Comparing two versions of the OIG report on STELLARWIND.

Recently the *New York Times* was able to FOIA additional portions of the Inspector General's report on STELLARWIND, in the process revealing additional evidence regarding the program's questionable legality, more information regarding what type of information was collected, and the standards for so doing.

In addition to what is in the article, here are some items to note:

- (Pg 21) The “probable cause” standard demanded by the 1st amendment becomes “based on the factual and practical considerations of every day life on which reasonable and prudent persons act, there are reasonable grounds to believe...” This is not simply a flowery rewording, it is weakening of the standards of evidence.

- (Pg 54 & 480) That the President's authority “displaces provisions of law.” Literally a revival of the discredited Nixonian “If the President does it, it's not illegal.”

These have been noted before, but it is worth pointing them out again.

Still remaining: the names of the people affected by this program. There are literally people who have gone to jail based on evidence that neither they nor their attorneys ever saw. Pages 76 thru 78 covers some of that, as do pages 186-189 and 648 thru 661. Starting at 670 we have a discussion regarding discovery of evidence, and how STELLARWIND falls short. “We found that the department made little effort to understand and comply with its discovery obligations in connection with Stellar Wind-derived information.” (pg 693). Moreover, in a newly released segment on page 739, we see that as of the time the report was written that “… the Department of Justice continues to lack a comprehensive process for identifying potentially discoverable Stellar Wind information in terrorism cases.” Have the defense attorneys been notified in each of the criminal cases enumerated in the report? That remains unclear, hidden in the blackouts.

Likewise we continue to be denied key terms, for instance, “tippers” is used many times throughout the report, yet the definition of this word in the glossary is redacted. And yet we have a fair definition from duly FOIA'd documents hosted on NSA's own website. We are denied enumeration, by which I mean that most references to numbers are redacted, (How many reports, how much interception, how many emails, phone calls? How many terrorists nabbed?) as are many graphs. We are also frequently denied dates, from which to put together an accurate timeline.

I also note that many of the remaining redactions do not have a specific FOIA exemption listed. One can only take from this that there is no security reason to continue to deny this information.

In cases, what is redacted is already known from multiple public sources, and there is no good reason to hide them. The *Times* and others, therefore should continue to press for the release of additional information.

I have provided here a table enumerating the changes between the two versions.
(U) SIGNIT Activities Authorized Under the Program

The 4 October 2001 Presidential Authorization directed the Secretary of Defense to use the capabilities of the Department of Defense, including but not limited to the signals intelligence capabilities of the National Security Agency, to collect foreign intelligence by electronic surveillance, to provide the surveillance was intended to:

(a) acquire a communication (including but not limited to a wire communication carried into or out of the United States by cable) for which there is probable cause to believe that

(6/NF) Each of the Presidential Authorizations included a finding to the effect that terrorist groups of global reach possessed the intent and capability to attack the United States, that an extraordinary emergency continued to exist, and that these circumstances constituted an urgent and compelling governmental interest permitting electronic surveillance within the United States for counterterrorism purposes, without judicial warrants or court orders. The primary authorities cited for the legality of the electronic surveillance and related activities were Article II of the Constitution and the 18 September 2001 Authorization for Use of Military Force Joint Resolution (AUMF).

The President also noted his intention to inform appropriate members of the Senate and the House of Representatives of the program "as soon as I judge that it can be done consistently with national defense needs."

and Department of Justice Correlation as to Form and Legality

(6/NF) Each of the Presidential Authorizations included a finding to the effect that terrorist groups of global reach possessed the intent and capability to attack the United States, that an extraordinary emergency continued to exist, and that these circumstances constituted an urgent and compelling governmental interest permitting electronic surveillance within the United States for counterterrorism purposes, without judicial warrants or court orders. The primary authorities cited for the legality of the electronic surveillance and related activities were Article II of the Constitution and the 18 September 2001 Authorization for Use of Military Force Joint Resolution (AUMF). The authorizations further provided that any limitation in B.C. 12335 or any other Presidential directive inconsistent with the Presidential Authorizations shall not apply, to the extent of the inconsistency, to the electronic surveillance authorized under the PSP. Each authorization also included the President's determination that, to assist in preserving the secrecy necessary to "detect and prevent acts of terrorism against the United States," the Secretary of Defense was to defer notification of the authorizations and the activities carried out pursuant to them to persons outside the Executive Branch. The President also noted his intention to inform appropriate members of the Senate and the House of Representatives of the program "as soon as I judge that it can be done consistently with national defense needs."

