Legal Barriers to Information Sharing:
The Erection of a Wall Between Intelligence and Law Enforcement Investigations

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Staff Monograph

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As the threat of terrorism from radical Islamic groups developed, the FBI had both law enforcement and intelligence responsibilities in response to the threat. And it had different tools to use depending on whether its investigation was designated as an intelligence matter or a criminal matter. For criminal matters it could apply for and use traditional criminal warrants. For intelligence matters it could apply to a special court, known as the Foreign Intelligence Surveillance Court (FISC), for warrants pursuant to the Foreign Intelligence Surveillance Act (FISA) of 1978.[1] This law governs electronic surveillance and physical searches of foreign powers and their agents within the United States. This divergence in purposes for the respective types of investigations and concerns about using intelligence techniques to advance law enforcement interests led to information sharing barriers being erected between the investigations. This paper will describe the history and development of the various barriers and their impact on the 9/11 story.

The History of Tensions Between Intelligence and Criminal Investigations.

Issues regarding the sharing of information between intelligence and criminal investigations did not arise suddenly in the summer of 2001. There was a long history of concerns about how the FBI collected intelligence activities within the United States and what was done with the information that it gathered.

The FBI's domestic intelligence gathering dates from the 1930s. With World War II looming FBI Director J. Edgar Hoover, at President Franklin Roosevelt's direction, added to the FBI's duties investigation of possible espionage, sabotage, or subversion. After the war, foreign intelligence duties were assigned to the newly established Central Intelligence Agency. The CIA was expressly precluded from engaging in domestic law enforcement activities.[2] Domestic intelligence responsibilities remained with the FBI.

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[1] 50 U.S.C. §§ 1801 et seq. As enacted in 1978, FISA permitted orders authorizing electronic surveillance. It did not refer to physical searches. In 1994, the statute was amended to permit orders authorizing physical searches. Pub. L. No. 103-359, 108 Stat. 3423, 3443 (Oct. 14, 1994); 50 U.S.C. §§ 1821-1829.

[2] See, *The National Security Act of 1947* (50 U.S.C. 403-3(d)(1)) (the CIA "shall have no police, subpoena, or law enforcement powers or internal security functions).

Thus, the FBI was in the unique position of having dual intelligence and law enforcement responsibilities.

Under Hoover the FBI's domestic intelligence activities expanded greatly. The FBI established a covert action program that operated from 1956 to 1971 against domestic organizations and, eventually, domestic dissidents. The FBI spied on numerous political figures, especially ones Hoover sought to discredit, and authorized unlawful wiretaps and surveillance. Two years after Hoover's death in 1972, congressional and news media investigations of the Watergate scandals of the Nixon administration evolved into general congressional investigations of foreign and domestic intelligence by the Church and Pike committees.[3] As a result, the FBI's Domestic Intelligence Division was dissolved and reforms were recommended that were "designed to build a wall between federal law enforcement and the nation's intelligence community."[4]

To protect individual rights and guard against abuse, the attorney general was given authority over domestic intelligence-gathering activities. In 1976, Attorney General Edward Levi adopted domestic security guidelines to regulate intelligence collection in the United States. The FBI's domestic intelligence activities were governed by these guidelines. These guidelines were periodically modified by subsequent attorneys general but their basic purpose remained the same.[5]

Over time, the attorney general's authority to approve intelligence surveillance and searches also changed. Traditional criminal search warrants or electronic surveillance require a federal judge's approval and a finding that there is probable cause that a crime was being or had been committed. For many years, however, the attorney general could authorize surveillance and physical searches of foreign powers and agents of foreign powers without any court review or approval.[6] Perceived abuses of this authority led to calls for reform. Some suggested that this authority should be eliminated and only traditional criminal warrants should be permitted.

In 1978 Congress passed the Foreign Intelligence Surveillance Act (FISA). This law regulated intelligence collection directed at foreign powers and agents of foreign powers in the United States. It was a compromise. FISA did not require traditional court approval

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[3] See generally, Kathyrn Olmsted, Challenging the Secret Government: The Post-Watergate Investigations of the CIA and FBI (Univ. of North Carolina Press, 1996); see also Jim McGee and Brian Duffy, Main Justice: The Men and Women Who Enforce the Nation's Criminal Laws and Guard Its Liberties (Simon & Schuster 1996) at 308-10.

[4] McGee and Duffy at 309.

[5] See John T. Elliff, "Symposium: National Security and Civil Liberties: The Attorney General's Guidelines for FBI Investigations," *Cornell Law Review*, vol. 69 (April 1984); McGee and Duffy at 310-311.

[6] The Attorney General's authority to issue electronic surveillance or physical searches was contained in Executive Order 12333. The Supreme Court, while holding that electronic surveillance within the United States to protect national security against domestic threats requires a warrant, noted its holding did not extend to electronic surveillance that protects national security from foreign threats. See United States v. Keith, 407 U.S. 297 (1972).

of a warrant, but established a special new court, the Foreign Intelligence Surveillance Court (FISC), to review requests for surveillance pursuant to this law. The Department of Justice created an Office of Intelligence Policy and Review (OIPR). OIPR would be responsible, *inter alia*, for presenting surveillance applications to the FISA court.[7]

Because of longstanding concerns regarding the use of non-criminal warrants to obtain evidence for criminal matters the 1978 act was interpreted by the courts, the Congress, and the Justice Department, to require that a search be approved only if its "primary purpose" was to obtain foreign intelligence information.[8] The FISA application process required a certification from a high-ranking Executive Branch official, such as the Director of the FBI, that the purpose of the desired surveillance was to obtain foreign intelligence information.[9] In other words, the FISA process could not be used ~~to~~ circumvent traditional criminal warrants to build a criminal case or to spy upon domestic targets unrelated to foreign powers. If a prosecution became or was perceived to have become the primary purpose of FISA coverage, the FISA court could terminate the surveillance and the criminal court could suppress any of the information obtained or derived from the FISA coverage. The Justice Department interpreted these rulings to mean that criminal prosecutors could be briefed on FISA-related information but could not direct or control its collection.[10]

There was, however, some recognition that evidence collected via a FISA warrant could be used in subsequent criminal proceedings. How and when it could be used was the subject of significant debate.[11] Through the 1980s and early 1990s informal information

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[7] See McGee and Duffy, supra, at 312-314.

[8] The statute only referred to "a purpose" being foreign intelligence collection. The courts, however, believed that to ensure that the FISA process was not misused for criminal investigative purposes, foreign intelligence collection had to be the "primary" purpose of the surveillance. For a history of the primary purpose standard see, *In Re Sealed Case*, 310 F.3d 717 (per curiam) (FISC Ct. of Rev. Nov. 18, 2002). For congressional interpretation see *Implementation of the Foreign Surveillance Act,* H.R. Rep. No. 98-738, 98th Cong., 2d Sess. 14 (1984) at 49; *The Foreign Intelligence Surveillance Act of 1978: The First Five Years,* S. Rep. No. 98-660, 98th Cong., 2d Sess.(1984) at 10-11 (because "international terrorism" may reach individuals whose activities are essentially a domestic law enforcement problem, the Justice Department should use criminal surveillance tools when it is clear that the main concern with respect to a terrorist group is criminal prosecution). For Department of Justice interpretation see DOJ Memorandum to Vatis from Dellinger, "Standards for Searches Under Foreign Intelligence Surveillance Act," Feb. 14, 1995. In October 2001, the USA PATRIOT Act amended FISA by replacing "the purpose" with a "significant purpose." See "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) Section 218

[9] The FISA application also must include the approval of the attorney general based upon his or her finding that "it satisfies the criteria and requirements of such application" as set forth in the statute. 50 U.S.C. §§ 1804(a), 1823(a). Thus, the attorney general implicitly certifies that the purpose of the FISA coverage is "to obtain foreign intelligence information."

[10] *Final Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation*, Chapter 20, at 711 (May 2000) [hereinafter AGRT Report].

[11] See Supplemental Brief for the United States, In Re: Sealed Case, No. 02-001, FISC Ct. of Rev., (Sep. 25, 2002) pp. 11-19.

sharing procedures allowed FBI agents to brief criminal prosecutors on what was being collected during FISA surveillances. There were no written guidelines governing such contacts. The prosecutors understood that they could not manipulate the process to direct the FISA collection to advance their criminal matters.[12] Whether and when the FBI shared information pertinent to possible criminal investigations was left solely to the judgment of the FBI. There were no requirements that OIPR be apprised of such information sharing.[13]

The Creation of the July 1995 Procedures

The prosecution of Aldrich Ames for espionage in early 1994 raised concerns about the prosecutors' role in intelligence investigations. Over the course of the Ames investigation FBI Director Freeh and Attorney General Reno signed nine certifications that the information being sought was for the purpose of collecting foreign intelligence information. Some of these certifications were made after a decision had been made to criminally prosecute Ames and he was talking to the prosecutors.[14]

Richard Scruggs, the acting head of OIPR, became worried that because of the numerous prior consultations between FBI agents and criminal prosecutors, the judge handling the criminal case might rule that the FISA warrants had been misused. If that happened, Ames might escape conviction. Scruggs complained to Attorney General Reno about the absence of any information sharing controls.[15] Almost immediately Scruggs began

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[12] AGRT Report at 711.

[13] Id. at 712. Alan Kornblum, who was a deputy chief of OIPR during this time, suggested that there was an informal rule regarding when FISA information could be shared. He noted FISA warrants were good for 90 days. But he said that generally it took much of that time to get the surveillance in place. Thus, there was little information gathered during the first surveillance period and little to share so there was no need for the agents to contact prosecutors. The surveillance would then be approved for another 90 days and the certification would not have any contact with criminal prosecutors to report. Collection would proceed for the next 90 days and then the surveillance would be renewed. Once there was a second renewal, OIPR felt there was a sufficient track record to indicate to the FISC that the surveillance for intelligence purposes that it was then okay for the agents to begin briefing prosecutors. Commission interview Alan Kornblum (May 19, 2004).

[14] AGRT Report at 713.

[15] As one witness reported, Scruggs went to the Attorney General and "ginned her up" about the FBI's contacts with prosecutors. Scruggs was concerned that the FISA statute had been violated and that the Attorney General's certifications were inaccurate. Scruggs warned the Attorney General that she might have to testify in the Ames case regarding her authorization of searches. The Attorney General was very upset by what Scruggs had told her and she instructed Scruggs to "make sure this did not happen again." AGRT Report at 713; see also, Commission interview Richard Scruggs (May 26, 2004); McGee and Duffy, supra, at 334-36.

