Wray and Rowan were the first Department attorneys with Criminal Division-level responsibility for terrorism prosecutions to be read into the program. ~~(TS//STLW//SI//OC/NF)~~

Wray told the OIG that after his and Rowan's read-in, they "were kind of left on our own." He said that no one directed him or Rowan to continue studying the Rule 16 issues or the government's *Brady* obligations in connection with international terrorism prosecutions, nor did anyone tell them to develop any judgments or opinions on the subject. (U)

Wray told us that at some point after his read-in he may have read Yoo's [redacted] memorandum on the Department's discovery obligations in [redacted] and he instructed Rowan to review the memorandum. Rowan told us that he was familiar with Yoo's memorandum, but stated that he could not recall whether the purpose of Yoo's memorandum was to lay out in general the pertinent legal issues or to document how [redacted] in particular was to be handled. Rowan told us that he did not recall having any problems with the conclusions Yoo reached. ~~(TS//STLW//SI//OC/NF)~~

A. The "Informal Process" for Treating Discovery Issues in International Terrorism Cases (U)

During his OIG interview, Rowan described the processes at the Department prior to the December 2005 disclosure of aspects of the Stellar Wind program in The New York Times to address discovery obligations with respect to Stellar Wind-derived information. He said that the NSA was generally aware of the Justice Department's international terrorism criminal cases, at least in part due to NSA's ongoing contacts with Patrick Philbin and others in the Department. According to Rowan, the NSA's general awareness of the Department's international terrorism docket amounted to an "informal process" for spotting cases that may present discovery issues. Rowan stated that prosecutors in U.S. Attorney's Offices typically would request the NSA to perform "prudential searches" of its databases for any relevant information concerning their prosecutions, including for discovery purposes, although this did not happen in every international terrorism case. Rowan stated that if the NSA located any responsive but classified information, it would be expected to notify senior Justice Department officials with the requisite clearances about the information. Rowan said he was confident that if *Brady* information were known to the NSA, it would be brought to the attention of the Department and steps would have been taken to dismiss the case or otherwise ensure the program was not disclosed. ~~(TS//STLW//SI//OC/NF)~~

In addition to these routine communications between Department prosecutors and the NSA in criminal prosecutions, Rowan described other

measures that were in place to keep Stellar Wind-derived information out of the criminal prosecution process. He stated that the FBI had "walled off" any evidence it collected from inclusion in criminal cases by tipping out Stellar Wind-derived information under [redacted] with a caveat that the information in the tipper was "for lead purposes only." Rowan noted that OIPR also had in place a scrubbing process to delete program-derived information from FISA applications. Rowan expressed confidence that these mechanisms ensured that no program information was used in international terrorism prosecutions.[416] Finally, Rowan stated that the FBI is "very quick to get FISAs up," thereby minimizing the likelihood that the NSA's Stellar Wind database would be the sole repository of *Brady* material. ~~(TS//STLW//SI//OC/NF)~~

B. [redacted] Memorandum Analyzing Discovery Issues Raised by the Stellar Wind Program ~~(TS//STLW//SI//OC/NF)~~

At the direction of Assistant Attorney General Wray, Rowan memorialized his research regarding these discovery issues in a memorandum entitled [redacted] Rowan said he worked on the memorandum largely alone, consulting occasionally with Wray. Rowan said it was very difficult to work on the matter because of the secrecy surrounding the program and the other demands of his job.[417] ~~(TS//STLW//SI//OC/NF)~~

In his [redacted] memorandum, [redacted]

[416] As discussed in Chapter Six, the caveats were intended to exclude at the outset any Stellar Wind-derived information from FISA applications and other criminal pleadings. The scrubbing process acts as a second check against including this information in FISA applications. However, neither the caveats nor the scrubbing process relieved the government of its obligations under *Brady* to disclose evidence in the government's possession favorable to the defendant and material to either guilt or punishment. ~~(TS//STLW//SI//OC/NF)~~

[417] The memorandum noted, "Because there were no additional attorneys within the Criminal Division who were read into the program (and very few in the Department generally), we have been unable to assign work to others or to fully consult with others within the Division." ~~(TS//SI//NF)~~

[redacted]

[redacted]

Rowan's memorandum also referred to guidance in the United States Attorney's Manual (USAM). For cases in which the Intelligence Community had no active involvement in the criminal investigation, the USAM stated that there are two circumstances in which the prosecutor must conduct a "suitable search" of Intelligence Community files: (1) where the prosecutor has "direct or reliable knowledge" that the Intelligence Community

[redacted]

possesses potential *Brady* or other discovery material; or, (2) in the absence of such knowledge, where "there nonetheless exists any reliable indication suggesting" that the Intelligence Community possesses such material. USAM, Criminal Resources Manual § 2052 (2002). The USAM stated that, as a general rule, a prosecutor should not seek access to Intelligence Community files unless there is an affirmative obligation to do so. However, it noted that certain types of cases, including terrorism prosecutions, fall outside this general rule. In such cases, the USAM advised that the prosecutor should conduct a "prudential search." Id. ~~(TS//STLW//SI//OC/NF)~~

Rowan wrote that the practice in several sections within the Criminal Division was to "generally go beyond both the legal obligations outlined [in his memorandum] and the general rule outlined in the USAM, initiating searches out of prudence, rather than a legal obligation." For instance, Rowan reported that the practice of the Criminal Division's Counterespionage Section (CES) was to search Intelligence Community files in almost every case, even in instances in which the Intelligence Community had no involvement in the investigation or prosecution [redacted].[420] ~~(TS//STLW//SI//OC/NF)~~

[redacted][421] In cases involving the NSA, the typical practice

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[420] The OIG interviewed John Dion, the Chief of CES, which became part of the National Security Division in 2006. [redacted] Dion stated that such searches are conducted in cases in which there is likely to be intelligence collection concerning the defendant as "suggested by the facts of the matter." He added that the searches were requested for a variety of reasons, including for purposes of meeting discovery obligations. Dion said that searches also were requested to determine whether the defendant has a "relationship" with an intelligence agency. He noted that CES does not request prudential searches as a matter of course to avoid making spurious requests. ~~(S//NF)~~

[421] [redacted] Dion said CES was a proponent of the position that line prosecutors with whom CES co-prosecutes cases should have the same knowledge as CES concerning the "national security equities" involved in each case. Dion said this arrangement also allows for the AUSA, who is often the prosecutor most familiar with the case and the jurisdictional practices, to review any Intelligence Community material for Rule 16 and *Brady* purposes. Dion acknowledged the limitations to this arrangement concerning strictly compartmented programs such as Stellar Wind, where the NSA understandably would be reluctant to read in line prosecutors for the limited purpose of screening defense discovery requests. ~~(TS//STLW//SI//OC/NF)~~

was for the CES attorney to use the provisions of CIPA to prevent disclosure of sensitive material. Rowan noted that other sections within the Criminal Division also relied on CIPA to protect Intelligence Community files found during searches. ~~(TS//SI//OC/NF)~~

[redacted]

[redacted]

Thus, although Rowan's memorandum did not contain a proposal for handling discovery requests in cases involving Stellar Wind, it identified key legal issues that would have to be addressed as a part of any such proposal.

[redacted]

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

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[422] When Rowan became principally responsible for coordinating the Department's responses to defense discovery requests as a Deputy Assistant Attorney General in the (Cont'd.)

C. Office of Legal Counsel and Discovery Issue (U)

Shortly before Rowan finished his memorandum in [redacted] OLC Principal Deputy Assistant Attorney General Steve Bradbury became the acting head of OLC. Bradbury told us that he recalled having some discussion with Rowan about how discovery matters should be handled in connection with the Stellar Wind program. Bradbury said that John Eisenberg, later a Deputy in OLC, also may have discussed the matter with Rowan. Bradbury stated that he did not believe that OLC followed up on Rowan's request that it continue researching these issues. ~~(TS//STLW//SI//OC/NF)~~

Eisenberg told us that he discussed the Rule 16 issue with Rowan at some point, but did not recall whether they discussed the *Brady* issue. He recalled discussing Yoo's [redacted] memorandum with Rowan and said he believes the Justice Department took the position that the Yoo memorandum was correct, at least with respect to Yoo's legal analysis in [redacted] ~~(TS//STLW//SI//OC/NF)~~

When we showed Eisenberg a copy of Rowan's [redacted] memorandum, Eisenberg stated that he had not previously seen it. Eisenberg told us that OLC would not typically be responsible for addressing the discovery issues presented in Rowan's memorandum and that he was not aware of any OLC opinion on the subject other than Yoo's memorandum. Eisenberg also said he was not aware of any formal procedures for handling Rule 16 disclosure requests or the government's affirmative *Brady* obligations other than the *ex parte* in camera motions practice pursued by the National Security Division, discussed below. ~~(TS//STLW//SI//OC/NF)~~

CES Chief Dion agreed that OLC would not be the appropriate entity to review discovery procedures in the context of Stellar Wind, in part because OLC attorneys generally do not have criminal litigation expertise. Dion suggested that if the Department were to develop procedures for handling discovery of Intelligence Community files, it should be done by the Department's National Security Division in coordination with United States Attorneys' Offices, and it should be binding only on those two entities. Rowan, while generally agreeing with Dion, told the OIG that he believed the OLC appropriately could have analyzed the legal issue of what impact a

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National Security Division in 2006. [redacted] The results of these searches were produced to the courts *ex parte*, in camera, pursuant to CIPA. ~~(TS//STLW//SI//OC/NF)~~

guilty plea would have on the government's *Brady* obligations. ~~(TS//STLW//SI//OC/NF)~~

[redacted]

IV. Use of the Classified Information Procedures Act (CIPA) to Respond to Discovery Requests (U)

After publication of The New York Times articles in December 2005, the Justice Department received numerous discovery requests in connection with international terrorism prosecutions throughout the country. After these articles, additional officials in the Criminal Division were read into the Stellar Wind program, including the new Assistant Attorney General Alice Fisher and other senior officials, both to assist with the Criminal Division's investigation into the leak of information to The New York Times and to handle the discovery requests following the public confirmation of the program by the President and other Administration officials in December 2005.[423] After the National Security Division was created in September 2006, it assumed much of the responsibility for handling the responses to discovery requests. ~~(TS//STLW//SI//OC/NF)~~

Typically, the defense motions sought to compel the government to produce information concerning a defendant that had been derived from the "Terrorist Surveillance Program," the term sometimes used by the government to refer to what the President confirmed after publication of The New York Times articles. The government responded to the discovery requests by filing *ex parte* in camera responses requesting to "delete items" from material to be produced in discovery pursuant to CIPA. ~~(S//NF)~~

In the following sections we provide a brief overview of CIPA and its use in international terrorism cases potentially involving Stellar Wind-derived intelligence. ~~(TS//STLW//SI//OC/NF)~~

[423] [redacted]

A. Overview of CIPA (U)

The Classified Information Procedures Act, 18 U.S.C. App. 3, was enacted in 1980 to provide procedures for protecting classified information in federal criminal prosecutions. When a party to a criminal proceeding notifies the court that classified information will be used in the course of the proceeding, CIPA requires the court to initiate procedures to "determine the use, relevance, or admissibility of the classified information that would otherwise be made during the trial or pretrial proceeding." 18 U.S.C. App. 3 § 6(a). Where the government holds the classified information, it may bring the matter before the court *ex parte*, but it also must provide notice to the defense that classified information is at issue. Id. at § 6(b)(1). (U)

Protective procedures generally are established through a CIPA hearing with both parties present. The hearing may be conducted in camera if the government certifies that an in camera hearing is necessary to protect the classified information. Id. at § 6(a). Typically, the government seeks an order to protect against the disclosure of any classified information to the defense. The government may also seek to withhold production of the classified information in one of three ways: (1) deletion of the classified items from the material disclosed to the defendant, (2) summarization of the classified information, or (3) admission of certain facts that the classified information would tend to prove. Id. at § 4. Based on the OIG's review of CIPA filings related to the Stellar Wind program, the government has only used option 1 (deleting classified items from material to be disclosed to the defendant) in response to defense motions for Stellar Wind information. ~~(TS//STLW//SI//OC/NF)~~

To prevent the disclosure of classified information, the government may make an *ex parte* showing to the court. To do so the government must submit "an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information." Id. at § 6(c)(2). If the court decides that the defendant's right to access to the evidence outweighs the government's national security interests, the government can choose to dismiss the indictment rather than make a disclosure. *United States v. Moussaoui*, 382 F.3d 453, 466 n. 18, 474-76 (4th Cir. 2004). (U)

B. Use of CIPA in International Terrorism Prosecutions Alleged to Involve Stellar Wind-Derived Information ~~(TS//STLW//SI//OC/NF)~~

We reviewed the CIPA pleadings files maintained in the National Security Division relating to the Stellar Wind program. In almost every instance, the CIPA litigation was handled by the National Security Division

without the involvement of the line prosecutors in the U.S. Attorney's Offices who handled the underlying prosecutions but who were not read into the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

[redacted] Rowan, who became the National Security Division Acting Assistant Attorney General in April 2008 and was confirmed as the Assistant Attorney General in September 2008, told us that [redacted] ~~(TS//STLW//SI//OC/NF)~~

The scope and nature of the defense motions initiating the CIPA litigation varied, depending on the procedural posture of the case. For instance, some defense motions sought to compel discovery of NSA surveillance information, while others sought to suppress all government evidence and, in the alternative, have the government's case dismissed on the theory that illegal electronic surveillance caused the government to initiate its criminal investigation in the first instance. [redacted] ~~(TS//STLW//SI//OC/NF)~~

Regardless of the varying procedural posture of the cases and the scope and nature of the defense motions, the government responses we examined were fairly uniform, consisting of a motion to delete items from discovery, a legal memorandum in support of the motion, declarations from senior FBI and NSA officials, and a proposed order. ~~(TS//STLW//SI//OC/NF)~~

[redacted] ~~(TS//STLW//SI//OC/NF)~~

The government's CIPA submissions asserted that the information at issue in the discovery litigation was classified and subject to the national security privilege as codified in CIPA. They generally described the types of information its searches of intelligence databases (including Stellar Wind) might reveal. [redacted]

[redacted]

424 [redacted]

[redacted][425]

The government's responses we reviewed uniformly stated that information in the NSA's intelligence reports had not been or would not be used as evidence, and that there was no causal connection between the information in the reports and any evidence used or to be used at trial, or was too attenuated from the evidence to be discoverable. The government argued that because the facts concerning the NSA's reporting would not aid the defense, the court need not explore the sources and methods used to acquire the information. The submissions also argued that the information collected by the NSA was not included in the government's FISA application, and therefore was too attenuated from the trial evidence to merit a review of the means by which the intelligence information was gathered. The government asserted that the "causal connection" between discovery of the derivative evidence and the alleged illegal search "may have become so attenuated as to dissipate the taint."[426] It is important to note that the government did not argue in the CIPA responses we reviewed that [redacted] (~~TS//STLW//SI//OC/NF~~)

