U.S. Department of Justice

National Security Division

Washington, D.C. 20530

EMAIL: savage@nytimes.com

NSD FOIA/PA #16-065
March 24, 2017

Mr. Charlie Savage
The New York Times
1627 I Street, N.W.
Washington, D.C. 20006

Dear ~~Mr. Savage~~ Charlie:

This is in response to your Freedom of Information Act (FOIA) request dated January 7, 2016, for "a copy of - and, as necessary, declassification review of - the memo on discovery issues raised by Stellarwind written by Pat Rowan and dated May 4, 2005". Your request was received on January 8, 2016.

In response to your request, we have conducted a search of Office of the Assistant Attorney General for the National Security Division (NSD). We have located one record and processed this document under the FOIA. We are withholding the record in part pursuant to one or more of the following FOIA exemptions set forth in 5 U.S.C. 552(b):

(1) which permits the withholding of information properly classified pursuant to Executive Order No. 13526;

(3) which permits the withholding of information specifically exempted from disclosure by statute, including but not limited to Section 102(d)(3) of the National Security Act of 1947;

(5) which permits the withholding of inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, including but not limited to information protected by the deliberative process privilege, the attorney work product doctrine, and/or the attorney-client privilege.

(7)(A) which permits the withholding of records or information compiled for law enforcement purposes the release of which could reasonably be expected to interfere with enforcement proceedings; and

(7)(E) which concerns, *inter alia*, records or information compiled for law enforcement purposes the release of which would disclose techniques and procedures for law enforcement investigations or prosecutions.

For your information, Congress excluded three discrete categories of law enforcement information and national security records from the requirements of the FOIA. See 5 U.S.C. §552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Although this request is now the subject of litigation, we are including the following information on FOIA mediation and administrative appeals.

You may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, or at ogis@nara.gov, or 202-741-5770, or toll free at 1-877-684-6448, or facsimile at 202-741-5769. Or you may contact our Public Liaison at 202-233-0756.

If you are not satisfied with this response, you may administratively appeal by writing to the Director, Office of Information Policy, U.S. Department of Justice, 1425 New York Avenue, N.W., Suite 11050, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA portal by creating an account at: https://foiaonline.regulations.gov/foia/action/public/home. Your appeal must be postmarked or transmitted electronically within 90 days of the date of my response to your request. If you submit an appeal by mail, both the letter and envelope should be clearly marked, "Freedom of Information Act Appeal."

Sincerely,

Kevin G. Tiernan
Records and FOIA

~~TOP SECRET//HCS/SI/ORCON/NOFORN/STELLAR WIND~~

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

FROM Patrick Rowan, Counsel to the Assistant Attorney General

DATE May 4, 2005

RE Discovery Issues Raised by Stellar Wind

b(1), b(3), and b(5) [redacted] 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. As a result, we have proceeded in a very careful and deliberate fashion. I am generating this memorandum at your request to summarize our work up to this point.

Background

After our initial briefing on this program, I reviewed OLC memos concerning this program, including the Memorandum for the Attorney General, Disclosure Requirements under Federal Rule of Criminal Procedure 16 b(1), b(3), and b(5) [redacted] (Disclosure Requirements), and the Memorandum for the Attorney General, Review of the Legality of the STELLAR WIND Program (May 6, 2004). b(5) [redacted]

~~TOP SECRET//HCS/SI/ORCON/NOFORN/STELLAR WIND~~

b(1), b(3), b(5), and b(7)(E)

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

b(1), b(3), b(7)(A) and (E)

Discovery Obligations

Rule 16 of the Federal Rules of Criminal Procedure provides for discovery of, among other things, the defendant's own recorded statements. Pursuant to Rule 16(a)(1)(B)(I), "upon a defendant's request, the government must disclose to the defendant . . . any relevant written or recorded statement by the defendant if . . . the statement is within the government's possession, custody, or control; and the attorney for the government knows – or through due diligence could know – that the statement exists[.]" Some analysis of this provision is contained within OLC's Disclosure Requirements Memorandum. Exculpatory information, including a defendant's own statements, is subject to the rule of Brady v. Maryland, 373 U.S. 83 (1963).

