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CHAPTER TWENTY

(U) "PRIMARY PURPOSE" AND THE SHARING OF INTELLIGENCE INFORMATION AMONG THE FBI, OIPR, AND THE CRIMINAL DIVISION

Questions Presented

Question One: (U) Whether OIPR and the FBI are correctly interpreting and properly applying the Attorney General's July 19, 1995 memorandum, which requires notification of the Criminal Division during an FCI investigation when "facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed."

Question Two: (U) Whether the "direction and control" of an FCI *investigation* is an appropriate standard for assessing the propriety of advice given to the FBI by the Criminal Division, when the FISA statute, as interpreted uniformly by the courts, focuses upon the "primary purpose" of the FISA *search or surveillance*.

Question Three: (U) Whether the provision in the Attorney General's July 19, 1995 memorandum, prohibiting the Criminal Division from giving the FBI any advice that might, even "inadvertently," give the "appearance" of "directing or controlling" an FCI investigation, is appropriate or necessary, given the FISA statute's focus upon the "primary purpose" of the search or surveillance and the deference accorded to the FBI Director's certification as to such purpose.

Question Four: (U) Whether the Criminal Division may give advice during an FCI investigation that is intended not only to "preserve," but also to "enhance," a potential criminal prosecution, *provided that* the Criminal Division does not instruct the FBI on the operation, continuation, or expansion of any FISA search or surveillance, except for the purpose of preventing damage to a potential criminal prosecution.

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A. (U) Introduction

(U) The Attorney General's July 19, 1995 memorandum, captioned "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations," requires that the Criminal Division be notified when a foreign counterintelligence ("FCI") investigation develops facts or circumstances that "reasonably indicate that a significant federal crime has been, is being, or may be committed." (Appendix D, Tab 23) As discussed in Chapters 9 and 19, *supra*, the failure of the FBI and the Office of Intelligence Policy and Review ("OIPR") to follow the letter and spirit of the July 1995 memorandum in the Wen Ho Lee investigation had significant, and potentially disastrous, effects upon the investigation. Unfortunately, the practice of excluding the Criminal Division from FCI investigations was not an isolated event confined to the Wen Ho Lee matter. It has been a way of doing business for OIPR, acquiesced in by the FBI, and inexplicably indulged by the Department of Justice. One FBI supervisor has said that it has only been "lucky" that a case has not yet been hampered by the rigid interpretation of the rules governing contacts with the Criminal Division. (Bereznay 8/30/99) It may be said that in the Wen Ho Lee investigation, luck ran out.

(U) Larry J. Parkinson, FBI General Counsel, has described the relationship among the FBI, OIPR, and the Criminal Division in the arena of foreign counterintelligence as "strained," "awkward," and "dysfunctional." (Parkinson 8/11/99) James K. Robinson, Assistant Attorney General for the Criminal Division, agreed that the relationship is "dysfunctional." (Robinson 8/13/99) John Dion, acting Chief of the Internal Security Section ("ISS"), described the relationship as "broken." (Dion 8/5/99) In particular, the problem lies in the role that the Criminal Division is permitted to play -- or, more precisely, is not permitted to play -- in an FCI investigation that has the potential for criminal prosecution.³³² Many of those interviewed by the AGRT traced the origins of these difficulties to the implementation of the Attorney General's July 19, 1995 memorandum.

³³²(U) Because this is the context in which the mission of the AGRT arose, in the FCI investigation of Wen Ho Lee, this chapter and the recommendations contained herein apply specifically to FCI investigations. As discussed below, the legislative history of the FISA statute recognizes important differences between foreign intelligence ("FI") investigations and FCI investigation. Accordingly, not all of the recommendations made here may be applicable to FI investigations.

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(U) It should be noted at the outset that this is not a new problem, but one that has persisted from the time that the July 1995 memorandum was promulgated. It was the subject of a working group in 1997 chaired by Daniel S. Seikaly and composed of representatives of the FBI, the Criminal Division, and OIPR. Seikaly concluded that the Attorney General's memorandum was being "ignored" by both OIPR and the FBI. (Appendix D, Tab 45) Unfortunately, the work of the group brought about no change in the status quo, and things have not improved since then. If anything, the situation has gotten worse.

