article II authority on which Stellar Wind was based largely reflected the legal reasoning of a single Justice Department attorney working alone, without adequate review or scrutiny of his analysis. As we also concluded, this led to a flawed legal analysis on which the program rested for several years. This approach also led to a contentious dispute between Department and White House officials in 2004 involving renewal of aspects of the program. By contrast, the FISA statute provided an alternative basis for Stellar Wind-like collection activities that we believe should have been considered, and pursued, much earlier by the Administration. ~~(TS//STLW//SI//OC/NF)~~

In this regard, the White House’s strict control over the Justice Department’s access to the program lessened the opportunity for lawyers with relevant expertise to advise the Administration on the viability of working within the FISA statute to achieve the same operational objectives as the Stellar Wind program. Moreover, as the limited number of Department read-ins persisted, meaningful consideration of FISA as an alternative to presidential authority for the program was limited.³²³
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³²² For instance, under Stellar Wind the meta data querying standards did not include restrictions on acquiring data that may have been based solely on the exercise of First Amendment rights. When these activities were placed under the FISA Court’s supervision, the Court required that this intelligence-gathering activity adhere to the FISA standard that an e-mail address or telephone number cannot be targeted for acquisition based solely on activities protected by the First Amendment. ~~(TS//STLW//SI//OC/NF)~~

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We also found there were operational benefits to transitioning Stellar Wind to FISA. The PR/TT and Section 215 Orders to collect e-mail and telephone meta data that were eventually obtained from the FISA Court allowed the government to compel [REDACTED] the [REDACTED] telecommunications carriers. [REDACTED]

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The transition of Stellar Wind to FISA authority, together with the passage of the Protect America Act, allowed the NSA to begin the process to close, or "de-compartment," the Stellar Wind program. This change, which was not completed until mid-2008, has allowed agents in FBI field offices greater access to information about the telephone numbers and e-mail addresses being provided as leads. As described in Chapter Three, the principal complaint of agents who were assigned [REDACTED] and [REDACTED] leads was the lack of detail provided about the nature of the international contacts and the foreign entity allegedly involved with terrorism that was one of the communicants. These details often were not provided because of the highly classified and compartmented nature of the Stellar Wind program. Now that such information is gathered under FISA authority and not compartmented as it was under Stellar Wind, it is classified at a level that allows agents in FBI field offices to gain access to additional details upon request.³²⁴ ~~(TS//STLW//SI//OC/NF)~~

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We recognize that Stellar Wind's transition to FISA resulted in the imposition of new responsibilities and conditions on the exercise of these unprecedented collection authorities. In the PR/TT and Section 215 Orders, the FISA Court imposed significant oversight measures that were not required under Stellar Wind. To be sure, the government, particularly the NSA, must devote substantial resources to ensure compliance with these oversight measures. Yet, we believe that such requirements are appropriate, given the massive amounts of data collected and the potential impact on the privacy interests of U.S. persons. ~~(TS//STLW//SI//OC/NF)~~

We also recognize that the transition of content collection from presidential authority to statutory authority under FISA resulted in significant diminution in authorized surveillance activity of the content of communications. We described in this chapter how first under Judge Howard's Order, and then more significantly under Judge Vinson's revised

³²⁴ Chapter Six of this report discusses FBI agents' improved access to program-derived information under FISA after the Stellar Wind program was closed. ~~(TS//SI//NF)~~

Order, the NSA placed increasingly fewer foreign selectors under FISA coverage as compared to Stellar Wind. The NSA was tasking [REDACTED] foreign selectors under Stellar Wind at the time of the first content application in December 2006, but placed [REDACTED] foreign selectors under surveillance coverage under Judge Vinson's May 2007 Order. National Security Division officials told us that they successfully added approximately [REDACTED] foreign selectors under the terms of the Court's Order. (TS//STLW//SI//OC/NF)

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However, we believe that such broad surveillance and collection activities conducted in the United States, particularly for a significant period of time, should be conducted pursuant to statute and judicial oversight, even though this resulted in a diminution of foreign selectors due to resource issues. We also believe that placing the activities under Court supervision provides an important measure of accountability for the government's conduct that is less assured when the activities are both authorized and supervised by the Executive Branch alone.³²⁵
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In sum, we concluded there were compelling reasons to pursue beginning the process of transitioning the collection activities of Stellar Wind to FISA authority earlier than [REDACTED] 2004. These included the program's large collection of information about U.S. persons, which warranted judicial oversight; the instability of the legal reasoning on which the program rested for several years; and the substantial restrictions placed on FBI agents' access to and use of program-derived information due to Stellar Wind's highly classified status. We acknowledge that transitioning Stellar Wind's collection activities to FISA would have been an enormously complex and time-consuming effort that rested upon novel interpretations and uses of FISA that not all FISA Court judges would authorize. Nevertheless, the events described in this chapter demonstrate that a full transition to FISA authority was achievable and, in our judgment, should have been pursued earlier. (TS//STLW//SI//OC/NF)

³²⁵ Even Judge Vinson's decision regarding the foreign selectors content application, [REDACTED] was not without benefit. Judge Vinson's decision reflected what some intelligence officials considered limitations in the FISA statute as it applied to the acquisition of communications in the United States of persons located outside the United States, especially non-U.S. persons. In this way, transitioning Stellar Wind's content collection to FISA helped the government make its case to Congress in concrete, non-hypothetical terms for modernization legislation amending the statute. (TS//STLW//SI//OC/NF)

CHAPTER SIX

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[REDACTED] (S//NF)

The preceding chapters examined the evolution of the Stellar Wind program and its transition from Presidential Authorization to FISA authority. In this chapter, we examine more closely the FBI's involvement in Stellar Wind and the impact the program had on FBI counterterrorism efforts. (TS//STLW//SI//OC/NF)

[REDACTED] is the codename for the project, classified at the Secret level, that the FBI initiated in September 2002 to disseminate Stellar Wind information to FBI field offices in a manner that did not disclose the source of the information or the means by which it was acquired. The FBI originally opened [REDACTED] as an administrative file to serve as the repository for all communications FBI Headquarters disseminated to FBI field offices relating to Stellar Wind information, as well as all communications FBI Headquarters received from field offices reporting the results of any investigation conducted in response to the "tipped" information originating from Stellar Wind. In November 2006, the FBI opened an investigative file under the name [REDACTED]³²⁶ (TS//STLW//SI//OC/NF)

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Section I of his chapter summarizes how the FBI used [REDACTED] to disseminate Stellar Wind information to FBI field offices. Section II describes the FBI's decision in mid-2003 to make its headquarters-based Communications Analysis Unit (CAU), instead of FBI field offices, responsible for issuing National Security Letters (NSL) to obtain subscriber information for telephone numbers (basket 2 of Stellar Wind) disseminated under [REDACTED]³²⁷ Section III discusses the role the FBI played, beginning in approximately March 2004, in the process to "scrub" international terrorism FISA applications for Stellar Wind information. (TS//STLW//SI//OC/NF)

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Section IV of this chapter examines the impact of the information obtained from Stellar Wind on FBI counterterrorism efforts. It first provides statistics concerning the number of tippers the NSA derived from Stellar Wind information - telephony, e-mail, and content - disseminated to FBI

³²⁶ As discussed in Chapter Three, [REDACTED] was preceded by the [REDACTED] [REDACTED] which the FBI created in October 2001 to receive and disseminate Stellar Wind-derived information. (TS//STLW//SI//OC/NF)

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³²⁷ The CAU is the successor to the Telephone Analysis Unit (TAU), which the FBI created after the September 11 terrorist attacks to analyze telephone communications. The CAU assumed TAU's responsibilities in late 2002. (S//NF)

field offices through the [REDACTED] process. Next, it describes how FBI field offices generally investigated [REDACTED] tipplers and the typical results of the investigations. The section then summarizes two statistical surveys of meta data tipplers the FBI conducted in 2006 to assess the value of Stellar Wind to FBI operations, and describes observations about the program's contribution and value provided by FBI officials and employees in OIG interviews and contained in documents the OIG obtained during the course of this review. In addition, the section examines five FBI international terrorism investigations commonly cited as examples of Stellar Wind's contribution to counterterrorism efforts in the United States.³²⁸

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Lastly, Section V of this chapter contains the OIG's analysis of [REDACTED] impact on FBI operations. ~~(S//NF)~~ [REDACTED]

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I. [REDACTED] ~~Process (S//NF)~~

The [REDACTED] process was managed by a group of FBI employees from CAU, designated as "Team 10," who in February 2003 were assigned full-time to the NSA to work on the Stellar Wind program.³²⁹ Team 10 was described to us as a "conduit" and a "curtain" between Stellar Wind and the FBI, in that Team 10's chief responsibility was to disseminate Stellar Wind-derived information to FBI field offices for investigation without disclosing that the NSA was the source of the information or how the NSA acquired the information. ~~(TS//STLW//SI//OC/NF)~~

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Team 10 initially was staffed with two FBI special agents (one of whom served as supervisor) and two analysts. The CAU subsequently replaced one agent position with a third analyst and later added a fourth analyst. At the NSA, Team 10 was co-located in a large open space with dozens of NSA and other Intelligence Community personnel assigned to the Stellar Wind program. Each team member was provided a computer with direct access to NSA information associated with Stellar Wind. The NSA told the OIG that Team 10 members worked at the NSA under the authority of the NSA Director and as such were required to adhere to NSA minimization rules and attend the same training as NSA employees. Team 10 members also were provided access to Stellar Wind-related systems and

³²⁸ As noted above, our report examines the FBI's role in the Stellar Wind program and does not review the use of the program by other agencies, such as the CIA. ~~(S//NF)~~

³²⁹ The CAU is organized into ten teams, nine of which are responsible for providing communications analysis support to specific field offices and FBI Legal Attaches (Legat). According to an FBI organizational chart, Team 10 supports "Off-site Intelligence Community Special Projects." Team 10 was exclusively responsible for managing [REDACTED]

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databases, and had access from their computers to FBI systems such the Automated Case Support (ACS) system and [REDACTED]