As noted above, as a result of the program, b(1), b(3), and b(5)

b(1), b(3), and b(5) [redacted]

b(5) [redacted] If OLC's analysis is correct, there should be no question that the government's prosecutors have acted in good faith with respect to their Rule 16 obligations. Moreover, because the Brady obligation is designed to ensure that defendants receive fair trials, a prosecutor's good or bad faith in suppressing exculpatory evidence is considered irrelevant. Brady, 373 U.S. at 87.

b(5) [redacted]

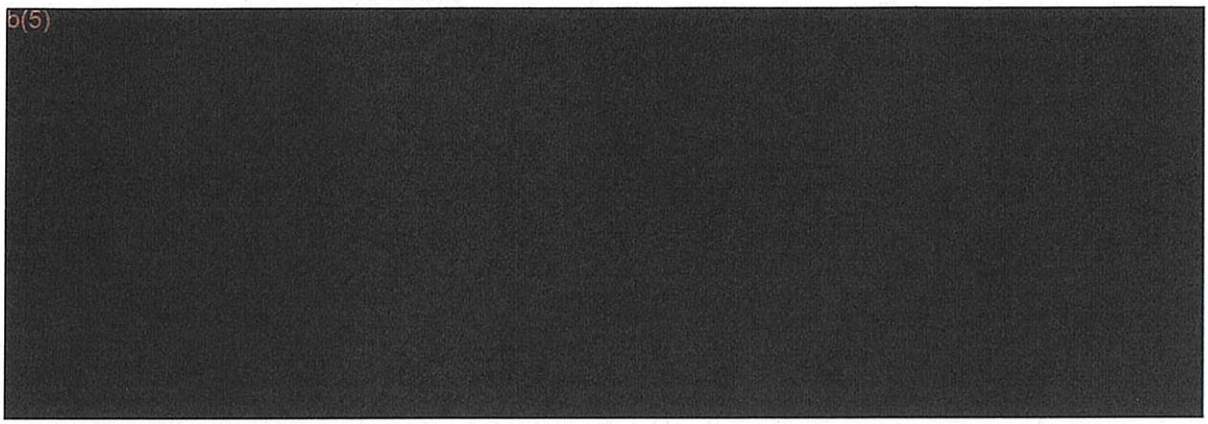
Prosecutor's Discovery Obligations

	Charge to Conviction	After Conviction
Rule 16 Obligations	Requires disclosure to defendant of written or recorded statements that are (1) relevant[1]; (2) within the government's possession custody or control; and (3) the attorney for the government knows – or through due diligence could know – that the statement exists.[2]	Appears to impose no obligation on the government to disclose statements to the defense.[3]
Brady Obligations	Brady and the decisions applying it hold that the government has a duty to disclose exculpatory information when such disclosure is necessary to ensure a fair trial.[4] Brady does not require the government to provide the defendant with immediate access to Brady material. Instead, the government satisfies its Brady obligations as long as it provides Brady information to the defendant in time for its effective use at trial.[5]	Following a trial, the government continues to be obligated to disclose evidence that is "material in the sense that its suppression undermines confidence in the outcome of the trial."[6] It appears that there is no Constitutional obligation to provide exculpatory evidence after a defendant pleads guilty, but there are some lower court decisions characterizing the principle as a "general rule" with exceptions for those instances in which the government makes material misrepresentations that render a plea unintelligent, particularly if the misrepresentations concern factual innocence.[7]

Endnotes

1. The term "relevant statements" does not encompass statements that are innocuous, statements unrelated to the crimes charged, or statements that are completely separate from the Government's trial evidence. See United States v. Doe, 20 F.3d 544 (9th Cir. 1995); United States v. Clark, 957 F.2d 148 (6th Cir. 1992); United States v. Scarpa, 897 F. 2d 63, 70 (2d Cir. 1990); United States v. McElroy, 697 F.2d 459 (2d Cir. 1982).

2. See Fed. R. Crim. P. (a)(1)(B)(i).

b(5)


4. Brady, 373 U.S. at 87-88.

5. United States v. O'Keefe, 128 F.3d 885, 889-899 (5th Cir. 1997), cert. denied, 523 U.S. 1078 (1998); United States v. Valencia-Lucena, 925 F.2d 506, 514 (1st Cir. 1991).

6. United States v. Bagley, 473 U.S. 667, 678 (1985). See also Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) (evidence is material "only if there is a reasonably probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability is a probability sufficient to undermine the confidence in the outcome" (quoting Bagley, 473 U.S. at 682)).