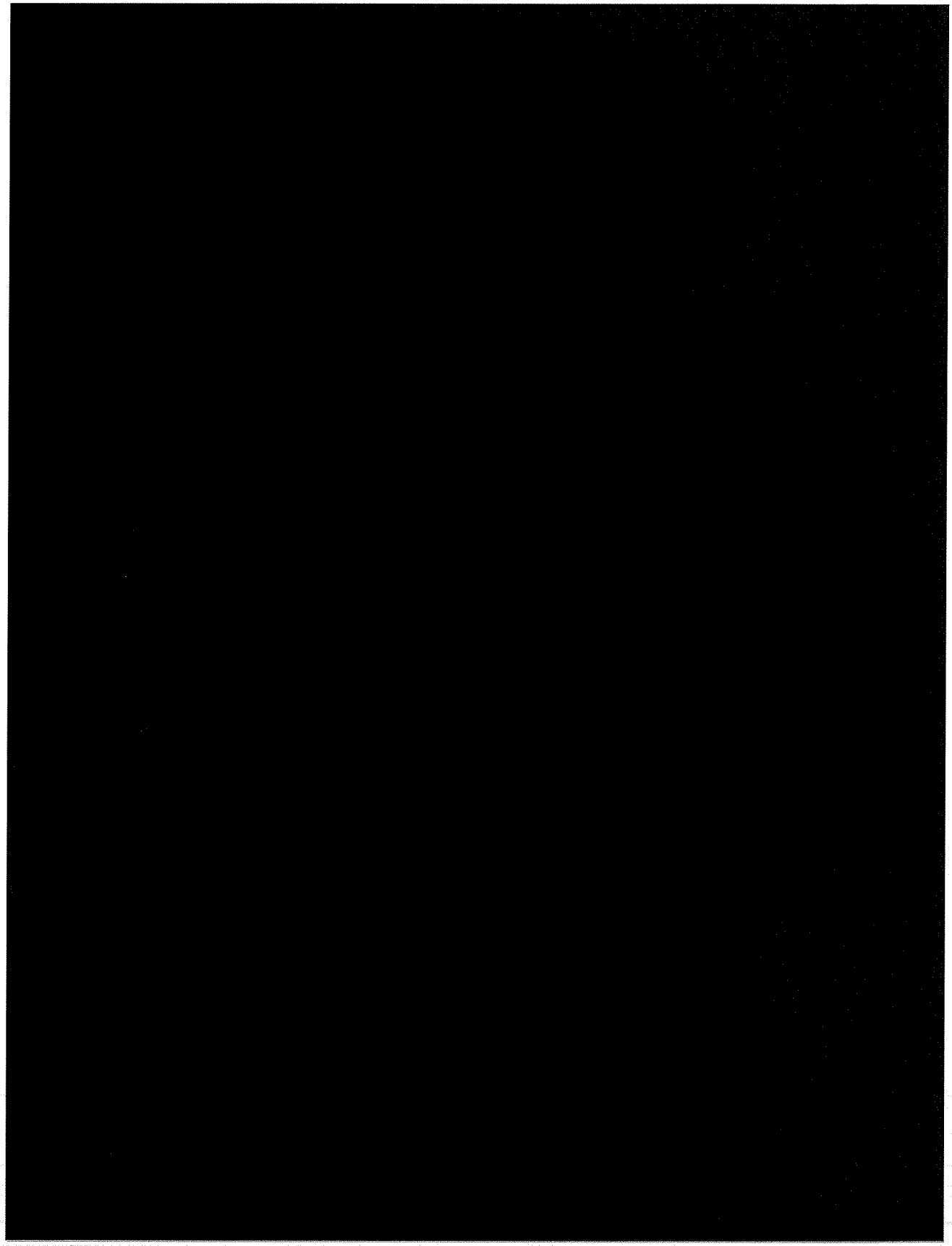
C. Government Arguments in Specific Cases (U)

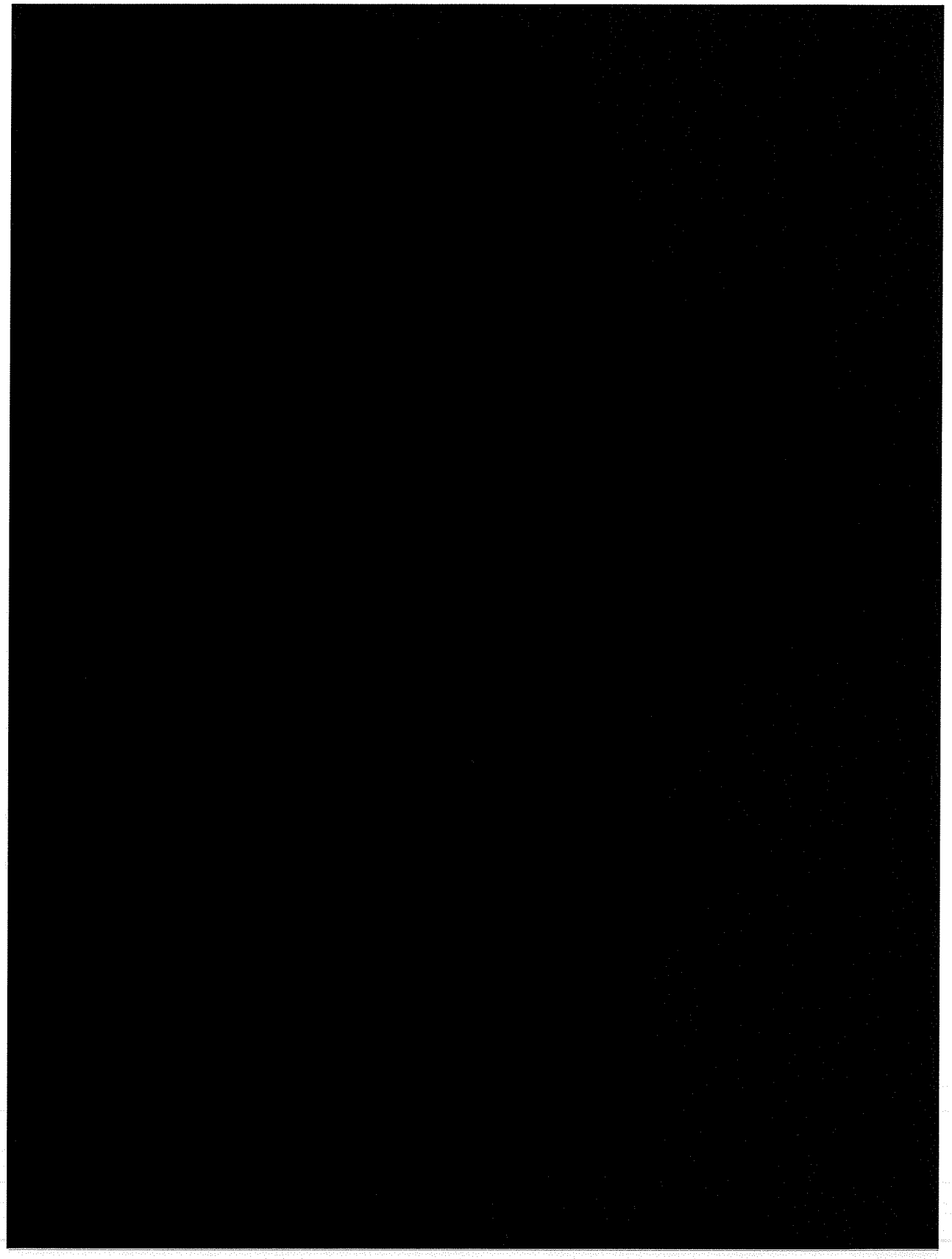
In this section we describe [redacted] cases that illustrate the arguments made by the government in CIPA litigation with respect to defendant's requests for discovery of Stellar Wind-derived information. ~~(TS//STLW//SI//OC/NF)~~

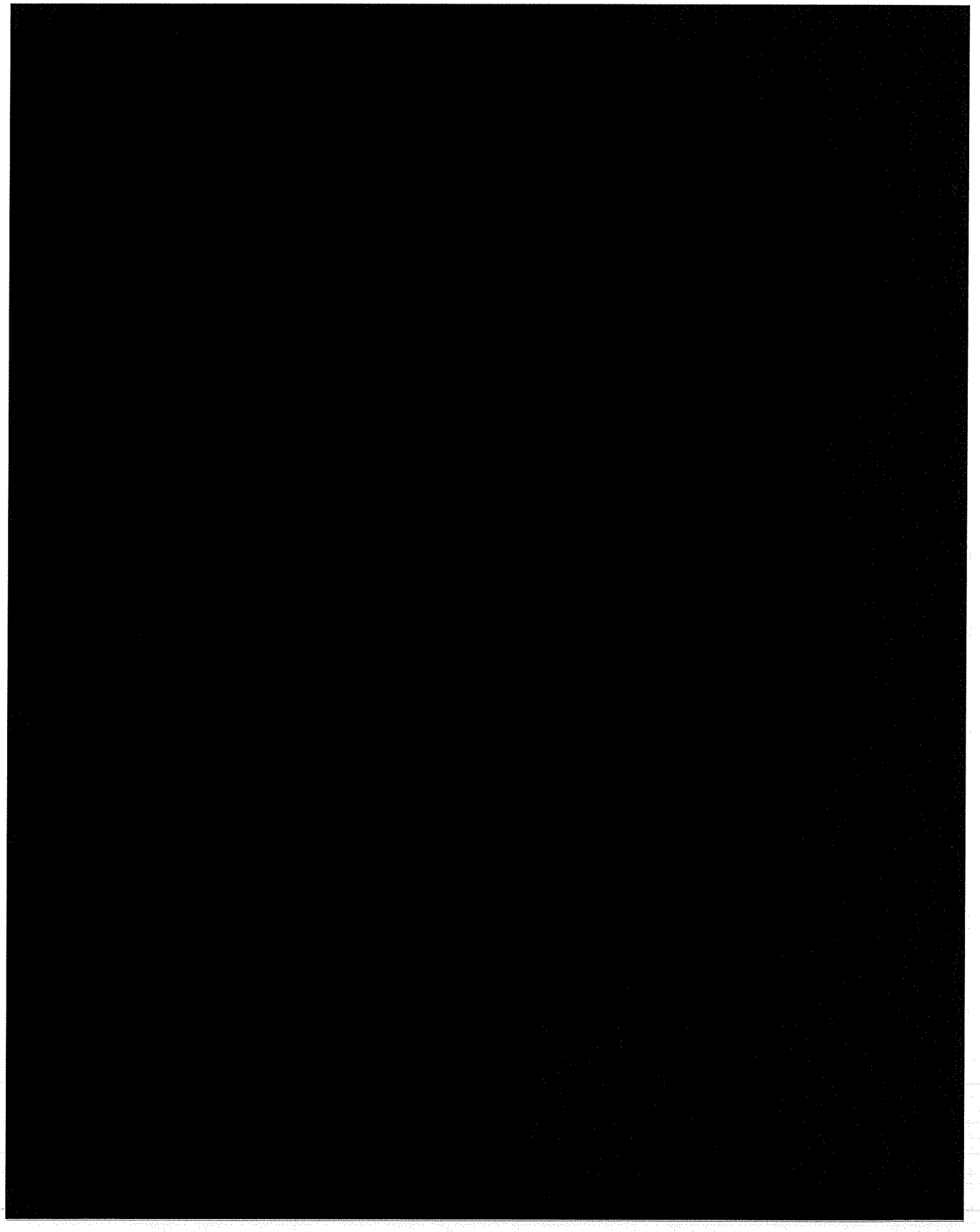
[redacted]

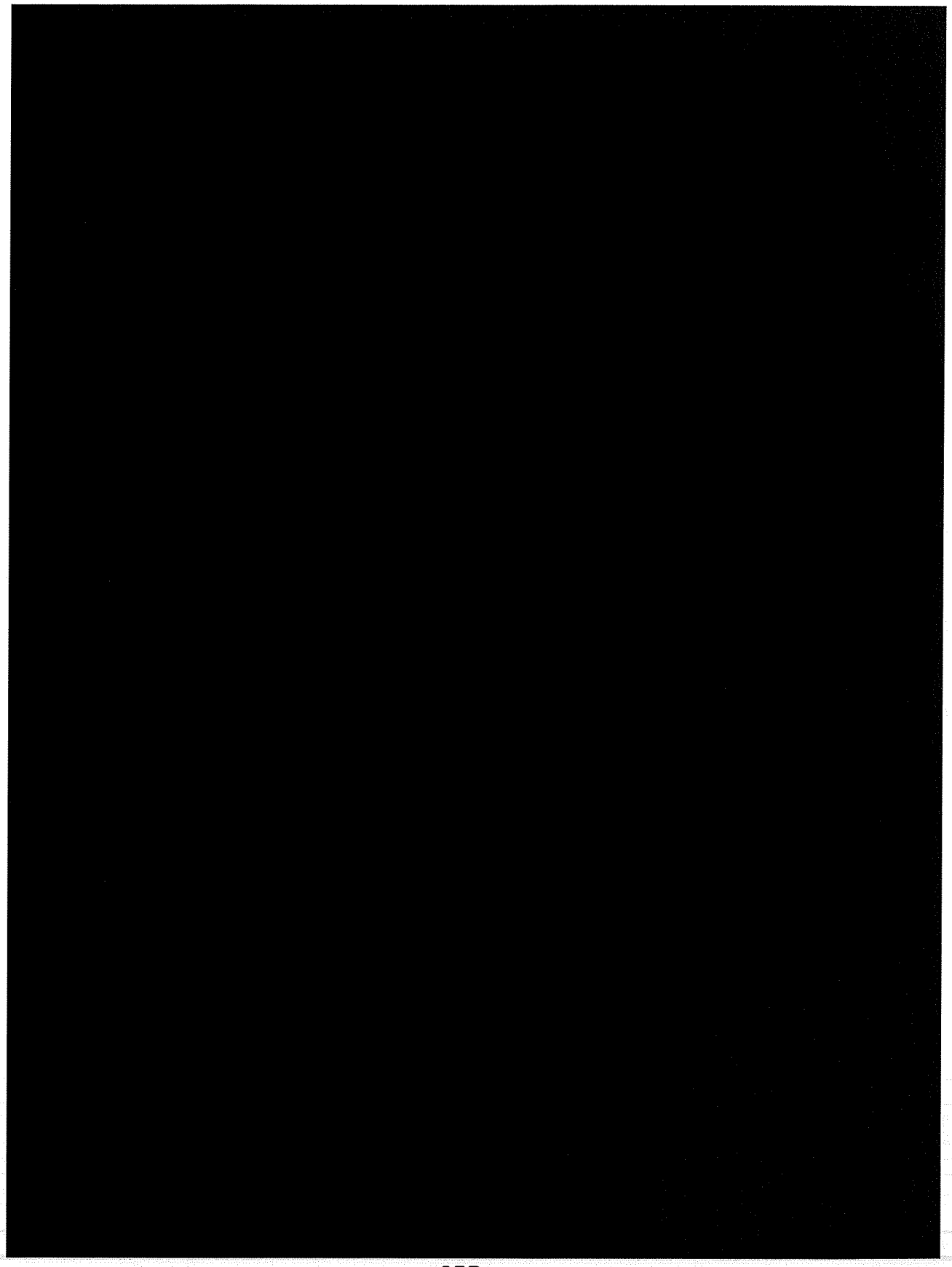
[425] In several instances, the Stellar Wind information was disseminated within the FBI after the FBI already had obtained a FISA order to conduct electronic surveillance of the defendant, thus allowing the government to argue that the NSA reporting played no role in its acquisition of the evidence used or planned to be used against the defendant. ~~(TS//STLW//SI//OC/NF)~~