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The process under [REDACTED] to disseminate Stellar Wind information was similar to the process the FBI established under the [REDACTED] described in Chapter Three. In short, the NSA provided Top Secret, compartmented Stellar Wind reports to Team 10, which in turn converted the information into Secret, non-compartmented [REDACTED] electronic communications (EC) and disseminated the communications, referred to as [REDACTED] "tippers," to FBI field offices for appropriate action.³³⁰ The [REDACTED] process was applied, with some differences, to each of Stellar Wind's three "baskets" of information. The vast majority of Stellar Wind reports involved the NSA's analysis of telephony meta data – that is, basic information such as date, time, and duration, about contacts between foreign and domestic telephone numbers for which the NSA determined there was a reasonable articulable suspicion to believe were related to al Qaeda or an affiliated group.³³¹ ~~(TS//STLW//SI//OC/NF)~~

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Each [REDACTED] EC included a paragraph that summarized the [REDACTED] project and explained that the CAU could not disclose the source of the information contained in the EC, but that the information came from a "sensitive and highly reliable" source. Each EC also included a [REDACTED] paragraph advising the field offices that the information provided by the [REDACTED] source could be used for "lead purposes only" and could not be "incorporated into any affidavit, court proceeding, FISA application or

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[REDACTED]

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[REDACTED]

unclassified investigative file.” In addition, each [REDACTED] EC assigned a “lead” that instructed the field office what investigative action, if any, should be taken regarding the information provided. We further describe [REDACTED] leads and FBI field offices’ handling of them in Section IV of this chapter. (TS//STLW//SI//OC/NF)

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Before Team 10 disseminated Stellar Wind-derived information to field offices, an analyst queried FBI databases for relevant information about the telephone number, e-mail address, or individual (in the case of a content report) identified in the Stellar Wind report. These queries often identified, for example, subscriber information the FBI previously obtained for Stellar Wind telephone numbers as part of a prior FBI investigation, or active counterterrorism investigations in which the subscriber to a Stellar Wind-targeted number was the subject or in which the number, and sometimes the subscriber, were referenced. Team 10 analysts also checked public and commercial databases, most commonly in connection with e-mail addresses. These checks sometimes identified the specific [REDACTED] and any domain names the user of an e-mail address had registered.

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[REDACTED] Any such information Team 10 located about a Stellar Wind-derived telephone number or e-mail address was included in the [REDACTED] EC as a “CAU Comment” or an “Analyst Comment” to differentiate the FBI information from the information provided by the Stellar Wind source.³³² (TS//STLW//SI//OC/NF)

Over time, Team 10 began to do more than receive and disseminate program-derived information. For example, Team 10 occasionally submitted telephone numbers to the NSA for possible querying against the database containing the bulk telephony meta data collected under Stellar Wind.³³³

³³² In this respect, Team 10 handled Stellar Wind content reports differently from meta data reports. Team 10 analysts typically did not perform additional analytical work on the information provided in Stellar Wind content reports other than to identify any FBI cases to which the information was relevant. For example, a content report might summarize intercepted communications indicating that an acquaintance of the subject of an FBI investigation is traveling to or from the United States. The connection between this Stellar Wind information and the relevant FBI investigation would be reported in the [REDACTED] EC. (TS//STLW//SI//OC/NF)

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³³³ As described in previous chapters, the purpose of the bulk collection of meta data under Stellar Wind was to allow the NSA to use analytical tools such as contact chaining [REDACTED] to identify known and unknown individuals associated with al Qaeda or an al Qaeda affiliate. The technique involves querying the telephony or e-mail database with a number or address for which an analyst had a “reasonable articulable suspicion” to believe was used by persons involved in al Qaeda or an al Qaeda affiliate, and then examining any contacts with that number or address. (TS//STLW//SI//OC/NF)

The telephone numbers Team 10 provided typically were obtained from the FBI's domestic and international counterterrorism operations, such as a number identified during a phone conversation monitored under FISA or a number found in the address book of a subject arrested abroad. The NSA conducted independent analysis to determine whether telephone numbers (or e-mail addresses) provided by Team 10 met the querying standard established by the Presidential Authorizations that governed Stellar Wind (that is, a reasonable articulable suspicion to believe that communications from the telephone number relate to al Qaeda or an affiliated group).³³⁴
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Team 10 also contributed to the NSA's drafting process for Stellar Wind reports. Telephone numbers and e-mail addresses identified through queries of the databases that contained the bulk telephony and e-mail meta data were reviewed by NSA analysts to determine whether the contacts should be reported to the FBI in a Stellar Wind report. Team 10 participated in this process by reviewing draft reports and providing any information from FBI databases that might be relevant to this determination.³³⁵ ~~(TS//STLW//SI//OC/NF)~~

We were told that one of the benefits of Team 10's presence at the NSA and its involvement in the Stellar Wind report drafting process was an improvement in the quality of the information disseminated to FBI field offices. For example, the FBI Supervisory Special Agent (SSA) who supervised Team 10 from April 2005 to July 2006 told the OIG that he tried to reduce the NSA's reporting of telephone numbers that were several hops removed from the telephone number linked to al Qaeda or an affiliated terrorist group. He said that he wanted Team 10 to disseminate "solid numbers with value," not numbers with questionable value such as "high volume numbers" (public telephones, for example) and [REDACTED]

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[REDACTED] The FBI SSA said that the NSA expressed the concern

³³⁴ Team 10 analysts submitted such telephone numbers to the NSA electronically through "Requests for Information," or RFIs, which is the formal process by which the FBI and other agencies provide leads and request information from the Stellar Wind database. FBI records indicate that from April 2002 to January 2006 the FBI directed [REDACTED] to NSA analysts for possible analysis under Stellar Wind. The records do not indicate the disposition of each RFI. ~~(TS//STLW//SI//OC/NF)~~

³³⁵ The NSA developed formal "checklists" to guide the Stellar Wind report drafting process for telephony and e-mail tipplers. The checklists include over 30 steps that NSA analysts were required to complete, and a supervisor had to approve, before a report could be distributed to the FBI or any other Stellar Wind customers (the CIA and National Counterterrorism Center). A significant feature of the checklist from the FBI's perspective was the requirement that NSA analysts check any telephone numbers and e-mail addresses in a draft report with the FBI and "make best effort to include FBI . . . data in [the] tippler."
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that it could not foresee whether any particular contact, although remote, might prevent the next terrorist attack, and did not want to find itself in the position of defending its decision not to pass that number to the FBI. However, he said the NSA took several steps to improve the quality of information such as [REDACTED] for the domestic contacts that were reported and including analytical judgments about the contacts.³³⁶
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As discussed in Chapter Five, the government transitioned Stellar Wind's bulk e-mail meta data collection (basket 3) to FISA authority in July 2004 with the Pen Register/Trap and Trace Order, bulk telephony meta data collection (basket 2) in May 2006 with the Section 215 Business Records Order, and content collection (basket 1) in January 2007 when the FISA Court granted the government's domestic and foreign selectors applications. (TS//STLW//SI//OC/NF)

However, after the transition was completed the NSA continued to produce reports within the Stellar Wind compartment to the FBI and other program customers, even though the information contained in the reports was derived from the FISA-authorized collection activities. Consequently, the FBI continued to disseminate the information under the [REDACTED] process. The current Team 10 supervisor told us that this decision, reached after consultation with the FBI's Office of the General Counsel (OGC), was made to adhere to the FISA Court's continuing requirement that international terrorism FISA applications be scrubbed for Stellar Wind information (the procedure for which is described in Section III of this chapter). (TS//STLW//SI//OC/NF)

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The NSA received permission to begin the process to close, or "de-compartment," the Stellar Wind program after the Protect America Act was passed in August 2007. In mid-2008, the NSA officially closed the program and discontinued issuing "Stellar Wind" reports. In November 2008, the FBI initiated a new investigative file, [REDACTED] to disseminate the NSA's FISA-derived information.³³⁷ The Team 10 supervisor

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³³⁶ The NSA told us that one of the difficulties it faced with the Stellar Wind program was that the NSA was serving two customers – the FBI and the CIA – but had just one set of reporting guidelines. This was so because the NSA traditionally does not provide single-agency reporting except in narrowly defined circumstances. [REDACTED]

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³³⁷ According to the FBI memorandum explaining the predication for opening the file, the focus of [REDACTED] investigation is on known and unknown operatives of [REDACTED]

[REDACTED]. The memorandum stated that as of August 2008 the FBI had [REDACTED] open national security investigations related to [REDACTED] of individuals believed to be associated with [REDACTED]

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(Cont'd.)

told us that the dissemination process and the FBI's coordination with the NSA under [redacted] is similar to what occurred under [redacted]. However, one notable difference is that the NSA's FISA-derived reports, while classified at the Top Secret/Sensitive Compartmented Information (TS/SCI) level, are not subject to the highly restrictive Stellar Wind compartment designation, which is significant from an operational standpoint. [redacted] ECs, like [redacted] ECs, can only include information classified Secret or lower because the FBI's primary computer network for disseminating communications cannot be used for Top Secret information. Unlike under [redacted] agents in field offices can now request access to additional information about [redacted] leads because agents have the appropriate clearances. As discussed in Chapter Three and addressed below, the chief criticism of [redacted] leads was the lack of detailed information that could be provided to field agents about tippers because of the highly compartmented nature of Stellar Wind.

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II. FBI's Decision to Issue National Security Letters under [redacted] to Obtain Telephone Subscriber Information (S//NF)

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From August 2003 to November 2006, as part of the [redacted] process the Communications Analysis Unit (CAU) assumed responsibility from the field offices for requesting National Security Letters (NSL) to obtain subscriber information for [redacted] telephone number tippers.³³⁸ The NSLs were authorized by the FBI's OGC and issued pursuant to the [redacted] project. As discussed below, however, this practice was contrary to applicable FBI investigative guidelines because [redacted] was opened as a non-investigative file and therefore under FBI policy should not have been used as the basis for issuing NSLs. ~~(S//NF)~~

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The FBI uses NSLs to obtain information from third parties such as telephone companies, financial institutions, Internet service providers, and consumer credit agencies. NSLs, authorized by five specific provisions contained in four federal statutes, direct third parties to provide customer account information and transactional records such as telephone toll billing

[redacted] of individuals believed to be associated with [redacted] and [redacted] of [redacted] (S//NF)

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³³⁸ Field offices remained responsible for issuing NSLs in connection with e-mail address tippers, which was likely attributable to the comparatively low volume of e-mail tippers and the ability of field offices to handle them expeditiously. ~~(S//NF)~~

records.³³⁹ The OIG issued two reviews in 2007 and 2008 examining the FBI's use of NSLs.³⁴⁰ (U)

Justice Department investigative guidelines issued by the Attorney General govern the circumstances under which the FBI may use NSLs. The Attorney General guidelines in effect during the Stellar Wind program authorized the FBI to issue NSLs relevant to and in the course of an authorized national security investigation.³⁴¹ Further, FBI internal policy distinguishes between "investigative files" and non-investigative "administrative files" (commonly referred to as "control files"). This distinction is not a mere technicality. Investigative files, in the national security context, are opened based on evidence that a person, group, or organization is involved in international terrorism. From October 2003 to September 2008, the Attorney General Guidelines required the FBI to provide summary reports to the Justice Department at the end of each year

³³⁹ The four federal statutes are the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422; the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2709; the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.; and the National Security Act, 50 U.S.C. § 436(a)(1) (2000). NSLs issued under [REDACTED] relied on the ECPA statute, which provides that the FBI may obtain subscriber information from a communications service provider if the FBI certifies that the information sought is

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relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States.