(6/NF) The language of the second Presidential Authorization changed in three respects the scope of collection and metadata acquisition was redefined in the second Presidential Authorization.

First, the "probable cause to believe" standard for the collection of Internet communications and telephone content was replaced with "based on the factual and scientific evidence available to the Government."
P. 22

physical characteristics of a person's face which can be used to identify or locate that person. Such characteristics are not generally obtainable from the information contained in the database used by the FBI. However, in some cases, such information may be obtained from other sources, such as photographs or fingerprints. These sources may contain additional information about the individual, such as their name, address, or occupation, which could be used to further identify them.

P. 55

On the morning of 11 March 2004, with the Presidential Authorization set to expire, President Bush signed a new authorization for the PES. In a departure from the past practice of having the Attorney General certify the authorization, the 11 March authorization was certified by White House Counsel McNulty. The 11 March authorization also differed markedly from prior authorizations in three other respects.

P. 54

On the morning of 11 March 2004, with the Presidential Authorization set to expire, President Bush signed a new authorization for the PES. In a departure from the past practice of having the Attorney General certify the authorization, the 11 March authorization was certified by White House Counsel McNulty. The 11 March authorization also differed markedly from prior authorizations in three other respects.

The first significant difference between the 11 March 2004 Presidential Authorization and prior authorizations was that the executive order that Article II Commanders-in-Chief authority did not contain the provisions of law, including the Foreign Intelligence Surveillance Act and chapter 1A of Title 18 of the United States Code (including 18 U.S.C. § 2331), relating to the conduct of intelligence activities, nor did it contain any language referring to the conduct of intelligence activities under Article II. The President's authorization also differed markedly from prior authorizations in three other respects.
P. 56

The third departure from prior authorizations was the inclusion of a statement that the Attorney General of the United States approved as to form and legality of the three conditions on which the President authorized the same activities as are extended by this authorization. (Id. at para. 10, y)

P. 57

However, this language was not qualified by the following two subparagraphs:

1) The Department of Defense may obtain and retain background screening type information, including telecommunications dialing data, in connection with the security clearance process for Department of Defense personnel, and
2) Background screening type information, including telecommunications dialing data, is "ascertained" as purposes of subparagraph (1) above when, and only when, the Department of Defense has ascertained and retained such background screening type information, including telecommunications dialing data and not when the Department of Defense has background screening type information which relates to Department of Defense, or to Department of Defense personnel, and

The decision (1 March 2004 authorized the first three sought to and the March 2004 authorized the second three sought to add certain conditions to the Department of Defense and allowed authority to both obtain and retain such information and ascertain such information using the three conditions on which the President authorized the same activities as are extended by this authorization.

The language describing what the term "ascertained" meant was that it was one of the conditions on which the President authorized the same activities as are extended by this authorization.

P. 56

The third departure from prior authorizations was the inclusion of a statement that the Attorney General of the United States approved as to form and legality of the three conditions on which the President authorized the same activities as are extended by this authorization. (Id. at para. 10, y)
 minimization procedures and additional controls on PESP operations.

Management emphasized that the
minimization rules required under non-PESP authorities also
applied to PESP. The Authorizations specifically directed NIA
to "minimize the information collected concerning American
citizens, to the extent consistent with the effective
accomplishment of the mission of detection and prevention of
acts of terrorism within the United States." NIA complied by
applying USDSP0193 minimization procedures. For
example, and as described in the following section:

- The collection of U.S. access information was
  minimized by

PESP Operations: Metadata

For example, e-mail message metadata includes the sender and recipient e-mail
addresses. It does not include the subject line or the text of the
e-mail, which are considered content. Telephony metadata includes such information as the calling and called
telephone numbers, but not spoken words.

PESP Operations: Metadata

The Authorization defines
"metadata" as
"sender/recipient/addressing-type information,
including telecommunications dialing-type data, but not the
contexts of the communication." For example, e-mail
message metadata includes the sender and recipient e-mail
addresses. It does not include the subject line or the text of the
e-mail, which are considered content. Telephony
metadata includes such information as the calling and called
telephone numbers, but not spoken words.