Scruggs came to Main Justice in 1993 at the request of Attorney General Reno. He had been a prosecutor in the United States Attorney's Office in Miami while Reno was chief state prosecutor in Miami. They had worked together on some matters. Scruggs had significant experience on foreign intelligence matters while Reno had little. She came to rely heavily on his expertise in this area. Commission interview Richard Scruggs (May 26, 2004).

imposing information sharing procedures for FISA material. As a result, OIPR became the gatekeeper for the flow of FISA information to criminal prosecutors. The FBI was not permitted to brief criminal prosecutors on information gathered from FISA surveillance without OIPR's approval.[16]

Scruggs believed that these procedures should be formalized to protect the FISA process and forestall the possibility that the FISC would deny surveillance warrants or that the criminal courts would suppress FISA information. In June 1994 he sent a memorandum to FBI General Counsel Howard Shapiro proposing an addition to the attorney general guidelines governing the conduct of foreign intelligence investigations. Scruggs's proposal would require that any questions regarding possible criminal prosecutions arising out of foreign intelligence investigations first be referred to OIPR. OIPR would coordinate any necessary responses with the Criminal Division of the Department of Justice or any of the United States Attorney's Offices (USAO). His proposal barred FBI Headquarters or any FBI field agents from contacting the Criminal Division or any USAO without prior consultation with OIPR.[17]

That same month Scruggs sent a memorandum with a more detailed proposal to the principal deputy attorney general, the Office of Legal Counsel, the chief of the Criminal Division, chiefs of several sections within the Criminal Division, Shapiro, and FBI Deputy Director Robert "Bear" Bryant. Scruggs proposed that there be a "Chinese wall" to divide attorneys as well as investigators who were working on intelligence from those working on criminal investigations. This is the first known proposal to create an internal wall between agents within the FBI. OIPR would work with the FBI on any foreign intelligence or foreign counter intelligence matters. None of the investigators or attorneys working on the intelligence matters could institute criminal process. Rather any information relevant to a criminal matter would have to be passed to prosecutors and criminal agents for instituting criminal process.[18] This proposal led to more than a year's debate over the nature of appropriate procedures.

Scruggs circulated several proposals in 1994 but failed to reach concurrence on any set of procedures. In December 1994 Deputy Attorney General Gorelick asked Michael Vatis, who was head of the Executive Office for National Security (EONS), to set up a working group to develop procedures.[19] The selection of EONS to lead the effort was significant

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[16] After Ames pled guilty, FBI Headquarters sent "word" out that there would be no more contacts with prosecutors in FCI investigations without OIPR's permission. Deputy Director Bryant warned agents that violating this new rule was a "career stopper." AGRT Report at 713-14.

[17] DOJ Memorandum to Shapiro from Scruggs, "Amendment of the FCI Guidelines," June 29, 1994.

[18] DOJ Memorandum to Garland, et. al. from Scruggs, "Counterintelligence v. Criminal Investigations," (undated).

[19] Commission interview Jamie Gorelick (Jan. 9, 2004); Commission interview Michael Vatis (Jan. 21, 2004). EONS was part of the joint staff of the Attorney General and the Deputy Attorney General. When Gorelick assumed the Deputy Attorney General position she recommended that she and the Attorney General have small personal staffs and that there be a larger staff that they would share for issues of concern to both of them.

because EONS would not be affected by the procedures and thus could be a neutral arbiter among competing interests.[20]

One of the first tasks of the working group was to ask the Office of Legal Counsel (OLC) for an opinion on the necessity of the primary purpose standard.[21] On January 19, 1995, OLC issued a draft opinion indicating that although the law did not clearly require a primary purpose standard, courts were likely to apply such a standard anyway. Therefore, it was necessary for the Department to be prepared to defend its FISA warrants under such a standard. OLC recommended that an appropriate internal process be established to insure that FISA certifications are consistent with the "primary purpose" test.[22]

The FBI, the Criminal Division, and OIPR weighed in on their respective views regarding possible procedures. None quarreled with the use of the primary purpose standard. The FBI argued that it still should be able to seek advice and guidance from prosecutors although it proposed language that any contacts between the FBI and the Criminal Division should not "inadvertently result in the fact or appearance of the Criminal Division controlling the intelligence investigation." The FBI and the Criminal Division objected to OIPR being the gatekeeper for information sharing with the Criminal Division. The Criminal Division complained that OIPR appeared to be adopting a view that a case is either entirely an intelligence matter or entirely a criminal matter. The FBI agreed that both OIPR and the Criminal Division should approve any FBI contacts with the United States Attorney's Offices (USAOs) because the necessary sensitivity to the issues and experience "treading this fine line" will often be absent in those offices.[23]

Drafts of what would become the Attorney General's procedures were circulated beginning in February 1995.[24] The procedures had two governing principles: first, there was a duty to share relevant information with the Criminal Division and second, there

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[20] Commission interview Richard Scruggs (May 26, 2004); Commission interview Jamie Gorelick (June 4, 2004)..

[21] Commission interview Michael Vatis (Jan. 21, 2004); Commission interview Jamie Gorelick (Jan. 9, 2004). As legal counsel to the attorney general, OLC's opinions were the final word on any legal issues within the Department of Justice.

[22] This draft opinion was officially issued in final form on February 14, 1995. The final opinion repeated the draft opinion's advice. See DOJ Memorandum to Vatis from Dellinger, "Standards for Searches Under Foreign Intelligence Surveillance Act," Feb. 14, 1995.

[23] See FBI Memorandum to Deputy Director Executive Office on National Security from General Counsel Federal Bureau of Investigation, "Access to Criminal Division Attorneys by FBI Counterintelligence Agents," Jan. 30, 1995; DOJ Memorandum to Vatis from Reynolds, "Procedures for Contacts Between FBI and Criminal Division During Foreign Intelligence and Counterintelligence Investigations," Feb. 7, 1995; FBI Memorandum to Vatis from Shapiro, "Procedures for Contacts Between FBI and Criminal Division During Foreign Intelligence and Counterintelligence Investigations," Feb. 7, 1995.

[24] See DOJ Memorandum to Bryant, et. al. from Vatis, "Procedures for Contacts Between FBI and Criminal Division During Foreign Intelligence and Counterintelligence Investigations," Feb. 3, 1995; DOJ Memorandum to Bryant, et. al. from Vatis, "Procedures for Contacts Between FBI and Criminal Division During Foreign Intelligence and Counterintelligence Investigations," Feb. 10, 1995.

had to be an appropriate process to govern such sharing so that there was no improper direction and control by prosecutors. In mid-April, Vatis sent a memorandum to the Attorney General, through the Deputy Attorney General, with draft procedures attached. He indicated that all of the affected components had concurred in the procedures.[25] Gorelick responded by asking for the comments of Mary Jo White, United States Attorney for the Southern District of New York.[26]

White raised two objections. First, she requested that whenever the FBI notified the Criminal Division about foreign intelligence information, it should at the same time notify the relevant USAO. Second, she wanted to ensure that the specific procedures that had already been worked out and issued as instructions by the Deputy Attorney General should remain in effect.[27]

The FBI, OIPR, and the Criminal Division all objected to the proposal that notification be given to the USAO at the same time it was given to the Criminal Division. The FBI argued that policy decisions regarding whether a case should be handled as an intelligence matter or a law enforcement matter needed to be made at headquarters level. It also argued that most USAOs had little experience in handling intelligence matters and that, unlike the Criminal Division, the USAO's sole equity in the process was to bring criminal prosecutions. This would, it argued, upset the delicate balance between intelligence and law enforcement concerns. Finally, it noted that the level of consultations with the USAO in the Ames case was a significant factor in determining there was a need for procedures. The Criminal Division argued that the FBI needed a single point of contact to ensure that any contacts with criminal prosecutors were properly documented. It also noted that early on in an investigation venue may not be clear so that deciding which USAO to contact would be unclear.[28]

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[25] DOJ Memorandum for the Attorney General from Vatis, "Procedures for Contacts Between FBI and Criminal Division During Foreign Intelligence and Counterintelligence Investigations," April 12, 1995.

[26] DOJ Memorandum for Deputy Attorney General from Vatis, "Procedures for Contacts Between FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations," May 24, 1995; Commission interview Jamie Gorelick (June 4, 2004). As United States Attorney for the Southern District of New York, White had significant experience in leading counterterrorism cases. Her office would thus have a practical perspective to offer on the proposed procedures. Gorelick also asked for the views of Michael Stiles, the United States Attorney for the Eastern District of Pennsylvania. White provided comments on behalf of Stiles as well.

[27] These procedures will be discussed in the next section.

[28] See DOJ Memorandum to Vatis from Harris, "Procedures for Contacts Between FBI and Criminal Division During Foreign Intelligence and Counterintelligence Investigations," May 22, 1995; FBI Memorandum to Vatis from Shapiro, "Procedures for Contacts Between FBI and Criminal Division During Foreign Intelligence and Counterintelligence Investigations," May 22,1995.

There are 96 USAOs in the United States, one for each federal district court. Each USAO may only handle matters for which they have venue – meaning that the courts would determine the matter to be sufficiently linked to that geographic area to permit a prosecution to be brought there. The Criminal Division, however, has nationwide jurisdiction and may handle matters in any federal district court.

OIPR still was not satisfied. In addition to rejecting White's suggestions, Scruggs complained that the procedures still provided too much opportunity for the FBI to meet with the Criminal Division. He argued the FBI wanted to meet with the Criminal Division on the "most mundane issues" and the Criminal Division exhibited no willingness to defer such meetings despite the potential legal issues created by the meetings. He complained that the Criminal Division welcomed such meetings on its "overly optimistic" view of the law. Scruggs argued that the only way to ensure that such contacts between the FBI and the Criminal Division did not create legal issues for OIPR was for OIPR to decline to forward to the attorney general any FISA applications where OIPR believed the FBI and the Criminal Division had had too many contacts.[29] In late May Vatis rejected OIPR's complaints and declined to make OIPR the gatekeeper. He noted that if OIPR believed there were too many contacts in any particular case, it could come to the deputy attorney general to resolve the matter.[30]

In mid-June White made one last set of comments to the procedures in a memorandum addressed to Reno.[31] White said that she believed Vatis and her staff "had worked out acceptable instructions" for foreign intelligence and foreign counterintelligence investigations in the SDNY. She noted, however, that it was "hard to be totally comfortable with instructions prohibiting the FBI from contacting the USAO when such prohibitions were not legally required. She argued that if it was legally permissible for the FBI to contact the Criminal Division, it was legally permissible for it to contact the USAO. She conceded, however, that she understood that tighter controls reduced the risk of improper contacts and DOJ not wanting the FBI to automatically contact USAOs.[32]

On July 14 Vatis forwarded a final draft to Gorelick through her principal deputy Merrick Garland. This version incorporated some minor changes proposed by White, including a provision that would permit the Attorney General to exempt particular investigations from the procedures. He also agreed at White's request to draft a separate memorandum that indicated these procedures did not supersede the procedures already in place for the SDNY as a result of the March memorandum. He rejected White's request to bring the USAOs into the process earlier in cases where there was no FISA warrant in place because if the USAO was involved in the matter prior to a FISA application, it would be very difficult to assure the FISC that the FISA's primary purpose was intelligence as opposed to criminal. He defended the procedures, arguing that there cannot be a separate

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[29] DOJ Memorandum to Vatis from Scruggs, "Comments on Procedures for Contacts Between FBI and Criminal Division During Foreign Intelligence and Counterintelligence Investigations," May 25, 1995.

[30] DOJ Memorandum for the Deputy Attorney General from Vatis, "Procedures for Contacts Between FBI and Criminal Division During Foreign Intelligence and Foreign Counterintelligence Investigations," May 24, 1995.

[31] Although a copy of the memorandum was also addressed to Vatis, it was sent directly to Reno. Witnesses indicated that White had a very close relationship with Reno and would often go directly to her on issues of importance instead of going through the usual chain of command.