(U) To understand why, it is important to appreciate the dual purposes of the Attorney General's July 1995 memorandum, which are "to ensure that FI and FCI investigations are conducted lawfully, and that the Department's criminal and intelligence/counterintelligence functions are properly coordinated." There is a tension in the achievement of these two purposes. The first purpose, ensuring that the investigations are conducted "lawfully," has to do, for the most part, with the statutory requirement that the "purpose" of electronic surveillance and physical searches conducted pursuant to the Foreign Intelligence Surveillance Act ("FISA") must be "to obtain foreign intelligence information." 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B). In other words, the "primary purpose" of the FISA coverage³⁹ must be to obtain foreign intelligence information, and not to investigate criminal activity.⁴⁰ Thus arises the tension with the second purpose of the Attorney General's July 1995 memorandum, the "proper[] coordinat[ion]" of the Department's criminal and FCI functions. The concern is that the greater the coordination of these two functions in the context of a particular investigation, attended by the sharing of information and the seeking and giving of advice from prosecutors, the greater the possibility that a court might find that the primary purpose of the FISA coverage was not

³⁹(U) "FISA coverage" will refer herein to both electronic surveillance and physical searches conducted pursuant to FISA.

⁴⁰(U) See United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (primary purpose of surveillance must be to gather foreign intelligence information) and United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (primary purpose of surveillance must not be the investigation of criminal activity).

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foreign intelligence gathering. Were a court to make such a finding in an espionage prosecution, for example, it would be obliged to order the suppression of the unlawfully obtained evidence and its fruits. 50 U.S.C. § 1806(g).

(U) The concern that a court in a criminal prosecution might suppress evidence on this ground (although no court since the enactment of FISA has done so), or that it might cause the Foreign Intelligence Surveillance Court ("FISA Court") to reject an application in the first place (although this has never occurred either), has skewed the balance between these potentially competing purposes. As discussed below, this is due in part to the context in which the July 1995 memorandum was created, following the investigation of Aldrich Ames. It results, too, from an unnecessarily timid reading of the FISA statute and the relatively small number of cases interpreting it. As a result, "the Criminal Division is not even at the table" (Richard 8/12/99), because it is not informed of FCI investigations with the potential for prosecution, or, what amounts to the same thing, it is prevented from making any meaningful contribution to the investigation because of an unduly strict application of the "primary purpose" rule. In either case, the Criminal Division is prevented from carrying out its essential functions.

(U) As discussed below, the Attorney General's July 19, 1995 memorandum is not being followed: The Criminal Division is not being notified when FCI investigations have developed evidence of significant federal crimes. Or the Criminal Division is being notified at the eleventh hour, shortly before an arrest, with all the attendant problems that creates for preparing the prosecution and fulfilling disclosure obligations. Beyond this, however, the July 1995 memorandum needs to be rewritten. There is 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. At this juncture, such differences can only be addressed by a clear statement from the Attorney General expressing what is expected of the affected components. Some of these were suggested in interim recommendations submitted to the Attorney General by the AGRT in October 1999. (Appendix D, Tab 54) Additional recommendations follow in this chapter.²⁴¹

²⁴¹(U) To address the issues in this chapter, the AGRT gathered extensive materials from the Offices of the Attorney General and Deputy Attorney General, OIPR, the Criminal Division, and the FBI. In addition, the AGRT conducted numerous

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B. (U) The relevant facts

1. (U) The "legislative history" of the Attorney General's July 19, 1995 memorandum

(U) From 1984 until her death in October 1993, Mary C. Lawton was the head of OIPR. (Schroeder 7/7/99) As Counsel for Intelligence Policy, Lawton was regarded as a "guru" in any intelligence matter, and OIPR was seen as a "mini Office of Legal Counsel" with respect to any issue concerning intelligence policy. (Richard 8/12/99) During Lawton's tenure, there were no written guidelines governing contacts between the FBI and the Criminal Division in FCI investigations. (Richard 8/12/99; Reynolds 10/14/99)