18 U.S.C. § 2709(b)(2) (2000 & Supp. IV 2005). The statute also permits access to "toll billing records" or "electronic communication transactional records," 18 U.S.C. § 2709(a), but requires a warrant for access to the content of telephone communications. See 18 U.S.C. § 2511 (Wiretap Act) and 3121 (Pen Register Act); see also 18 U.S.C. § 2702(b)(8). (U)

³⁴⁰ The OIG's first report on NSLs, issued in March 2007, was entitled, *A Review of the Federal Bureau of Investigation's Use of National Security Letters*. The OIG's second report, issued in March 2008, was entitled, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006*. (U)

³⁴¹ From March 8, 1999, through October 31, 2003, national security investigations were governed by the Attorney General's Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (FCI Guidelines). The FCI Guidelines were replaced, effective October 31, 2003, with the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSI Guidelines). (U)

The evidentiary standard for initiating an investigation is the same under both sets of guidelines. To open a full investigation, the FBI is required to demonstrate [REDACTED]

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[REDACTED] A preliminary investigation (or "inquiry," under the FCI guidelines) requires only a showing of [REDACTED] of such involvement. See NSI Guidelines, Section II.C. (October 31, 2003); FCI Guidelines, Section III.B. (March 8, 1999). (S//NF)

a full national security investigation continues. These requirements helped ensure that there was sufficient, documented predication for investigative activities FBI agents sought to conduct, such as requesting NSLs. ~~(S//NF)~~

Control files, in contrast, are "separate files established for the purpose of administering specific phases of an investigative matter or program." The files do not require any predication and remain open indefinitely without any reporting requirements for national security investigations. For example, the September 2002 EC requesting that a control file [REDACTED] be opened for Stellar Wind information stated that "a dedicated control file for this project will better serve the specific needs of the special project and will add an additional layer of security for the source." The file has remained open since September 2002 without any official documentation of need or justification. (As discussed below, in November 2006 the FBI opened an [REDACTED] investigative file; however, the [REDACTED] control file was not closed at that time.)

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The FBI's National Foreign Intelligence Program (NFIP) Manual states that [REDACTED]

[REDACTED]³⁴² Thus, in accordance with the NFIP Manual, it was improper for the FBI to issue NSLs from control files during the Stellar Wind program. ~~(S//NF)~~

The OIG's March 2007 NSL report identified the [REDACTED] project as one of two circumstances where the FBI was using control files rather than investigative files to issue NSLs. The OIG report concluded that this use was contrary to FBI policy. However, our report also found that the CAU officials involved in the decision to issue NSLs from the [REDACTED] control file concluded in good faith that the FBI had sufficient predication either to connect the [REDACTED] NSLs with existing preliminary or full investigations of al Qaeda and affiliated groups or to open new preliminary or full investigations in compliance with Justice Department investigative guidelines. ~~(S//NF)~~

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As part of our review of the FBI's participation in Stellar Wind, we sought additional explanation for the use of NSLs under [REDACTED]. We were told the purpose of having the CAU instead of the field offices obtain approval for the issuance of such NSLs was to make the telephony tippers more "actionable" by ensuring that field offices at a minimum knew the subscribers for the numbers. As described in Chapter Three, the members of the [REDACTED] (the predecessor to [REDACTED]) had received complaints from agents in FBI field offices that [REDACTED] leads lacked direction about how to make investigative use of the telephone numbers and did not provide sufficient information to open national security investigations. This was problematic because leads disseminated under the [REDACTED] and for a time under [REDACTED] instructed field offices to obtain subscriber information for tipped telephone numbers. Thus, if agents could not locate the information in FBI or commercial databases, they faced a dilemma about how to proceed in the absence of what they viewed as sufficient predication. ~~(TS//STLW//SI//OC/NF)~~

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The CAU's first Unit Chief (who served in an Acting capacity) discussed the problem in an EC distributed in January 2003 that addressed the [REDACTED] project. The EC stated,

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Depending on the nature of the information provided [in an [REDACTED] lead], field offices may determine this intelligence could be used to predicate either a criminal investigation or an intelligence investigation of someone in their territory. Some of the [REDACTED] leads may contain a request for a field office to confirm a subscriber in their territory, if possible, in addition to providing intelligence. The identification of some subscribers might actually require a National Security Letter (NSL) or a Grand Jury subpoena; however, the [REDACTED] control file would not be the appropriate legal authority for these requests.

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The Acting Unit Chief's supervision of the CAU ended in February 2003. In March 2003, another FBI Supervisory Special Agent (SSA) was appointed as the CAU's first permanent Unit Chief. He told us that when he joined the CAU he was aware that field offices sometimes did not obtain subscriber information on tippers because some agents did not believe [REDACTED] ECs provided sufficient information to open a national security investigation. The Unit Chief disagreed, based in part on his insider knowledge about how Stellar Wind operated. He said that he believed the

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[REDACTED] tippers contained sufficient information to open preliminary b1, b3, b7E investigations and issue NSLs.³⁴³ ~~(TS//STLW//SI//OC/NF)~~

The Unit Chief wanted field offices at a minimum to know the identity of subscribers of tipped telephone numbers. He also said it was important to ascertain the correct identities of the subscribers at the time the tipped calls were placed. The Unit Chief stated that if the field office did not issue an NSL for subscriber information promptly, or if the field office relied only on publicly available information, the passage of time could cause the user of the phone to be misidentified. In addition, the Unit Chief said that even if a tipper did not result in any investigative value at the time of the tip, it nevertheless was important to identify the subscriber in the event the tipper became relevant in the future or to another investigation. For all of these reasons, the Unit Chief said he took steps to make the CAU, instead of the FBI field offices, responsible for issuing NSLs for telephone number tippers under the Stellar Wind program.³⁴⁴ ~~(TS//STLW//SI//OC/NF)~~

In approximately July 2003, a CAU analyst was read into the Stellar Wind program to process [REDACTED] NSLs. The analyst told us she questioned the Unit Chief and the Team 10 supervisor about whether it was permissible to issue NSLs out of a control file. The Unit Chief told us that he was not aware at this time that a control file such as [REDACTED] could not be used to issue NSLs. ~~(TS//STLW//SI//OC/NF)~~

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The analyst volunteered to approach FBI OGC and met with Marion "Spike" Bowman of the OGC's National Security Law Unit to discuss this concern. She said she told Bowman that the CAU wanted to know if it could issue NSLs under [REDACTED] in view of its status as a control file. She said she told Bowman that the NSLs would seek subscriber information only and that field offices would be responsible for seeking related toll billing records if warranted by additional investigation. ~~(TS//STLW//SI//OC/NF)~~

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According to the analyst, Bowman said that it would be permissible to issue NSLs out of the [REDACTED] file as long as only subscriber information was sought. The analyst said she could not recall whether Bowman affirmatively stated that issuing NSLs from a control file would be

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³⁴³ On January 16, 2003, 2 months before the FBI SSA was appointed Unit Chief of the CAU, Attorney General Ashcroft authorized the FBI to issue NSLs during preliminary investigations. Prior to this time, the FCI guidelines authorized the FBI to issue NSLs only as part of a "full investigation." ~~(S//NF)~~

³⁴⁴ The Unit Chief told us that he did not believe it was critical at the preliminary stage to also obtain telephone subscribers' calling records, or "toll records," identifying all outgoing and incoming calls. ~~(TS//STLW//SI//OC/NF)~~

permissible or whether he merely agreed that it would be permissible under the conditions the analyst presented.³⁴⁵ ~~(TS//STLW//SI//OC/NF)~~

Shortly after the meeting, the CAU implemented procedures for requesting that OGC issue NSLs to obtain subscriber information for each [REDACTED] telephone number tipper disseminated to field offices that the FBI was not already aware of or for which it did not have subscriber information. Under these procedures, the CAU analyst received a copy of each [REDACTED] EC with telephone number tippers as they were issued by Team 10 and drafted a separate approval EC to the NSLB that repeated this information and requested that the NSLB issue NSLs for the numbers listed. NSLB attorneys were responsible for determining whether the NSL requests were "relevant to an authorized investigation," as required by statute. If the attorneys determined that they were, NSLs were drafted and signed by the Deputy General Counsel for NSLB and forwarded to the CAU for service on the appropriate communications service providers. The providers returned the responsive records to the CAU, which in turn disseminated the information to the appropriate FBI field offices. From August 2003 to November 2006, the CAU issued over 500 NSLs under [REDACTED] ~~(TS//STLW//SI//OC/NF)~~

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We interviewed FBI Deputy General Counsel Julie Thomas about NSL issuance practices under [REDACTED]. Thomas was read into Stellar Wind shortly after joining the NSLB in October 2004. She was responsible for reviewing and authorizing [REDACTED] NSLs requested by the CAU. Thomas said she was familiar with the operational reasons the CAU began issuing NSLs under [REDACTED] but stated that it was not until the OIG was conducting its first review of the FBI's use of NSLs in 2006 that she learned [REDACTED] was a control file and the significance of this status as it related to issuing NSLs. Thomas said that the CAU's requests to NSLB to authorize NSLs under [REDACTED] always identified the specific file number associated with the project and indicated that the CAU had initiated a preliminary inquiry in connection with the NSL request. Thus, in Thomas's view, the NSL being requested was "relevant to" an authorized investigation, as

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³⁴⁵ FBI General Counsel Valerie Caproni told the OIG that she believes Bowman based his guidance to the CAU on the understanding that the NSA, by reporting a tipper to the FBI, already had established a reasonable articulable suspicion that the foreign end of the contact was related to al Qaeda or an affiliated group. Caproni said that in view of the hundreds of al Qaeda investigations the FBI was conducting, Bowman likely concluded it was permissible to issue NSLs under [REDACTED] for the subscriber information of tippers even if at the time there was not a specific investigation to which each NSL could be connected. The Team 10 supervisor at this time told the OIG that he recalled the decision to issue NSLs from [REDACTED] was based on [REDACTED] close relationship to the FBI's ongoing investigations of al Qaeda and affiliated groups. ~~(TS//STLW//SI//OC/NF)~~