The Associate General Counsel for Operations said
that establishing a link to international terrorist groups or al-
Qaeda and its affiliates met the Authorization's requirement
that all activities conducted under the PESP be for the purpose
of detecting and preventing terrorist acts within the
United States. He explained that because the President had
determined that international terrorist groups
al-Qaida present a threat within the United States,
regardless of whose members were located, linking a target
selector to such groups established that the collection was for

(9) 42 U.S.C. §§ 1552, 1556; 21 C.F.R. 5.22(a).

The Associate General Counsel for Operations said
that establishing a link to international terrorist groups or al-
Qaeda and its affiliates met the Authorization's requirement
that all activities conducted under the PESP be for the purpose
of detecting and preventing terrorist acts within the
United States. He explained that because the President had
determined that international terrorist groups
al-Qaida present a threat within the United States,
regardless of whose members were located, linking a target
selector to such groups established that the collection was for

(9) 42 U.S.C. §§ 1552, 1556; 21 C.F.R. 5.22(a).

The Associate General Counsel for Operations said
that establishing a link to international terrorist groups or al-
Qaeda and its affiliates met the Authorization's requirement
that all activities conducted under the PESP be for the purpose
of detecting and preventing terrorist acts within the
United States. He explained that because the President had
determined that international terrorist groups
al-Qaida present a threat within the United States,
regardless of whose members were located, linking a target
selector to such groups established that the collection was for

(9) 42 U.S.C. §§ 1552, 1556; 21 C.F.R. 5.22(a).
Before NSA personnel tracked target selectors for FOI content collection, the Authorization required that target selectors comply with two criteria. First, they had to determine that

as described in guidance issued by OGC in 2005. Second, the purpose of the collection had to be the prevention and detection of terrorist attacks in the United States. The OGC provided the same guidance for tracking selectors for content collection as it had for contact chaining. Specifically, because the President had determined that al-Qa’ida presented a threat within the United States, regardless of where its members were located, linking a target selector to designated international terrorist groups or al-Qa’ida and its affiliates, established that the collection was for the purpose of detection and prevention of terrorist acts within the United States.

(U) The Presidential Authorizations

The Authorizations documents that contained the terms under which NSA executed special Presidential authority were addressed to the Secretary of Defense and were labeled “Presidential Authorization for Specified Electronic Surveillance Activities during a Limited Period to Detect and Prevent Acts of Terrorism within the United States.” The first Authorization consisted of eight paragraphs, and all but one subsequent Authorization consisted of nine. Three of the Authorizations, two specifications, and one document described as (U) The Authorizations text by paragraph:

(U) Paragraph 1 - The President’s Conditions

After the first Authorization, the second paragraphs stated that the President based his conclusions about terrorist capabilities on information provided by the DOD, including an attached terrorism threat assessment, a document that consisted of five or more pages and was a draft of the DOD’s (later by the DNI and the Secretary of Defense.

(U) Paragraph 2 - Terrorism Threat

After the first Authorization, the second paragraphs stated that the President based his conclusions about terrorist capabilities on information provided by the DOD, including an attached terrorism threat assessment, a document that consisted of five or more pages and was a draft of the DOD’s threat assessment.

(U) Paragraph 3 - Considerations

The third paragraph contained the President’s conclusions in authorizing electronic surveillance, including the potential for death, injury, and destruction from acts of terrorism, the need for action and secrecy, and conclusions and alternatives. In the first Authorization the considerations were in paragraph two.
"extraordinary emergency" related to electronic surveillance without a court order or a compelling government interest? 

[Paragraph 4: Authorized Electronic Surveillance] 

The paragraph that explains the President's authority for issuing the executive order and the rationale for describing electronic surveillance that is authorized and directed. The President states that he is acting pursuant to Article II of the Constitution, including the war powers, and that all actions are consistent with the principles of the American Constitution and the law of armed conflict. The paragraph also clarifies the role of the executive, including the President, in the context of the national security and the constitutional framework.