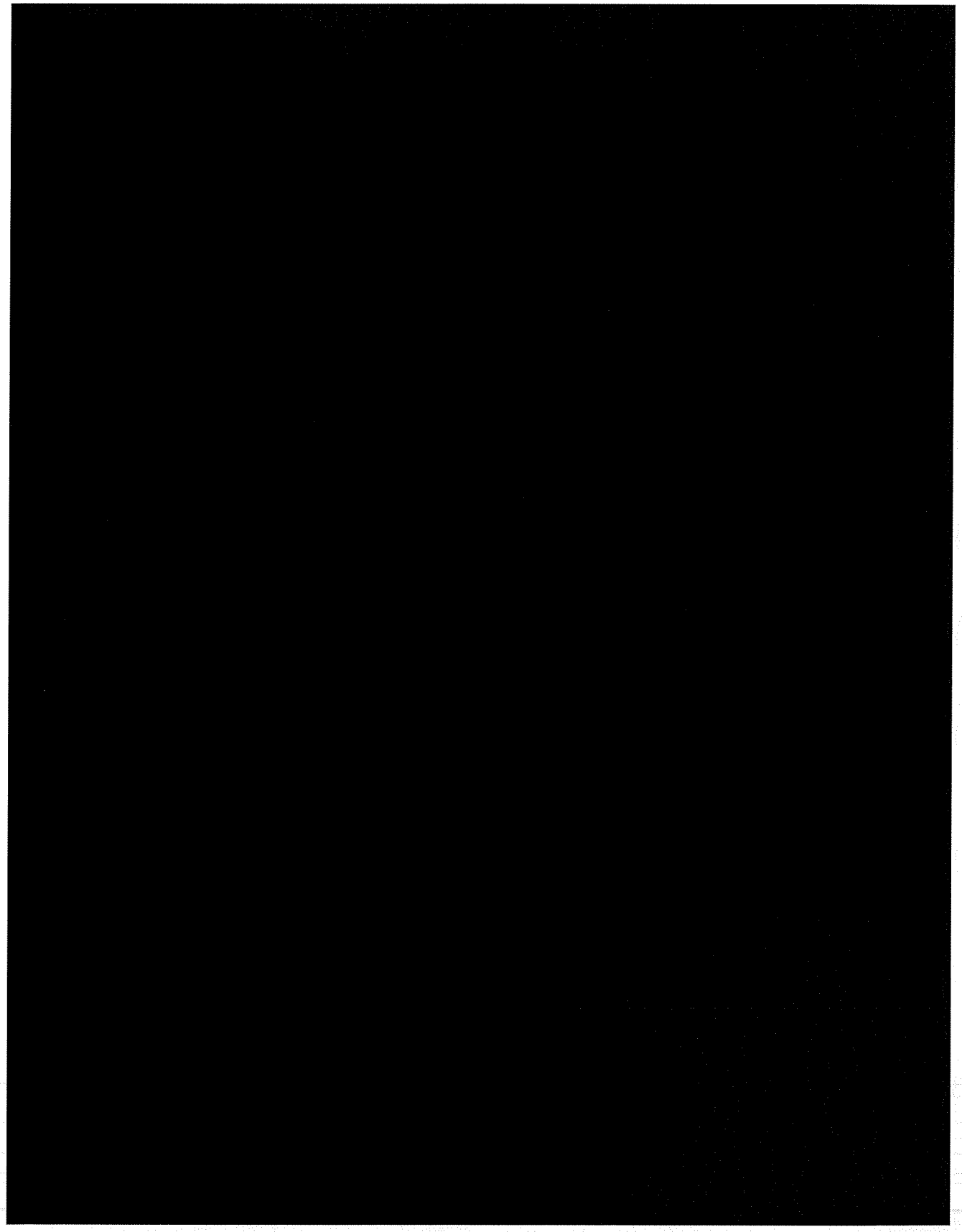
[426] *Nardone v. United States*, 308 U.S. 338, 341 (1939). The government also argued in its submissions that suppressing its evidence would not serve any deterrence purpose. The government argued that the NSA acquires, processes, and disseminates intelligence not to produce criminal prosecutions, but to protect the national security. It asserted that any suppression of evidence would therefore frustrate a criminal prosecution and create an incentive for the intelligence community not to share information with law enforcement, thereby harming national security. ~~(TS//SI//OC/NF)~~











[redacted]

V. OIG ANALYSIS (U)

We found that the Department made little effort to understand and comply with its discovery obligations in connection with Stellar Wind-derived information for the first several years of the program. The Department's limited initial effort was also hampered by the limited number of attorneys who were read into the program. As a result, OLC attorney John Yoo alone initially analyzed the government's discovery obligations in one early case, and he produced a legal analysis that was based on an incorrect understanding of the facts of the case to which it applied. When other attorneys from the Department's Criminal Division eventually were read into the program, [redacted] At that point, the Department eventually took steps to address [redacted] its discovery obligations. However, in our view, those steps are not complete and do not fully ensure that the government has met its discovery obligations regarding information obtained through the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

As described in this chapter, in 2002 the Department first recognized that the Stellar Wind program could have implications for discovery obligations in terrorism cases. OIPR Counsel Baker raised with Department

[redacted]

and FBI officials the question of how the government would meet its discovery obligations regarding Stellar Wind information. Despite awareness of this issue, the Department took no action at this time to ensure that it was in compliance with Rule 16 or *Brady* with respect to Stellar Wind-derived information. We believe that at this point senior Department officials were on notice that, at a minimum, the discovery issue merited attention. However, no concrete action was taken until early [redacted] in the context of [redacted] when the Department had to address how to handle Stellar Wind information that was not also obtained under FISA and that could be material to the defense under Rule 16. This issue was assigned to Yoo, who concluded [redacted]

[redacted] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

As with other aspects of the Stellar Wind program, we believe the error in Yoo's legal analysis may have resulted in part from the failure to subject his memorandum to typical OLC and Department review and scrutiny. Because other Department attorneys were not read into the Stellar Wind program, the risk that the Department would produce a factually flawed and inadequate legal analysis of these important discovery issues was escalated. As we concluded in Chapters Three and Four, we believe the lack of sufficient legal resources at the Department during this early phase of the Stellar Wind program hampered its legal analysis of important issues related to the program. We believe that Yoo's [redacted] memorandum is one more manifestation of this problem. ~~(TS//STLW//SI//OC/NF)~~

In July 2004, Patrick Rowan, a senior counsel in the Criminal Division, was read into the program and conducted a more systemic analysis of the Department's discovery obligations with regard to Stellar Wind information. [redacted]

[redacted]

[redacted] ~~(TS//STLW//SI//OC/NF)~~

[redacted]

With his memorandum, Rowan initiated a request that the issue be further examined by OLC. ~~(TS//SI//NF)~~

However, other than in informal discussions with Rowan concerning Yoo's [redacted] memorandum, OLC did not further examine these issues or follow up on Rowan's recommendation. While we recognize that OLC was not responsible for developing litigative strategy on this issue, we believe that OLC or another appropriate Department component should have provided guidance on this important legal issue. ~~(TS//STLW//SI//OC/NF)~~

We recommend that the Department conduct a comprehensive legal assessment of the important issues [redacted] that still remain unresolved [redacted] the legal ramifications of a guilty plea on the government's disclosure obligations under Rule 16 and in particular *Brady*. We believe the Department should carefully consider whether it must re-examine past cases to see whether potentially discoverable but undisclosed Rule 16 or *Brady* material was collected by the NSA, and take appropriate steps to ensure that it has complied with its discovery obligations in such cases. ~~(TS//SI//NF)~~

The Department took steps to respond [redacted] to discovery motions [redacted]

However, the Department's handling of these motions did not require the Department to identify the potentially discoverable information derived under the Stellar Wind program that may exist in other cases. We recommend that the Department, in coordination with the NSA, develop and implement a procedure for identifying Stellar Wind-derived information that may be associated with international terrorism cases, currently pending or likely to be brought in the future, and to evaluate such information in light of the government's discovery obligations under Rule 16 and Brady. ~~(TS//STLW//SI//OC/NF)~~

CHAPTER EIGHT
PUBLIC STATEMENTS ABOUT THE SURVEILLANCE PROGRAM (U)

This chapter examines Attorney General Alberto Gonzales's testimony and public statements related to the Stellar Wind program. Aspects of this program were first disclosed publicly in a series of articles in The New York Times in December 2005. In response, the President publicly confirmed a portion of the Stellar Wind program – the interception of the content of international communications of people reasonably believed to have links to al Qaeda and related organizations. Subsequently, Attorney General Gonzales was questioned about the program in two hearings before the Senate Judiciary Committee in February 2006 and July 2007. ~~(S//NF)~~

In between those two hearings, former Deputy Attorney General James Comey testified before the Senate Judiciary Committee about the dispute between the Department and the White House concerning the program. Gonzales's and Comey's differing congressional testimony led to allegations that Gonzales had made misleading statements to Congress about the dispute and the program itself.[434] (U)

In this chapter, we examine whether Attorney General Gonzales made false, inaccurate, or misleading statements related to the Stellar Wind program. (U//~~FOUO~~)

I. Summary of the Dispute about the Program (U)

As described in detail in Chapters Three and Four, the Stellar Wind program is best understood as consisting of three types of collections, informally referred to as "baskets." Basket 1 related to the collection of e-mail and telephone content. Initially, the Stellar Wind program collected e-mail and telephone content when probable cause existed to believe one of the parties to the call or e-mail was outside the United States and at least one of the communicants was a member of an international terrorist group.

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[434] For example, Senator Arlen Specter stated at a Senate hearing on July 24, 2007, that he did not find Attorney General Gonzales's testimony to be credible and suggested to the Attorney General that he "review this transcript very, very carefully." After this hearing Senate Judiciary Committee Chairman Patrick Leahy sent a letter to the OIG, dated August 16, 2007, asking the OIG to review Gonzales's statements to determine whether they were intentionally false, misleading, or inappropriate. Gonzales testified several times before the Senate and House Judiciary and Intelligence Committees about the program. In this chapter, we focus on his February 2006 and July 2007 testimony in which he discussed the events of March 2004. (U)

Basket 2 involved bulk collection of telephony meta data, and basket 3 involved bulk collection of e-mail meta data. (~~TS//STLW//SI//OC/NF~~)

These collections were authorized by a Presidential Authorization that was re-issued at approximately 30 to 45-day intervals. Each Authorization was certified as to form and legality by the Attorney General. The Attorney General's certifications were initially supported by legal opinions from OLC attorney John Yoo affirming the legality of the program. (~~TS//STLW//SI//OC/NF~~)

As discussed in Chapter Four, after Jack Goldsmith was confirmed as Assistant Attorney General for OLC in October 2003, he, along with Associate Deputy Attorney General Patrick Philbin, conducted an analysis of the legal basis underlying each basket in the Stellar Wind program. As a result of this review, he, Philbin, and recently confirmed Deputy Attorney General Comey concluded that they could find no legal support for several aspects of the existing program. [redacted] (~~TS//STLW//SI//OC/NF~~) [redacted]

In early March 2004, the dispute between the Department and the White House over the Department's revised legal analysis of the Stellar Wind program came to a head. Deputy Attorney General Comey, who assumed the duties of the Attorney General when Attorney General Ashcroft was hospitalized, informed the White House that the Department could not recertify the program. This dispute culminated in the unsuccessful attempt by then-White House Counsel Gonzales and White House Chief of Staff Andrew Card to get Attorney General Ashcroft to overrule Comey and recertify the program while he was in the hospital. When Ashcroft refused to certify the program and said that Comey was acting as the Attorney General, not him, the President reauthorized the program without the

Attorney General's certification. Instead Gonzales, as White House Counsel, recertified the program. ~~(TS//SI//NF)~~

After the White House's actions to continue the program without Justice Department certification, Deputy Attorney General Comey, FBI Director Mueller, and many other senior Department officials considered resigning. When the President learned of this, he directed that the Department work with other involved agencies and the White House to place the program on a firmer legal foundation. [redacted]

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

II. The New York Times Articles and President Bush's Confirmation Regarding NSA Activities (U)

In 2004, aspects of the Stellar Wind program were disclosed to two reporters for The New York Times. The reporters, James Risen and Eric Lichtblau, sought to publish an article about the program in late 2004. However, after a series of meetings with Administration officials who argued that publication of the story would harm the national security, The New York Times agreed to delay publishing the story. ~~(S//NF)~~

The New York Times eventually published a series of articles about the program on December 16 through 19, 2005. According to one of the reporters, the Times decided to publish the articles at least in part because the newspaper learned of serious concerns about the legality of the program that had "reached the highest levels of the Bush Administration."[435] (U)

The first article, on December 16, 2005, was entitled, "Bush Lets U.S. Spy on Callers Without Courts." This article stated that "Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials." The article described in broad terms the content collection aspect of the NSA program (basket 1), stating that according to officials the NSA has "monitored the international telephone calls of hundreds, perhaps

[435] See Eric Lichtblau, *Bush's Law* (2008), p. 203. (U)

thousands, of people inside the United States without warrants over the past three years in an effort to track possible 'dirty numbers' linked to al Qaeda." The article stated that the NSA continued to seek warrants to monitor purely domestic communications. ~~(TS//STLW//SI//OC/NF)~~

The article asserted that "reservations about aspects of the program" had also been expressed by Senator Jay Rockefeller (the Vice Chair of the Senate Select Committee on Intelligence) and a judge who presided over the FISA Court. The article added, "Some of the questions about the [NSA's] new powers led the administration to temporarily suspend the operation last year and impose more restrictions, officials said." The article also stated that "In mid-2004, concerns about the program expressed by national security officials, government lawyers and a judge prompted the Bush administration to suspend elements of the program and revamp it." However, the article incorrectly tied this suspension of the program to Judge Colleen Kollar-Kotelly's concerns that information gained from the program was also being used to seek FISA orders, rather than to the March 2004 dispute between Department officials and the White House about the legality of aspects of the program. ~~(TS//SI//NF)~~

On December 17, 2005, the day after The New York Times published the first article, President Bush publicly acknowledged the portion of the NSA program that was described in the article. President Bush described in broad terms these NSA electronic surveillance activities, stating:

> In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks.
>
> This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies. Yesterday the existence of this secret program was revealed in media reports, after being improperly provided to news organizations. As a result, our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk. Revealing classified information is illegal, alerts our enemies, and endangers our country . . . .
>
> The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our government and the

threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our nation's top legal officials, including the Attorney General and the Counsel to the President. I have reauthorized the program more than 30 times since the September 11th attacks, and I intend to do so for as long as our nation faces a continuing threat from al Qaeda and related groups.[436] (U)

III. Other Administration Statements (U)

On January 19, 2006, the Justice Department issued a document, informally referred to as a "White Paper," entitled "Legal Authorities Supporting the Activities of the National Security Agency Described by the President." The 42-page document addressed in an unclassified form the legal basis for the collection activities that were described in the December 16, 2005, New York Times article and other media reports and confirmed by President Bush. The White Paper stated that the President acknowledged that "he has authorized the NSA to intercept international communications into and out of the United States of persons linked to al Qaeda or other related terrorist organizations." (U)

The White Paper reiterated the legal theory advanced by the Department in Goldsmith's May 2004 memorandum about the revised NSA program, which concluded that the September 18, 2001, Congressional Authorization for the Use of Military Force authorized the President to employ "warrantless communications intelligence targeted at the enemy," a fundamental incident of the use of military force, pursuant to the President's Article II Commander-in-Chief powers. The White Paper also argued that the NSA's activities were consistent with FISA, as confirmed and supplemented by the AUMF. ~~(TS//SI//NF)~~

On January 22, 2006, the White House also issued a press release and memorandum to counter criticism of the NSA program by members of Congress. The press release was entitled "Setting the Record Straight: Democrats Continue to Attack the Terrorist Surveillance Program." This document was the first time we found any official use of the term "Terrorist Surveillance Program" to apply to the NSA program or aspects of the program.[437] ~~(S//NF)~~

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[436] The full text of President Bush's December 17, 2005, radio address can be found at http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html. (U)

[437] See http://www.whitehouse.gov/news/releases/2006/01/200060122.html. We found that the term was used in the media prior to this time. The first published reference (Cont'd.)