[32] See DOJ Memorandum to Reno from White, "Instructions Re FI and FCI Investigations," June 13, 1995.

set of procedures for one USAO.[33] Garland recommended that Gorelick approve the procedures and forward them to Reno for approval. Gorelick concurred and forwarded them to Reno.[34]

On July 19, 1995, the "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" were issued by the Attorney General. The procedures required that the Criminal Division be notified when a foreign counterintelligence (FCI) or foreign intelligence (FI) investigation developed facts or circumstances that "reasonably indicate that a significant federal crime has been, is being, or may be committed." The FISA court officially incorporated these procedures in future FISA orders as accepted procedures to govern information sharing.

It is important to understand what these procedures did and did not do. First, these procedures only applied to information gathered by the FBI as part of an intelligence investigation. They did not control information gathered by the CIA or the NSA [redacted] Thus, information from the CIA and NSA could be shared with criminal investigators and/or prosecutors without complying with these procedures and any notice to or involvement by OIPR.

Second, despite OIPR's proposals to the contrary, these procedures said nothing about information sharing within the FBI. FBI agents working intelligence matters could freely share information with agents working on parallel criminal matters. The only controls were on information sharing between the FBI and criminal prosecutors.

Third, the procedures compelled information sharing when there was evidence of a significant criminal offense. Both the FBI and OIPR had an independent obligation to notify the Criminal Division when this threshold was met. The procedures clearly rejected OIPR's view that it should have the gatekeeper role in deciding what intelligence information should or could be shared with criminal prosecutors. They did not ban information sharing under any circumstances.

Finally, the limits on information sharing were solely on the advice-giving role of prosecutors, not the sharing itself. The procedures specifically endeavored to prevent even the appearance of direction and control. They limited the type of advice that the criminal prosecutors could give to agents working on the intelligence matters. Such advice could preserve the possibility of a criminal prosecution but could not direct activities so as to enhance such a prosecution.

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[33] See DOJ Memorandum for the Deputy Attorney General from Vatis, "Procedures for Contacts Between FBI and Criminal Division During Foreign Intelligence and Foreign Counterintelligence Investigations," July 14, 1995.

[34] Commission interview Jamie Gorelick (June 4, 2004); Handwritten memorandum to Attorney General from Gorelick (undated).

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In a memorandum attached to the procedures the Attorney General indicated that these procedures did not supersede the March 4, 1995, memorandum issued by Gorelick that governed cases in the Southern District of New York. This edict was at White's request. To understand why White wanted this memorandum to remain in effect, one must understand the genesis and purpose of that memorandum.

The March 1995 Gorelick Memorandum

Mary Jo White became the United States Attorney for the Southern District of New York (SDNY) in the spring of 1993, shortly after the first World Trade Center bombing and the discovery of the so-called Landmarks Plot to simultaneously bomb New York City tunnels and landmarks. Her attorneys and the FBI agents in the New York Field Office worked tirelessly to bring to prosecution the perpetrators of the attack and the plot.

By the early spring of 1995 the trial of the plotters was underway. During the trial the FBI learned of death threats against the judge, the prosecutors, and witnesses at the trial. Criminal pen registers on relevant telephones were already in place to try to learn who was behind the threats. It was decided, however, that these techniques were not providing adequate information, and there was continuing concern for the safety of government officials and witnesses. White and her staff suggested that an intelligence investigation be opened to aggressively address the ongoing threats.[35]

Because any intelligence surveillance or physical searches within the United States required a FISA warrant, the FBI would need to convince OIPR to present a warrant application to the Foreign Intelligence Surveillance Court. The FBI believed, however, that because there was already an open criminal matter on these individuals and the threats, OIPR would reject such an application because it would appear that the primary purpose of such surveillance was the criminal case, not an intelligence investigation. The FBI contacted OIPR, believing that OIPR would tell the SDNY that no FISA warrants could be obtained under the circumstances.[36]

This request was very troubling to OIPR. There is ample evidence that some individuals in OIPR believed that once it was decided that a case would become a criminal matter, the intelligence investigation had to be terminated. This view was not without some basis in the law. The seminal case on the primary purpose standard, United States v. Truong Dinh Hung, supported such a view.[37] The court in Truong, which involved a pre-FISA search but was decided after the passage of FISA, upheld the admission of evidence gathered in the intelligence investigation prior to the matter becoming a criminal investigation. Once the Criminal Division wrote a memorandum indicating that it was

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[35] Commission interview Mary Jo White (May 17, 2004); Commission interview Richard Scruggs (May 26, 2004).

[36] Commission interview Alan Kornblum (May 19, 2004); Commission interview Richard Scruggs (May 26, 2004).

[37] United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980).

going to open a criminal matter, the court held the primary purpose was no longer intelligence and all information gathered after that point was suppressed.[38] The Truong case became the foundation for subsequent cases holding that the primary purpose standard also applied to surveillance authorized under FISA.

Because the New York case was already a criminal matter and criminal surveillance had already been conducted, OIPR worried that the FISC would conclude that a FISA application at this point would be an effort to conduct an end run around the criminal process. Moreover, because the SDNY was involved in the request for the FISA surveillance, there was a serious risk that the court would believe that the SDNY was directing and controlling the intelligence investigation. Thus, any such application would be rejected by the court. In OIPR's view, these facts presented the worst case scenario for a FISA application. Certainly such a request was unprecedented in the 17-year history of FISA.[39]

Recognizing the seriousness of the matter, however, Scruggs and his deputy, Allan Kornblum, flew to New York to meet with White and her staff to discuss how to proceed. Scruggs said that while he was in New York, he and White's staff negotiated a possible memorandum to attach to the FISA application to persuade the court that the primary purpose of this particular surveillance was collection of intelligence information regarding the possible plot to kill individuals involved in the criminal matter.[40] Scruggs recalled that the resulting memorandum was drafted by one of White's attorneys.

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[38] Id. at 915-16 (Warrantless foreign intelligence surveillance not permitted once "surveillance becomes primarily a criminal investigation" or "when the government is primarily attempting to form the basis for a criminal prosecution.")

[39] Commission interview Alan Kornblum (May 19, 2004); Commission interview Richard Scruggs (May 26, 2004).

[40] Id. Kornblum recalled no resolution of the disagreements between Scruggs and White during the meeting he attended. Kornblum believed that Scruggs never would have agreed to the terms of this memorandum without outside influence and thought that White must have gone to Gorelick to have her force Scruggs to compromise. White denies that she did so. Moreover, because White believed Gorelick shared Scruggs's views regarding the need to shut down the criminal case before opening an intelligence case, White would not have viewed Gorelick as a sympathetic listener. As there is no contemporaneous evidence of Gorelick's views on conducting parallel investigations, we cannot say whether White's beliefs were grounded in fact. There is evidence, however, that Reno shared Scruggs' view and required intelligence investigations to be terminated once a case moved to a grand jury. Gorelick said she was not consulted by White or her staff regarding the March memorandum and was not involved in its drafting or formulation. Commission interview Mary Jo White (May 17, 2004); Commission interview Jamie Gorelick (June 4, 2004). Scruggs confirmed that Gorelick had no role in drafting the March procedures. Commission interview Richard Scruggs (May 26, 2004).

Scruggs did not recall Kornblum being present at the meeting where the disagreements were hammered out. This suggests that there may have been two separate trips to New York, the first one that Kornblum attended and a second one that he did not. Scruggs had a distinct recollection of an all-day meeting where the terms of the memorandum were debated and finally agreed upon.

Once agreement was reached on the terms of the memorandum, it was decided that the parties could not enforce the terms of the agreement on their own. They agreed that they needed a senior official (or in the words of one witness – "an adult") to issue the memorandum as a set of orders to the SDNY, the FBI, and OIPR. They decided to ask Gorelick to issue the memorandum. Scruggs briefed Gorelick on the memorandum and she agreed to sign it. It was filed with the FISC as part of the FISA application. The FISA warrant was issued as requested.[41]

The memorandum was described as a treaty between OIPR and the SDNY. Each of the affected parties agreed to its terms. It covered the two existing terrorism matters then under investigation by the SDNY.[42] Most significantly, it permitted the SDNY to designate one of its attorneys who would have access to all information collected by the surveillance to determine what information needed to be shared with the criminal prosecutors. This attorney had been involved in the criminal matter and thus would have a good basis to understand what needed to be shared. OIPR had no role in reviewing the gathered information or deciding what could or could not be shared with criminal investigators or prosecutors.

Several provisions, however, were included to appease OIPR's continuing concerns regarding the purpose of the surveillance. First, the parties included language to the effect that the proposed procedures went even further than the law required. Scruggs said this self-serving language was added to satisfy the FISA court's concerns about the unprecedented agreement. Second, Scruggs was able to insert a provision creating not only a wall between the FBI and the SDNY but also a wall between the FBI investigators working on the criminal case and those assigned to the new intelligence matter. He believed this was essential to the court approving the application. This echoed a provision that Scruggs had unsuccessfully proposed be included in the general procedures that were being drafted at the same time as this memorandum.[43]

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[41] Commission interview Richard Scruggs (May 26, 2004); Commission interview Mary Jo White (May 17, 2004); DOJ Memorandum to White, et. al. from Gorelick, "Instructions on Separation of Certain Foreign Counterintelligence and Criminal Investigations," Mar. 4, 1995.

[42] At the time of this memorandum, the SDNY had not yet opened a criminal case related to Bin Ladin and al Qaeda. That would not occur until over a year later.

[43] Commission interview Richard Scruggs (May 26, 2004). It should be recognized that although this memorandum was negotiated during the time the Attorney General's general procedures were being debated, the two processes were wholly unrelated. Vatis, who was directing the group considering the general procedures, was not involved in the drafting or approval of this memorandum. This memorandum only dealt with two specific cases in New York while the general procedures would govern all foreign intelligence matters countrywide. Finally, these procedures contained provisions that were significantly different than the general procedures subsequently approved in July.

The memorandum had two primary limits on coordination: neither the SDNY nor the Criminal Division could exercise any direction or control over the intelligence investigation and the intelligence investigators could only share portions of their investigative memoranda without approval from FBI headquarters and OIPR. It also contained sharing requirements. If intelligence investigators developed information that "reasonably indicated" the commission of a "significant federal crime," they were required to notify criminal investigators.

As the terms of this agreement offered the SDNY access to all of the intelligence gathered pursuant to the FISA surveillance and provided no role for OIPR in the process, it is not surprising that the SDNY requested that these provisions remain in effect when the Attorney General's procedures were issued in July. The memorandum only related, however, to the two specific matters identified within. It had no applicability to any other cases going forward and thus, as will be seen later, had no role in the events in the summer of 2001.

Reports of Problems With the July 1995 Procedures and Efforts at Reform

The July 1995 procedures were intended to permit a reasonable degree of information sharing between FBI agents conducting intelligence investigations and Criminal Division prosecutors. They were also intended, however, to ensure that the FBI would be able to obtain continuing FISA coverage and later be able to use the fruits of such coverage in criminal cases. If the FISA court or a subsequent criminal court held that the primary purpose was something other than intelligence collection, renewal of coverage could be denied or evidence could be suppressed. As all parties to the procedures agreed, this could be a very delicate balance with substantial risks to national security if the process was not adequately managed. All agreed that some management was required. They disagreed as to how this management should be exercised. As a result the procedures were widely misunderstood and misapplied. This resulted in far less information sharing and coordination between the FBI and the Criminal Division in practice than was allowed in theory under the July 1995 procedures.