[Table: Changes to Authorization Language] 

<table>
<thead>
<tr>
<th>Version</th>
<th>Date</th>
<th>Description of Changes to Authorization Language</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Authorization</td>
<td>4 October 2001</td>
<td>Authorized SSA to acquire and analyze data and communications, including voice and data communications associated with or out of the United States by means of electronic surveillance. The SSA will not be required to maintain the text &quot;counterterrorism&quot;. Version 1 also clarified the application of liability and civil and criminal authority to such actions taken by the SSA, and the SSA is authorized to use the text &quot;counterterrorism&quot;. Paragraph 3 included the authority to...</td>
</tr>
</tbody>
</table>

[Notes]

1. The legal process was similar to the order that was mentioned in the Executive Order.
2. The paragraph is an explanation of certain provisions.
3. The paragraph provides a summary of certain actions.
<table>
<thead>
<tr>
<th>Version/Date</th>
<th>Description of Changes to Authorization Language</th>
</tr>
</thead>
<tbody>
<tr>
<td>Version 2 2 November 2001 and 30 November 2001</td>
<td>Authorized NSA to acquire the content and associated metadata of communications for which there were reasonable grounds to believe that one of the communications was related to an international terrorist organization or activities that were planned or carried out outside the United States and that were intended to cause significant harm to the United States. This change was made to expand the scope of the authorities and to provide more flexibility in collecting communications.</td>
</tr>
<tr>
<td>Version 3 8 January 2003 to 14 January 2004</td>
<td>Limited to communications with at least one party known to be a citizen of the United States or communications that were reasonably believed to be of interest to the United States. This change was made to narrow the scope of the authorities.</td>
</tr>
<tr>
<td>Version 4 11 March 2004</td>
<td>Stated that the Department of Defense may obtain and analyze data for national security purposes. This change was made to clarify the scope of the authorities.</td>
</tr>
</tbody>
</table>

*Not Qualified as "based on the historical and practical considerations of everyday life as which remains private act."*
TOP SECRET/ULTRA

TOP SECRET/ULTRA

Table of Changes in Authorisations:

<table>
<thead>
<tr>
<th>Version</th>
<th>Date</th>
<th>Description of Changes in Authorisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Version 5</td>
<td>10 March 2004</td>
<td>Removed the restriction on the use of internet.</td>
</tr>
<tr>
<td>Version 6</td>
<td>19 April 2006</td>
<td>Added the restriction on the use of internet.</td>
</tr>
<tr>
<td>Version 7</td>
<td>25 October 2006</td>
<td>Removed the restriction on the use of internet.</td>
</tr>
</tbody>
</table>

Paragraph 5 - Detailed and Prevent.

[Text of paragraph 5]

The President stated that the restriction was essential and appropriate to...
...
1. Presidential Authorization of November 2, 2001

On November 2, 2001, with the first Presidential Authorization set to expire, President Bush signed a second Presidential Authorization. The second Authorization relied upon the same authorities in support of the President’s actions, namely the Article 2 Commander-in-Chief powers and the AUMF. The second Authorization cited the same findings as to the necessity of the external threat and the likelihood of its occurrence in the future.

1a By October 4, 2001, the legal analysis was based on a hypothetical scenario related to the program prior to October 4 when Ashcroft was sworn in. (20010904)

2. Presidential Authorization of November 2, 2001

On November 2, 2001, with the second Presidential Authorization set to expire, President Bush signed a third Presidential Authorization. The third Authorization relied upon the same authorities in support of the President’s actions, namely the Article 2 Commander-in-Chief powers and the AUMF. The third Authorization cited the same findings as to the necessity of the external threat and the likelihood of its occurrence in the future. However, the scope of the second Authorization was increased by adding the following language below in paragraphs 4a) and 4b):

(a) acquire a communication (including but not limited to a wire communication carried into or out of the United States by cable) for which, based on the factual and probable consideration of ordinary life, there is reasonable grounds to believe that

...
engaged in international terrorism, or activities in preparation thereof, or any agent of such a group, or who, with respect to a communication, header/router/addressing-type information, including telecommunications dialing-type data, but not the contents of the communication, when (i) at least one party to such communication is outside the United States, (ii) no party to such communication is located in the United States, or (iii) based on the factual and procedural considerations of everyday life on which reasonable and prudent persons act, there are specific and articulable facts giving reason to believe that such communications relate to international terrorism, or activities in preparation thereof.

158. See Presidential Authorization of April 22, 2003 at para. 42(b) & (ii). The April 22, 2003, Authorization was the only Authorization generally approved so to form and legally to veins. He approved the Authorization on April 14, 2003, some days before the date of Flight 93's attack on the World Trade Center. Internal Revenue Service.