(U) According to Deputy Assistant Attorney General Mark M Richard, the Internal Security Section ("ISS") of the Criminal Division received informal briefings from the FBI in FCI matters, with Mary Lawton's knowledge, which served at least three purposes. (Id.) First, the briefings insured that investigative steps being considered by the FBI would not undercut a potential prosecution. (Id.) Second, the briefings served to insure that a given FCI investigation would not be unduly prolonged at the expense of Criminal Division interests that the investigation begin to focus on prosecution. (Id.) Third, the briefings served to maintain the dichotomy between the criminal and intelligence branches, because there were separate offices making the judgments about the equities in a particular investigation. (Id.)

(U) At these briefings, John Dion and John Martin of ISS would opine on how to preserve the prosecutorial option. (Richard 8/12/99) According to Richard, "we knew we were not to 'direct' the FCI investigation or to suggest the use of FISA" for criminal investigative purposes. (Id.) Rather, the function of the briefings was to maintain the

interviews, including those of the Attorney General, the Director of the FBI, their deputies, and division and section heads at the Department of Justice and the FBI. (Bereznay 8/30/99; Bowman 8/11/99; Bryant 11/15/99; Dion 8/5/99; Freeh 11/11/99; Holder 11/22/99; Horan 7/29/99; Kornblum 7/26/99; Lewis 7/6/99; McAdams 7/16/99; Parkinson 8/11/99; [REDACTED] 7/16/99; Reno 11/30/99; Reynolds 10/14/99; Richard 8/12/99; Robinson 8/13/99; Ryan 7/8/99; Schroeder 7/7/99; Soruggs 9/9/99; Seikaly 7/1/99; Skelly-Nolen 7/7/99; Torrence 7/30/99; Townsend 6/29/99; Vatis 7/29/99)

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viability of the prosecutorial option and to prevent missteps, for example, to advise against interviews without appropriate warnings or prevent the making of "off-the-wall" representations to witnesses that might harm a subsequent prosecution.⁹⁴² (Id.) During these briefings, the Criminal Division played a "defensive role," according to Richard, but the briefings also afforded an opportunity for the Criminal Division to say, "This should go criminal now." (Id.) The FBI was not required to notify OIPR of communications between the FBI and ISS, but Mary Lawton was aware that ISS was being kept apprised of the intelligence investigation. (Id.)

(U) This system appears to have worked quite satisfactorily while Mary Lawton was the head of OIPR, both from the perspective of the Criminal Division and from that of the FBI. (Richard 8/12/99; Dion 8/5/99; Reynolds 10/14/99; Bryant 11/15/99) After Lawton's death, when Richard Scruggs replaced her as Counsel for Intelligence Policy, he felt that "[i]t was a really sloppy operation under Mary." (Scruggs 9/9/99) Scruggs was concerned that there were no written guidelines governing contacts between the Criminal Division and the FBI. (Reynolds 10/14/99) This coincided with issues arising from the investigation of Aldrich Ames.⁹⁴³

(S/NF) During the Ames FCI investigation, the Attorney General was asked to sign as many as nine certifications to the FISA Court in support of applications for FISA surveillance.⁹⁴⁴ (Richard 8/12/99) According to Richard, "on the ninth certification" in

(U) (S/NF) According to John Dion, Deputy Chief of ISS, the section was generally aware of ongoing FCI investigations under Lawton's tenure, and was involved before the interview of the subject of an investigation. (Dion 8/5/99) Dion stressed that many espionage cases depend upon admissions made during the interview of the subject. (Id.)

⁹⁴³(U) Aldrich Ames was arrested in February 1994 and pleaded guilty to various espionage charges on April 28, 1994.