The following day, on January 23, 2006, President Bush referred to the "terrorist surveillance program" during a speech at Kansas State University:

> Let me talk about one other program . . . something that you've been reading about in the news lately. It's what I would call a terrorist surveillance program. (U)

In the speech, President Bush described the program as the interception "of certain communications emanating between somebody inside the United States and outside the United States; and one of the numbers would be reasonably suspected to be an al Qaeda link or affiliate." (U)

On January 24, 2006, Attorney General Gonzales delivered a speech at the Georgetown University Law Center which, according to his prepared remarks, began by stating that his remarks "speak only to those activities confirmed publicly by the President, and not to purported activities described in press reports." Gonzales referred to the program throughout his speech as either the "terrorist surveillance program" or "the NSA's terrorist surveillance program." (U)

IV. Testimony and Other Statements (U)

After the New York Times articles disclosed aspects of the NSA program, members of Congress expressed concern that the President had exceeded his authority by authorizing electronic surveillance activity without FISA orders, and congressional hearings were held on the issue. Gonzales testified before the Senate Judiciary Committee on February 6, 2006, and July 24, 2007, about the NSA's surveillance activities. We describe in the next sections his testimony and other statements he made about the NSA's activities, as well as testimony by former Deputy Attorney General Comey before the Senate Judiciary Committee on May 15, 2007. ~~(TS//SI//NF)~~

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we found to the "terrorist surveillance program" in connection with the NSA electronic surveillance activities was in NewsMax, an online news website, on December 22, 2005. (U) See "Barbara Boxer: Bush Spy Hearings Before Alito," NewsMax.com, December 22, 2005, http://archive.newsmax.com/archives/ic/2005/12/22/173255.shtml. On January 20, 2006, the term appeared again on another Internet blog called "RedState." See "Making the case for the NSA terrorist surveillance program," at http://www.redstate.com/story/2006/1/20/92730 /0977. (U)

A. Gonzales's February 6, 2006, Senate Judiciary Committee Testimony (U)

In his opening statement before the Senate Judiciary Committee on February 6, 2006, Gonzales began by saying that his testimony would necessarily be limited:

> Before going any further, I should make clear what I can discuss today. I am here to explain the Department's assessment that the President's terrorist surveillance program is consistent with our laws and Constitution. I am not here to discuss the operational details of that program, or any other classified activity. The President has described the terrorist surveillance program in response to certain leaks, and my discussion in this open forum must be limited to those facts the President has publicly confirmed – nothing more. Many operational details of our intelligence activities remain classified and unknown to our enemy – and it is vital that they remain so. (U)

The questioning of Gonzales at this hearing focused primarily on the nature of the NSA surveillance activity and the legal basis for it.[438] Senator Charles Schumer asked Gonzales specifically about accounts of a disagreement within the Justice Department over the NSA program:

> SEN. SCHUMER: But it's not just Republican senators who seriously question the NSA program, but very high-ranking officials within the administration itself. Now, you've already acknowledged that there were lawyers in the administration who expressed reservations about the NSA program. There was dissent. Is that right?
>
> ATTY GEN. GONZALES: Of course, Senator. As I indicated, this program implicates very difficult issues. The war on terror has generated several issues that are very, very complicated.
>
> SEN. SCHUMER: Understood.
>
> ATTY GEN. GONZALES: Lawyers disagree.

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[438] Neither the Chairman of the Senate Judiciary Committee at the time (Senator Specter), nor the Ranking Member (Senator Leahy), were read into the program or provided the underlying documents authorizing the program. Senator Leahy stated at the outset of the hearing that he and others had made a request to review the Presidential Authorizations and OLC memoranda about the program, but that these materials had not been provided to the Committee. (U)

SEN. SCHUMER: I concede all those points. Let me ask you about some specific reports. It's been reported by multiple news outlets that the former number two man in the Justice Department, the premier terrorism prosecutor, Jim Comey, expressed grave reservations about the NSA program, and at least once refused to give it his blessing. Is that true?

ATTY GEN. GONZALES: Senator, here's a response that I feel that I can give with respect to recent speculation or stories about disagreements. There has not been any serious disagreement, including – and I think this is accurate – there's not been any serious disagreement about the program that the President has confirmed.

There have been disagreements about other matters regarding operations, which I cannot get into. I will also say –

SEN. SCHUMER: But there was some – I'm sorry to cut you off. But there was some dissent within the administration, and Jim Comey did express at some point – that's all I asked you – some reservation.

ATTY GEN. GONZALES: The point I want to make is that, to my knowledge, none of the reservations dealt with the program that we're talking about today. They dealt with operational capabilities that we're not talking about today.

SEN. SCHUMER: I want to ask you again about – I'm just – we have limited time.

ATTY GEN. GONZALES: Yes, sir.

SEN. SCHUMER: It's also been reported that the head of the Office of Legal Counsel, Jack Goldsmith, a respected lawyer and professor at Harvard Law School, expressed reservations about the program. Is that true?

ATTY GEN. GONZALES: Senator, rather than going individual by individual –

SEN. SCHUMER: No, I think we're – this is –

ATTY GEN. GONZALES: – let me just say that I think differing views that have been the subject of some of these stories does not – did not deal with the program that I'm here testifying about today.

SEN. SCHUMER: But you are telling us that none of these people expressed any reservations about the ultimate program. Is that right?

> ATTY GEN. GONZALES: Senator, I want to be very careful here, because, of course, I'm here only testifying about what the President has confirmed. And with respect to what the President has confirmed, I believe – I do not believe that these DOJ officials that you're identifying had concerns about this program. (U)

Throughout the hearing, other Senators asked Gonzales questions relating to various aspects of the NSA program, and Gonzales would often qualify his answers by stating that he was not discussing activities beyond what the President had confirmed. However, in doing so Gonzales sometimes suggested that the NSA's activities under the program were limited to what the President had confirmed. In one exchange with Senator Leahy, for example, Gonzales suggested that the electronic surveillance activities the President had publicly confirmed were the only activities the President had authorized to be conducted. Specifically, in response to a series of questions from Senator Leahy regarding what activities beyond warrantless electronic surveillance Gonzales would deem legal under the Authorization for the Use of Military Force, Gonzales stated,

> Sir, I have tried to outline for you and the committee what the President has authorized, and that is all that he has authorized. . . . There is all kinds of wild speculation out there about what the President has authorized and what we're actually doing. And I'm not going to get into a discussion, Senator, about hypotheticals.[439] ~~(S//NF)~~

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[439] On February 28, 2006, Gonzales wrote to Senator Specter to provide additional responses to questions that he had answered during his February 6 hearing and to clarify certain responses. Gonzales wrote that he confined his letter and testimony

> to the specific NSA activities that have been publicly confirmed by the President. Those activities involve the interception by the NSA of the contents of communications in which one party is outside the United States where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (hereinafter, the "Terrorist Surveillance Program").

One response Gonzales sought to clarify was this response to Senator Leahy. Gonzales wrote:

> First, as I emphasized in my opening statement, in all of my testimony at the hearing I addressed – with limited exceptions – only the legal underpinnings of the Terrorist Surveillance Program, as defined above. I did not and could not address operational aspects of the Program or any other classified intelligence activities. So, for example, when I testified in response to questions from Senator Leahy, "Sir, I have tried to outline for you and the Committee what the President has authorized, and that is all that he has authorized," Tr. at 53, I was confining my remarks to the Terrorist

(Cont'd.)

In response to Senator Sam Brownback's question about whether the FISA application process would include "even these sort of operations we've read about data mining operations? Would that include those sorts of operations, or are those totally a separate type of field?" (U)

Gonzales responded:

> I'm not here to talk about that. Again, let me just caution everyone that you need to read these stories with caution. There is a lot of mumbling – I mean, mixing and mangling of activities that are totally unrelated to what the President has authorized under the terrorist surveillance program, and so I'm uncomfortable talking about other kinds of operations that might – that are unrelated to the terrorist surveillance program. (U)

B. Comey's May 15, 2007, Senate Judiciary Committee Testimony (U)

Former Deputy Attorney General Comey appeared before the Senate Judiciary Committee on May 15, 2007, in a hearing called to examine whether the Department had politicized the firing of U.S. Attorneys. Senator Schumer, who presided over the hearing, began the questioning by asking Comey about reports in the media that in March 2004 White House Counsel Gonzales and White House Chief of Staff Card had visited Attorney General Ashcroft in the hospital in an effort to override Comey's decision, made when he served as Acting Attorney General, not to certify a classified program. Comey was asked to recount the details of the incident. (U)

After prefacing his remarks by stating that he could not discuss classified information, Comey described the events of March 2004, including the confrontation between the Department and White House officials in Ashcroft's hospital room. In describing these events, Comey referred to a single classified program. For example, Comey testified that:

> In the early part of 2004, the Department of Justice was engaged – the Office of Legal Counsel, under my supervision, in a reevaluation both factually and legally of a particular classified program. And it was a program that was renewed on a regular basis and required signature by the Attorney General

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Surveillance Program as described by the President, the legality of which was the subject of the February 6th hearing.

Gonzales also attempted to clarify a response he had given to Senator Leahy about when the first Presidential Authorization was signed. Gonzales wrote that "The President first authorized the [Terrorist Surveillance] Program in October 2001 . . . ." (U)

> certifying to its legality. And the – and I remember the precise date; the program had to be renewed by March the 11th, which was a Thursday, of 2004. And we were engaged in a very intensive reevaluation of the matter. (U)

Comey also testified that "as Acting Attorney General, I would not certify the program as to its legality, and explained our reasoning in detail, which I will not go into here, nor am I confirming it's any particular program." As detailed in Chapter Four, Comey then described from his perspective the incident in the hospital room and testified that after that incident "[t]he program was reauthorized without us, without a signature from the Department of Justice attesting as to its legality . . . ." (U)

C. Gonzales's June 5, 2007, Press Conference (U)

In light of Comey's statements, questions were raised about the accuracy of Gonzales's February 2006 testimony to the Senate Judiciary Committee. For example, in a press conference on June 5, 2007, called to announce the indictment of members of an international gang called MS-13, the first question a reporter asked Gonzales concerned Comey's testimony:

> REPORTER: Attorney General, last month Jim Comey testified about visits you and Andy Card made to John Ashcroft's hospital bed. Can you tell us your side of the story? Why were you there and did Mr. Comey testify truthfully about it? Did he remember it correctly?
>
> ATTY GEN. GONZALES: Mr. Comey's testimony related to a highly classified program which the President confirmed to the American people some time ago. Because it's on a classified program I'm not going to comment on his testimony. (U)

As discussed below, when later asked about this statement, Gonzales said that he had misspoke, and that he did not mean to say that Comey's testimony related to the program that the President confirmed. (U)

D. Gonzales's July 24, 2007, Senate Judiciary Committee Testimony (U)

Gonzales was again called to testify before the Senate Judiciary Committee on July 24, 2007. In advance of Gonzales's July 24 appearance, Senator Leahy sent Gonzales a letter advising him of the questions that would be asked at the hearing.[440] The letter referenced Gonzales's

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[440] According to the letter, Senator Leahy took this step because in Gonzales's appearance before the Senate Judiciary Committee on April 19, 2007, to discuss the removal of nine U.S. Attorneys, Gonzales had responded to an estimated 100 questions that (Cont'd.)

February 6, 2006, testimony in which he stated that Department officials did not have "concerns about this program." The letter also referenced Comey's May 15 testimony concerning the incident in Ashcroft's hospital room in March 2004. The letter specifically advised Gonzales that he would be asked to "provide a full explanation for the legal authorization for the President's warrantless electronic surveillance program in March and April 2004." (U)

At the July 24 hearing, Gonzales was repeatedly questioned about alleged inconsistencies between his and Comey's accounts of the events of March 2004 and the NSA program. For example, Senator Specter asked:

> Let me move quickly through a series of questions – there's a lot to cover – starting with the issue that Mr. Comey raises. You said, quote, "There has not been any serious disagreement about the program." Mr. Comey's testimony was that Mr. Gonzales began to discuss why they were there to seek approval and he then says, quote, "I was very upset. I was angry. I thought I had just witnessed an effort to take advantage of a very sick man."
>
> First of all, Mr. Attorney General, what credibility is left for you when you say there's no disagreement and you're party to going to the hospital to see Attorney General Ashcroft under sedation to try to get him to approve the program?
>
> ATTY GEN. GONZALES: The disagreement that occurred and the reason for the visit to the hospital, Senator, was about other intelligence activities. It was not about the terrorist surveillance program that the President announced to the American people. (U)

At other points in the hearing, Gonzales stated that the dispute referred to "other intelligence activities," and not the "terrorist surveillance program." (U)

Senator Schumer also questioned Gonzales about his answer in the June 5 press conference in which he stated that Comey's testimony "related to a highly classified program which the President confirmed to the American people some time ago." Gonzales first responded that he would have to look at the question and his response from the press conference, and then he said "I'm told that what I'd in fact – here in the press

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he could "not recall." Leahy wrote that he wanted to assist Gonzales with his preparation for the July 24 testimony to "avoid a repeat of that performance." (U)

conference – I did misspeak, but I also went back and clarified it with the reporter."[441] (U)

Gonzales then responded to Senator Schumer that "The President confirmed the existence of one set of activities," and that "Mr. Comey was talking about a disagreement that existed with respect to other intelligence activities. . . . Mr. Comey's testimony about the hospital visit was about other intelligence activities, disagreements over other intelligence activities. That's how we'd clarify it." (U)

Other Senators questioned Gonzales's responses on this issue. For example, Senator Feingold stated:

> With respect to the NSA's illegal wiretapping program, last year in hearings before this committee and the House Judiciary Committee, you stated that, quote, "There has not been any serious disagreement about the program that the President has confirmed," unquote, that any disagreement that did occur, quote, "did not deal with the program that I am here testifying about today," unquote, and that, quote, "The disagreement that existed does not relate to the program the President confirmed in December to the American people," unquote. (U)
>
> Two months ago, you sent a letter to me and other members of this committee defending that testimony and asserting that it remains accurate. And I believe you said that again today. Now, as you probably know, I'm a member of the Intelligence Committee. And therefore I'm one of the members of this committee who has been briefed on the NSA wiretapping program and other sensitive intelligence programs. I've had the opportunity to review the classified matters at issue here. And I believe that your testimony was misleading, at best. I am prevented from elaborating in this setting, but I intend to send you a classified letter explaining why I have come to that conclusion. (U)

Senator Whitehouse, also a member of the Intelligence Committee, similarly stated:

> Mr. Gonzales, let me just follow up briefly on what Senator Feingold was saying, because I'm also a member of both committees. And I have to tell you, I have the exact same

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[441] Gonzales also testified that he did not speak directly to the reporter (Dan Eggen, from the Washington Post) to clarify the comment. Rather, Gonzales said he told a Department spokesperson to go back and clarify the statement to Eggen. (U)

perception that he does, and that is that if there is a kernel of truth in what you've said about the program which we can't discuss but we know it to be the program at issue in your hospital visit to the Attorney General, the path to that kernel of truth is so convoluted and is so contrary to the plain import of what you said, that I, really, at this point have no choice but to believe that you intended to deceive us and to lead us or mislead us away from the dispute that the Deputy Attorney General subsequently brought to our attention. So you may act as if he's behaving, you know, in a crazy way to even think this, but at least count two of us and take it seriously.[442] (U)

Gonzales also offered to answer a question about the terrorist surveillance program in closed session during this exchange with Senator Specter:

SEN. SPECTER: Going back to the question about your credibility on whether there was dissent within the administration as to the terrorist surveillance program, was there any distinction between the terrorist surveillance program in existence on March 10th, when you and the Chief of Staff went to see Attorney General Ashcroft, contrasted with the terrorist surveillance program which President Bush made public in December of 2005?

ATTY GEN. GONZALES: Senator, this is a question that I should answer in a classified setting, quite frankly, because now you're asking me to hint or talk – to hint about our operational activities. And I'd be happy to answer that question, but in a classified setting.