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required by statute and Justice Department investigative guidelines.³⁴⁶
~~(TS//STLW//SI//OC/NF)~~

However, Thomas said she did not believe the [REDACTED] NSLs were improper even though they were issued from a control file. Thomas stated that the NSLs in fact were relevant to authorized international terrorism investigations in that the FBI was conducting hundreds of investigations of al Qaeda and its affiliates at the time the NSLs issued. Thomas told the OIG that, notwithstanding this position, in November 2006 the FBI converted [REDACTED] to an "umbrella investigative file" to reflect the program's relationship to international terrorism investigations. ~~(TS//SI//NF)~~

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The OIG reviewed the communication from the CAU opening this investigative file. It stated that a member of the U.S. Intelligence Community [the NSA] reported to the FBI that al Qaeda members and associates are using telecommunications systems to facilitate their terrorist activities, that the FBI has independently determined that this is occurring, and that "inasmuch that Al-Qa'ida is a multi-faceted and international terrorism organization, the FBI has determined it is appropriate to open a full field investigative [sic]." The communication stated that the CAU was using information obtained from the member of the U.S. Intelligence Community to issue NSLs and that the results are disseminated to the appropriate FBI field offices. The communication also advised that all investigative leads associated with the investigation would be titled [REDACTED] to protect the source of the information and the methods used to obtain the information. ~~(TS//STLW//SI//OC/NF)~~

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The FBI currently is taking a similar approach to NSLs under the [REDACTED]. A field office (instead of the CAU) is authorized to issue an NSL under the [REDACTED] investigative file, even if the field office does not open its own investigation and the tipped domestic telephone number or e-mail address is not relevant to another open investigation. However, NSLs issued under [REDACTED] can request subscriber information only and may not request transactional records, as was done under [REDACTED]. ~~(TS//SI//NF)~~

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The FBI's decision to restrict [REDACTED] NSLs in this way was not required by law, but was an operational decision. As discussed below, FBI

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³⁴⁶ The [REDACTED] file number is [REDACTED]. Thomas told us that she did not realize that the "C" designation stood for "Control File." In addition, in the approval ECs reviewed by the OIG that sought the issuance of NSLs, the CAU stated, among other things, that the [REDACTED] source" reported telephonic contact between possible al Qaeda or other international terrorism entities and numbers in the United States and that "a preliminary CAU inquiry was conducted for the US telephone numbers reported by this source." ~~(TS//STLW//SI//OC/NF)~~

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field offices addressed most [REDACTED] tipplers by conducting "threat assessments" to determine whether the tippler had a nexus to terrorism and warranted the field office initiating a preliminary or full investigation. The subscriber information for a tippler is sufficient for purposes of completing a threat assessment. The same is true for [REDACTED] tipplers, and the current Team 10 supervisor told us that it would not be a "good business" practice to collect transactional records on a U.S. person unless a threat assessment justified the field office initiating its own preliminary or full investigation of the individual. ~~(TS//SI//NF)~~

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We believe the FBI should have opened an [REDACTED] investigative file in July 2003 and used it to issue NSLs related to Stellar Wind information. The Justice Department investigative guidelines in effect at that time authorized the FBI to open full investigations of groups for which there were specific and articulable facts to believe were involved in international terrorism, such as al Qaeda. However, the FBI decided to issue Stellar Wind NSLs from an existing control file, which was contrary to FBI internal policy. ~~(TS//STLW//SI//OC/NF)~~

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We did not find evidence that officials from the CAU and OGC involved in the decision to use an existing control file to issue NSLs related to Stellar Wind information deliberately tried to circumvent FBI guidelines. The July 2003 rationale for issuing the NSLs out of the control file – the close relationship between the Stellar Wind program and the FBI's ongoing investigations of al Qaeda and affiliated groups – essentially was the reasoning used in November 2006 to open the [REDACTED] investigative file and in November 2008 to open the [REDACTED] investigative file. As we found in our March 2007 report concerning the FBI's use of NSLs, the CAU and OGC officials involved in the decision to issue NSLs from the [REDACTED] control file concluded in good faith that the FBI had sufficient predication either to connect the [REDACTED] NSLs with existing preliminary or full investigations of al Qaeda and affiliated groups or to open new preliminary or full investigations in compliance with Justice Department investigative guidelines. Nevertheless, the decision violated FBI internal policy. ~~(TS//STLW//SI//OC/NF)~~

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III. [REDACTED] and Scrubbing Process ~~(TS//SI//NF)~~

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As discussed in Chapter Three, the Department implemented a process imposed by the FISA Court to "scrub" FISA applications to account for Stellar Wind-derived information. The objectives of the initial scrubbing process were to determine whether any NSA information contained in international terrorism FISA applications was derived from Stellar Wind and whether any of the facilities (telephone numbers or e-mail addresses) targeted by international terrorism FISA applications were also targeted for

Stellar Wind collection (commonly referred to as dual coverage).

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

The scrubbing process was coordinated by the Justice Department and NSA, beginning in February 2002 after Judge Lamberth was read into Stellar Wind. In May 2002, Judge Kollar-Kotelly succeeded Judge Lamberth as Presiding Judge of the FISA Court and continued the scrubbing procedures. However, whereas Judge Lamberth required only that he be notified of applications that contained Stellar Wind information, Judge Kollar-Kotelly required that such information be removed.

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

As described in Chapter Four, on March 14, 2004, OIPR Counsel Baker briefed Judge Kollar-Kotelly about the President's decision to sign the March 11, 2004, Presidential Authorization without the Justice Department's certification as to the Authorization's form and legality, and about subsequent changes the Authorization made to the Stellar Wind program. ~~(TS//SI//NF)~~

According to a handwritten letter Judge Kollar-Kotelly drafted to Baker following this meeting, Baker had informed her that the Stellar Wind program 


 The letter also stated that Baker informed her that with these changes the Deputy Attorney General agreed to certify the program as to form and legality, and that OLC had prepared a new legal memorandum regarding the legality of Stellar Wind to replace the November 2001 memorandum authored by Yoo. ~~(TS//STLW//SI//OC/NF)~~

Judge Kollar-Kotelly's letter marked the first time her expectations concerning the Department's use of Stellar Wind information in FISA applications was communicated in writing to OIPR. Judge Kollar-Kotelly wrote,

Although the Court has every confidence in the oral representations of Jim Baker [and] does not have any reason to question his honesty or credibility with the FISC or this judge, I am requesting that representations, previously done orally, now be put in writing that relate to [Stellar Wind] and FISA applications so that there are no misunderstandings.

....

I want to emphasize my position which has been consistent since I came on the FISC in May 2002, the [Stellar Wind] program and FISA applications are to be kept separate, and no

information direct or indirect, derived or obtained from [Stellar Wind] should be included in FISA applications. Only in this way can the integrity of the process and intelligence collected through FISA applications be maintained.

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

Judge Kollar-Kotelly also wrote that she would not sign any FISA applications that contained substantive information from Stellar Wind-generated tips or any applications where the Stellar Wind tip was the sole or principal factor for an agency initiating the underlying investigation, "even if the investigation was conducted independently of the tip from [Stellar Wind]." ~~(TS//STLW//SI//OC/NF)~~

Baker told us that this letter was Judge Kollar-Kotelly's preliminary response to the changes in the Stellar Wind program. Through subsequent discussions between Judge Kollar-Kotelly and Baker, and between Baker and other Department and FBI officials, a more flexible arrangement was reached on scrubbing that addressed Judge Kollar-Kotelly's concerns without imposing an absolute prohibition on including certain Stellar Wind-derived information in FISA applications.³⁴⁷

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

In short, the scrubbing procedures implemented in March 2004, and that continue to the present day, substantially expanded the procedures OIPR originally developed in February 2002.³⁴⁸ In addition to determining whether any NSA information contained in international terrorism FISA applications was derived from Stellar Wind and whether there was any dual coverage, Judge Kollar-Kotelly required the FBI to determine whether any facility (telephone number or e-mail address) that appeared in a FISA application also appeared in a Stellar Wind report and, if so, whether the FBI had developed, independent of Stellar Wind, an investigative interest in the facility before it was the subject of an [REDACTED] tipper.³⁴⁹ This third

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³⁴⁷ FBI OGC said that it was not until these discussions that the FBI was aware of the scrubbing procedures OIPR had implemented in approximately February 2002 after Judge Lamberth was read into the Stellar Wind program. ~~(TS//SI//NF)~~

³⁴⁸ The scrubbing procedures described here apply both to NSA information derived from the Stellar Wind program and to information derived from the FISA Court's PR/TT and Section 215 bulk meta data orders. Until mid-2008 when the Stellar Wind program officially was closed, leads the NSA developed from the FISA-authorized bulk meta data collections were disseminated under the Stellar Wind compartment.