⁹⁴⁴(U) Each application for FISA coverage requires "the approval of the Attorney General based upon [her] finding that it satisfies the criteria and requirements of such application as set forth in this subchapter." 50 U.S.C. §§ 1804(a), 1823(a). The Attorney General therefore must implicitly certify, as the FBI Director does explicitly,

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the Ames investigation, Scruggs went to the Attorney General and "ginned her up" about contacts that the FBI had been having with prosecutors. (Id.) Scruggs raised concerns with the Attorney General that the FISA statute had been violated by these contacts and that her certifications had been inaccurate.⁹⁴ (Id.) Scruggs believed that the relationship that existed between the FBI and ISS during the Ames investigation could be used by defense counsel to cast doubt upon the "primary purpose" of the FISA surveillance and thereby jeopardize the prosecution. (Scruggs 9/9/99) Scruggs told the Attorney General that she might be called as a witness in the Ames case regarding the searches she authorized. (Id.) Although the position of Richard and Shapiro was that there was no problem with the contacts between the FBI and ISS,⁹⁶ the Attorney General was "very upset" by what Scruggs had told her. (Richard 8/12/99) According to Scruggs, the Attorney General told him to "make sure this did not happen again." (Scruggs 9/9/99)

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~~(S/NF)~~ After Aldrich Ames pleaded guilty, the "word" went out from FBI Headquarters, according to Richard, that there were to be no further contacts with prosecutors in FCI investigations without the permission of OIPR, due to the issues raised about these certifications. (Richard 8/12/99) Given what the FBI was being told by OIPR, this reaction was understandable. According to Robert M. Bryant, Deputy Director of the FBI, Scruggs gave the impression that he believed the FBI had violated FISA by using the surveillance for criminal investigations. (Bryant 11/15/99) Scruggs told Shapiro that what

that the purpose of the FISA coverage is "to obtain foreign intelligence information." 50 U.S.C. §§ 1804(a)(7), 1823(a)(7).

^(u)~~(S/NF)~~ According to OIPR Deputy Counsel Alan Kornblum, however, he was told by Scruggs in November 1993 that FBI General Counsel Howard Shapiro had called and said that FBI Director Louis Freeh would not sign a FISA certification in the Ames investigation because of contacts between ISS and the FBI. (Kornblum 7/26/99) Parkinson, on the other hand, did not believe that the Director had refused to sign a certification in Ames. (Parkinson 8/11/99)

⁹⁶(U) Dion believes that there was no critical event which occurred in the investigation that had not previously occurred in other espionage investigations. What changed, according to Dion, were the individuals who handled these issues after the death of Lawton. (Dion 8/5/99)

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Scruggs regarded as a "backdoor" channel between the FBI and ISS was being closed.⁹⁴⁷ (Scruggs 9/9/99) Because of the perceived threat to obtaining FISA coverage, Deputy Director Bryant made it clear to the agents that this was a "career stopper" if they violated this rule. (Richard 8/12/99)

(U) In June 1994, Scruggs proposed an amendment to the Attorney General's Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations ("AG Guidelines").⁹⁴⁸ The proposed amendment⁹⁴⁹ would have provided that "questions which arise relating to potential criminal prosecution shall be referred first to" OIPR, with OIPR "coordinat[ing] any response necessary with the Criminal Division." (Appendix D, Tabs 2 & 3) It also proposed that "[n]either FBI Headquarters nor any FBI field office should contact the Criminal Division of the Department of Justice or any United States Attorney's office without prior consultation with OIPR." (*Id.*) In Scruggs' view, to ensure the accuracy of the Director's certification as to the purpose of the FISA surveillance, "it is imperative that contacts between FBI Agents and prosecutors during on-going foreign intelligence cases be carefully proscribed and carefully monitored." (Appendix D, Tab 3) Because Scruggs believed that "the courts are going to look to the overall scope and direction of the case to determine the actual purpose of the surveillance or search," he proposed that the amendment apply not only to investigations where FISA surveillance was actually in use, but also in those where FISA usage was contemplated.