SEN. SPECTER: Well, if you won't answer that question, my suggestion to you, Attorney General Gonzales, is that you review this transcript very, very carefully. I do not find your testimony credible, candidly. When I look at the issue of credibility, it is my judgment that when Mr. Comey was testifying he was talking about the terrorist surveillance program and that inference arises in a number of ways, principally because it was such an important matter that led you and the Chief of Staff to Ashcroft's hospital room. . . . So my suggestion to you is that you review your testimony very carefully. The chairman's already said that the committee's

[442] According to a May 17, 2006, letter from the Director of National Intelligence, two other members of the Judiciary Committee – Senators Dianne Feinstein and Orrin Hatch – also had been briefed on the NSA program. (U)

going to review your testimony very carefully to see if your credibility has been breached to the point of being actionable. (U)

Near the end of the hearing Senator Schumer questioned Gonzales regarding the meeting at the White House with the "Gang of Eight" congressional leaders, just before Gonzales and Card went to Ashcroft's hospital room on March 10, 2004:

> SEN. SCHUMER: OK. But you testified to us that you didn't believe there was serious dissent on the program that the President authorized. And now you're saying they knew of the dissent and you didn't?
>
> ATTY GEN. GONZALES: The dissent related to other intelligence activities. The dissent was not about the terrorist surveillance program the President confirmed and . . .
>
> . . .
>
> SEN. SCHUMER: You said, sir – sir, you said that they knew that there was dissent. But when you testified before us, you said there has not been any serious disagreement. And it's about the same program. It's about the same exact program. You said the President authorized only one before. And the discussion – you see, it defies credulity to believe that the discussion with Attorney General Ashcroft or with this group of eight, which we can check on – and I hope we will, Mr. Chairman: that will be yours and Senator Specter's prerogative -- was about nothing other than the TSP. And if it was about the TSP, you're dissembling to this committee. Now was it about the TSP or not, the discussion on the eighth?
>
> ATTY GEN. GONZALES: The disagreement on the 10th was about other intelligence activities.
>
> SEN. SCHUMER: Not about the TSP, yes or no?
>
> ATTY GEN. GONZALES: The disagreement and the reason we had to go to the hospital had to do with other intelligence activities.
>
> SEN. SCHUMER: Not the TSP? Come on. If you say it's about "other," that implies not. Now say it or not.
>
> ATTY GEN. GONZALES: It was not. It was about other intelligence activities.
>
> SEN. SCHUMER: Was it about the TSP? Yes or no, please? That's vital to whether you're telling the truth to this committee.

ATTY GEN. GONZALES: It was about other intelligence activities. (U)

When we interviewed Gonzales, he stated that there was never any intent to hide the NSA program from Congress, and he said that Congress was briefed on multiple occasions about the program.[443] Gonzales also stated that he could not explain to the Senate Judiciary Committee that the "serious" dispute concerned [redacted] Gonzales said that he could not recall where the term "terrorist surveillance program" originated, but that when he used the term it referred only to the content collection activities the President had confirmed publicly, and that the rest of the program remained classified. Gonzales also asserted that this distinction should have been clear to those on the committee who were read into the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

E. FBI Director Mueller's July 26, 2007, House Committee on the Judiciary Testimony (U)

Two days after Gonzales's July 24, 2007, Senate Judiciary Committee testimony, FBI Director Mueller testified before the House Judiciary Committee. At this hearing, Mueller was asked about his conversation with Attorney General Ashcroft at the hospital on the evening of March 10, 2004. As discussed in Chapter Four of this report, Mueller arrived at the hospital just after Gonzales and Card left. Mueller was asked to recount what he learned from Ashcroft concerning Ashcroft's exchange with Gonzales and Card earlier that evening:

REP. JACKSON LEE: Could I just say, did you have an understanding that the discussion was on TSP?

MR. MUELLER: I had an understanding the discussion was on a – a NSA program, yes.

REP JACKSON LEE: I guess we use "TSP," we use warrantless wiretapping, so would I be comfortable in saying that those were the items that were part of the discussion?

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[443] Gonzales cited in particular the "Gang of Eight" briefing convened on March 10, 2004, to inform congressional leaders of the Department's legal concerns about aspects of the program and the need for a legislative fix. We also reviewed Gonzales's closed-session testimony before the House Permanent Select Committee on Intelligence (HPSCI), which he provided on July 19, 2007, just a few days before his July 24 Senate Judiciary Committee testimony. In his classified HPSCI testimony, Gonzales stated, "This disagreement [with Justice Department officials] primarily centered on [redacted] ~~(TS//STLW//SI//OC/NF)~~

MR. MUELLER: I – the discussion was on a national – an NSA program that has been much discussed, yes. (U)

We asked Mueller about his understanding of the term "terrorist surveillance program." Mueller said that the term "TSP" was not used by the FBI prior to The New York Times article and the President's confirmation of one aspect of the program. Mueller said he understood the term to refer to what the President publicly confirmed as to content intercepts. Mueller said he believed the term "TSP" was part of the "overarching" Stellar Wind program, but that "TSP" is not synonymous with Stellar Wind.[444] ~~(S//NF)~~

F. Gonzales's Follow-up Letter to the Senate Judiciary Committee (U)

In an effort to clarify his July 24, 2007, Senate testimony, on August 1, 2007, Gonzales sent unclassified letters to Judiciary Committee Chairman Leahy and Senator Specter. Gonzales's letter to Leahy stated that he was deeply concerned with suggestions that his testimony was misleading and he was determined to address any such impression. He explained that "shortly after 9/11, the President authorized the NSA to undertake a number of highly classified activities," and that, "although the legal bases for these activities varied, all of them were authorized in one presidential order, which was reauthorized approximately every 45 days." Gonzales wrote that before December 2005 "the term 'Terrorist Surveillance Program' was not used to refer to these activities, collectively or otherwise." Rather, Gonzales wrote that the term was first used in early 2006 "as part of the public debate that followed the unauthorized disclosure [by the New York Times] and the President's acknowledgement of one aspect of the NSA activities[.]" (U)

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[444] We also interviewed an NSA official, who serves as an original classifying authority for the NSA, about the use of the term "terrorist surveillance program" or "TSP" at the NSA. [redacted]

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

Gonzales also wrote in this letter that in his July 24 testimony he was discussing "only that particular aspect of the NSA activities that the President has publicly acknowledged, and that we have called the Terrorist Surveillance Program[.]" He wrote that he recognized that his use of this term or his shorthand reference to the "'program' publicly 'described by the President'" may have "created confusion." Gonzales maintained that there was "not a serious disagreement between the Department and the White House in March 2004 about whether there was a legal basis for the particular activity later called the Terrorist Surveillance Program." (U)

Gonzales also wrote in his letter, "That is not to say that the legal issues raised by the Terrorist Surveillance Program were insubstantial; it was an extraordinary activity that presented novel and difficult issues and was, as I understand, the subject of intense deliberations within the Department. In the spring of 2004, after a thorough reexamination of all these activities, Mr. Comey and the Office of Legal Counsel ultimately agreed that the President could direct the NSA to intercept international communications without a court order where the interceptions were targeted at al Qaeda or its affiliates. Other aspects of the NSA's activities referenced in the DNI's letter [attached to Gonzales's letter] did precipitate very serious disagreement." (U)

V. OIG Analysis (U)

In this section, we assess whether Gonzales made false, inaccurate, or misleading statements during his testimony before the Senate Judiciary Committee. As discussed below, we concluded that Gonzales's testimony did not constitute a false statement under the criminal statutes. We also concluded that he did not intend his testimony to be inaccurate, false, or misleading. However, we found in at least two important respects his testimony was confusing, inaccurate, and had the effect of misleading those who were not read into the program. (U)

At the outset, we recognize that Gonzales was in a difficult position because he was testifying in an open, unclassified forum about a highly classified program. In this setting, it would be difficult for any witness to clearly explain the nature of the dispute between the White House and the Department while not disclosing additional details about classified activities, particularly because only certain NSA activities had been publicly confirmed by the President. (U)

However, some of this difficulty was attributable to the White House's decision not to brief the Judiciary Committee, which had oversight of the Department of Justice, about the program. As discussed in Chapter Four, the strict controls over the Department's access to the program hindered the

Department's ability to adequately fulfill its legal responsibilities concerning the program through March 2004. Similarly, the White House's decision not to allow at least the Chair and Ranking Members of the House and Senate Judiciary Committees to be briefed into the program created difficulties for Gonzales when he testified before Congress about the disputes regarding the program. This limitation also affected the Committee's ability to understand or adequately assess the program, especially in connection with the March 2004 dispute. We agree with Goldsmith's observation about the harm in the White House's "over-secrecy" for this program, as well as Director Mueller's suggestion, made in March 2004, that briefings on the program should have been given to the House and Senate Judiciary Committees. This did not occur, and it made Gonzales's testimony to the Senate Judiciary Committee unusually difficult. ~~(TS//SI//NF)~~

Yet, even given these difficulties, we believe that Gonzales's testimony was imprecise, confusing, and likely to lead those not read into the program to draw wrong conclusions about the nature of the dispute between White House and Department officials in March 2004. In addition, two Senators who had been read into the program stated that they were confused by Gonzales's testimony. Although we concluded that Gonzales did not intend to mislead Congress, his testimony nonetheless had the effect of creating confusion and inaccurate perceptions about certain issues covered during his hearings. (U)

Gonzales, as a participant in the March 2004 dispute between the White House and the Justice Department and, more importantly, as the nation's chief law enforcement officer, had a duty to balance his obligation not to disclose classified information with the need not to be misleading in his testimony about the events that nearly led to mass resignations of senior officials at the Justice Department and the FBI. Instead, Gonzales's testimony only deepened the confusion among members of Congress and the public about these matters. We were especially troubled by Gonzales's testimony at the July 2007 Senate hearing because it related to an important matter of significant public interest and because he had sufficient time to prepare for this hearing and the questions he knew he would be asked. (U)

At the outset of his testimony on February 6, 2006, Gonzales explained that he was confining his remarks to the program and the facts that the President publicly confirmed in his radio address on December 17, 2005. In those remarks, the President had, in essence, confirmed the

content collection part, or basket 1, of the NSA surveillance program.[445] The President, and Gonzales, used the term "terrorist surveillance program" in connection with the President's confirmation of these NSA activities. However, as discussed below, it was not clear – even to those read into the program – whether the term "terrorist surveillance program" referred only to content collection (basket 1) or the entire program.
~~(TS//STLW//SI//OC/NF)~~

Nevertheless, Gonzales suggested in his testimony that the dispute between the White House and the Department concerned other intelligence activities that were unrelated to the content collection portion of the program that the President had confirmed. This was not accurate. ~~(S//NF)~~

We recognize that the term "terrorist surveillance program" was intended by Gonzales and other Administration officials to describe a limited set of activities within the Stellar Wind program and that the term was created only in response to public disclosures about the program. However, by using phrases such as the "terrorist surveillance program" or "the program that the President has confirmed," and setting that program distinctly apart from "other intelligence activities," Gonzales's testimony created a perception that the two sets of activities were entirely unrelated, which was not accurate. Gonzales's testimony suggested that the dispute that Comey testified about was not related to the program that the President had confirmed, and instead that the dispute concerned unrelated "operations" or "intelligence activities." Thus, while Gonzales may have intended the term "terrorist surveillance program" to cover only content collection (basket 1), it led to confusion and misperceptions when he testified that the dispute [redacted] was unrelated to "the terrorist surveillance program."
~~(TS//STLW//SI//OC/NF)~~

Gonzales reinforced this misperception throughout his testimony. For example, when asked by Senator Leahy what activities Gonzales believed would be supported under the Authorization for Use of Military Force rationale, Gonzales stated, "I have tried to outline for you and the committee what the President has authorized, and that is all that he has authorized." In fact, the President had authorized two other types of collections in the same Authorization. Gonzales himself subsequently realized that his response to Senator Leahy was problematic. In a February 28, 2006, letter to Senators Specter and Leahy, Gonzales sought to clarify his response,

[445] [redacted]

stating, "I was confining my remarks to the Terrorist Surveillance Program as described by the President, the legality of which was the subject of the February 6th hearing." However, in our view this attempt to clarify his remarks did not go nearly far enough. As discussed below, it was not until after Gonzales's next appearance before the Senate Judiciary Committee in July 2007 that Gonzales acknowledged that the President had also authorized a range of intelligence-gathering activities, including those described under the terrorist surveillance program, in a single order. ~~(TS//STLW//SI//OC/NF)~~

We concluded that Gonzales created a misimpression for Congress and the public by suggesting that the March 2004 dispute between the Department and the White House concerned issues wholly unrelated to "the program the President confirmed," or the terrorist surveillance program. We believe a fairer and more accurate characterization would have been that the March 2004 dispute concerned aspects of a larger program of which the terrorist surveillance program was a part. As discussed earlier, the NSA viewed the three types of collections as a single program. The three types of collections were all authorized by the same Presidential order and administered by a single intelligence agency. Moreover, all three collections were known in the Intelligence Community by the same Top Secret/Sensitive Compartmented Information program cover term, Stellar Wind. ~~(TS//STLW//SI//OC/NF)~~

In addition, we believe that Gonzales's testimony regarding the dispute between the Department and the White House [redacted] was incomplete and not accurate. ~~(TS//SI//OC/NF)~~

When Senator Schumer asked Gonzales at the February 2006 Senate hearing whether media accounts that Comey "expressed grave reservations about the NSA program" were true, Gonzales responded that there was no "serious disagreement about the program that the President has confirmed." But there was a dispute about [redacted] As recounted in detail in Chapter Four of this report, [redacted] The dispute involving [redacted] was not resolved, and the March 11, 2004,

Presidential Authorization continued to permit the activity [redacted] ~~(TS//STLW//SI//OC/NF)~~

When we interviewed Gonzales, he told us that he was trying to be careful during his public testimony about discussing or characterizing a classified program with persons not read into the program, and that he used the term "serious disagreement" to distinguish the disagreement regarding [redacted] from other disagreements regarding the program. Gonzales told us that he believed his statement that there was "no serious disagreement" was accurate because he did not consider the Department's conclusion that [redacted] to be a point of "serious disagreement" between the Justice Department and the White House, particularly when compared to the more serious disagreement related to [redacted].[446] Gonzales also told the OIG that he would not have gone to Ashcroft's hospital room solely over [redacted] and other evidence discussed in Chapter Four tends to confirm that [redacted] was not the critical issue in the confrontation with Department officials at the hospital or that it precipitated the threat of mass resignations by senior Department and FBI officials. ~~(TS//STLW//SI//OC/NF)~~

Yet, even if one agrees that [redacted] was not a "serious disagreement" between the Department and the White House, Gonzales's testimony is still problematic. When Senator Schumer pressed Gonzales on whether Department officials "expressed any reservations about the ultimate program," Gonzales replied: "Senator, I want to be very careful here, because, of course, I'm here only testifying about what the President has confirmed. And with respect to what the President has confirmed, I believe – I do not believe that these DOJ officials that you're identifying had concerns about this program." ~~(TS//STLW//SI//OC/NF)~~

We understand that it is possible to construct an argument that the Department officials did not have "reservations" or "concerns" about the [redacted] However, while such an argument at best might be considered technically accurate, it would still not account for key details that were omitted from

[446] While Gonzales may subjectively have believed the disagreement about this issue did not rise to the level of a serious dispute, he was aware that Goldsmith and Addington sharply disagreed about [redacted] ~~(TS//SI//NF)~~

Gonzales's testimony that would be necessary for an accurate understanding of the situation. The Department clearly had reservations and concerns about the [redacted] of the program, [redacted] Moreover, Gonzales himself contradicted this attempted construction by stating in a February 28, 2006, letter to Senator Specter that the terrorist surveillance program was first authorized by the President in October 2001, years before the [redacted] Gonzales knew that Comey, Goldsmith, and others at the Department had expressed "reservations" or "concerns" about [redacted] prior to the President's decision to [redacted] ~~(TS//STLW//SI//OC/NF)~~

While we believe the evidence does show that [redacted] was more significant than the dispute about [redacted] the evidence is clear that Comey and others had strong and clearly identified concerns regarding the extent of the President's authority to conduct [redacted] These concerns had been communicated to the White House in several meetings over a period of months prior to and including March 2004, and the White House did not [redacted] part of the program in response to these concerns. However, Gonzales's testimony suggested that such concerns and reservations on the part of Justice Department officials never existed. To the contrary, the Department's firm objections to this aspect of the program were instrumental in bringing about [redacted] collection in "the program the President has confirmed." ~~(TS//STLW//SI//OC/NF)~~

Following his July 24, 2007, testimony, Gonzales acknowledged in an unclassified August 1, 2007, letter to Senator Leahy that his use of the term "terrorist surveillance program" and his "shorthand reference to the 'program' publicly 'described by the President' may have created confusion," particularly for those familiar with the full range of NSA activities authorized by the President. Gonzales wrote that he was determined to address any impression that his testimony was misleading. In this letter, Gonzales attempted to describe what he had meant by the term "terrorist surveillance program," stating that it covered one aspect of the NSA activities that the President had authorized. His letter also acknowledged the dispute concerned the legal basis for certain NSA activities that were regularly authorized in the same Presidential Authorization as the terrorist surveillance program. Gonzales also acknowledged that Comey had refused to certify a Presidential Authorization "because of concerns about the legal basis of certain of these NSA activities." Yet, this follow-up letter, while providing more context about the issues than his July 2007 statements, did not completely address the misimpressions created by his testimony.