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

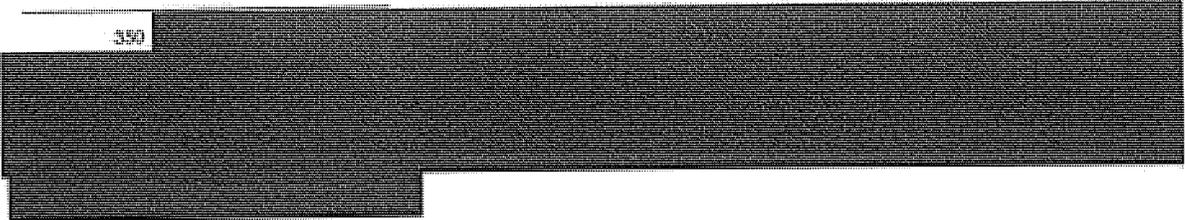
³⁴⁹ As discussed in Chapter Three, Baker did not believe in May 2002, when he first discussed the subject with Judge Kollar-Kotelly, that such a scrub was possible. Baker told us that by March 2004 he better understood the NSA's and FBI's process for disseminating Stellar Wind information and the agencies' ability to track program-derived tips in a timely manner. ~~(TS//STLW//SI//OC/NF)~~

scrub is coordinated among OIPR, the FBI's National Security Law Branch (NSLB), and Team 10. (TS//STLW//SI//OC/NF)

The scrub requires NSLB to compile a list of all "facilities" – telephone numbers and e-mail addresses – that appeared in any draft international terrorism FISA applications.³⁵⁰ This list is compiled as FISA packages become ready for filing with the Court and is provided to an attorney in NSLB read into the Stellar Wind program. The attorney in turn forwards the facilities list to Team 10 at the NSA. Team 10 checks each facility against the NSA's Stellar Wind reports database to determine whether a listed facility is contained in any Stellar Wind reports and, if so, whether the facility appeared in the tearline portion of a report that was further disseminated to FBI field offices. If both inquiries are positive, Team 10 notes the date of the relevant Stellar Wind report and searches the FBI's Automated Case Support System (ACS) to determine whether the facility appears in ACS and, if so, the date the facility came to the FBI's attention. Team 10 reports the results of these checks to the NSLB attorney for review. (TS//STLW//SI//OC/NF)

The NSLB attorney takes one of two steps at this stage. If Team 10's checks are negative – meaning none of the facilities are contained in a Stellar Wind report or contained in information below the tearline of a Stellar Wind report – the NSLB scrub attorney notifies the OIPR attorney and FBI case agent that the FISA application can be cleared for presentation to the FISA Court and that the application can proceed to final processing. If both checks on a facility are positive, the NSLB attorney will try to determine if there is a basis for the Court to allow the information in the application based on the theories, discussed in further detail below, that the FBI had an independent investigative interest in or would have inevitably discovered the facility in question. To determine this, the NSLB attorney researches FBI databases, analyzes records, and attempts to craft an argument under one of these theories. The NSLB attorney then provides this information to OIPR for presentation the Court. If the NSLB attorney cannot find a basis for including the information under either of the theories, and the facility is not essential to the showing of probable cause for the requested FISA coverage, the facility is excised from the FISA application, and processing continues. If the information is important to the probable cause showing, the NSLB attorney discusses with OIPR whether to make the argument to the appropriate FISA Court judge (initially

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Judge Kollar-Kotelly and now, the judge assigned to case) that the facility nevertheless can remain in the application. ~~(TS//STLW//SI//OC/NF)~~

According to the Deputy General Counsel for NSLB, the argument to keep such information in an application is based on “standard Fourth Amendment [exclusionary rule] analysis.” The “exclusionary rule” generally holds that where the government obtains evidence in violation of the Fourth Amendment, the court will suppress, or exclude, the evidence from the prosecutor’s case-in-chief in a criminal trial. Under the “fruit of the poisonous tree” doctrine, a corollary to the exclusionary rule, any evidence obtained directly or derivatively from the government’s improper conduct is also excluded. However, there are several exceptions to the exclusionary rule, two of which were relevant to scrubbing: independent source and inevitable discovery. The independent source exception holds that the exclusionary rule does not bar the use of evidence obtained in violation of the Fourth Amendment if there is also an independent, legal source for the evidence.³⁵¹ The inevitable discovery exception applies when evidence obtained in violation of the Fourth Amendment would have been obtained independently had the illegal search not occurred, which the government must prove by a preponderance of the evidence.³⁵² (U)

Thus, in the scrubbing context, the issue is whether the Stellar Wind information contained in a FISA application should not be excluded, either because the FBI had an investigative basis independent of Stellar Wind for including the information in the application or because the FBI inevitably would have discovered the information in the absence of Stellar Wind. More specifically, under the independent investigative basis exception, if Team 10’s search of ACS shows that a facility came to the FBI’s attention before the facility appeared in a Stellar Wind report, this fact establishes that the FBI has an independent, non-Stellar Wind factual basis to include the facility in the application.³⁵³ NSLB Deputy General Counsel Thomas told us that in her experience the FBI already is aware of the facility – meaning it appears in ACS or other FBI databases – in nearly every instance that a facility contained in a FISA application also appears in a Stellar Wind report. ~~(TS//STLW//SI//OC/NF)~~

³⁵¹ See *Segura v. United States*, 468 U.S. 796, 805 (1984). (U)

³⁵² See *Nix v. Williams*, 467 U.S. 431, 443 (1984). (U)

³⁵³ For example, in one case the NSLB attorney’s review of the underlying investigative file showed that the FBI had obtained the telephone number at issue in response to an NSL Letter. Because the NSL was dated earlier than the Stellar Wind report that also contained the telephone number, the FBI had an independent investigative basis for including the number in the FISA application. ~~(TS//STLW//SI//OC/NF)~~

The inevitable discovery exception in the scrubbing context applies when Team 10's check of ACS indicates the FBI was not aware of the facility before the date of the Stellar Wind report containing the facility. Under this approach, the NSLB attorney attempts to demonstrate to OIPR that normal investigative steps in the underlying investigation inevitably would have identified the facility in question. The scrubbing attorney analyzes such case evidence as close associates and other relationships of the subjects of the investigation that could logically lead investigators – through NSLs, for example – to the facility contained in the Stellar Wind report.³⁵⁴
(TS//STLW//SI//OC/NF)

Until January 2006, when the full FISA Court was read into Stellar Wind, Judge Kollar-Kotelly required that all applications the FBI determined contained facilities or information that also appeared in Stellar Wind reports be cleared with her before being filed with the FISA Court. As she wrote in a January 12, 2005, letter to OIPR, "I want to ensure, that, to the extent possible, [Stellar Wind] information is excluded from applications submitted to the FISC and that, if it is necessary to include such information, it is specifically identified to the FISC as derived from [Stellar Wind] collection when the application is presented." OIPR Deputy Counsel Skelly-Nolen – who was read into Stellar Wind on March 12, 2004, but who had been involved in the scrubbing process since 2001 – was responsible, along with Baker, for coordinating this aspect of the scrubbing process and, when warranted, for presenting the argument to the judge that an application containing information that was the subject of a Stellar Wind report to the FBI should nevertheless be approved for filing. (TS//STLW//SI//OC/NF)

Skelly-Nolen characterized the applications she presented to Judge Kollar-Kotelly as either "vanilla" or "non-vanilla." Vanilla applications were those for which Skelly-Nolen could confidently represent that the FBI had an independent investigative basis for the facility identified in the application that was the subject of a Stellar Wind report (for example, a facility the FBI learned of through FISA coverage that pre-dated the Stellar Wind report). Skelly-Nolen told us that over time Judge Kollar-Kotelly allowed the vanilla applications to be handled telephonically in an unclassified manner, a departure from her general requirement that the discussions be held in judge's chambers. Non-vanilla applications typically involved those cases that required Skelly-Nolan to demonstrate that the FBI

³⁵⁴ For example, in one case a telephone number of a particular business did not appear in an FBI database prior to the date it appeared in a Stellar Wind report. However, the subject of the underlying investigation was the target of an FBI national security investigation, and OIPR argued that the telephone number inevitably would have been connected to the subject through the "natural course of the investigation," possibly from toll records associated with other telephone numbers used by the subject, trash covers and open source information, or physical surveillance. (TS//STLW//SI//OC/NF)

inevitably would have discovered the facility in question during the normal course of investigation. Skelly-Nolen said these cases were always discussed with Judge Kollar-Kotelly in person. ~~(TS//STLW//SI//OC/NF)~~

Skelly-Nolen told us that there were instances when Judge Kollar-Kotelly requested additional information to support the proffered theory for including Stellar Wind information in the FISA application. In some cases, Judge Kollar-Kotelly simply struck a line through the paragraphs in the filed application that contained the Stellar Wind-derived information and annotated in the margin, "This section (strike) not considered in evaluation of probable cause," followed by her signature and the date. Skelly-Nolen also said that in one or two cases Judge Kollar-Kotelly required that certain Stellar Wind information arguably necessary for establishing probable cause be removed from the applications.³⁵⁵ However, in general Judge Kollar-Kotelly accepted OIPR's and the FBI's assessment that there was a non-Stellar Wind investigative basis for the information in question, or that the information inevitably would have been discovered even in the absence of Stellar Wind-derived tips to the FBI. ~~(TS//STLW//SI//OC/NF)~~

After operating under the expanded scrubbing procedures for approximately 6 months, Judge Kollar-Kotelly agreed in November 2004 to allow other FISA Court judges who had not yet been read into the Stellar Wind program to handle scrubbed international terrorism applications. However, Judge Kollar-Kotelly still required that Skelly-Nolen bring to her attention all vanilla and non-vanilla applications so they could be "cleared" before being formally filed. As noted above, it was not until January 2006, when the full FISA Court was read into Stellar Wind, that Skelly-Nolen was able to discuss such cases with other judges. ~~(TS//STLW//SI//OC/NF)~~

Since that time, the basic scrubbing procedure described above has continued. The Office of Intelligence attorney primarily responsible for the process told us that each new FISA application that references a facility that was disseminated under Stellar Wind is brought to the attention of the judge assigned to the case.³⁵⁶ However, with limited exceptions, the FISA Court judges do not require that the government inform them of renewal applications that contain such facilities so long as they were previously brought to the Court's attention in the initiation application or prior renewal applications. The Office of Intelligence attorney told us that the government

³⁵⁵ According to Skelly-Nolen, Judge Kollar-Kotelly nevertheless allowed OIPR to file these applications and approved them. ~~(TS//STLW//SI//OC/NF)~~

³⁵⁶ The Office of Intelligence Policy and Review (OIPR) became a part of the Department's National Security Division, which was created in September 2006. As of April 2008, OIPR was renamed the Office of Intelligence. (U)

relies on the independent investigative interest theory in the majority of cases in which it seeks to keep a facility in an application. The attorney also said that from the perspective of the Office of Intelligence the scrubbing process is more manageable today than in the past because the process is better organized, additional personnel have been read into the program, and the FISA Amendments Act of 2008 extended the period of time the government must bring emergency applications to the FISA Court from 72 hours to 7 days. However, from the FBI's perspective, the scrubbing process continues to be burdensome and requires a significant expenditure of time and other resources. ~~(TS//STLW//SI//OC/NF)~~

IV. Impact of Stellar Wind Information on FBI Counterterrorism Efforts ~~(S//NF)~~

This section examines the impact of the information obtained from Stellar Wind on FBI counterterrorism efforts. It first provides statistics concerning the number of tippers from Stellar Wind information – telephony, e-mail, and content – disseminated to FBI field offices through the [REDACTED] process. Next, it describes how FBI field offices generally investigated [REDACTED] tippers and the typical results of the investigations. This section then summarizes two statistical surveys of meta data tippers the FBI conducted in 2006 to assess the value of Stellar Wind to FBI operations, and describes observations about the program's value provided to us by FBI officials and employees in OIG interviews and contained in documents the OIG obtained during the course of this review. Finally, the section examines [REDACTED] FBI international terrorism investigations commonly cited as examples of Stellar Wind's contribution to counterterrorism efforts in the United States. ~~(TS//STLW//SI//OC/NF)~~