OIPR's leadership was very risk averse and thus took a very conservative approach as to how much information sharing could take place and when. It believed that the earlier and the more frequent the contact between the FBI and the Criminal Division, the more likely that the court would find that the primary purpose standard was not met.[44] During the debate over the procedures OIPR argued that information sharing should be minimized

[44] See Commission interview Alan Kornblum (May 19, 2004). All the parties agreed that the primary purpose test governed the process. Even the SDNY, which would later question some of the procedures, did not dispute the applicability of the primary purpose test. See SDNY Memorandum to White from Fitzgerald and Khuzami, "Clarification of FISA rules in Case of Ongoing Counterterrorism Investigations," Apr. 22, 1996. The dispute was over what the test meant when it came to information sharing. Even different OIPR counsel did not agree on the implication of the test. Scruggs noted that when Jim McAdams became head of OIPR, McAdams believed that Scruggs had been too conservative and loosened the controls somewhat. Commission interview Richard Scruggs (May 26, 2004).

and worried that the FBI and the Criminal Division wanted to meet more often than OIPR deemed wise.[45] Over time OIPR, and eventually the FISC itself, began to see mere contacts between the FBI and the Criminal Division as a proxy for improper direction and control. Significantly, OIPR viewed its role primarily as an officer of the FISA court and therefore responsible for stewardship of the court's responsibilities. It viewed its role as an advocate for its institutional clients as secondary.[46] This would materially affect how OIPR handled the subsequent problems that arose regarding FISA applications.

Although OIPR had been unsuccessful at persuading the working group to make it the gatekeeper in the July 1995 procedures, OIPR continued the role it had adopted during the months preceding the issuance of the procedures. The FBI went along with this approach. The agents working the intelligence matter would first approach the FBI's Office of General Counsel (OGC) attorneys for advice on whether information should be shared with the Criminal Division. The OGC attorneys would refer the agents to OIPR. OIPR would more often than not recommend that the agents not contact the Criminal Division.[47] This approach was reinforced by Deputy FBI Director Bryant's declaration that too much information sharing could be a career stopper for an FBI agent. As a result, the information flow between the FBI and the Criminal Division on foreign intelligence matters withered.

The procedures and the Southern District of New York

In December 1995 White forwarded to Reno, then a few days later to Gorelick, a memorandum written by her staff regarding perceived problems with addressing terrorism as an intelligence matter versus as a criminal matter. The New York prosecutors argued that terrorism should be addressed using criminal processes as opposed to intelligence techniques.[48] White added some comments to the end of the

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[45] Deputy Counsel Kornblum believed that FCI goals of an investigation "should be completed, or very nearly so, before the Criminal Division is notified" of a possible criminal case. Under this view, no notification should occur until the FBI was prepared to end its FISA coverage. AGRT Report at 723. See also DOJ Memorandum to Vatis from Scruggs, "Comments on Procedures for Contacts Between FBI and Criminal Division During Foreign Intelligence and Counterintelligence Investigations," May 25, 1995. Although this linear view of cases being intelligence and then moving toward criminal might have been palatable in ordinary espionage cases, this model did not fit terrorism cases. Intelligence regarding possible terrorism always is evidence of a criminal offense. Moreover, because of the dangers posed by terrorists, waiting to initiate criminal proceedings until after an intelligence investigation was completed is neither practical nor wise. When the 1995 procedures were created, however, they were developed with FCI investigations in mind. The special needs and requirements of counterterrorism cases were not considered. Commission interview Larry Parkinson (Feb. 24, 2004).

[46] James McAdams testimony, Senate Select Committee on Intelligence, Dec. 9, 1995.

[47] FBI fax, Parkinson to Seikaly, Oct. 8, 1997; DOJ Memorandum to Vatis, et. al. from Seikaly, "Minutes of the October 16, 1997, Meeting of the DOJ Working Group on Sharing of FI and FCI Information," Oct. 20, 1997.

[48] See SDNY Memorandum to White from Bomb Team II, Dec. 5, 1995.This position was not surprising as the prosecutors had no authority to direct intelligence techniques but had such authority in criminal matters. Thus, for them to be involved in the direction and control of terrorism matters they had to be handled as

(continued...)

memorandum in which she echoed the view that terrorism should be approached as a criminal, not intelligence, issue. She argued that by using a criminal approach there would not be unnecessary walls. She argued that the July procedures concerning communications built unnecessary walls and that there was no need to keep prosecutors in the dark or to prohibit them from giving advice.[49] She did not, however, provide any evidence that information relevant to the SDNY had not made its way to the SDNY attorneys because of the July 1995 procedures.

In response to this memorandum, on the same day White's memorandum was sent to Gorelick, a deputy counsel in OIPR sent a memorandum to Principal Deputy Attorney General Garland analyzing White's comments. The counsel argued that most of White's difficulties stemmed from "a fundamental lack of understanding" of the purpose of intelligence investigations. He claimed that many of the examples of issues raised by White had previously been resolved by the Joint Intelligence Community Law Enforcement (JICLE) working group and the July 1995 procedures.[50] There is no evidence that any action was taken in response to the SDNY memorandum at this time.

In April 1996 two SDNY attorneys wrote to White suggesting that there be a clarification of the FISA rules in the case of ongoing counterterrorism cases. They argued that although the March 1995 memorandum was somewhat more flexible than the July 1995 procedures, they believed the March memorandum unnecessarily limited the dissemination of non-FISA human source information. The memorandum did not distinguish between information gathered via FISA surveillance or other non-FISA techniques.[51]

The authors indicated that they agreed with OLC's analysis and conclusions regarding the application of the primary purpose standard. They also noted that the July procedures did not address agent-to-agent contact and suggested that appropriate "Chinese walls" be put in place between squads investigating intelligence cases and those handling criminal cases. In addition to proposed additions to the procedures, they proposed adding language that "the procedures outlined below go beyond what is legally required."[52] Attached to the memorandum was a series of questions regarding the meaning of the 1995 procedures

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[48](...continued)
criminal matters, not as intelligence matters. Whatever the merits of their arguments as to the value of criminal terrorism investigations, no one was going to voluntarily give up using any intelligence tools just to give the SDNY the ability to direct and control the investigations.

[49] Her position did not differentiate between FBI communications with the Criminal Division and with the SDNY. As her prior comments on the procedures focused solely on attempting to put the SDNY on the same footing as the Criminal Division, these comments appear to be reiterating her earlier position that had been unanimously rejected by all the parties in the working group, including the Criminal Division.

[50] See DOJ Memorandum to Garland from Gallington, "Mary Jo White Memo," Dec. 27, 1995.

[51] See SDNY Memorandum to White from Fitzgerald and Khuzami, "Clarification of FISA rules in Case of Ongoing Counterterrorism Investigations," Apr. 22, 1996.

[52] This language is identical to the language that the SDNY and OIPR agreed to insert in the March memorandum signed by Gorelick.

and suggested answers. The intent was to provide guidance to agents in the field regarding the meaning of the procedures.

In June 1996 a memorandum was drafted for the Attorney General to issue explaining the July 1995 procedures. The draft indicated that it had come to her attention that the July procedures had been construed to prohibit communications between intelligence and criminal investigations of a common target. That draft said such a conclusion "was incorrect." The memorandum insisted that timely information sharing was required and that it was only "uncoordinated and unnecessary" communications that had to be avoided. The memorandum apparently was never issued.[53]

Later that same month, Jim McAdams, then head of OIPR, sent a memorandum to White in response to the April memorandum from her staff. McAdams told White that she and her staff had construed the Attorney General's procedures to be far more prohibitive as to communications between intelligence and criminal agents on parallel investigations than they were intended to be. He contended that although the original procedures caused angst at the outset, they created far fewer problems than anticipated by some. He believed that most of the problems relating to the procedures stemmed from misunderstanding them. He also provided edited answers to the questions proposed by the New York prosecutors. He argued that there were many ways to have contact between the FBI and prosecutors without violating the procedures.[54]

In October, White sent a memorandum to McAdams, thanking him for his work on arriving at a consensus on the meaning of the July 1995 procedures. She indicated that her staff realized in meeting with relevant parties that in many instances they had been talking past each other. She noted that when they worked through concrete examples they realized that they "could by and large accomplish what we think needs to be accomplished." She added, however, that they still had concerns about Part B of the procedures (which govern information sharing in cases where no FISA surveillance was yet in place).[55]

The next month White and some of her staff met with the Attorney General and the Deputy Attorney General to discuss remaining concerns with the July 1995 procedures. In a memorandum to Reno and Gorelick in advance of the meeting, McAdams offered his opinion that many of the SDNY's concerns were due to misunderstandings regarding

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[53] See draft Memorandum to Assistant Attorney General, Criminal Division, et. al. from Reno, "Memorandum of July 19, 1995, Regarding Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations," June 13, 1996. When a similar memorandum was proposed in late 1997, it was suggested that issuing a memorandum that essentially echoed the original memorandum but suggested this time the Attorney General really meant it would not be terribly effective.

[54] DOJ Memorandum to White from McAdams, "OIPR/FBI Responses to Questions & Answers Regarding FISA procedures and Guidelines," June 28, 1996.

[55] SDNY Memorandum to McAdams from White, Oct. 4, 1996 (attaching SDNY memorandum to White from Fitzgerald and Khuzami, "FISA Issues," Oct. 2, 1996.

the procedures. He said other concerns merely reflected the SDNY's "angst" over DOJ control over FISA and FISA-derived information that might be relevant to a SDNY case. He concluded that there were no disagreements among the parties regarding Part A of the procedures but there were still issues regarding Part B.[56] The meeting led to extended discussions regarding the application of Part B of the procedures to the SDNY.

Finally in July 1997 the Attorney General authorized an exception to Part B of the procedures for the SDNY. Under this "annex" to the 1995 procedures, FBI agents working on intelligence matters where no FISA warrant was in place could contact the national security coordinator in the SDNY without obtaining prior approval from the Criminal Division. This annex was good for one year and could be renewed. It was renewed annually thereafter. This apparently resolved the SDNY's concerns as there is no evidence of further complaints regarding the procedures.[57]

Broader complaints regarding application of the procedures

General concerns about the application of the procedures persisted, however, so that in October 1997 the Attorney General announced that she wanted to improve information sharing between the FBI and the Criminal Division in foreign intelligence matters. She established a working group consisting of OIPR, the FBI, and the Criminal Division to recommend changes. It was chaired by Daniel Seikaly, Deputy Director of EONS. During the working group meetings the FBI conceded that its agents were going to OIPR to ask permission to approach the Criminal Division rather than contacting the Criminal Division directly as mandated by the 1995 procedures. The Criminal Division complained that the FBI Office of General Counsel and OIPR had opined that mere contacts between investigators and the criminal Division created an appearance of improper direction and control. It also complained that it had heard that if too much contact occurred that OIPR would refuse to present any further FISA applications in the particular case. Seikaly concluded that the Attorney General's memorandum was being "ignored" by both the FBI and OIPR.[58]

OIPR was asked to explain why it was recommending that the FBI not immediately notify the Criminal Division when it obtained information relevant to a possible criminal investigation. Allan Kornblum responded that immediate notification might lead the

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[56] DOJ Memorandum for the Attorney General from McAdams, "Procedures Concerning Foreign Counterintelligence Investigations," Nov. 15, 1996.