⁹⁴⁷(U) According to Scruggs, although the Attorney General's memorandum was not signed until July 19, 1995, it became effective "de facto" in mid 1994. (Scruggs 9/9/99)

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⁹⁴⁸(S) The most recent version of the AG Guidelines, effective March 8, 1999, can be found in Appendix D, at Tab 1. The relevant provisions of two earlier versions of the AG Guidelines applicable to the period covered by this chapter, which were effective April 1, 1983 (OIPR 2027) and May 25, 1995 (OIPR 0999), contain, in all material respects, language and numbering that is identical to the March 1999 AG Guidelines.

⁹⁴⁹(U) The memorandum proposing the change in the AG Guidelines was actually drafted by Kornblum. (Kornblum 7/26/99)

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(Id.) "[T]he role of prosecutors at all stages of the investigation, including the period of time preceding any FISA orders, will potentially be subjected to close scrutiny by the courts." (Id.)

(U) Scruggs' proposal touched off considerable controversy and led to a series of meetings among the principals in the Criminal Division, OIPR, the FBI, ISS, the Criminal Division's Terrorism and Violent Crime Section ("TVCS"), and the Executive Office for National Security ("EONS"). (Scruggs 9/9/99; Kornblum 7/26/99; Appendix D, Tab 7) A number of counter proposals were circulated and discussed. These materials constitute, in effect, the legislative history for the Attorney General's July 19, 1995 memorandum.⁹³⁰

(U) Shapiro opined that the proposal would be "unnecessarily burdensome and will deter useful and productive contacts." (Appendix D, Tab 5) According to Shapiro, FBI contacts with Criminal Divisions attorneys during an FCI investigation were needed "to ensure that steps taken to further the primary FCI purpose of the investigation do not needlessly prejudice a potential criminal case."⁹³¹ (Id.) Moreover, according to Shapiro, "as the same investigation will often accomplish both FCI and criminal purposes, and as both the statute and the courts permit this to be the case, there is nothing inappropriate in FBI agents consulting with Criminal Division attorneys during the course of these

⁹³⁰(U) The materials are collected in Appendix D, Tabs 3, 5 through 11, and 13 through 23.

⁹³¹(U) Shapiro noted that "[i]n the past, the governing procedure was that the FBI could consult with [the predecessor to ISS] to ensure that activities undertaken by the FBI did not inadvertently foreclose the possibility of criminal prosecution at some time in the future." (Appendix D, Tab 5)

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investigations." (Id.) Shapiro distinguished between having the Criminal Division maintain "direction and control"⁹⁵² over an investigation and having the Criminal Division provide "advice and guidance" during the investigation:

(U) The seeking of advice and guidance from the Criminal Division of the Department in terrorism and espionage cases falls far short of ceding the "direction and control" of the investigation to the Criminal Division. This latter is surely prohibited, as it is inconsistent with the investigation having foreign counterintelligence as its primary purpose. The former – advice and guidance – is merely prudent, given the likelihood that some of these FCI cases will result in criminal prosecution.

(Id.)

(U)
(S) Assistant Attorney General Jo Ann Harris objected to the Scruggs proposal on the grounds that it would place in OIPR responsibility for balancing both intelligence and law enforcement objectives.⁹⁵³ (Appendix D, Tab 6) "Since there will sometimes be a tension between the [intelligence and criminal justice] perspectives, the Department is not well-served by having a single organization represent both functions." (Id.) Adopting the standard for notification of the Criminal Division contained in the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism

⁹⁵²(U) This term, "direction and control," was apparently coined by OIPR attorneys. (See Appendix D, Tabs 3 & 44) It does not appear, as a qualifier on the purpose of the surveillance, in the FISA statute, its legislative history, or in the cases discussing "primary purpose." It does appear in defining the circumstances in which an entity may be deemed to be a "foreign power," 50 U.S.C. § 1801(a), but in this sense, it sets quite a high standard for finding an entity to be "directed and controlled" by a foreign government. See, e.g., S. Rep. No. 95-604, pt. 1, at 19, (1977) reprinted in 1978 U.S.C.C.A.N. 3904, 3920.