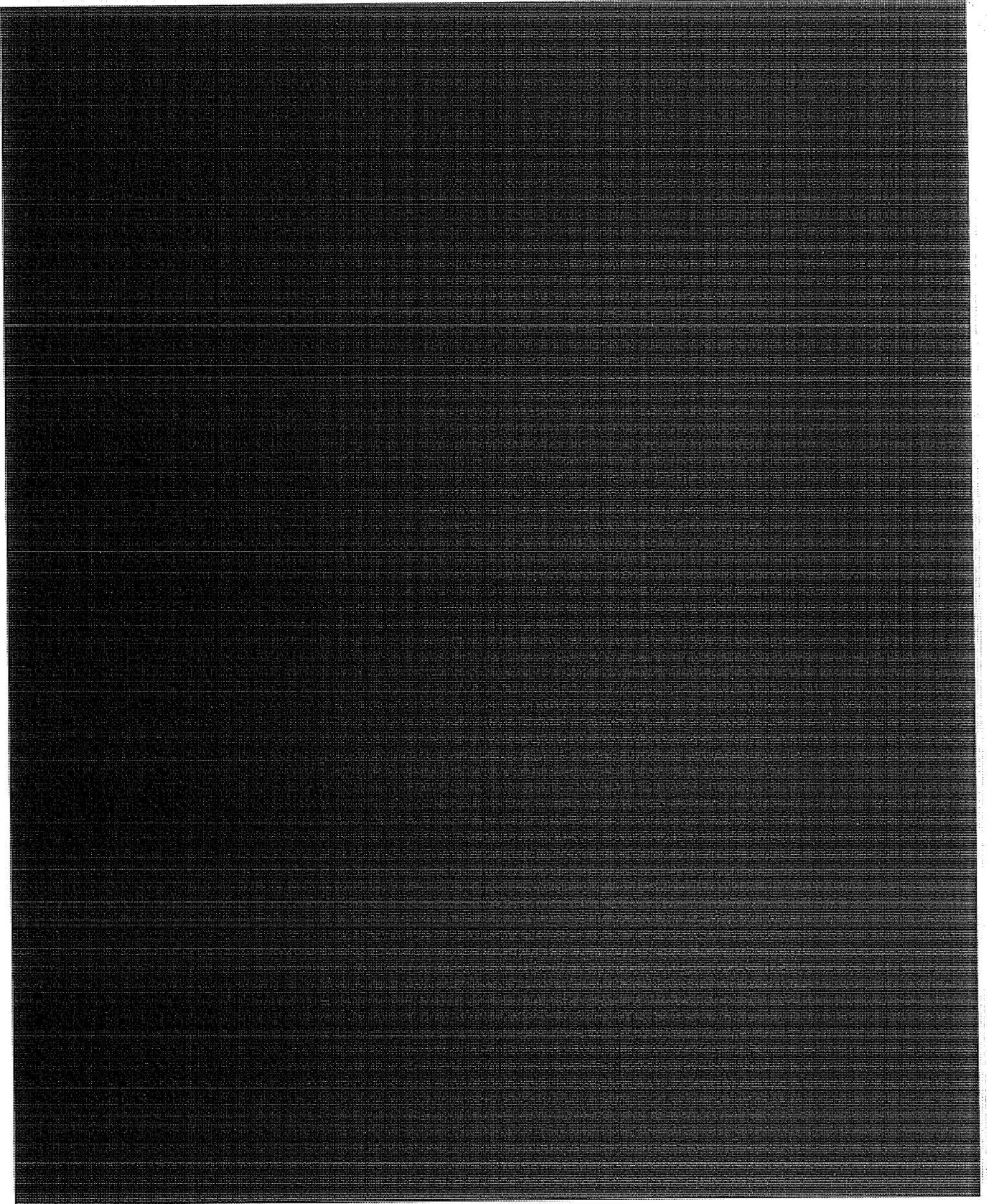
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A. Stellar Wind/[REDACTED] Statistics ~~(TS//STLW//SI//OC/NF)~~

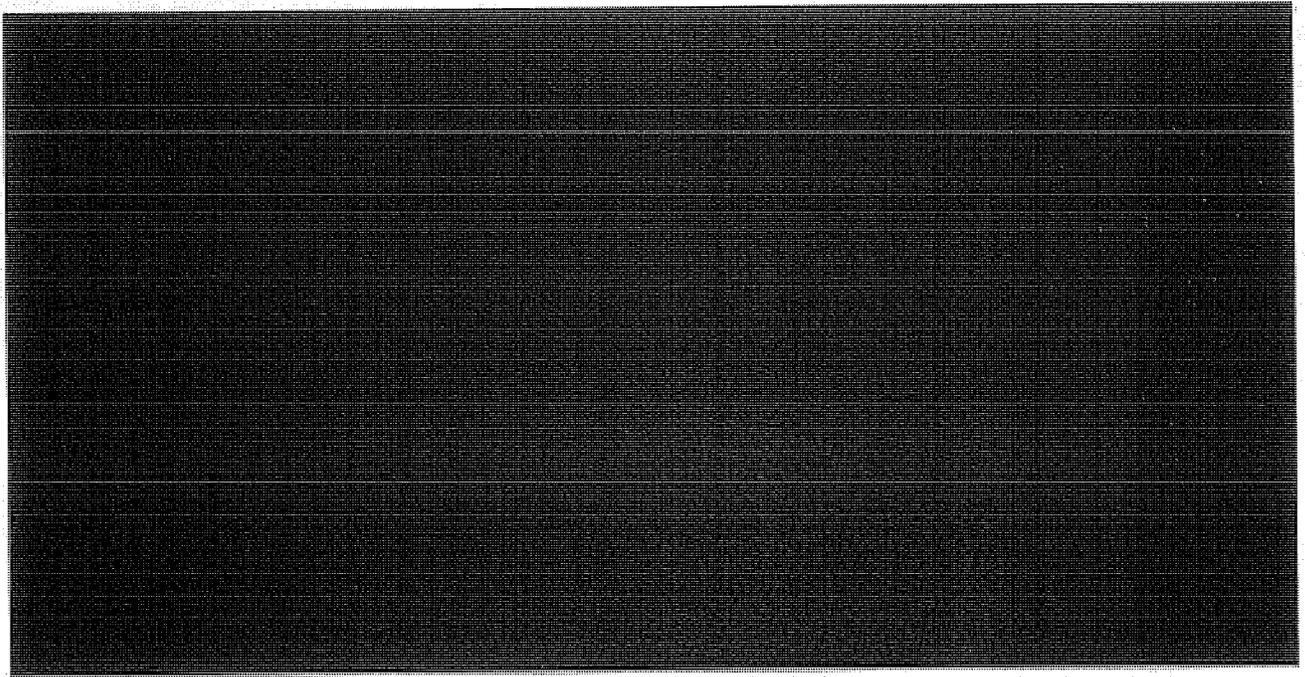
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We reviewed FBI and NSA statistics relating to the Stellar Wind program. According to an NSA document, from October 1, 2001, to February 28, 2006, the NSA provided [REDACTED] telephone numbers and e-mail addresses under the Stellar Wind program. The FBI disseminated most of these as tippers to field offices. Chart 6.1 depicts the distribution of the telephone numbers and e-mail addresses the NSA provided the FBI by type. ~~(TS//STLW//SI//OC/NF)~~

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As described in Chapter Three, the NSA provided ratings, or [REDACTED] for each telephone number and e-mail address to help the FBI prioritize the tippers being disseminated to field offices. The FBI defined the rankings in ECs disseminated to field offices in the following manner:



The FBI included these rankings in [REDACTED] and [REDACTED] ECs until early 2003. At that time, Team 10 began to make independent assessments about tippers' priority for the FBI, set leads on that basis, and generally discontinued including the ratings in [REDACTED] ECs. As discussed in this chapter, Team 10 usually set Action leads for telephone numbers and e-mail addresses the FBI did not already know and Discretionary leads for those the FBI was aware of in connection with closed or ongoing cases. ~~(TS//STLW//SI//OC/NF)~~

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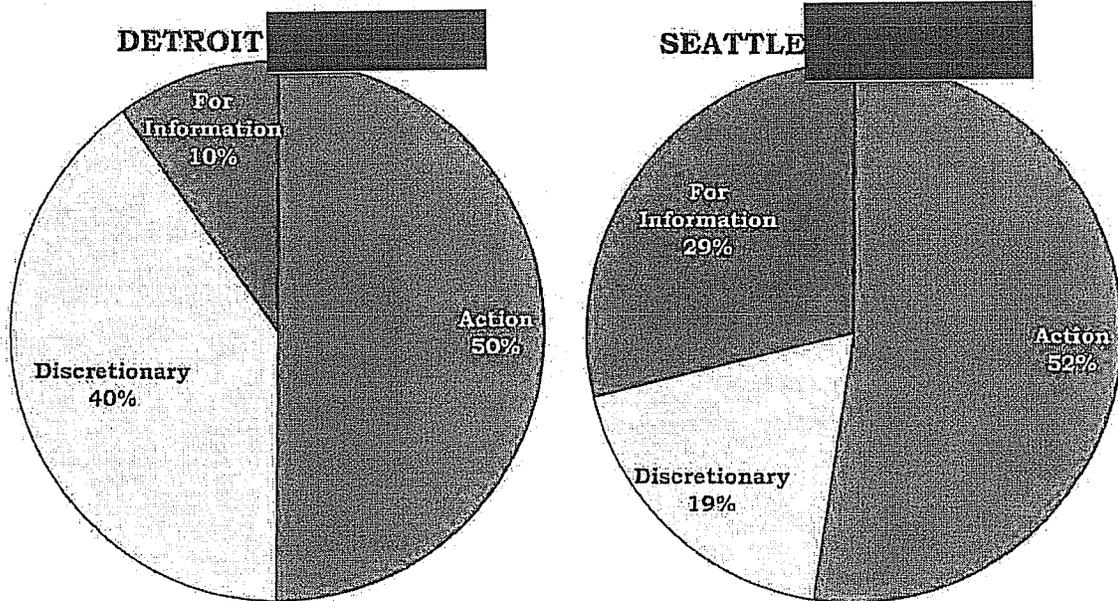
We could not compare the relationship between the NSA's [REDACTED] and the FBI's leads because the FBI did not maintain statistics about the lead type for each tipper that Team 10 disseminated. However, in connection with our visits to the FBI's Detroit and Seattle field offices, we examined the number of individual telephone numbers and e-mail addresses provided to those offices and the type of lead assigned for each. We determined that FBI Headquarters assigned Action leads for approximately 50 percent of the total [REDACTED] leads sent to these offices. As depicted in Chart 6.2, of the [REDACTED] leads sent to the Detroit field office from December 2001 to December 2006, [REDACTED] as Action leads. During this same period, of the [REDACTED] leads sent