7. Compare Smith v. United States, 876 F.2d 655 (8th Cir.) (holding that Brady claim did not survive entry of a guilty plea), cert. denied, 493 U.S. 869 (1989), with Matthew v. Johnson, 201 F.3d 353, 357 (5th Cir. 2000) (noting that some circuit decisions hold a defendant pleading guilty may challenged his conviction on the ground that the prosecutor failed to disclose material exculpatory evidence prior to a plea, and listing cases). In United States v. Ruiz, 536 U.S. 622, 629-630 (2002), in holding that the Constitution does not require the Government to disclose material impeachment evidence prior to entering into a plea agreement with a criminal defendant, the Court rejected the argument that a guilty plea is not intelligent and voluntary if it was entered into without knowledge of impeachment information. As noted in Ruiz, the Supreme Court has found that the Constitution does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See Brady v. United States, 397 U.S. 742, 757 (1970) (defendant "misapprehended the quality of the state's case"); United States v. Broce, 488 U.S. 563, 573 (1989) (counsel failed to point out a potential defense). The purpose of the Court's Brady decisions is to protect the fairness of the trial and to guard against the risk that an innocent person might be found guilty because the government withheld evidence. That purpose is not implicated when a defendant enters a plea.

The Prosecutor's General Duty to Search Intelligence Community Files

b(1), b(3), and b(5) [redacted]

OLC's Disclosure Requirements Memorandum indicates that, b(5) [redacted] This conclusion is consistent with the materials that I reviewed, which seemed to analyze any government obligation to search IC files as deriving solely from Brady and its progeny.

However, the precise scope of a prosecutor's duty to search for material, exculpatory information is one of the most unsettled areas of the law under Brady. The Supreme Court has never had occasion to rule on whether prosecutors must search for Brady material within government entities that have not engaged in law enforcement activity under a prosecutor's direction and control. In its most recent case concerning the duty to search, Kyles v. Whitley, 514 U.S. 419, 437-438 (1995), the Supreme Court expressly imposed on prosecutors a limited duty to search for Brady material not known or possessed by them. At issue in that case was impeachment evidence that had not been turned over by prosecutors because police investigators had not shared it with the prosecutors. Id. at 428. The prosecution argued on appeal that it had no knowledge of the Brady material held by the police – the prosecutor's investigative arm in the case – and that it should not be held accountable for evidence known only to police investigators. Id. at 437-438. The Court held that the "prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Id. at 437. The Court did not explain what kinds of relationships with the prosecution rise to the level of "acting on the government's behalf."

Federal courts of appeals analyzing this issue after Kyles have not settled on a single test to determine the limits of a prosecutor's duty to search. See, e.g., United States v. Bhutani, 175 F.3d 572, 577 (7th Cir. 1999) (noting that if an agency charged with administering a statute has consulted with the prosecution, the agency will be considered part of the prosecution); United States v. Morris, 80 F.3d 1151, 1169 (7th Cir. 1996) (prosecutors are under no duty "to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue"); Smith v. Secretary of N.M. Dep't of Corr., 50 F.3d 801,

824 (10th Cir. 1995) (citation and footnote omitted) (stressing that "the prosecution" for Brady purposes "encompasses not only the individual prosecutor handling the case, but also to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture"). See also United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989) ("Brady, then, applies only to information possessed by the prosecutor or anyone over whom he has authority."). See generally United States v. Combs, 267 F.3d 1167, 1172-1175 (10th Cir. 2001) (discussing various approaches taken by the circuit courts). Indeed, one commentator has noted that "the scant reasoning provided by the circuits indicate that the courts of appeals share no common understanding regarding the policies that the Brady disclosure obligation is designed to serve." Mark D. Villaverde, Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material, 88 Cornell L. Rev.1471, 1492 (2003).

b(5) [redacted]

In addition to reviewing court decisions in this area, I have attempted to locate any statements of Department policy concerning the duty to search the IC. In fact, the United States Attorney's Manual (USAM or Manual) contains policy guidance on this issue. The USAM notes that a prosecutor's obligation to review IC files for discovery material will vary depending upon whether the IC had active involvement in the criminal investigation or prosecution. USAM, Criminal Resource Manual, § 2052 (2002). In those circumstances in which the IC had no active involvement in the criminal investigation, the USAM offers the following direction:

> Assuming no demand for specific discovery, there remains the question of when the prosecutor is nevertheless required to search IC files. The relevant factors for answering that query are:
>
> 1. whether the prosecutor has direct or reliable knowledge of potential Brady and/or other discovery material in the possession of the IC; or
> 2. assuming no such knowledge by the prosecutor, whether there nevertheless exists any reliable indication suggesting that the IC possesses evidence that meets the Brady case law standard of

materiality.

