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MEMORANDUM FOR THE RECORD

Event: Interview of David Nahmias, Deputy Assistant Attorney General of the Criminal Division, United States Department of Justice

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Special Access Issues: None

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Participants Non-Commission: Faith Burton, DOJ Office of Legal Affairs

Participants – Commission: Lance Cole, Peter Rundlet, Len Hawley

Background: David Nahmias is Deputy Assistant Attorney General, Criminal Division, at the United States Department of Justice (“DOJ”). Nahmias is originally from Atlanta, Georgia, and attended college at Duke University, graduating in 1986. After college he worked for a time as a management consultant, then attended Harvard Law School, graduating in 1991. He then clerked for Judge Silberman at the D.C. Court of Appeals and for Justice Scalia at the Supreme Court. After his clerkships he worked at the Hogan & Hartson law firm in Washington, D.C., then moved with his wife to Atlanta, where both served as an Assistant United States Attorney (“AUSA”).

Department of Justice Positions. Nahmias worked for seven years as an AUSA in Atlanta, including work on violent crimes and domestic terrorism cases, including the Eric Rudolph case. He also “interacted with” the Oklahoma City bombing prosecution team, and later he worked on fraud and public corruption cases in Atlanta. Immediately after the 9/11 attacks he was assigned to staff the Atlanta FBI office to assist with the investigation of the attacks. During this period he “had feelers out” for jobs in Washington, D.C. and had received a job offer from the Treasury Department. A friend, John Malcolm, suggested that Nahmias should talk with Assistant Attorney General Michael Chertoff, who offered Nahmias a job as Counsel to the Assistant Attorney General. In November and December 2001 Nahmias worked part-time in Atlanta and part-time in Washington, where Chertoff had directed him to “look at what was done over the past two and a half months” from an investigative perspective and determine if anything had been missed. Nahmias “worked with [Deputy Assistant Attorney General] Alice Fisher as her alter ego” on the 9/11 investigations. During this time period Fisher

spent about 80% of her time on counterterrorism ("CT") matters, and Nahmias spent 90-95% of his time on CT matters.

Post-9/11 Actions. In January 2002, Nahmias came to Washington to work full-time as Counsel to the Assistant Attorney General, focusing on al Qaeda terrorism. As part of Nahmias's review of the investigation of the 9/11 attacks, he went through the "INS special interest list" (the list of the detainees who were recently the subject of a DOJ Inspector General's report), for example by following up on people who had failed polygraph examinations on terrorism-related questions. The effort was called the "Red Cell" review.

Nahmias helped set up the Anti-Terrorism Task Forces ("ATTFs") in each judicial district throughout the country, which have since been renamed Anti-Terrorism Advisory Councils ("ATACs"). The task forces were set up by Attorney General Ashcroft shortly after the 9/11 attacks. The ATACs hold regional conferences to address issues such as interaction with the JTTFs, training on counterterrorism, and information sharing under the PATRIOT Act. Nahmias emphasized that "there is no bigger change in what has been done to make the country safer" than the new ability to share intelligence and law enforcement information.

In addition to his work with the ATACs, Nahmias worked on "oversight" of the Reed, Moussau, and Lindh cases. He also started working on new cases that were being developed in Buffalo, Seattle, and New York.

Information Sharing. During this period the "front office" of the DOJ Criminal Division would meet each week with the FBI International Terrorism Operations Section ("ITOS") to share information about terrorism cases and counterterrorism efforts. They would also meet on a weekly basis with CIA and Department of Defense offices of general counsel representatives. Beginning in the summer of 2002, the Attorney General and the FBI Director were briefed each day on terrorism matters. Nahmias noted that such briefings have become possible "since the wall came down" between foreign intelligence collection and law enforcement. Now the Criminal Division can see the daily FBI reports on terrorism matters, which may serve as a "trigger" for DOJ involvement in FBI investigations.

When asked about concerns by some FBI agents in the field that information may be being reported prematurely to the Attorney General and FBI Director for reporting up to the President, before it is fully investigated and determined to be of appropriate significance to report at that level, Nahmias stated that the present system "is designed to be competitive reporting" by the DOJ and the FBI. He added that the DOJ tries to report only matters that "have prosecutorial significance."

Nahmias went on to say that at DOJ "we want to know about everything from the start" so as to be actively involved in the investigation. Problems have arisen in the past when DOJ was not sufficiently informed about an investigation. For example, in the Lackawanna case "after a long intelligence investigation" the FBI learned that someone

of investigative interest had been detained in a foreign country and could only be held for a short period, 36 or 48 hours. In that "ridiculous time frame" DOJ attorneys had to figure out a prosecutorial strategy, including using FISA take with "the wall" still in place at that time. They had to document the prosecutors' use of FISA information and report that use to the FISA Court. Although they were successful, Nahmias described it as "a very close thing" that easily could have failed.

In contrast to the Lackawanna experience, that occurred before "the wall" came down, in the Portland case there was full discussion and cooperation from the outset. As a result, there were no irrational time pressures facing the prosecution team.

Nahmias added that another example of the problems that had been caused by "the wall" is the situation described in the congressional Joint Inquiry report in which the FBI National Security Law Unit took the position that criminal agents and DOJ prosecutors could not assist in the efforts to locate Hazmi and al Midhar in the United States prior to the 9/11 attacks.

Role of the ATACs: Under the present system information from the field that would be of interest to the Attorney General or the President is reported up in the DOJ by the ATACs. There are 93 ATACs nationwide – one in each federal judicial district. The DOJ is represented on the ATACs by the AUSAs who are assigned to the FBI field offices. The exact composition and organization of an ATAC is left to the U.S. Attorney in that district. The ATACs have representatives from state and local law enforcement authorities, as well as "first responders." The ATACs are most important in districts where there is no JTTF in place. For example, in the New Orleans area there are three U.S. Attorney's Offices, but no JTTF, so the ATACs are very important there.

Changes at DOJ: Nahmias stated no single U.S. Attorney's Office "can have the big picture" in the counterterrorism area, so it is necessary to "pair people in the field" with people from main Justice. Nahmias believes the FBI is doing the same thing in the counterterrorism area. At DOJ, the restructuring of Barry Sabin's Counterterrorism Section of the Criminal Division has been a major change in the Department's approach to fighting terrorism. The changes in the Section have made it more of a litigation section, rather than a group that just gives advice to the field. Nahmias believes this change is appropriate because terrorism is a national issue, not a local issue.

The Criminal Division now sometimes sends attorneys out to the local U.S. Attorney's Offices to make sure all available legal tools are being used in terrorism cases. Nahmias said that the "spitting on the sidewalk theory" is being used by the DOJ, and it is important to make sure that "all options are preserved" in terrorism cases. For example, it may be necessary to protect an intelligence agent's identity by pairing that agent up with a criminal agent to conduct an interview so that the criminal agent can later testify, if necessary.