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to the Seattle field office, [REDACTED] as Action leads. These figures, taken together with the fact that only 5 percent of the meta data leads the NSA provided the FBI from October 1, 2001, to February 28, 2006, were rated [REDACTED], indicate that FBI field offices were required to investigate a substantial volume of telephone numbers and e-mail addresses that NSA analysts had rated [REDACTED] in terms of their connections to terrorism. (TS//STLW//SI//OC/NF) —

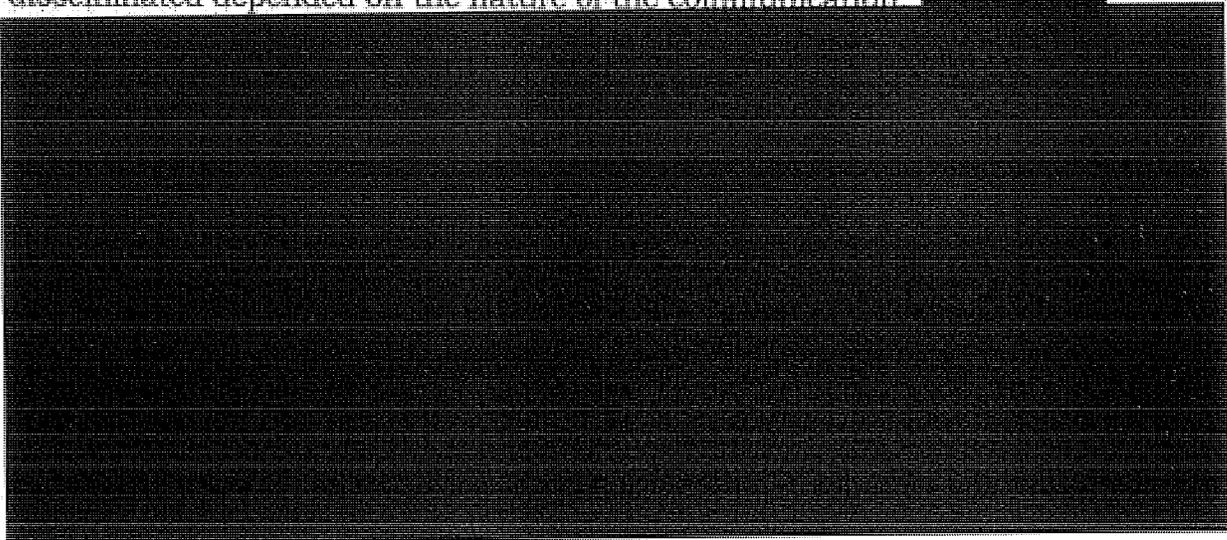
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**CHART 6.2: Percentage of Lead Types for Detroit and Seattle
(January 2001 to May 2007) (S//NF)
(Chart below is SECRET//NOFORN)**



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With respect to leads that provided the content of communications the NSA intercepted under Stellar Wind, the manner in which these leads were disseminated depended on the nature of the communication. [REDACTED]



[REDACTED]³⁵⁷ The FBI did not maintain statistics on the number of [REDACTED] content tipplers disseminated to FBI field offices from Stellar Wind content reports. ~~(TS//STLW//SI//OC/NF)~~

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We also found that [REDACTED] leads were distributed unevenly among FBI field offices. The majority of tipplers were disseminated to large offices with substantial counterterrorism programs, such as New York, Washington, Chicago, and Los Angeles, and to offices whose territory contained significant Middle Eastern populations, such as Detroit. For example, FBI records indicate that of the [REDACTED] leads disseminated in 2005, 50 percent were assigned to 10 field offices. Table 6.1 depicts the distribution of [REDACTED] in 2005 among FBI field offices.³⁵⁸ ~~(TS//STLW//SI//OC/NF)~~

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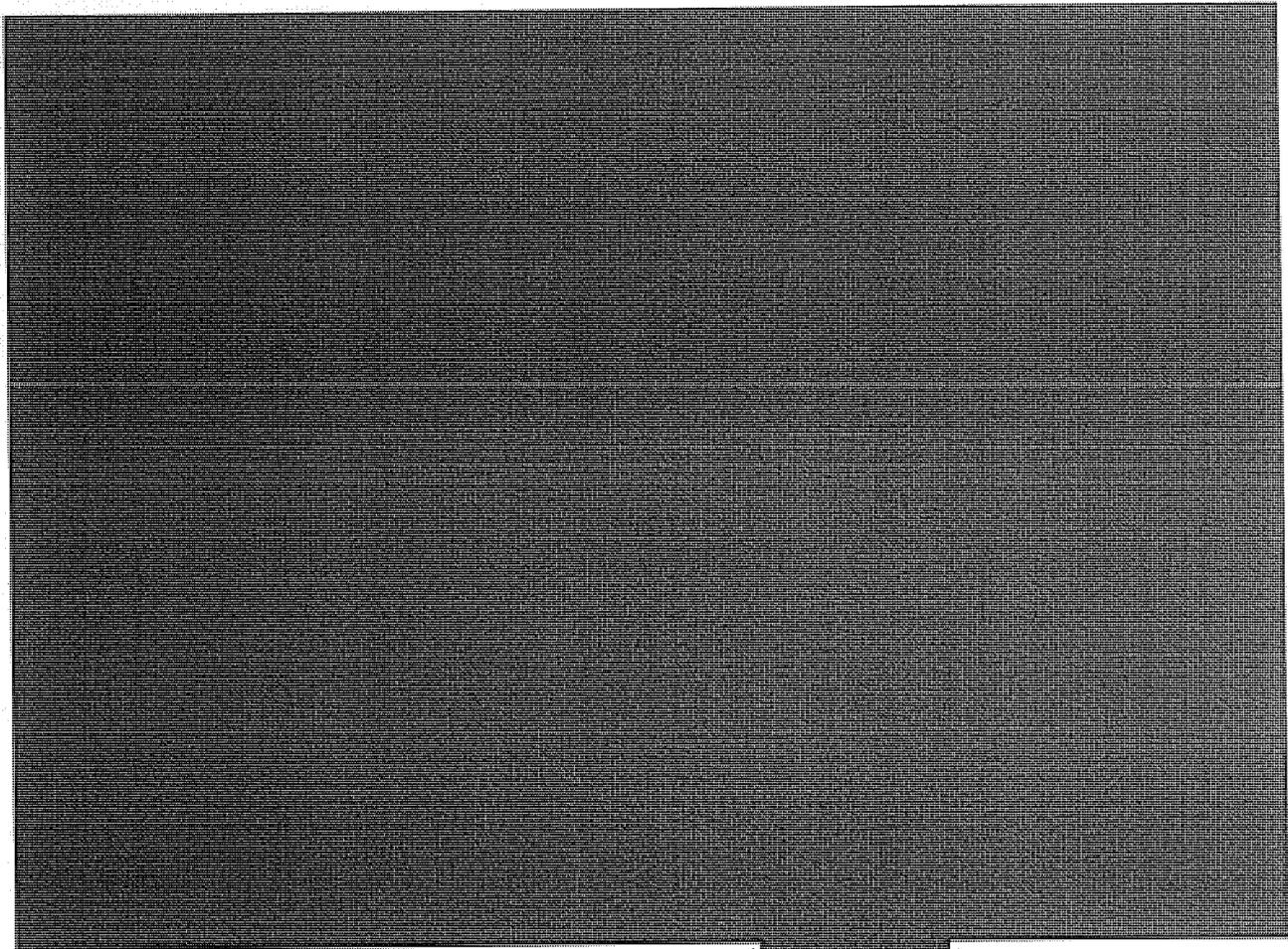
TABLE 6.1: [REDACTED] Leads by Division (2005) (U//FOUO)
(Table below is ~~SECRET//NOFORN~~)

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[REDACTED]

³⁵⁸ A "lead" in these figures does not equate to a single telephone number or e-mail address; each [REDACTED] lead could contain several telephone numbers or e-mail addresses. For example, the Detroit field office received [REDACTED] in 2005 containing [REDACTED] individual tipplers. ~~(TS//STLW//SI//OC/NF)~~

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B. FBI Field Office Investigations of [REDACTED] Tipplers
~~(S//NF)~~

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FBI field offices were not required to investigate every tipper disseminated under [REDACTED].³⁵⁹ Rather, the type of lead that the [REDACTED] EC assigned – Action, Discretionary, or For Information – governed a field office’s response to a tipper.³⁶⁰ [REDACTED] content tipplers, which

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³⁵⁹ As discussed in Chapter Three, the practice under the [REDACTED] in the first several weeks of the Stellar Wind program was to set Action leads for all telephone number tipplers. This practice was modified when the NSA began to designate each tipper in a Stellar Wind report [REDACTED]

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³⁶⁰ An Action lead instructs a field office to take a particular action in response to the EC. An Action lead is “covered” when the field office takes the specified action or conducts appropriate investigation to address the information in the EC. A Discretionary lead allows the field office to make a determination whether the information provided warrants investigative action. A field office that receives a “For Information” lead is not expected to take any specific action in response to the EC, other than possibly route the

(Cont’d.)

provided information derived from communications of telephone numbers and e-mail addresses under surveillance, generally assigned Discretionary or For Information leads. The information in these tippers usually related to individuals already under FBI investigation and was provided to the agents responsible for those cases, [REDACTED] e-mail address tippers generally assigned Discretionary leads to field offices unless the information was particularly urgent. As noted above, content and e-mail address tippers accounted for a comparatively small portion of the [REDACTED] tippers disseminated by Team 10. (TS//STLW//SI//OC/NF)