Gonzales still suggested in his August 1 letter that the only dispute between the Department and the White House concerned aspects of the program [redacted] ~~(TS//STLW//SI//OC/NF)~~

While we again acknowledge the difficulty of the situation Gonzales faced in testifying publicly about a highly classified and controversial program, we believe Gonzales could have done other things to provide clearer and more accurate testimony without divulging classified information. Similar to the import of his August 1 letter, and without providing operational details about these other activities, he could have clarified that part of the dispute with the Department concerned the scope of what he called "the terrorist surveillance program," while another part of the dispute concerned other "intelligence activities" that were either related to the terrorist surveillance program or, more accurately, a different aspect of the same NSA program. Gonzales also could have explained that different activities under the program raised different concerns within the Department because each set of activities rested upon different legal theories.[447] ~~(S//NF)~~

Alternatively, Gonzales could have declined to discuss any aspect of the dispute at an open hearing.[448] Or, short of seeking a closed session, Gonzales could have sought White House approval to brief the Chairs and Ranking Members of the Senate and House Judiciary Committees about the program so that they would fully understand the nature of the NSA program and the classified issues surrounding the dispute. Instead, Gonzales gave public testimony that was confusing and inaccurate, and had the effect of misleading those who were not read into the program, as well as some who were. (U)

Concerning Gonzales's July 2007 testimony in particular, the questions Gonzales would be expected to answer were clearly foreseeable, especially in light of the disparities between his February 6, 2006, testimony and Comey's May 15, 2007, testimony. In addition, Gonzales had been provided a letter by Senator Leahy referencing Comey's testimony and advising Gonzales to be prepared to discuss the legal authorization for the "President's warrantless electronic surveillance program in March and April

[447] [redacted]

[448] As noted, Gonzales provided closed-session testimony before HPSCI on July 19, 2007, in which he described the March 2004 dispute between White House and Justice Department officials as [redacted] ~~(TS//STLW//SI//OC/NF)~~

2004." Gonzales was therefore on notice that he would be expected to bring clarity to the confusion that existed following Comey's testimony. Rather than clarify these matters, we believe Gonzales further confused the issues through his testimony. (U)

Finally, we considered whether Gonzales's testimony constituted criminal false statements and concluded that his statements did not constitute a criminal violation of 18 U.S.C. § 1001. A person violates that statute by "knowingly and willfully" making a "materially false, fictitious, or fraudulent statement or representation[.]" 18 U.S.C. § 1001(a)(2). We do not believe the evidence showed that Gonzales intended to mislead Congress or willfully make a false statement. Moreover, we do not believe a prosecutor could prove beyond a reasonable doubt that there was no interpretation of his words that could be viewed as literally true, even if his testimony was confusing and created misperceptions.[449] (U)

In sum, we believe that while the evidence did not show that Gonzales's statements constitute a criminal violation, or that he intended to mislead Congress, his testimony was confusing, not accurate, and had the effect of misleading those who were not knowledgeable about the program. His testimony also undermined his credibility on this important issue. As the Attorney General, we believe Gonzales should have taken more care to ensure that his testimony was as accurate as possible without revealing classified information, particularly given the significance of this matter and the fact that aspects of the dispute had been made public previously. (U)

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[449] See *United States v. Milton*, 8 F.3d 39, 45 (D.C. Cir. 1993)("defense of literal truth" applies to false statement prosecutions under 18 U.S.C. § 1001), *cert. denied*, 513 U.S. 919 (1994). See also *United States v. Hsia*, 24 F. Supp. 2d 33 (D.D.C. 1998), in which the court stated, "A false statement is an essential element of a prosecution under 18 U.S.C. § 1001, and if the statement at issue is literally true a defendant cannot be convicted of violating Section 1001." Id. at 58; *United States v. Hsia*, 176 F.3d 517, 525 (D.C. Cir. 1999)(reversing on other grounds). (U)

CHAPTER NINE
CONCLUSIONS (U)

Within weeks of the terrorist attacks of September 11, 2001, the National Security Agency (NSA) initiated a Top Secret, compartmented program to collect and analyze international and domestic telephone and e-mail communications and related data. The intent of the NSA program, which used the cover term Stellar Wind, was to function as an "early warning system" to detect and prevent future terrorist attacks within the United States. ~~(TS//STLW//SI//OC/NF)~~

The program was authorized by the President in a series of Presidential Authorizations that were issued at approximately 30 to 45 day intervals and certified as to form and legality by the Attorney General. The Presidential Authorizations stated that an extraordinary emergency existed permitting the use of electronic surveillance within the United States for counterterrorism purposes, without a court order, under specified circumstances. Under the program the NSA collected vast amounts of information through electronic surveillance and other intelligence-gathering techniques, including information concerning the telephone and e-mail communications of American citizens and other U.S. persons. Top Secret compartmented information derived from this collection was provided to, among other agencies, the FBI, which sent Secret-level, non-compartmented versions of the information to FBI field offices as investigative leads. ~~(TS//STLW//SI//OC/NF)~~

The Stellar Wind program represented an extraordinary expansion of the NSA's signals intelligence activity and a departure from the traditional restrictions on electronic surveillance imposed under the Foreign Intelligence Surveillance Act (FISA), Executive Order 12333, and other laws. Yet, the program was conducted with limited notification to Congress and without judicial oversight, even as the program continued for years after the September 11 attacks. ~~(TS//STLW//SI//OC/NF)~~

The White House tightly controlled who within the Justice Department could be read into the Stellar Wind program. In particular, we found that only three Department attorneys, including the Attorney General, were read into the program and only one attorney was assigned to assess the program's legality in its first year and a half of operation. The limited number of Justice Department read-ins contrasted sharply with the hundreds of operational personnel who were read into the program at the FBI and other agencies involved with the program. ~~(TS//STLW//SI//OC/NF)~~

I. Operation of the Program (U//~~FOUO~~)

Under the program, the NSA initially intercepted the content of international telephone and e-mail communications in cases where at least one of the communicants was reasonably believed to be associated with any international terrorist group. These collections became known as basket 1 of the Stellar Wind program. [redacted] ~~(TS//STLW//SI//OC/NF)~~

The NSA also collected bulk telephony and e-mail meta data – communications signaling information showing contacts between and among telephone numbers and e-mail addresses, but not the contents of those communications. These collections became known as basket 2 (telephone meta data) and basket 3 (e-mail meta data) of the Stellar Wind program. ~~(TS//STLW//SI//OC/NF)~~

Under basket 2 collections, [redacted] These call detail records included the originating and terminating telephone number of each call, and the date, time, and duration of each call, but not the content of the call. The NSA collected [redacted] "pairs" of contacts per day, including all domestic and international telephone calls [redacted] ~~(TS//STLW//SI//OC/NF)~~

Regarding e-mail meta data (basket 3), the NSA collected and archived [redacted] Internet traffic [redacted][450] E-mail meta data included only the "to," "from," "cc," "bcc," and other addressing-type information, but similar to call detail records did not include the subject line or the message contents. ~~(TS//STLW//SI//OC/NF)~~

NSA analysts accessed baskets 2 and 3 for analytical purposes with specific telephone numbers or e-mail addresses that satisfied the standard

[450] [redacted]

for querying the data as described in the Presidential Authorizations. A small amount of the collected content and meta data was analyzed by the NSA, working with other members of the Intelligence Community, to generate intelligence reports about suspected terrorists and individuals possibly associated with them. Many of these reports were disseminated, or "tipped," to the FBI for further dissemination as leads to FBI field offices. As of March 2006, [redacted] individual U.S. telephone numbers [redacted] e-mail addresses had been tipped to the FBI, the vast majority of which were disseminated to FBI field offices for investigation or other action. The results of these investigations were uploaded into FBI databases. ~~(TS//STLW//SI//OC/NF)~~

The Justice Department had two primary roles in the Stellar Wind program. First, the Attorney General was required to certify each Presidential Authorization as to form and legality – in effect, to give the Department's assurance that the activities the President was authorizing the NSA to conduct were legal. In carrying out this responsibility, the Attorney General was advised by the Department's Office of Legal Counsel (OLC). As we described in this report and discuss in the next section, we found that during the early phase of the Stellar Wind program the Department lacked sufficient attorney resources to be applied to the legal review of the program and, due in significant part to the White House's extremely close hold over the program, was not able to coordinate its legal review of the program with the NSA. ~~(TS//STLW//SI//OC/NF)~~

The Department's other primary role in Stellar Wind was as a member of the Intelligence Community. The FBI was one of two main customers of the intelligence produced under the program (the other being the CIA). Working with the NSA, a small team of FBI personnel converted the NSA's Top Secret Stellar Wind intelligence reports into leads that were disseminated at the Secret level, under an FBI program called [redacted] to FBI field offices for appropriate action. As detailed in Chapter Six and discussed below, we concluded that although the information produced under the Stellar Wind program had value in some counterterrorism investigations, it played a limited role in the FBI's overall counterterrorism efforts. ~~(TS//STLW//SI//OC/NF)~~

II. Office of Legal Counsel's Analysis of the Stellar Wind Program ~~(TS//SI//NF)~~

As described in Chapters Three, Four, and Five of this report, the Justice Department advised the Executive Branch, and in particular the President, as to the legality of the Stellar Wind program. The Department's view of the legal support for the activities conducted under the program changed over time as more attorneys were read into the program. These

changes occurred in three phases. In the first phase of the program (September 2001 through May 2003), the legality of the program was founded on an analysis developed by John Yoo, a Deputy Assistant Attorney General in OLC. In the second phase (May 2003 through May 2004), the program's legal rationale underwent significant review and revision by OLC Assistant Attorney General Jack Goldsmith and Associate Deputy Attorney General Patrick Philbin. In the third and final phase (July 2004 through January 2007), based in part upon the legal concerns raised by the Department, the entire program was moved from presidential authority to statutory authority under FISA, with oversight by the FISA Court. ~~(TS//STLW//SI//OC/NF)~~

In Chapters Three and Four, we examined the Department's early role in assessing the legality of the Stellar Wind program. The Justice Department's access to the program was controlled by the White House, and former White House Counsel and Attorney General Alberto 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 Counsel to the Vice President David Addington and White House Counsel 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)~~

We believe the White House's policy of limiting access to the program for non-operational personnel was applied at the Department of Justice in an unnecessarily restrictive manner prior to March 2004, and was detrimental to the Department's role in the operation of the program from its inception through that period. We also believe that Attorney General Ashcroft, as head of the Department during this time, 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. We believe that the circumstances as they existed as early as 2001 and 2002 called for additional Department resources to be applied to the legal review of the program. As noted in Chapter Three, Ashcroft requested to have his Chief of Staff and Deputy Attorney General Larry Thompson read into the program, but the White House did not approve this request. However, because Ashcroft did not agree to be interviewed by the OIG for this investigation, we were unable to determine the full 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)~~

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 believe 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)~~

In the earliest phase of the program, Yoo advised Attorney General Ashcroft and the White House that the collection activities under Stellar Wind were a lawful exercise of the President's inherent authorities as Commander-in-Chief under Article II of the Constitution, subject only to the Fourth Amendment's reasonableness standard. In reaching this conclusion, Yoo dismissed as constitutionally incompatible with the President's Article II authority the FISA statute's provision that FISA was to be the "exclusive means" for conducting electronic surveillance in the United States for foreign intelligence purposes, and he concluded that these statutory provisions should be read to avoid conflicts with the President's constitutional Commander-in-Chief authority. (~~TS//STLW//SI//OC/NF~~)

As noted above, during the first year and a half of the Stellar Wind program only three Department attorneys were read into the program – Yoo, Attorney General Ashcroft, and James Baker, Counsel in the Office of Intelligence Policy and Review. Jay Bybee, the OLC Assistant Attorney General and Yoo's direct supervisor, was not read into the program and was unaware that Yoo was providing advice on the legal basis to support the program. Thus, Yoo was providing legal opinions on this unprecedented expansion of the NSA's surveillance authority without review by his OLC supervisor or any other Department attorney. Rather, Yoo worked alone on this project, and produced two major opinions supporting the legality of the program. ~~(TS//STLW//SI//OC/NF)~~

When additional attorneys were read into the program in 2003, they provided a fresh review of Yoo's legal memoranda. Patrick Philbin, an Associate Deputy Attorney General, and later Jack Goldsmith, Bybee's replacement as the Assistant Attorney General for OLC, concluded that Yoo's analysis was seriously flawed, both factually and legally. Goldsmith and Philbin concluded that Yoo's analysis fundamentally mischaracterized [redacted] by failing to address the fact that the NSA was collecting [redacted] and also failing to assess the legality of this activity as it was carried out by the NSA. Goldsmith and Philbin also pointed to Yoo's assertion that Congress had not sought to restrict presidential authority to conduct warrantless searches in the national security area, and criticized Yoo's omission from his analysis of a FISA provision (50 U.S.C. § 1811) that addressed the President's authority to conduct electronic surveillance during wartime. They further noted that Yoo based his assessment of the program's legality on an extremely

aggressive view of the law that revolved around the Constitutional primacy of the President's Article II Commander-in-Chief powers, and he may have done so based on a faulty understanding of key elements of the program. (~~TS//STLW//SI//OC/NF~~)

As described in Chapter Four, Goldsmith and Philbin's reassessment of the legality of Stellar Wind began after Yoo left the Department in May 2003, and culminated in a 108-page legal memorandum issued on May 6, 2004. That memorandum superseded Yoo's earlier Stellar Wind opinions and premised the legality of the program's electronic surveillance activities on statutory rather than Article II constitutional grounds.[451] As a consequence of this new legal rationale, Department officials concluded that the President's authority to conduct electronic surveillance of the enemy in wartime was [redacted] The Department's advice to the White House that the scope of collection under the program [redacted] was legally problematic led to a contentious dispute in March 2004 (discussed below in Section III). (~~TS//STLW//SI//OC/NF~~)

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 such a complex and contentious program without critical review both within the Department and by the NSA. These officials told us that errors in Yoo's legal memoranda may have been identified and corrected if the NSA had been allowed to review his work. They also stressed the importance of adhering to OLC's traditional practice of peer review of all OLC memoranda and the need for the OLC Assistant Attorney General, as a Senate-confirmed official, to review and approve all such opinions. (~~TS//SI//NF~~)

These officials also stated that such review and oversight measures are especially important with regard to legal opinions on classified matters that are not subjected to outside scrutiny. We agree with these officials' comments and note that 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//SI//NF~~)

[redacted]

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

We did not agree with Gonzales's view that it was necessary for national security reasons to limit the number of Department read-ins to those "who were absolutely essential," as distinguished from the numerous operational read-ins who were necessary to the technical implementation of the program. First, the program was as legally challenging as it was technically complex. Just as a sufficient number of operational personnel were read into the program to assure its proper technical implementation, we believe that 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 at least the first 20 months of the program. ~~(TS//SI//NF)~~