> A positive answer to either of these questions means that the prosecutor "needs to know" and must conduct a suitable search of the IC files. If both queries can be answered in the negative, there is no justification for a search of IC files.

Id. Later, however, the Manual states, "As a general rule, a prosecutor should not seek access to IC files except when, because of the facts of the case, there is an affirmative obligation to do so. There are, however, certain types of cases that may fall outside of that rule in which issues relating to national security and/or classified information are likely to be present, e.g., those targeting corrupt or fraudulent practices by middle or upper official of a foreign government; ... those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially that if they involve foreign government or military personnel ...." Id. The Manual suggests that in these types of cases, it may be wise to initiate what it terms a "prudential search" to assist the prosecutor in identifying and managing potential classified information problems before indictment and trial. Id. The Manual offers no additional guidance as to how a prosecutor should determine that a "prudential search" is advisable, notwithstanding the general rule that one is not required.

Criminal Division Section Practices

I have also informally surveyed several Criminal Division sections to learn what practices they follow in deciding whether IC files must be searched for potential discovery material. It appears that these sections generally go beyond both the legal obligations discussed above and the general rule outlined in the USAM, initiating searches out of prudence, rather than a legal obligation.

b(5) Counterespionage Section (CES) reported that they initiate searches of IC files in virtually all of their cases. They do so even in circumstances in which the IC has had no involvement in the investigation and prosecution of the matter b(5)

b(3) and b(5)

b(3) and b(5)

[redacted]

b(5)

[redacted]

b(5)

[redacted]

The Need for Further Analysis

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

[redacted]

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

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

b1, b3, b6, b7C, b7E

In another internal Justice Department review of his actions, Yoo has acknowledged that he is not well versed in criminal law. During an interview with the Department's Office of Professional Responsibility (OPR) in connection with its investigation concerning his legal opinions in support of a detainee interrogation program, Yoo stated that "criminal prosecution process in the Department was not my specialty," and "criminal law was not my area."[415] ~~(TS//SI//OC/NF)~~

III. Criminal Division Examines Discovery Issues (U)

Following (b)(1), (b)(3) the Justice Department's Criminal Division was tasked with developing procedures for handling Rule 16 disclosure issues because the issues fell within its area of expertise. As a result, in (b)(1), (b)(3) Patrick Rowan, a senior counsel in the Criminal Division, was read into the program to deal with Stellar Wind-related discovery issues. Rowan's supervisor, Criminal Division Assistant Attorney General Christopher Wray, was also read into the program at the same time.

b1, b3, b6, b7C, b7E

(b)(5)

b1, b3, b6, b7C, b7E

[415] The OPR investigation concerned a Top Secret compartmented program relating to detainee interrogations. Yoo drafted legal opinions for this program while in the Office of Legal Counsel. However, as discussed in Chapter Four, in contrast with the Stellar Wind program at least four other OLC attorneys assisted Yoo with drafting the legal memoranda. Yoo was also able to consult with Criminal Division attorneys and the client agency on this matter. ~~(TS//STLW//SI//OC/NF)~~

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 (b)(1), (b)(3) 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)~~ b1, b3, b6, b7C, b7E

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)~~ b1, b3, b7E

B. (b) (5) [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 (b) (5) [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 (b) (5) [redacted] memorandum, (b) (5) [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)~~

(b) (5) [redacted] b1, b3, b6, b7C, b7E

(b) (5)

[redacted]

b1, b3, b7E

(b) (5)

[redacted]

b1, b3, b7E

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

b1, b3, b6, b7C, b7E

(b) (5)

[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] (b) (5) [redacted][420] ~~(TS//STLW//SI//OC/NF)~~

(b) (5) [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] (b) (5) [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] (b) (5) [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)~~

(b) (5)

(b) (5)

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.

(b) (5)

~~(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 (b) (5) 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 (b)(1), (b)(3) 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 (b)(1), (b)(3) ~~(TS//STLW//SI//OC/NF)~~ b1, b3, b6, b7C, b7E

When we showed Eisenberg a copy of Rowan's (b) (5) 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

National Security Division in 2006. (b) (5) 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)~~

Wray 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. He said "the thinking was" that the Rowan memorandum was the "first step" toward devising "some kind of systematized process" for such reviews. However, we found no indication that OLC followed up on Rowan's request to further study these discovery issues with any kind of written product. ~~(TS//STLW//SI//OC/NF)~~

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)~~

[redacted]

(b)(3)