[57] See DOJ Memorandum for Keeney, et. al. from Reno, "Annex to Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations," Aug. 29, 1997. We found no explanation why it took nearly eight months after the meeting to issue this memorandum. It likely reflected an earlier expressed concern regarding the difficulty of treating one USAO differently than the others. As would later be argued, if the modified procedures were legally permissible for one office, it was legally permissible for all offices. The SDNY was treated differently because it had a level of expertise not found in most other offices.

[58] AGRT Report at 709; see also DOJ Memorandum to Vatis, et. al. from Seikaly, "Minutes of the October 16, 1997, Meeting of the DOJ Working Group on Sharing of FI and FCI Information," Oct. 20, 1997.

FISC to conclude that the purpose of the warrant was actually criminal, not foreign intelligence. Although it was suggested that there be some modification to the certification regarding the purpose of the surveillance, Kornblum objected because they had been using the same form for 19 years and he was concerned that the court would object to any changes. The working group disbanded without any change in the procedures or how they were applied.[59]

In July 1999 the Department of Justice Office of Inspector General (OIG) issued a report regarding the handling of information in the Department's campaign finance investigation. The OIG report found that the 1995 procedures were "largely misunderstood and often misapplied, resulting in undue reluctance among FCI agents to provide information to criminal investigators and prosecutors."[60] The report noted further that despite the fact that the procedures that were adopted rejected Scruggs' original proposal that the FBI not provide information to the Criminal Division without OIPR's approval, the FBI operated as if that proposal had been adopted. Even FBI Deputy Director Bryant incorrectly believed that the procedures required OIPR approval before the FBI could provide intelligence information, whether from human sources or FISA-derived, to the Criminal Division. As a result, FBI agents internalized the message that sharing intelligence information of any kind might engender criticism. This approach "needlessly chilled" information sharing between the FBI and the Criminal Division. The OIG found that the FBI and OIPR simply ignored the information sharing requirements of the 1995 procedures.[61]

The OIG also indicated that the 1995 procedures were vaguely written and thus recommended that they be rewritten to make clear what a reasonable indication that " a significant criminal offense" was or will be committed means.

In August 1999, in response to the OIG findings, Deputy Attorney General Eric Holder established a working group to address intelligence sharing problems between agents and prosecutors.[62] No reforms were ever developed as a result of this group.

In October 1999, Randy Bellows, who was leading the Department's investigation into the handling of the Los Alamos Laboratory investigation, wrote to Reno to warn that the

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[59] Minutes of October 7, 1997, Meeting of Working Group on Sharing of FI & FCI Information, Oct. 14, 1997; DOJ Memorandum to Vatis, et. al. from Seikaly, "Minutes of the October 16, 1997, Meeting of the DOJ Working Group on Sharing of FI and FCI Information," Oct. 20, 1997. One suggestion was to have the Attorney General "reassert the validity of the Procedures but it was concluded that it did not make sense for the Attorney General to issue a memorandum that said "And I really mean it this time." AGRT Report at 722.

[60] Department of Justice Office of Inspector General report, "The Handling of FBI Intelligence Information Related to the Justice Department's Campaign Finance Investigation," July 1999, at 256.

[61] Id. at 328-330, 343-344.

[62] See Memorandum to Bryant, et. al. from Holder, "Creating Specific Working Groups, and Establishing Timetables, to Resolve Outstanding Issues Related to Intelligence Matters," Aug. 3, 1999. Gorelick left the Department of Justice in May 1997. Holder became the new Deputy Attorney General in July that year.

relationship between the FBI and the Criminal Division in foreign intelligence matters was "dysfunctional." He argued that the July 1995 procedures that required information sharing needed to be "scrupulously followed." He identified two central problems. First, there was a lack of notification to the Criminal Division of FCI investigations that might result in a criminal prosecution. Second, there was insufficient opportunity for the Criminal Division to give meaningful advice concerning matters that could impact upon criminal prosecution. The Attorney General formed a review team to consider the recommendations from the AGRT report.[63]

In December 1999, during the high terror alert surrounding the Millennium, OIPR presented an unprecedented number of FISA applications to the court. Because of existing related criminal cases, including the prosecutions of the 1998 East Africa embassy bombings suspects and the outstanding indictment against Bin Ladin, OIPR and the court agreed that additional information sharing controls were needed to ensure that the new FISAs were intended to gather foreign intelligence, not enhance existing criminal matters. They agreed that the court itself would become the wall for regulating the sharing of information obtained through any [redacted] FISA applications. Thus, if the FBI wanted to share information with criminal prosecutors, it would need to obtain the court's permission.[64] As a result, at a time when portions of the Justice Department were considering ways to modify the 1995 procedures to increase information sharing, elsewhere more barriers to such sharing were being erected.

The AGRT team issued its final report in May 2000. As expected, it found that the FBI and OIPR were routinely ignoring the information sharing requirements of the 1995 procedures. The report concluded that "excluding the Criminal Division from FCI investigations was not an isolated event. . . It has been a way of doing business for OIPR, acquiesced in by the FBI, and inexplicably indulged by the Department of Justice."[65] The report also urged that the 1995 procedures be rewritten. It noted that there was "considerable uncertainty and difference of opinion concerning the nature and extent of the advice that the Criminal Division may give once notified of an FCI investigation, as well as the meaning and application of the 'primary purpose' rule."[66]

On October 6, 2000, the Attorney General's review team assigned to review the Los Alamos report's recommendations presented proposals for reform of the 1995 procedures. Although all of the affected parties agreed that the information sharing provisions needed to be made clearer and enforced, disagreements remained about the nature of advice that the Criminal Division could provide to the intelligence

[63] Letter to Reno from Bellows, October 19, 1999. In January 2000, while waiting for the final AGRT report with its final recommendations, the Attorney General issued an order requiring the FBI to periodically provide the Criminal Division with relevant letterhead memoranda that describe ongoing intelligence matters. This was viewed as a way to assist the Criminal Division know what it might need to obtain more information to protect possible criminal equities.

[64] Commission interview James Baker (March 1, 2004).

[65] AGRT Report at 708

[66] Id. at 710

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investigators. The issue was whether the Criminal Division could only provide advice to *protect* possible criminal investigations or whether it could also provide advice designed to *enhance* a criminal investigation. OIPR contended that the only appropriate purpose for advice was to protect a possible criminal investigation.[67] The others believed that enhancing advice could be given as long as the Criminal Division did not direct that such actions be taken. The proposal forwarded to the Attorney General rejected OIPR's position and advised that enhancing advice was permissible.

The proponents of the reforms believed that the Attorney General was prepared to approve the proposal as formulated. But at an October 6 meeting with the Attorney General, she rejected the proposal and told the parties to go back and develop a plan that all, including OIPR, would agree on.[68]

While the Department of Justice was considering reforms to the 1995 procedures to increase information sharing, the FISA court – with OIPR's concurrence – imposed additional restrictions. Over the course of 2000 OIPR had informed the FISA court of numerous errors in prior FISA applications, particularly as to the existence and nature of any parallel criminal investigations. The court reacted by imposing additional restrictions on information sharing. For all Bin Ladin-related FISAs the court ordered that no information obtained from such FISAs could be shared with criminal prosecutors (including the United States Attorney's Office in New York or anyone in the Criminal Division) or FBI agents working on any related criminal matter without the court's permission.[69]

In November 2000 the court added a requirement that no one in the FBI or the Department of Justice, including persons working solely on intelligence investigations, could see any FISA material before signing a form acknowledging that they understood the restrictions on sharing any of the information they obtained.[70] One attorney in the FBI's National Security Law Unit reported at the time that, based on his discussions with

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[67] Kornblum had previously argued that the Criminal Division could only be involved in an FCI investigation under the 1995 procedures only for "defensive" purposes, so as not to "screw up" a criminal case." AGRT Report at 727. Others suggested that the Criminal Division could give advice to enhance a future criminal prosecution as long as there was no advice regarding FISA coverage. Id.

[68] One individual present at the meeting indicated the participants were surprised that the Attorney General did not adopt the proposal. He noted that they had received indications that she intended to approve the changes. But when the Attorney General came to the meeting she came accompanied by Fran Fragos Townsend, then head of OIPR. The participants believed that Townsend had lobbied Reno prior to the meeting and convinced her that OIPR's position was correct. Commission interview David Kris (May 19, 2004); Commission interview James Baker (June 17, 2004).

[69] This effectively reinstituted the court wall that was first imposed in December 1999 and removed in March 2000 when the relevant Millennium FISAs had been terminated.

[70] One FBI supervisory agent referred to this form as "a contempt letter." This form assured that information sharing would essentially come to a halt because agents began to fear they would lose their jobs if any intelligence information was shared with criminal investigators. Department of Justice Office of Inspector General report, "A Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks" (hereinafter DOJ IG 9/11 report), July 2, 2004, p. 44.

OIPR, he believed the FISA court would no longer permit criminal prosecutors to give any advice to the FBI agents working on intelligence matters. The attorney also believed that the court's wall was about to be applied to more FISA applications and thus supersede the 1995 procedures entirely.[71]

The parties returned in December that year with slight modifications but still no unanimity on reform. OIPR continued to insist that Criminal Division advice had to be restricted. The Attorney General again rejected the proposal on the grounds that it was not unanimous.[72]

The December reform attempt also suffered from the court's unhappiness with the numerous factual errors in the applications it had received, including erroneous descriptions of the walls between intelligence and criminal investigations. Reform proponents recognized that even if the Attorney General had approved the reforms, the FISA court would also have had to approve the new procedures. The reform proponents recognized that the court would be unlikely to approve any changes that sought to increase information sharing, let alone expand the type of advice the prosecutors could provide to intelligence agents. Thus, achieving reform would likely require an appeal to the FISC court of review. This was considered particularly risky because the court of review had never before convened. Moreover, one of its judges had previously indicated doubts about the constitutionality of the FISA statute. Thus an appeal could risk the ability to obtain future FISA warrants.[73]

The problems with errors in FISA applications continued. On March 9, 2001, Chief Judge Lamberth of the FISA court wrote to Attorney General John Ashcroft that because of the continued errors on a series of FISA applications, the FISA court was banning a supervisory FBI agent who had been involved in preparing the particular applications.[74]

A few days later an Assistant Deputy Attorney General forwarded to the Attorney General a proposal for reform of the 1995 procedures that was virtually identical to the proposal presented to Reno in December 2000. It is unclear what happened to the proposal. Although the proponent believes he had been told that the memorandum had been forwarded to Ashcroft, there is no record that it ever made it past the Deputy Attorney General's office. In any event, no action was taken on the proposal. The difficulty of achieving court agreement to reform had only magnified as the application errors continued.[75]

In July 2001 the General Accounting Office (GAO) issued a report criticizing the FBI and OIPR for not complying with the information-sharing requirements of the 1995

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[71] See email from Ainora to Parkinson, "FYI-Special Session of the FISC," Nov. 17, 2000.
[72] Commission interview David Kris (May 19, 2004).
[73] Id.
[74] See Letter to Attorney General Ashcroft from Chief Judge Lamberth, March 9, 2001.
[75] Commission interview David Kris (May 19, 2004).

procedures.[76] This was the third report by a government agency in as many years that indicated that the 1995 procedures were not working as planned. But again, the timing for any reform aimed at increasing information sharing was poor.