Second, we do not believe that reading in a few additional Department attorneys during the initial phase of the program would have jeopardized national security, especially given the [redacted] operational personnel who were cleared into the program during the same period.[452] In fact, the highly classified nature of the program, rather than constituting an argument for limiting the OLC read-ins to a single attorney, made the need for careful analysis and review within the Department and by the NSA more compelling. ~~(TS//SI//NF)~~

We also found that the expansion of legal thinking and breadth of expertise from reading in additional Department attorneys over time eventually produced more factually accurate and legally comprehensive analyses concerning the program. Increased attorney read-ins also was an important factor in grounding the program on firmer legal footing under FISA. The transition of the program from presidential authority to statutory authority under FISA with judicial oversight was made possible through the collective work of the attorneys who finally were read into the program beginning in 2004. The applications to the FISA Court to effectuate this transition were produced by Department attorneys, working with both legal and technical personnel at the NSA, further reinforcing our view that such coordinated efforts are more likely to produce well-considered legal strategies and analysis. ~~(TS//SI//NF)~~

In addition, as discussed in Chapters Six and Seven, the increase in the number of attorneys read into the program beginning in 2004 helped the Department to more efficiently "scrub" Stellar Wind-derived information in FISA applications and improve the handling of Stellar Wind-related discovery issues in international terrorism prosecutions. ~~(TS//STLW//SI//OC/NF)~~

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[452] By the end of 2003, only Yoo, Ashcroft, Baker, Philbin, and Goldsmith had been read into Stellar Wind at the Department. [redacted] ~~(TS//SI//NF)~~

III. Hospital Visit and White House Recertification of the Program (U)

In Chapter Four, we describe how the Department's reassessment of Yoo's legal analysis led Deputy Attorney General James Comey, who was exercising the powers of the Attorney General while Ashcroft was hospitalized in March 2004, to conclude that he could not certify the legality of the Stellar Wind program. In response, the President sent Gonzales and Chief of Staff Andrew Card to visit Ashcroft in the hospital to seek his certification of the program, an action Ashcroft refused to take. We believe that the way the White House handled its dispute with the Department about the program – particularly in dispatching Gonzales and Card to Ashcroft's hospital room in an attempt to override Comey's decision – was troubling. ~~(TS//SI//NF)~~

As detailed in Chapter Four, by March 2004 when the Presidential Authorization in effect at that time was set to expire, Goldsmith had already notified the White House several months earlier about the Department's doubts concerning the legality of aspects of the Stellar Wind program. He had made clear that the Department questioned the legality of [redacted] ~~(TS//STLW//SI//OC/NF)~~

When Attorney General Ashcroft was hospitalized and unable to fulfill his duties, Deputy Attorney General Comey assumed the Attorney General's responsibilities. Before the Presidential Authorization was set to expire on March 11, 2004, Comey made clear to senior White House officials, including Vice President Cheney and White House Counsel Gonzales, that the Justice Department could not certify the program as legal. The White House disagreed with the Justice Department's position, and on March 10, 2004, convened a meeting of eight congressional leaders to brief them on the Justice Department's decision not to recertify the program and on the need to continue the program. The White House did not ask Comey or anyone from the Department to participate in this briefing, nor did it notify any Department officials that the briefing had been convened. ~~(TS//SI//NF)~~

Following this congressional briefing, at the direction of President Bush, Gonzales and White House Chief of Staff Andrew Card went to the hospital to seek Attorney General Ashcroft's certification of the Authorization. Again, the White House did not notify any Department officials, including Comey, the ranking Department official at the time, that it planned to take this action. Gonzales's and Card's attempt to persuade Attorney General Ashcroft, who was in the intensive care unit recovering from surgery and according to witnesses appeared heavily medicated, to certify the program over Comey's opposition was unsuccessful. Ashcroft

told Gonzales and Card from his hospital bed that he supported the Department's revised legal position, but that in any event he was not the Attorney General at the time – Comey was.[453] ~~(TS//SI//NF)~~

On March 11, the following day, Gonzales certified the Presidential Authorization as to form and legality. ~~(TS//SI//NF)~~

We agree with Director Mueller's observation that the White House's failure to have Justice Department representation at the congressional briefing and the attempt to persuade Ashcroft to recertify the Authorization without going through Comey "gave the strong perception that the [White House] was trying to do an end run around the Acting [Attorney General] whom they knew to have serious concerns as to the legality of portions of the program." ~~(TS//SI//NF)~~

After Mueller, Comey, and other senior Department and FBI officials made known their intent to resign, the President directed that the issue be resolved, and the program was modified to address the Department's legal concerns. Because we were unable to interview key White House officials, we could not determine for certain what caused the White House to change its position and modify the program, although we believe the prospect of mass resignations at the Department and the FBI was a significant factor in this decision. ~~(TS//SI//NF)~~

We reached several conclusions based on our review of the Department's role in the legal analysis of this program and the events surrounding the dispute between the Department and the White House. First, legal opinions supporting complex national security programs – especially classified programs that press the bounds of established law – should be collaborative products supported by sufficient legal and technical expertise and resources at the Department, working in concert with other participating agencies, with the goal of providing the Executive Branch the most informed and accurate legal advice. By limiting access to this program as it did, the White House undermined the Department's ability to perform its critical legal function. ~~(TS//SI//NF)~~

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[453] Gonzales stated that even if he knew that Ashcroft was aware Comey opposed recertifying the program, Gonzales would still have wanted to speak with Ashcroft because he believed Ashcroft still retained the authority to certify the program. Gonzales testified before the Senate Judiciary Committee in July 2007 that although there was concern over Ashcroft's condition, "We would not have sought nor did we intend to get any approval from General Ashcroft if in fact he wasn't fully competent to make that decision." Gonzales also testified, "There's no governing legal principle that says that Mr. Ashcroft [. . .] If he decided he felt better, could decide, 'I'm feeling better and I can make this decision, and I'm going to make this decision.'" (U)

Second, we believe that if the OLC's traditional peer review and supervisory procedures had been adhered to at the outset, the prospect that aspects of the program would have rested on a questionable legal foundation for over 2 years would have been greatly mitigated. ~~(TS//SI//NF)~~

Third, we believe that the Department and FBI officials who resisted the pressure to recertify the Stellar Wind program because of their belief that aspects of the program were not legally supportable acted courageously and at significant professional risk. We believe that this action by Department and FBI officials – particularly Ashcroft, Comey, Mueller, Goldsmith, Philbin, and Counsel for Intelligence Policy James Baker – was in accord with the highest professional standards of the Justice Department. ~~(TS//SI//NF)~~

We recommend that when the Department of Justice is involved with such programs in the future, the Attorney General should carefully assess whether the Department has been given adequate resources to carry out its vital function as legal advisor to the President and should aggressively seek additional resources if they are found to be insufficient. We also believe that the White House should allow the Department a sufficient number of read-ins when requested, consistent with national security considerations, to ensure that such sensitive programs receive a full and careful legal review. (U)

IV. Transition of Program to FISA Authority ~~(TS//STLW//SI//OC/NF)~~

We also examined the transition of the Stellar Wind program's collection activities from presidential authority to FISA authority. We believe there were strong considerations that favored attempting to transition the program to FISA sooner than actually happened, especially as the program 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 massive amounts of non-content data about U.S. persons' domestic and international telephone calls and e-mail communications. We believe that such broad surveillance and collection activities, particularly for a significant period of time, should be conducted pursuant to statute and

judicial oversight. We also believe that placing these activities under Court supervision provides an important measure of accountability for the government's conduct that is less assured where the activities are both authorized and supervised by the Executive Branch alone.
~~(TS//STLW//SI//OC/NF)~~

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 were additional reasons for transitioning Stellar Wind's collection activities to FISA authority. We acknowledge that the transition would always 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 report demonstrate that a full transition to FISA authority was achievable and, in our judgment, should have been pursued earlier.
~~(TS//STLW//SI//OC/NF)~~

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

As a user of Stellar Wind program information, the FBI disseminated leads or "tippers" to FBI field offices. These tippers primarily consisted of specific domestic telephone numbers and e-mail addresses that NSA analysts had determined through meta data analysis were connected to individuals involved with al Qaeda or affiliated groups. The tippers also included content of communications intercepted by the NSA based upon its determination that there was probable cause to believe that a party to the communication was al Qaeda or an affiliated group. From October 2001 through February 2006, the NSA provided the FBI [redacted] Stellar Wind tippers, the vast majority of which were domestic telephone numbers.
~~(TS//STLW//SI//OC/NF)~~

The FBI's chief objective during the earliest months of Stellar Wind's operation was to expeditiously disseminate program information to FBI field offices for investigation, while protecting the NSA as the source of the information and the methods used to collect the information. The FBI assigned this task to a small group of personnel from the Telephone Analysis Unit (TAU) at FBI Headquarters. This group developed a straightforward process to receive the Top Secret, compartmented Stellar Wind reports from the NSA, reproduce the information in a non-compartmented, Secret-level format, and disseminate the information in Electronic Communications, or ECs, to the appropriate field offices for investigation. These [redacted] ECs placed restrictions on how the information could be used, instructing field offices that the information

was "for lead purposes only" and could not be used for any legal or judicial purpose. ~~(TS//STLW//SI//OC/NF)~~

The FBI's participation in Stellar Wind evolved over time as the program became less a temporary response to the September 11 attacks and more a permanent surveillance capability. As Stellar Wind continued to be reauthorized, the FBI tried to improve the effectiveness of its participation in the program. Most significantly, in February 2003 a team of FBI personnel (Team 10) was assigned to work full-time at the NSA to manage the FBI's participation in the program. ~~(TS//SI//NF)~~

Team 10's chief responsibility was to disseminate Stellar Wind information to FBI field offices. However, over time Team 10 began to participate in Stellar Wind in other ways. For example, Team 10 submitted telephone numbers and e-mail addresses to the NSA for possible querying against the bulk meta data collected under the program, and Team 10 regularly contributed to the NSA's drafting process for Stellar Wind reports. Overall, we found that the decision to assign Team 10 to the NSA improved the FBI's knowledge about Stellar Wind operations and gave the NSA better insight about how FBI field offices investigated Stellar Wind information. These benefits translated to improvements in the Stellar Wind report drafting process, and by extension, in [redacted] leads. ~~(TS//STLW//SI//OC/NF)~~

One of the other changes the FBI implemented to attempt to improve the process for handling Stellar Wind leads was to make the FBI's Headquarters-based Communications Analysis Unit (CAU), instead of the field offices, responsible for issuing National Security Letters (NSL) to obtain subscriber information on tipped telephone numbers and e-mail addresses. This measure, initiated in July 2003, was intended to address agent concerns that the leads, which reproduced the information in a non-compartmented, Secret-level format, did not provide sufficient information to initiate national security investigations, a prerequisite under Justice Department investigative guidelines to issuing NSLs. Agents complained that the ECs suffered from vagueness about the source of the information being provided and lacked factual details about the individuals allegedly involved with al Qaeda and with whom the domestic numbers being disseminated possibly were in contact. ~~(TS//STLW//SI//OC/NF)~~

We found that the CAU implemented this change by issuing NSLs from the [redacted] control file, the non-investigative file created in September 2002 as a repository for [redacted]-related communications between FBI Headquarters and field offices. Issuing NSLs from a control file instead of an investigative file was contrary to internal FBI policy. In November 2006, the FBI finally opened an investigative file for the [redacted] project. We believe 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. However, we concluded that the FBI could have, and should have, opened an investigative file for [redacted] when the decision was first made to have FBI Headquarters instead of field offices issue NSLs for [redacted] leads. ~~(TS//STLW//SI//OC/NF)~~

We also tried to assess the general role of Stellar Wind information in FBI investigations and its value to the FBI's overall counterterrorism efforts. Similar to the FBI, we had difficulty assessing the specific value of the program to the FBI's counterterrorism activities. ~~(S//NF)~~

The majority of Stellar Wind information the NSA provided the FBI related to domestic telephone numbers and e-mail addresses the NSA had identified through meta data analysis as having connections to al Qaeda or affiliated organizations. [redacted] Not surprisingly, FBI agents and analysts with experience investigating [redacted] leads told us that most leads were determined not to have any connection to terrorism. These agents and analysts did not identify for us any specific cases where [redacted] leads helped the FBI identify previously unknown subjects involved in terrorism, although we recognize that FBI officials and agents other than those we interviewed may have had different experiences with Stellar Wind information. ~~(TS//STLW//SI//OC/NF)~~

Two FBI statistical studies that attempted to assess the value of Stellar Wind meta data leads to FBI counterterrorism efforts did not reach explicit conclusions on the program's usefulness. The first study found that 1.2 percent of Stellar Wind leads made "significant" contributions.[454] The second study did not identify any examples of "significant" Stellar Wind contributions to FBI counterterrorism efforts.[455] The FBI OGC told us that

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[454] As we described earlier in this chapter, the FBI considered a tipper "significant" if it led to any of three investigative results: the identification of a terrorist, the deportation from the United States of a suspected terrorist, or the development of an asset that can report about the activities of terrorists. ~~(S//NF)~~

[455] As described earlier in this chapter, the FBI considered a tipper "significant" if it led to any of three investigative results: the identification of a terrorist, the deportation from the United States of a suspected terrorist, or the development of an asset that can report about the activities of terrorists. ~~(TS//NF)~~

statements by senior FBI officials in congressional testimony that the Stellar Wind program had value were based in part on the results of the first study, which found that 1.2 percent of the Stellar Wind leads made significant contributions to FBI cases. ~~(TS//STLW//SI//OC/NF)~~

FBI agents we interviewed generally were supportive of Stellar Wind (or [redacted]), calling the information "one tool of many" in the FBI's anti-terrorism efforts that "could help move cases forward" by, for example, confirming a subject's contacts with individuals involved in terrorism or identifying additional terrorist contacts. However, FBI agents and analysts also told us that the Stellar Wind information disseminated to FBI field offices could also be frustrating because it often lacked details about the foreign individuals allegedly involved in terrorism with whom domestic telephone numbers and e-mail addresses were in contact. Some agents also believed that the [redacted] project failed to adequately prioritize leads sent to FBI field offices. ~~(TS//STLW//SI//OC/NF)~~

FBI Director Mueller told us that he believes the Stellar Wind program was useful and that the FBI must follow every lead it receives in order to prevent future terrorist attacks. He stated that to the extent such information can be gathered and used legally it must be exploited, and that he "would not dismiss the potency of a program based on the percentage of hits." Other witnesses shared this view that an intelligence program's value cannot be assessed by statistical measures alone. General Hayden said that the value of the program may lie in its ability to help the Intelligence Community determine that the terrorist threat embedded within the country is not as great as once feared. Some witnesses also believed that the value of the program should not depend on documented "success stories," but rather on maintaining an intelligence capability to detect potential terrorist activity in the future. Several witnesses suggested that the program provides an "early warning system" to allow the Intelligence Community to detect potential terrorist attacks, even if the system has not specifically uncovered evidence of preparations for such an attack.
~~(TS//STLW//SI//OC/NF)~~

As part of our analysis, we sought to look beyond these comments of general support for Stellar Wind to specific, concrete examples of the program's contributions that illustrated the role Stellar Wind information either has or could play in the FBI's counterterrorism efforts. We examined five cases frequently cited in documents we reviewed and during our interviews as examples of Stellar Wind's positive contributions to the FBI's counterterrorism efforts. The evidence indicated that Stellar Wind information had value in some of these investigations by causing the FBI to take action that led to useful investigative results. In other cases the connection between the Stellar Wind information and the FBI's investigative actions was more difficult to discern. ~~(TS//STLW//SI//OC/NF)~~

In the end, we found it difficult to assess or quantify the overall effectiveness of the Stellar Wind program to the FBI's counterterrorism activities. However, based on the interviews conducted and documents reviewed, we concluded that although Stellar Wind information had value in some counterterrorism investigations, it generally played a limited role in the FBI's overall counterterrorism efforts. ~~(S//NF)~~