159. See Presidential Authorization of April 22, 2003 at para. 42(b) & (ii). The April 22, 2003, Authorization was the only Authorization generally approved so to form and legally to veins. He approved the Authorization on April 14, 2003, some days before the date of Flight 93's attack on the World Trade Center. Internal Revenue Service.

160. As described later in this chapter, the term “acquired” was not clarified until the March 11, 2005, Presidential Authorization. That Authorization assumed that data was “acquired” . . . when, and only when, the Department of Defense had searched for and obtained said header/router/addressing-type information, including telecommunications dialing-type data [and not when the Department obtains such header/router/addressing-type information, including telecommunications dialing-type data, such as "DAY,JUNE1999", "(ext.)"]

161. [Redacted]

162. [Redacted]

Gonzalez’s notes indicate that when he was asked at the meeting why Cooney was “hesitant” to sign the Authorization, Gonzales responded:

"We do not indicate what the two sentences about the basis for the Department’s concerns about the legal support for the program. It’s not in my notes, I don’t remember.

The notes indicate that Andrew Card stated that “it would be hard to
On the morning of March 11, 2004, with the Presidential Authorization set to expire, President Bush signed a new Authorization. In a departure from the past practice of having the Attorney General certify the Authorization to be in form and legality, the March 11 Authorization was certified by White House Counsel Gonzales. The March 11 Authorization also differed markedly from prior Authorizations in these other respects.

The first significant difference between the March 11, 2004, Presidential Authorization and prior Authorizations was the President’s explicit assertion that the exercise of his Article II Commander-in-Chief authority was based on the need to protect national security and to prevent further attacks, and that the Authorization was necessary to achieve those ends.

As discussed above, the President’s certification as to form and legality, and the President’s assertion that the Authorization was necessary to achieve those ends, must be scrutinized by the courts to determine whether they were sufficiently supported.

Second, as the March 11, 2004, Presidential Authorization stated that it would expire on May 6, 2004, it appears that the President’s certification as to form and legality, and the President’s assertion that the Authorization was necessary to achieve those ends, must be scrutinized by the courts to determine whether they were sufficiently supported.
P. 505

Authorization. The first paragraph of the Modification stated that “this
commencement, as a policy matter, modified the Presidential Authorization of
March 1, 2004 to set forth in the
and statement added by all the Presidential Authorizations in the course set forth in the
Modification.” The March 19 Modification made two significant changes to
the existing Authorization and a third important change affecting all
Authorization. The changes were to become effective beginning at midnight on

First, the March 19 Modification inserted language into newer centered
collection (Basket 1) to (1) open and affiliated local groups, as the
Department had advised. The new centered collection authority in paragraph
4(a) of the March 1 Authorization, with the new language from the
March 19 Modification inserted in it, was:

acquire a communication (including but not limited to a wire)
communications central office or out of the United States by cable
which, based on the formal and practical considerations of
the President, are reasonable to believe that
there are reasonable grounds to believe such communications,
originated or transmitted outside the United States and
are engaged in international terrorism,

or activities in preparation therefor, or any agent of
such a group, located in the United States,

or a group affiliated with it,

or another group that it determines a

the United States and poses a threat of hostile action within
the United States.

P. 515

Attorney General Ashcroft's decision cleared him to resume his duties
as Attorney General as of March 31. Comey advised Ayers in a March 30,
2004, memorandum that as of 7:00 a.m. on March 31, the Attorney General

P. 518

The Department took steps to respond discovery motions.

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.

P. 683

Way also told us that there was no organized Departmental effort to
establish formal procedures for reviewing international terrorism
prosecutions to comply with Rule 16 disclosure requests and Brady
obligations. We did “the thinking” that the Rove memorandum was the
“first step” toward devising “some kind of systematicized process” for such
reviews. However, we found no indication that DLC followed up on Rove's
request to further study these discovery issues with any kind of written

P. 695

The Department took steps to respond discovery motions.

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.
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 to discovery motions in a case-by-case basis.

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 discoverable Stellar Wind derived information.

However, the Department of Justice continues to lack a comprehensive regime for identifying potentially discoverable Stellar Wind information in terrorism cases. In this regard 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

403 Tоп SECRET//NIL//RED//ORCON//NOFORN-