On August 6, 2001, Deputy Attorney General Larry Thompson issued a memorandum affirming the 1995 procedures but clarifying that evidence of "any federal felony" was to be immediately reported by the FBI to the Criminal Division.[77] Prior to issuing the memorandum Thompson had met with the FISA court judges to ensure that the court would not start rejecting FISA applications because it disapproved of the proposed modifications. After receiving the necessary assurances, he issued the memorandum.[78] In light of the additional barriers to information sharing imposed by the court over the prior two years, these modifications were unlikely to have any measurable impact on information sharing. Agents had already become extreme leery about sharing any intelligence information with agents working on criminal matters. The 1995 procedures remained in effect until after September 11, 2001.[79]

The Erection of Internal FBI Walls

By the Summer of 2001, internal walls between FBI agents working on intelligence matters and FBI agents working on criminal matters were in place, at least in matters relating to Bin Ladin. These walls did not preclude information sharing between the agents but governed the circumstances and means by which the information could be shared. We sought to determine when and why such procedures were implemented.

The July 1995 procedures were silent on the issue of information sharing within the FBI. We found no witnesses who recalled when internal FBI information sharing procedures were first instituted. Jim Baker, head of OIPR since 2001, said he was not aware of any documents establishing internal FBI walls. He believed the concept was already in place when he arrived in 1996.[80] Former FBI General Counsel Larry Parkinson believed that

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[76] GAO report, "FBI Intelligence Investigations: Coordination Within Justice on Counterintelligence Criminal Matters is Limited," July 2001.

[77] Memorandum to Chertoff, et. al. from Thompson, "Intelligence Sharing," Aug. 6, 2001.

[78] Commission interview David Kris (May 19, 2004).

[79] The belief that the FISA court would have been unlikely to approve any of the significant reforms proposed in late 2000 or early 2001 was well-founded. Even when the Justice Department finally forwarded significant reform proposals after the passage of the Patriot Act, which changed *inter alia* the requirement that foreign intelligence be the purpose to a significant purpose, the FISA court unanimously rejected some of the key reforms. See, *In Re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F.Supp.2d 611 (FISC May 17, 2002). As predicted, the first-ever appeal to the FISA Court of Review was needed to obtain complete reform. See *In re Sealed Case*, supra, 310 F.3d 717. Some have suggested that in the absence of the USA Patriot Act, convincing the FISA Court of Review to accept the reforms would have been difficult. Convincing the court that despite a nearly 20-year long, essentially unanimous interpretation of the FISA statute to impose a primary purpose standard, it should suddenly hold otherwise would have been challenging. Thus, it is unclear that any real reform would have been possible prior to 9/11.

[80] Commission interview James Baker (Mar. 1, 2004).

the absence of such procedures was an oversight.[81] Given the fact that Scruggs had originally proposed such walls prior to the creation of the July 1995 procedures and the March 1995 memorandum included them, it appears more likely that the parties to the July 1995 procedures intentionally rejected internal FBI walls. We found no documents reporting any discussion of such walls during the development of the July 1995 procedures.

The absence of discussion may also be a reflection that there was no perceived need for internal FBI walls to satisfy the primary purpose standard. Although the FBI had different designations for investigations depending on whether they were an intelligence or criminal matter – terrorism intelligence investigations were designated as 199 cases and criminal terrorism investigations were designated as 265 cases – the FBI did not distinguish between agents. All agents attended the same academy and received most of their training in how to conduct criminal cases. Any agent on a counterterrorism squad could work both 199 and 265 cases. These separate designations for different types of investigations were an internal administrative matter for the FBI and had no impact on whether criminal charges could be instituted.[82]

More significantly perhaps, FBI agents had no authority to actually institute criminal proceedings. Only Department of Justice prosecutors could open a case in a grand jury, present witnesses, and obtain an indictment. Applications for criminal warrants and the filing of criminal charges in the district court required approval of a prosecutor. The series of cases applying the primary purpose standard routinely found that cases became criminal when prosecutors became involved. They did not consider what internal designation the FBI used to file its cases and did not look to see whether an agent wore an intelligence or criminal hat. It was solely the presence of prosecutors that changed the nature of the cases in the courts' eyes. Thus, while prosecutors could not direct or control the FISA process, any FBI agent could do so.[83]

Another significant factor was that OIPR did not believe that there should or could be parallel intelligence and criminal cases. Both Scruggs and Kornblum had argued that once a criminal case was instituted, the FISA coverage needed to be terminated.[84] Many of the court cases appeared to share this sequential view of intelligence and criminal

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[81] Commission interview Larry Parkinson (Feb. 26, 2004).

[82] Thus, post 9/11 the FBI removed such an artificial distinction and all counterterrorism cases were designated as 315 matters.

[83] This demonstrates that the courts focused solely on positions within the respective agencies as opposed to the skill sets of the relevant parties. Thus, Larry Parkinson, at the time FBI Deputy General Counsel, could provide any advice to the intelligence agents conducting the espionage investigation against Earl Pitts without raising OIPR's concerns about running afoul of the primary purpose standard. This is despite the fact that Parkinson had previously been an Assistant United States Attorney and thus would have been very knowledgeable about what would be helpful to any future criminal investigation. This same advice from someone sitting across the street in DOJ's Criminal Division would have been considered troublesome.

[84] Commission interview James Baker (Mar. 1, 2004); Commission interview Richard Scruggs (May 26, 2004); AGRT Report at 723.

cases. Because the central concern was not information sharing but rather direction and control, agents who gathered information via a FISA warrant could use the information in a subsequent criminal case. And because the FISA coverage would have been terminated, there were no direction and control concerns. This would prevent the need to keep agents separate. Indeed, in one of its memoranda commenting on the proposed 1995 procedures, the SDNY mentioned that OIPR apparently had no objection to the same agent who had worked on the intelligence matter and obtained FISA material working on the subsequent criminal case.[85]

This linear approach – first intelligence case and then criminal case – worked fairly well in traditional FCI matters. An investigation of a potential spy was first an intelligence investigation to determine who and what were involved. When this information was gathered criminal charges could be instituted, the individual would be arrested, his access to sensitive materials would end, and the criminal case could proceed.

As the respective parties would come to realize, terrorism cases were not so neat. There could be multiple plots and overlapping participants, and bringing criminal charges against one set of individuals did not end the need for ongoing intelligence. This was clearly demonstrated with regard to Bin Ladin. He was first indicted in June 1998 but he was not apprehended and he continued to plan and execute more terrorist acts. In August 1998 he directed the East Africa embassy bombings and a superseding indictment was brought. Concerns about additional plots around the Millennium required extensive intelligence gathering about possible future acts while Bin Ladin remained criminally charged for prior acts. These scenarios altered the traditional view of sequential investigations.[86]

Thus, it is clear why an internal FBI wall was in place in the March 1995 memorandum but not the July 1995 procedures. In the cases covered by the March memorandum the sequence of cases had been reversed – the criminal case preceded the intelligence case. Thus, OIPR was concerned that agents who were working on an active criminal case – and thus working closely with and often at the direction of criminal prosecutors – could be perceived to be directing FISA coverage for the ongoing criminal case. The July procedures, however, implicitly presumed sequential cases.[87]

While the Inspector General's report on campaign finance, the AGRT report on the handling of the Wen Ho Lee case, and GAO's report on information sharing were critical of how the July 1995 procedures were being applied, none mentioned any internal FBI walls. The issues in those matters focused solely on information sharing between the FBI

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[85] See SDNY Memorandum to White from Fitzgerald and Khuzami, "Clarification of FISA rules in Case of Ongoing Counterterrorism Investigations," April 22, 1996.

[86] See, e.g., Commission interview James Baker (Mar. 1, 2004) (terrorism cases are different from FCI cases because they are more likely to have prosecutors involved earlier on).

[87] At the time the 1995 procedures were created there were limited foreign terrorism prosecutions. The procedures were thus formulated with traditional FCI matters in mind. Commission interview Larry Parkinson (Feb. 26, 2004).

and prosecutors. Indeed, we found no evidence of internal FBI walls between the March 1995 memorandum that covered the two discrete SDNY cases and December 1999.[88]

In December 1999 there was overwhelming concern about possible terrorist attacks scheduled to coincide with the Millennium. Record numbers of FISA applications were being filed with the court. Many of these applications provided for coverage of individuals and facilities believed to be related to Bin Ladin. The problem was that there was already a criminal indictment returned against Bin Ladin. This posed a dilemma for OIPR. Normally once a criminal case was opened OIPR would no longer present applications for FISA coverage.[89] Here, however, Bin Ladin was not in custody and there was fear that he was planning further attacks. Thus, there was an acute need for additional intelligence collection and it needed to be approved quickly. OIPR and the FISA court resolved this dilemma by making the court the wall and specifying that information gathered pursuant to these particular FISA warrants could not be shared with criminal prosecutors or FBI agents working on the Bin Ladin-related criminal cases without first obtaining the court's permission. Thus, a distinction was made between agents collecting new intelligence and those assigned to particular criminal investigations.[90]

The first evidence of official FBI requirements for an internal wall between agents working on an intelligence investigation and criminal agents did not appear until December 2000. On December 7, 2000, a supervisor in the FBI's New York Field Office issued an order that in light of the FISA court's new procedures for Bin Ladin-related FISAs, his squad would have a designated intelligence agent. This agent could review any of the information collected from the relevant FISA surveillances. He could not, however, share any such information with fellow agents or attorneys at the SDNY prior to obtaining approval from the New York Field Office's legal unit, the FBI Office of General Counsel, OIPR, and the FISA court.[91]

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[88] The DOJ OIG found that there were internal walls in some FISA applications where there was a parallel criminal case as early as 1997. DOJ 9/11 Report, p. 34. We did not see any such applications although they would be consistent with OIPR's views that parallel criminal cases had to br treated specially. In any event, these walls would have been case specific, not FBI wide.

[89] Commission interview James Baker (Mar. 1, 2004).

[90] Id. It is unclear whether these internal walls were instituted solely at OIPR's direction or whether the court indicated that it would require such provisions before approving these applications. Because of the extremely close relationship between OIPR and the FISA court, it is likely that there was some discussion regarding these provisions prior to their insertion in the FISA applications. Notably these restrictions did not differentiate between intelligence and criminal agents generally but merely walled off agents working specific criminal cases. This demonstrates that the concern centered on the fact of the parallel criminal case as opposed to arbitrary categories of agents. In March 2000 OIPR moved to have the court wall removed because these particular surveillances had been terminated so that any risk of improper direction and control had been eliminated. Any information collected from this coverage could thus be freely shared among fellow agents.

[91] FBI electronic communication to New York Field Office from New York Squad I-49, "Instructions re FBI FISA policy," Dec. 7, 2000. Once again the internal wall appeared to be limited to the Bin Ladin-related matters. We did not locate any general procedures that extended the information sharing controls in

(continued...)

These procedures were the direct result of the FISA court's concern regarding numerous factual errors contained in a series of FISA applications, most notably the Bin Ladin-related FISAs. These applications contained errors regarding the existence and nature of parallel criminal investigations. Because the court was concerned that there was not adequate separation between intelligence and criminal investigations, it held a meeting with representatives from OIPR, the Criminal Division, FBI headquarters, and the FBI New York Field Office. The court insisted that there be a strict separation between the specific ongoing intelligence and criminal matters and that its procedures had to be strictly followed.[92]

Because of the court's dissatisfaction with the lax manner in which information had been shared, it began requiring that all persons within the FBI and the Department of Justice who received information from this FISA coverage sign a certification that they understood the court's limits on how and when such information could be shared.[93] Although the additional restrictions applied only to specific FISA warrants, it is apparent that the FBI began applying these additional restrictions to its handling of other unrelated FISA coverage. Thus, by late November 2000 the incentive to share information with fellow agents all but disappeared.