It is also important to note that a significant consequence of the NSA program and the FBI's approach to assigning leads for program information was that FBI field offices conducted many threat assessments on individuals located in the United States, including U.S. persons, that typically were determined not to have any nexus to terrorism or represent a threat to national security. As a result, the FBI collected and retained a significant amount of personal information about the users of tipped telephone numbers and e-mail addresses, such as names and home addresses, places of employment, foreign travel, and the identity of family members. The results of these threat assessments and the information collected generally were reported in communications to FBI Headquarters and uploaded into FBI databases. ~~(TS//STLW//SI//OC/NF)~~

The FBI's collection of information in this manner is ongoing under [redacted] project, the successor FBI project to [redacted] which disseminates to FBI field offices lead information the NSA derives from bulk telephony and e-mail meta data now collected under FISA authority. Like [redacted] project requires FBI field offices to conduct threat assessments on telephone numbers and e-mail addresses identified through the NSA's analytical process that the FBI is not already aware of, including telephone numbers and e-mail addresses one or two steps removed from direct contacts with individuals involved in terrorism. To the extent the leads derived from the FISA-authorized activities generate results similar to those under Stellar Wind, the FBI threat assessments will continue to result in the collection and retention of a significant amount of personal information about individuals in the United States, including U.S. persons, who do not have a nexus to terrorism or represent a threat to national security. ~~(TS//STLW//SI//OC/NF)~~

We recommend that, as part of the [redacted] project, the Justice Department's National Security Division (NSD), working with the FBI, should collect information about the quantity of telephone numbers and e-mail addresses disseminated to FBI field offices that are assigned as Action leads and that require offices to conduct threat assessments. The information compiled by the Justice Department should include whether individuals identified in threat assessments are U.S. or non-U.S. persons and whether the threat assessments led to the opening of preliminary or full national security investigations. With respect to threat assessments that conclude that users of tipped telephone numbers or e-mail addresses are

not involved in terrorism and are not threats to national security, the Justice Department should take steps to track the quantity and nature of the U.S. person information collected and how the FBI retains and utilizes this information. This will enable the Justice Department and entities with oversight responsibilities, including the OIG and congressional committees, to assess the impact this intelligence program has on the privacy interests of U.S. persons and to consider whether, and for how long, such information should be retained. ~~(TS//SI//NF)~~

We also recommend that, consistent with NSD's current oversight activities and as part of its periodic reviews of national security investigations at FBI Headquarters and field offices, NSD should review a representative sampling [redacted] leads to those offices. For each lead examined, NSD should assess FBI compliance with applicable legal requirements in the use of the lead and in any ensuing investigations, particularly with the requirements governing the collection and use of U.S. person information. ~~(TS//SI//NF)~~

VI. Discovery and "Scrubbing" Issues ~~(TS//SI//NF)~~

Although Stellar Wind was conceived and implemented as an intelligence-gathering program, it was inevitable that the information from this program would intersect with the Department's prosecutorial functions, both in criminal cases brought in federal courts and in seeking FISA orders from the FISA Court. We found that the limited number of Department read-ins also had adverse consequences on issues related to these Department functions. ~~(TS//STLW//SI//OC/NF)~~

One such issue concerned the Department's compliance with discovery obligations in international terrorism prosecutions, which we discuss in Chapter Seven. We determined that the Department was aware as early as [redacted] that information collected under Stellar Wind could have implications for the Department's litigation responsibilities under Federal Rule of Criminal Procedure 16 and *Brady v. Maryland*, 373 U.S. 83 (1963). ~~(TS//STLW//SI//OC/NF)~~

Analysis of this discovery issue was first assigned to John Yoo in [redacted] Yoo, working alone, produced a legal analysis of the government's discovery obligations in the case of [redacted] and [redacted]

[redacted]

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

[redacted]

No Justice Department attorneys with terrorism prosecution responsibilities were read into the Stellar Wind program until mid-2004, and as a result the Department continued to lack the advice of attorneys who were best equipped to identify and examine the discovery issues in connection with the program. Since that time the Department has taken steps to respond [redacted] to [redacted] discovery motions [redacted] These responses involve the use of the Classified Information Procedures Act, 18 U.S.C. App. 3, to file *ex parte* in camera pleadings with federal courts to describe any potentially responsive Stellar Wind-derived information. [redacted]

[redacted] (~~TS//STLW//SI//OC/NF~~)

[redacted] we recommend that the Department assess its discovery obligations regarding Stellar Wind-derived information in international terrorism prosecutions. We also recommend that the Department carefully consider whether it must re-examine past cases to see whether potentially discoverable but undisclosed Rule 16 or *Brady* material was collected by the NSA under the program, and take appropriate steps to ensure that it has complied with its discovery obligations in such cases. We also recommend that the Department, in coordination with the NSA, implement a procedure to identify Stellar Wind-derived information that may be associated with international terrorism cases currently pending or likely to be brought in the future and evaluate whether such information should be disclosed in light of the

government's discovery obligations under Rule 16 and *Brady.* (~~TS//STLW//SI//OC/NF~~)

In addition, we examined the issue of the Department's use of Stellar Wind-derived information in FISA applications. We believe it was foreseeable that some Stellar Wind-derived information would be contained in the FISA applications filed by the Department's Office of Intelligence Policy and Review (OIPR). OIPR Counsel Baker believed, and we agree, that it would have been detrimental to this relationship if the Court learned that information from Stellar Wind was included in FISA applications without the Court being told so in advance. As discussed in Chapter Three, White House officials initially rejected the idea of reading in members of the FISA Court, but after Department officials continued to press the issue, ultimately in January 2003 agreed to read in a single judge in January 2002 (Presiding Judge Lamberth, followed by Presiding Judge Kollar-Kotelly in May 2002). ~~(TS//STLW//SI//OC/NF)~~

The "scrubbing" procedures imposed by the Court and implemented by Baker to account for Stellar Wind-derived information in international terrorism FISA applications created concerns among some OIPR attorneys about the unexplained changes being made to their FISA applications. These scrubbing procedures also substantially altered the assignment of cases to FISA Court judges for nearly 3 years. We concluded that once Stellar Wind began to affect the functioning of the FISA process shortly after the program's inception, the number of OIPR staff and FISA Court judges read into Stellar Wind should have increased. Instead, read-ins were limited to a single OIPR official for over two years and to the Presiding Judge of the FISA Court for a period of four years. (~~TS//STLW//SI//OC/NF~~)

The Justice Department, together with the FBI and the NSA, today continues to apply scrubbing procedures to international terrorism FISA applications. Since January 2006, all members of the Court have been briefed on the Stellar Wind program and all of the judges handle applications that involve Stellar Wind-derived information in FISA applications. While we found that the government has expended considerable resources to comply with the scrubbing procedures required by the FISA Court since February 2002, we did not find any instances of the government being unable to obtain FISA surveillance coverage on a target because of this requirement. (~~TS//STLW//SI//OC/NF~~)

VII. Gonzales's Statements (U)

As part of this review, the OIG examined whether Attorney General Gonzales made false or misleading statements to Congress related to the Stellar Wind program. We concluded that Gonzales's testimony did not

constitute a false statement and that he did not intend to mislead Congress. However, we concluded that his testimony in several respects was confusing, not accurate, and had the effect of misleading those who were not knowledgeable about the program. ~~(S//NF)~~

Aspects of the Stellar Wind program were first disclosed publicly in a series of articles in The New York Times in December 2005. In response, the President publicly confirmed a portion of the program – which he called the terrorist surveillance program – describing it as the interception of the content of international communications of people reasonably believed to have links to al Qaeda and related organizations (basket 1). Subsequently, Attorney General Gonzales was questioned about NSA surveillance activities in two hearings before the Senate Judiciary Committee in February 2006 and July 2007. ~~(TS//STLW//SI//OC/NF)~~

Through media accounts and former Deputy Attorney General Comey's Senate Judiciary Committee testimony in May 2007, it was publicly revealed that the Department and the White House had a major disagreement related to the program in March 2004. As discussed in Chapter Four, this dispute – which resulted in the visit to Attorney General Ashcroft's hospital room by Gonzales and Card and brought several senior Department and FBI officials to the brink of resignation after the White House continued the program [redacted] ~~(TS//STLW//SI//OC/NF)~~

In his testimony before the Senate Judiciary Committee, Gonzales stated that the dispute at issue between the Department and the White House did not relate to the "Terrorist Surveillance Program" that the President had confirmed, but rather pertained to other intelligence activities. We believe this testimony created the misimpression that the dispute concerned activities entirely unrelated to the terrorist surveillance program, which was not accurate. In addition, we believe Gonzales's testimony that Department attorneys did not have "reservations" or "concerns" about the program the "President has confirmed" was incomplete and confusing because Gonzales did not account for the fact that the Department's concerns were what led to [redacted] and that these concerns had been conveyed to the White House over a period of months prior to and including March 2004 when the issue was resolved. ~~(S//NF)~~

We recognize that Attorney General Gonzales was in the difficult position of testifying about a highly classified program in an open forum. However, we also believe that Gonzales, as a participant in the March 2004 dispute between the White House and the Justice Department and, more importantly, as the nation's chief law enforcement officer, had a duty to balance his obligation not to disclose classified information with the need

not to be misleading in his testimony about the events that nearly led to mass resignations of the most senior officials at the Justice Department and the FBI. Although we believe that Gonzales did not intend to mislead Congress, we believe his testimony was confusing, inaccurate, and had the effect of misleading those who were not knowledgeable about the program. ~~(TS//SI//NF)~~

VIII. Conclusion (U)

From the inception of the Stellar Wind program in October 2001, vast amounts of information about telephone and e-mail communications were collected and stored in databases at the NSA. The NSA used this information to conduct analysis and disseminate reports to support the government's counterterrorism efforts. We found that in the early years of the Stellar Wind program, the Department of Justice lacked the necessary legal resources to carry out an adequate review of the legality of the program. The White House strictly controlled the Department's access to the program. For the first year and a half of the program only 3 Department officials were read into Stellar Wind, and only 3 more officials had been read in by the end of 2003. Only a single Department attorney analyzed the legal basis for the program during its first year and a half of its operation. Beginning in mid-2003, after additional Department officials were read into the program, the Department determined that this attorney's initial legal analysis was legally and factually flawed. ~~(TS//STLW//SI//OC/NF)~~

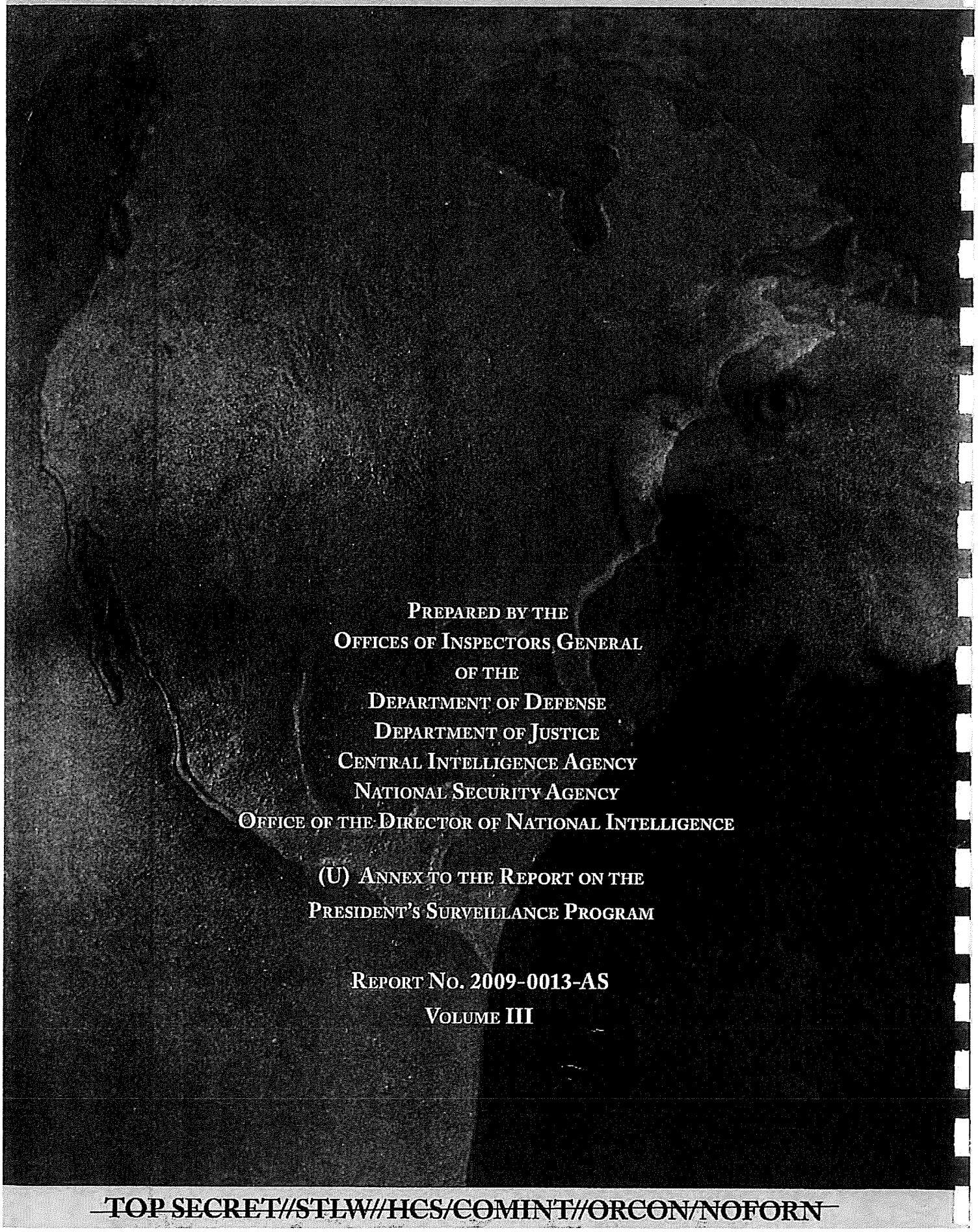
We believe that the strict controls over the Department's access to the program undermined the role of the Justice Department in advising the President as to the legality of the program during its early phase of operation. The Department's comprehensive reassessment of the program's legality beginning in mid-2003 resulted in a contentious dispute with the White House that nearly led to the mass resignation of the Department's senior leadership. In March 2004 the White House continued the program despite the Department's conclusion that it found no legal support for aspects of the program. In the face of the potential resignations, however, the White House [redacted] in accord with the Department's legal concerns. Eventually, the entire program was transitioned, in stages, to the authority of the FISA statute. ~~(TS//STLW//SI//OC/NF)~~

Given the broad nature of the collection activities under the Stellar Wind program, the substantial amount of information the program collected related to U.S. persons, and the novel legal theories advanced to support the program, we believe that the Department should have more carefully and thoroughly reviewed the legality of the program, in accord with its normal

peer review and oversight practices, particularly during its first year and a half of operation. ~~(TS//STLW//SI//OC/NF)~~

We also concluded that the Department should have begun efforts to transition the Stellar Wind program to FISA authority earlier than March 2004, when that process began, especially as Stellar Wind became less a temporary response to the September 11 attacks and more a permanent surveillance tool. We believe that such broad surveillance and collection activities conducted in the United States that impact U.S. persons, particularly when they extend for such a significant period of time, should be conducted pursuant to statute and be subjected to judicial oversight. Placing such activities under Court supervision, as now occurs, also provides an important measure of accountability for the government's conduct that is less assured when the activities are authorized and supervised by the Executive Branch alone. ~~(TS//STLW//SI//OC/NF)~~

Finally, we believe that the Department should carefully monitor the collection, use, and retention of the information that is now collected under FISA authority, given the expansive scope of the collection activities. The Department and other agencies should also continue to examine the value of collecting such information to the government's ongoing counterterrorism efforts. ~~(TS//SI//NF)~~



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

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