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The vast majority of FBI investigative activity related to Stellar Wind information involved responding to [REDACTED] telephone number tippers that assigned Action leads. Team 10 generally assigned Action leads for telephone numbers that the FBI did not previously know or that Team 10 otherwise deemed a high priority, such as a number that had a relationship to a major FBI investigation.³⁶¹ From approximately September 2002 (when [REDACTED] was created) to July 2003, Action leads instructed field offices to obtain subscriber information for the telephone numbers within its jurisdiction and to conduct any "logical investigation to determine terrorist connections." However, some agents complained that these Action leads lacked guidance about how to make use of the tippers, particularly given concerns that the [REDACTED] communications provided insufficient predication to open national security investigations. (TS//STLW//SI//OC/NF)

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Two changes in 2003 addressed some of these complaints. First, in July 2003 the CAU assumed responsibility from field offices for issuing NSLs, as we discussed in Section II above. Second, in October 2003 the Attorney General issued new guidelines for FBI national security investigations that created a new category of investigative activity called a "threat assessment."³⁶² [REDACTED]

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communication to the office personnel whose investigations or duties the information concerns. (S//NF)

³⁶¹ Discretionary leads were assigned to telephone numbers that already were known to the FBI, meaning the number or the number's subscriber was referenced in an active FBI investigation. These leads identified the case number of the related investigation and advised receiving field offices to "use the information as deemed appropriate" to bring the information to the attention of the appropriate case agent. (S//NF)

³⁶² As noted earlier, the October 2003 guidelines, entitled Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSI guidelines), replaced the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations. In September 2008, the Attorney General issued Guidelines for Domestic FBI Operations that replaced the October 2003 NSI guidelines with respect to domestic operations. The September 2008 guidelines use the term "assessment" instead of "threat assessment." (U)

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[REDACTED] Thus, beginning in October 2003, Action leads assigned by [REDACTED] telephone number tipplers instructed field offices to conduct threat assessments.
~~(TS//STLW//SI//OC/NF)~~

During our review, we visited the Detroit and Seattle field offices to review their handling of [REDACTED] leads. In addition, we interviewed several supervisory special agents at FBI Headquarters who had experience handling the leads in their respective field offices before being read into the program. In general, these agents' and analysts' experience with [REDACTED] leads was unremarkable. A threat assessment conducted by these agents and analysts typically involved querying several FBI, public, and commercial databases for any information about the tipped telephone number, and requesting that various state and local government entities conduct similar queries. Sometimes these queries identified the subscriber to the telephone number before the CAU obtained the information with an NSL. In other cases, the threat assessments continued after the field office received the NSL results.³⁶³ ~~(TS//STLW//SI//OC/NF)~~

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Examples of the databases utilized in their threat assessments included FBI systems such as the Automated Case Management System and [REDACTED] other government databases, such as the [REDACTED] state [REDACTED] databases, and local police department databases; and commercial databases, such as [REDACTED]. The results of their checks of these databases could sometimes be extensive and include personal information not only about the subscriber to the tipped telephone number, but also about individuals residing in the subscriber's residence or other acquaintances. In other cases, checks were negative or revealed little information about the number or the subscriber. ~~(S//NF)~~

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³⁶³ We were told that it sometimes took [REDACTED] for field offices to receive subscriber information from the CAU. A Team 10 supervisor said field offices frequently contacted the CAU about the status of outstanding NSLs because the usefulness of threat assessments conducted on a telephone number were limited without the identity of the subscriber. ~~(S//NF)~~

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The agents and analysts said they reviewed the results of these database checks to determine whether additional investigative steps under the threat assessment were warranted or whether there was predication to open a preliminary inquiry. None of the agents we interviewed could recall initiating any investigations based on a threat assessment of an [REDACTED] tipper.³⁶⁴ They said they frequently closed [REDACTED] leads after conducting a threat assessment interview of the subscriber and determining that there was no nexus to terrorism or threat to national security. Alternatively, the leads were closed based solely on the results of database checks. ~~(TS//SI//NF)~~

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Under the Attorney General's October 2003 national security investigations guidelines, [REDACTED]

[REDACTED] Under [REDACTED] agents were not permitted to explain to subscribers how they obtained the information that caused them to seek an interview. Instead, agents simply asked subscribers about their contacts in certain countries and with specific telephone numbers. Agents told us that subscribers generally consented to these interviews and were cooperative and forthcoming. In a few cases, subscribers refused the request or sought the advice of counsel.³⁶⁶ ~~(TS//STLW//SI//OC/NF)~~

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³⁶⁴ Prior to the CAU's July 2003 decision to assume responsibility for issuing NSLs, agents in FBI field offices often opened investigations in order to issue NSLs to obtain subscriber information. These cases usually were closed after the agents conducted investigations and determined the domestic telephone number tipper did not have a nexus to terrorism. ~~(S//NF)~~

³⁶⁵ On September 29, 2008, the Attorney General issued new guidelines for domestic FBI operations, which includes national security investigations. These guidelines [REDACTED] *Compare* Attorney General's Guidelines for Domestic FBI Operations, Section II.A.4.f. (September 29, 2008), *with* Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection, Section II.A.6. (October 31, 2003). ~~(S//NF)~~

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³⁶⁶ Several of the threat assessment interviews that agents described to us and that we reviewed in FBI documents provided examples of how some domestic telephone numbers appeared on their face to be in contact with an individual involved in terrorism. In the Seattle field office, several interviews revealed that the foreign telephone calls placed to domestic numbers were made using a pre-paid telephone service from local stores because the callers, often relatives of the domestic contacts, did not have telephone service at their residences. Thus, while the intelligence indicating that an individual involved in terrorism used the foreign telephone number might have been accurate, the number also was used by individuals about whom there was no reason to believe were involved in terrorism. ~~(TS//STLW//SI//OC/NF)~~

FBI field offices were required to report the results of the threat assessments to the CAU. In most of the ECs we reviewed, the field offices reported all of the information that was located about the telephone numbers, including the details of any subscriber interviews, and then stated that the office determined the tipped telephone number did not have a nexus to terrorism and considered the lead closed. Much less frequently, field offices reported that a preliminary investigation was opened to conduct additional investigation.³⁶⁷ Regardless of whether any links to international terrorism were identified, the results of any threat assessments and the information that was collected about subscribers generally were reported in communications to FBI Headquarters and uploaded into FBI databases.

~~(S//NF)~~

C. FBI Statistical Surveys of [REDACTED] Meta Data Tippers
~~(TS//STLW//SI//OC/NF)~~

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The FBI made several attempts, both informal and more formal, to assess the value of Stellar Wind to FBI counterterrorism efforts. The first was an informal attempt by the FBI's OGC. FBI General Counsel Valerie Caproni told us that in early 2004 she spoke with the CAU Unit Chief and the Section Chief for the Communications Exploitation Section about trying to assess the value of Stellar Wind information. According to Caproni, the two managers stated that based on anecdotal and informal feedback from FBI field offices, the telephony meta data tippers were the most valuable intelligence from the program for agents working on counterterrorism matters. However, Caproni told us it was difficult to conduct any meaningful assessment of the program's value in early 2004 because FBI field offices at that time were not required to report to FBI Headquarters the investigative results of the Stellar Wind leads disseminated under [REDACTED]. [REDACTED] FBI Headquarters did not make such reporting mandatory until October 2004. As a result, Caproni's discussions with the FBI managers did not result in any written assessment of the program.

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

³⁶⁷ The CAU advised field offices that investigative feedback about [REDACTED] tippers was important because it informed the "reliable source's" (the NSA's) assessment of whether to continue analyzing the "foreign entity" that caused the tippers to be disseminated. An NSA official told us that such information was also important to improving the NSA's analytical process, but he said it was sometimes difficult to obtain such feedback. A CAU Unit Chief told us that the NSA expressed particular concern about insufficient feedback from the FBI regarding investigative results pertaining to the tippers' nexus to terrorism. He said this was a difficult situation in that [REDACTED] professed to be sending out high value information about known links to terrorism," and it was "uncomfortable" to receive little feedback from field offices other than, "You're sending us garbage." Members of Team 10 told us that efforts to improve field office feedback over time had mixed results. ~~(TS//STLW//SI//OC/NF)~~

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The FBI's second informal assessment of the value of Stellar Wind came after the December 2005 New York Times articles that publicly disclosed the content collection aspect of the Stellar Wind program. Caproni said that in preparation for Director Mueller's testimony at congressional hearings in 2006 on the issue, she attempted to evaluate the Stellar Wind program. Caproni stated that because NSA Director Hayden asserted publicly that the program was valuable, she wanted Mueller's testimony to identify, if possible, any investigations that illustrated Stellar Wind's positive contribution to the FBI's counterterrorism efforts. Caproni stated that this effort was complicated by the fact that Mueller's testimony would be limited only to the aspect of the program disclosed in the New York Times article and subsequently confirmed by the President – the content collection basket. ~~(TS//STLW//SI//OC/NF)~~

As discussed above, Caproni said that FBI field offices did not find this aspect of the program to be as useful as the telephony meta data, primarily because [REDACTED] [REDACTED] was comparatively small and the FBI had FISA coverage on many of these already. Caproni told us that ultimately she was able to identify "a couple" of content tippers that contributed to FBI investigations, but she commented that there were not many. ~~(TS//STLW//SI//OC/NF)~~

The FBI subsequently conducted two more efforts to study the Stellar Wind program's impact on FBI operations, both in early 2006. The first study sampled the [REDACTED] tippers the FBI had received under Stellar Wind from 2001 through 2005. The second study reviewed [REDACTED] [REDACTED] e-mail tippers the NSA provided the FBI from August 2004 through January 2006. In both of these studies, the FBI sought to determine what percentage of tippers resulted in "significant contribution[s] to the identification of terrorist subjects or activity on U.S. soil." We describe in the next sections the findings of these two studies. ~~(TS//STLW//SI//OC/NF)~~

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1. **Early 2006 Survey [REDACTED] Telephony and E-Mail Meta Data Tippers** ~~(TS//STLW//SI//OC/NF)~~

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Following the December 2005 New York Times article publicly disclosing the content collection aspect of Stellar Wind, additional members of the Senate and House Intelligence Committees were read into the program. During this time, the NSA provided to cleared members of Congress substantive briefings about Stellar Wind, and the FBI was asked to testify about its participation in the program. In preparation for these briefings and testimony, the FBI sought to quantify the value of Stellar Wind intelligence for FBI counterterrorism operations. The CAU conducted a statistical study for this purpose, and in May 2006 the FBI provided a copy