The NSA Caveats

The National Security Agency (NSA) also placed restrictions on the sharing and use of information it collected. Initially these restrictions merely governed the use of its reporting in criminal matters. In December 1999, however, the NSA began placing new, more restrictive caveats on its Bin Ladin-related reporting. These caveats precluded sharing the information contained in these NSA reports with criminal prosecutors or investigators without obtaining OIPR's permission.

These new caveats were the result of NSA's and the Department of Justice's overabundance of caution. During the Millennium crisis the Attorney General authorized electronic surveillance of three individuals overseas. Because these searches were not within the United States, no FISA warrant was required. The Attorney General could authorize these searches pursuant to Executive Order 12333. The information that led to these targets, however, had initially been obtained from FISA-authorized surveillances. Thus, in an abundance of caution, the Attorney General conditioned these surveillances on a requirement that any reporting from these surveillances bear caveats preventing the

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[91](...continued)
the 1995 procedures to information sharing within the FBI

[92] See email from Ainora to Parkinson, "FYI-Special Session of the FISC," Nov. 17, 2000.

[93] Commission interview Royce Lamberth (Mar. 26, 2004); Commission interview Alan Kornblum (May 19, 2004).

sharing of any of the reporting with criminal investigators or prosecutors without first obtaining OIPR's permission.[94]

Because of the complexity of determining which Bin Ladin-related reporting was derived from these particular authorizations, NSA decided to place identical caveats on all Bin Ladin-related reporting, not just that authorized by the Attorney General. These caveats were added to NSA's Bin Ladin-related reporting on December 30, 1999.[95]

In May 2000 it was brought to Reno's attention that these caveats prevented attorneys in the Terrorism and Violent Crime Section (TVCS) of the Criminal Division from reading relevant reporting. Reno contacted NSA Director, Lieutenant General Michael Hayden, to discuss the issues caused by the caveats. After discussions with NSA and determining that certain TVCS attorneys served primarily in a policy, as opposed to an operational, role, the caveats were modified to permit the reporting to be shared with particular named TVCS attorneys. Several months later two attorneys in the SDNY were added to list of attorneys permitted to review the reporting without first obtaining OIPR's permission.[96]

In November 2000 the caveats were modified once more. As a result of the FISA court's added restrictions on sharing FISA information, NSA determined that its FISA and FISA-derived reporting was subject to the court's wall procedures. NSA concluded, however, that there was no administratively easy method to determine which of its reports were from FISA-based collections. Thus, caveats were added to all NSA counterterrorism reporting that precluded sharing the contents of the reports with criminal investigators or prosecutors without first obtaining permission from NSA's general counsel.[97]

The Wall in the Summer of 2001

Attorney General John Ashcroft testified to the Commission that specific information sharing failures in the summer of 2001 arose from Attorney General Reno's July 1995 procedures and specifically from the March 1995 memorandum signed by Deputy Attorney General Gorelick.[98] A review of the facts surrounding the information sharing failures, however, demonstrate that the Attorney General's testimony did not fairly and accurately reflect the significance of the 1995 documents and their relevance to the 2001 discussions.

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[94] See Memorandum Reno to Freeh, FISA surveillance of a suspected al Qaeda operative, Dec. 24, 1999; NSA email, William L. to Karen C., "distribution restrictions," Dec. 10, 1999; NSA email, William L. to Brian C., "dissemination of terrorism reporting," Dec. 29, 1999; NSA memo, Ann D. to others, "Reporting Guidance," Dec. 30, 1999.

[95] NSA email, William L. to Brian C., "dissemination of terrorism reporting," Dec. 29, 1999.

[96] See NSA Memorandum, Joan R. to Townsend and Reynolds, "Resumed Delivery of Classified intelligence to TVCS," June 9, 2000; NSA Memorandum, Hayden to Asst. Attorney General, "Proposal to Provide UBL-related Product to U.S. Attorney's Office/Southern District of New York," Aug. 30, 2000.

[97] Commission interview Marion Bowman (Mar. 6, 2004).

[98] John Ashcroft testimony, April 13, 2004.

There were three occasions in the summer of 2001 when questions were raised regarding what information could be shared and with whom. One occasion involved decisions whether to seek a criminal warrant or a FISA warrant for Zacarias Moussaoui's laptop computer and other possessions. The other two of these occasions related to information gathered by the NSA in December 1999 regarding Khalid al Mihdhar and Nawaf al Hazmi. We examined these incidents to determine what, if any, role the July 1995 procedures had on the failure to share relevant information.

The Moussaoui investigation

On August 15, 2001, the Minneapolis FBI Field Office received information that an individual named Zacarias Moussaoui was taking flight lessons at the Pan Am International Flight Academy in Eagan, Minnesota. Moussaoui had attracted the attention of the academy's flight instructors because, among other factors, despite having little knowledge of flying he wanted to learn how to "take off and land" a Boeing 747. The Minneapolis FBI agent assigned to investigate further was extremely suspicious of Moussaoui's intentions and believed he might be intending to hijack a plane.[99]

Because it was not clear that there was sufficient information of a criminal plot, the agent opened an intelligence investigation. The agent went promptly to work on gathering information regarding Moussaoui's intentions. Minneapolis and FBI Headquarters debated whether Moussaoui should be arrested immediately or surveilled to obtain further information. Because it was not clear that Moussaoui could be imprisoned for criminal charges, the FBI case agent decided the most important thing to do was to prevent Moussaoui from obtaining any further training he could later use to carry out a potential attack. As a French national who had overstayed his visa, Moussaoui could be detained immediately by the Immigration and Naturalization Service (INS). The INS arrested Moussaoui on the immigration violation on August 16. A deportation order was signed on August 17, 2001.[100]

Upon arresting Moussaoui it was determined that he had a laptop computer and a bag containing numerous papers and other materials. The FBI case agent believed that whatever Moussaoui had planned might be described in either the laptop or the other papers. The agent could not examine these materials, however, without obtaining a search warrant. The agent contacted the Minneapolis USAO and gave some hypothetical information similar to the Moussaoui facts to determine whether there was sufficient information to obtain a criminal search warrant. The Assistant United States Attorney told the agent they were close to having sufficient information. The agent did not ask for

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[99] The Final Report of the National Commission Terrorist Attacks Upon the United States, The 9/11 Commission Report, Authorized Edition (W.W. Norton July 2004) (hereinafter Commission Report) pp. 273, 540 en. 90. For a detailed, step-by-step chronology of activities taken regarding Moussaoui prior to September 11, see DOJ OIG 9/11 Report, pp. 109-197.

[100] Commission Report, pp. 273, 540 en. 92-93; DOJ OIG 9/11 Report, pp. 116-17, 128.

a final opinion on a criminal warrant and did not present an application for such a warrant to the USAO.[101]

The case agent conferred with agents in the Radical Fundamentalist Unit at FBI Headquarters about how to proceed. The agents at FBI Headquarters believed there was insufficient probable cause that a crime was about to be committed and thus believed that a criminal warrant could not be obtained. Relying on this advice, the Minneapolis Field Office decided to seek a FISA warrant instead of a criminal warrant.[102]

To obtain a FISA warrant, however, the FBI needed to demonstrate probable cause that Moussaoui was an agent of a foreign power, a showing that was not required to obtain a criminal warrant. The case agent did not have sufficient information to connect Moussaoui to a "foreign power," so he reached out for help in the United States and overseas. This set off a flurry of activity at FBI Headquarters, several FBI Legal Attache offices in Europe, and the CIA to obtain information linking Moussaoui to a foreign power.[103] Because this process did not involve sharing information with the Criminal Division, it was not governed by the July 1995 procedures.

At one point the Minneapolis Field Office indicated that it wanted to open a parallel criminal investigation of Moussaoui on the belief that he was planning to conduct a hijacking. FBI Headquarters ordered Minneapolis not to open a criminal case because it believed that the existence of a parallel criminal case might have a negative impact of the FISA court's willingness to authorize a FISA warrant.[104] There was nothing in the law or the July 1995 procedures that precluded opening a parallel criminal case. Headquarters's decision was based solely on its and OIPR's beliefs about possible reactions of the FISA court, not on actual rules governing the circumstances.

On August 18, the Minneapolis Field Office asked FBI Headquarters to obtain OIPR's permission for the Field Office to contact the Minneapolis USAO about a possible criminal case. The Field Office incorrectly believed that under Part B of the 1995 procedures (the portion covering situations where no FISA coverage exists), it needed OIPR's permission to contact a USAO in a case where an intelligence investigation was opened. Actually the procedures specified that the FBI needed the Criminal Division's, not OIPR's permission. In any event, FBI Headquarters did not inform the Field Office of its mistake and made no effort to obtain either OIPR's or the Criminal Division's permission. The Field Office did not press the issue. Thus, we do not know what the Criminal Division's position would have been and whether it would have granted permission. Moreover, no permission was needed to contact the Criminal Division and

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[101] Commission Report, pp. 273, 540 en. 94; DOJ OIG 9/11 Report, p.125.
[102] Commission Report, pp. 273-74, 540 en. 96-98.
[103] Commission Report, pp. 274; 540 en. 96-98.
[104] DOJ OIG 9/11 Report, p.138.

obtain its advice regarding the possibility of a criminal case. Neither the Field Office nor Headquarters apparently considered such an option.[105]

Eventually FBI Headquarters determined that there was insufficient information linking Moussaoui to a foreign power to obtain a FISA warrant and decided not to send an application to OIPR for its consideration. FBI Headquarters decided to deport Moussaoui without obtaining a FISA warrant to search his belongings.[106]

Once the decision was made not to seek a FISA warrant, there was no barrier preventing the Field Office from returning to the USAO in Minneapolis to seek a possible criminal warrant. The concern of Part B about retaining the possibility of a future FISA warrant was no longer relevant once any idea of obtaining a FISA warrant had been abandoned. The witnesses all said, however, that they just did not think about that option at the time. Once the idea of obtaining a criminal warrant had been abandoned in favor of trying to obtain a FISA warrant, no one gave a criminal warrant another thought.

In sum, the central question of whether a FISA warrant should have been applied for or could have been obtained was not governed by the July 1995 procedures. The sole issue in the Moussaoui matter that the procedures governed was the circumstances under which the Field Office could have contacted the local USAO to discuss a possible criminal case once an intelligence case had already been opened. As FBI Headquarters never pursued obtaining the required permission, we cannot say whether it would have been granted.

The Mihdhar and Hazmi information

In December 1999 NSA had picked up the movements of Khalid al Mihdhar and an individual then only identified as Nawaf. Mihdhar was linked him to a terrorist facility in the Middle East. He was tracked to Kuala Lumpur where he met with other then unidentified individuals. Some photographs were taken of these individuals on the streets of Kuala Lumpur. The surveillance trailed off when three of the individuals moved on to Bangkok on January 8, 2000. The NSA reporting regarding the links to the facility and Mihdhar's travel was disseminated to the intelligence community, including the FBI. The reports, however, bore caveats that precluded sharing the contents with FBI criminal investigators without first obtaining OIPR's permission. The CIA reports regarding the surveillance were not disseminated outside CIA.[107]

In late May and early June 2001 an FBI analyst assigned to the investigation of the October 2000 bombing of the *USS Cole* was investigating an individual involved in the *Cole* attack named Fahd al Quso. The analyst knew that Quso had traveled to Bangkok in January 2000 to give money to Tawfiq bin Attash, aka Khallad. Khallad was believed to have been a liaison between the attackers and Usama bin Ladin. A CIA analyst who had

[105] DOJ OIG 9/11 Report, pp. 201, 203.
[106] Commission Report, p. 274.
[107] Commission Report, pp. 181-182, 502 en. 41-48.

been working on *Cole*-related issues suggested showing some photographs to FBI agents in New York who were working on the *Cole* case and had interviewed Quso.[108]

The FBI analyst was given three surveillance photographs from the January 2000 Kuala Lumpur meeting to show to the New York agents. She was told one of the individuals was named Khalid al Mihdhar. She was not told why the photographs had been taken or why the Kuala Lumpur travel might have been significant. When the FBI analyst did some research of past intelligence reports, she found the original NSA reports on the planning for the Kuala Lumpur meeting. Because the CIA had not disseminated its reporting, the analyst did not locate any of its reports on the meeting.[109]

On June 11, 2001, the FBI analyst, an FBI analyst on detail to the CIA, and the CIA analyst who had suggested showing the photographs to the agents, went to New York to meet with the *Cole* investigators. At one point in the meeting, the FBI analyst showed the three photographs to the agents and asked whether they recognized Quso in any of them. The agents asked questions about the photographs – Why were they taken? Why were these people being followed? Where are the rest of the photographs?[110]

The only information the FBI analyst had regarding the meeting – other than the photographs – were the NSA reports that she had found. These reports, however, contained caveats that their contents could not be shared with criminal investigators without OIPR's permission. Therefore, the analyst concluded she could not pass the information contained in these reports to the agents. She did not ask OIPR for permission to share these reports. She did not explain to the agents about the caveats but merely said she could not share the information due to "the wall."[111]

The CIA analyst at the meeting knew much more about the Kuala Lumpur meeting. No one at the meeting asked him what he knew; he did not volunteer anything. He later told investigators that as a CIA analyst he was not authorized to answer FBI questions regarding CIA information. The FBI analyst said that she assumed that if the CIA analyst had the answers to the agents' questions, he would have volunteered them.[112]

Thus, the New York agents left the meeting without learning that Mihdhar had a U.S. visa, that Mihdhar's visa application indicated that he planned to travel to New York, that Mihdhar's colleague Nawaf al Hazmi had traveled to the United States in January 2000, or that in January 2001 a source put Mihdhar in the company of Khallad at the Kuala Lumpur meeting.[113]

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[108] Id. at pp. 268-269, 537 en. 67-68.
[109] Id. at 268, 537 en. 69.
[110] Id. at 268-269, 537 en. 70.
[111] Id. at 269, 537-38 en. 71.
[112] Id. at 269, 537 en. 72
[113] Id. at 266, 269.

Although the analyst blamed the generic "wall" for her inability to give the agents more information at the meeting, the fact that none of this information was shared with the agents was not due to the July 1995 procedures. The sole reason the analyst felt she could not share the information was the presence of the caveats on the NSA reports. But the fact that these particular reports contained these caveats was not due to the 1995 procedures. Indeed these reports were not even governed by the procedures.

As noted previously, the attorney general had ordered such caveats on certain reports around the Millennium because of concerns that such reports might conceivably be considered FISA-derived. None of the reports on Mihdhar and his travel were covered by the attorney general's order, however. The decision to place these caveats on additional reports was NSA's unilateral determination that trying to separate out which reports should bear the caveats and which did not need them was administratively too difficult. NSA determined that it would just be simpler to place caveats on all Bin Ladin-related reports and let individuals make requests to pass whatever reports they felt needed to be shared.

The fact that the 1995 procedures did not govern the information involved is also evident from the terms of the procedures themselves. Neither the NSA nor the CIA information regarding Mihdhar and the Kuala Lumpur meeting had been generated as part of an FBI intelligence investigation. The 1995 procedures by their terms governed only information collected by the FBI in the course of its intelligence investigations. Thus, the procedures were not applicable to sharing information gathered by the NSA and CIA. Indeed, the photographs that were shared were from the CIA and there was no need to obtain special permission to share them with the criminal agents.

Second, the issue at the June 11 meeting was whether the information could be shared with FBI agents, not criminal prosecutors. Again, the July 1995 procedures were silent on the issue of sharing among FBI agents and thus had no application to the information in question. Although there were internal FBI walls contained in some particular FISA orders, none of this information had been generated pursuant to such FISAs. Thus, even those internal walls did not apply.

Thus, the analyst could have shared the NSA information by asking OIPR's permission either prior to the meeting or sometime after the meeting. She did not, however, make any request to share the information until late August. Moreover, none of the CIA information bore any such caveats. The CIA analyst could have shared all of the information he had about Mihdhar's visa and travels without consideration of the July 1995 procedures. He merely believed it was not his role to share such information. He did not go back and ask his superiors for permission to share the information. The lost opportunity for information sharing in June 2001 was due to the failures of the two respective analysts to seek ways to share the information, not the July 1995 procedures.

A second opportunity to share this information arose in August 2001. On August 22 the FBI analyst and her colleague who was detailed to the CIA learned that Mihdhar had entered the United States on January 15, 2000, and again on July 4, 2001. They decided he should be found. The analyst detailed to the CIA asked the CIA to draft a cable requesting that Mihdhar and Hazmi be placed on the TIPOFF watchlist. Both were added to the list on August 24.[114]

The FBI analyst took responsibility for the search within the United States. As the information indicated that Mihdhar had last arrived in New York, she began drafting what is known as a lead for the FBI's New York Field Office. A lead relays information from one part of the FBI to another and requests that a particular action be taken. Her lead was sent on August 28. Because the lead contained information from the NSA reports that bore caveats regarding sharing with criminal investigators, the analyst included in the lead was not cleared for sharing with agents working on criminal matters. She sent the lead to a designated intelligence agent on the relevant squad. The lead suggested that the goal of the investigation was to locate Mihdhar, determine his contacts and reason for being in the United States, and possibly conduct an interview.[115]

The agent who received the lead forwarded it to his squad supervisor. That same day the supervisor forwarded the lead to another designated intelligence agent and requested that he open an intelligence case. The supervisor also sent the lead to the case agents investigating the *Cole* attack. One of the *Cole* case agents read the lead with interest and contacted the analyst to obtain more information. The analyst argued, however, that because the agent was a designated criminal FBI agent, not an FBI intelligence agent, the wall kept him from participating in any search for Mihdhar. In fact, she felt he had to destroy his copy of the lead because it contained NSA information from reports that bore the sharing caveats. The agent asked the analyst to get an opinion from the FBI's National Security Law Unit (NSLU) on whether he could open a criminal case on Mihdhar.[116]

Subsequently, the analyst sent an email to the *Cole* case agent explaining that according to the NSLU, the case could only be opened as an intelligence matter, and that if Mihdhar was found, only designated intelligence agents could conduct or even be present at any interview. The case agent angrily responded that there seems to be some confusion regarding the wall because in his view it only applied to FISA information. The analyst replied that she was not making up the rules; she claimed they were in the relevant manual and "ordered by the [FISA] Court and every office in the FBI is required to follow them including FBI NY." What she did not tell the agent was that she had sought and received permission to share the NSA information with criminal agents. Thus, there

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[114] Id. at 269-70, 538 en. 74-76.
[115] Id. at 270, 538 en. 75, 79.
[116] Id. at 270-71, 538-39 en. 80-81.

was no reason for her continued insistence that the New York agent could not keep a copy of the lead.[117]

It is now clear that everyone was confused about the rules governing the sharing and use of information gathered in intelligence channels. Because Mihdhar was being sought for his possible connection to or knowledge of the *Cole* bombing, he could have been investigated or tracked under the existing *Cole* criminal case. No new criminal case was needed for the criminal agent to begin searching for Mihdhar using all available investigative tools.[118]

Moreover, because NSA had given permission to share the 1999 report information, he could use all available information. The information from the INS and the State Department regarding Mihdhar's visa – including his visa application – and his two entries into the United States was available for his use as well because there were no restrictions on sharing such information with criminal agents. The information from the CIA regarding Mihdhar's meeting with Khallad in Kuala Lumpur also was not limited as to which agents could see and use such information to investigate and search for Mihdhar.[119]

Again, the July 1995 procedures were inapplicable. None of the relevant information had been gathered by the FBI as part of an intelligence investigation. Indeed, it was all gathered prior to the intelligence investigation being opened. Furthermore, there was no issue of sharing information with criminal prosecutors. As in June, the issue was solely which agents could have access to the information. Because all internal FBI walls were solely the result of specific FISA orders and no FISA information was involved in this case, there were no applicable internal FBI walls. There was no legal barrier to the criminal agent receiving all of the information and using it to conduct a search for Mihdhar.

Conclusion

As the review of the facts demonstrates, whatever the merits of the March 1995 Gorelick memorandum and the Attorney General's July 1995 procedures on information sharing, they did not control the decisions that were made in the summer of 2001. The Gorelick memorandum applied to only two specific cases, neither of which was involved (or even still existed) in the summer of 2001. The July 1995 procedures did not govern the sharing of information gathered by NSA, CIA, the State Department, or INS and thus did not apply to the information regarding Hazmi and Mihdhar that the analyst had to share with

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[117] Id. at 271, 538 en. 82.
[118] Id. at 271.
[119] There might, however, be limits on whether and how such evidence might be used in a criminal prosecution, but these limits have to do with revealing sources and methods, not whether the information can be used as lead information by criminal agents.

the criminal agent. Moreover, the July 1995 procedures did not govern whether information could be shared among FBI agents.

Although the procedures did require that the FBI Field Office in Minneapolis obtain permission from the Criminal Division to contact the USAO once the intelligence investigation of Moussaoui had been opened, FBI Headquarters never sought such permission. Indeed, it never notified the Criminal Division of the facts surrounding the Moussaoui INS detention or the possibility of his plan to hijack a plane. Thus, the FBI failed to follow the procedures and it is impossible to know what would have happened if the Criminal Division had been properly contacted.

What had happened was a growing battle within the Department of Justice during the 1990s, and between parts of Justice and the FISA court, over the scope of OIPR's screening function and the propriety of using FISA-derived information in criminal matters. The FISA court's concern with FBI sloppiness also began to take a toll, resulting in the court designating itself as the gatekeeper for intelligence information; the FBI being required to separately designate criminal and intelligence agents; and the court banning one FBI supervisor from appearing before it. By late 2000, these factors had culminated in a set of complex rules and a widening set of beliefs – a bureaucratic culture – that discouraged FBI agents from even seeking to share intelligence information. Neither Attorney General Reno nor Attorney General Ashcroft acted to resolve the conflicting views within the Department of Justice or challenged the strict interpretation of the FISA statute espoused by the FISA court and OIPR.

It is clear, therefore, that the information sharing failures in the summer of 2001 were not the result of legal barriers but of the failure of individuals to understand that the barriers did not apply to the facts at hand. Simply put, there was no legal reason why the information could not have been shared.