⁹⁵³(U) This memorandum was actually drafted by TVCS Chief James Reynolds. (Reynolds 10/14/99) The draft version in Appendix D, at Tab 6, is the one that was circulated. (Id.)

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Investigations, AAG Harris proposed that the Criminal Division should be notified in an FCI investigation "when facts or circumstance reasonably indicate that a federal crime has been, is being, or will be committed." (*Id.*) AAG Harris rejected "the view that an investigation is either entirely FCI or entirely criminal." (*Id.*) Rather, AAG Harris argued, "FISA intelligence can be part of a continuum which leads to criminal prosecution," and at some point on that continuum, "is a period during which there is a convergence of intelligence and criminal justice interests. During that time, it is appropriate that Criminal Division prosecutors become involved in criminal aspects while FISA surveillance remains ongoing."⁹⁵⁴ (*Id.*)

(U)
(S) The Criminal Division's guidance to the FBI would relate to restrictions in the course of the intelligence investigation necessary to preserve the criminal justice option. This guidance would, as stated above, not pertain to the undertaking of FISA searches, but would be limited to issues such as the handling of sensitive human sources so that they would not have to be compromised in the event of an ultimate decision to pursue a criminal prosecution.

(*Id.*)

(U) Deputy Attorney General Jamie S. Gorelick asked Michael A. Vatis, Deputy Director of EONS, to resolve the disagreement among OIPR, the Criminal Division, and the FBI concerning FBI contacts with the Criminal Division. (Vatis 7/29/99) On February 2, 1995, Vatis met with principals from OIPR, the FBI, ISS, and TVCS. (See Appendix D, Tab 7) Following the meeting, Vatis circulated draft procedures for contacts between the FBI and the Criminal Division during FCI investigations "embodying . . . the consensus from yesterday's meeting." (*Id.*) With certain changes to be discussed below, these draft procedures evolved into the Attorney General's July 19, 1995 memorandum.

⁹⁵⁴ (U)
(S) AAG Harris noted that "until recently we were frequently consulted by the FBI concerning the criminal justice ramifications of FCI investigations and our role in those instances has not served to compromise subsequent litigative efforts." (Appendix D, Tab 6)

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(U) The draft procedures were divided into two sections, the first addressing investigations in which FISA authority had been used, and the second addressing investigations in which there was no FISA coverage. (Appendix D, Tab 7) From the start, the draft procedures contained the provisions requiring the FBI and, when FISA authority had been used, OIPR to notify the Criminal Division when "facts or circumstances are developed that reasonably indicate that a significant⁹⁵ federal crime has been, is being, or will be committed."⁹⁶ (Id.) The draft also required the FBI to notify OIPR when it contacted the Criminal Division in an investigation where FISA had been used.

(U) The draft set forth limitations on the nature of the communications the FBI and the Criminal Division could have, which was, essentially, taken from the procedures suggested by AAG Harris (see Appendix D, Tab 6):

(U) Consultations between the Criminal Division and the FBI shall be limited in the following manner: The FBI will apprise the Criminal Division, on a timely basis, of information developed during the FCI investigation that relates to significant federal criminal activity. The Criminal Division may give guidance to the FBI aimed at preserving the option of a criminal prosecution. (For example, the Criminal Division may provide advice on the handling of sensitive human sources so that they would not be compromised in the event of an ultimate decision to pursue criminal prosecution.)

(Appendix D, Tab 7) The draft contained, as had AAG Harris' proposal, a provision that the Criminal Division could not "instruct the FBI on the operation, continuation, or expansion of FISA electronic surveillance or physical searches," and added the OIPR-

⁹⁵(U) According to Reynolds, the word "significant" was added at the request of the FBI. (Reynolds 10/14/99) The understanding at the time was that this addition "meant anything other than a petty offense or light misdemeanor." (Id.)

⁹⁶(U) In the drafting leading to the final version, this clause was changed to "may be committed." (Appendix D, Tab 10) So important was this notification that the first section in the draft was later amended to require that OIPR and the FBI, *each independently*, notify the Criminal Division. (Appendix D, Tabs 9 & 10) (emphasis added)

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inspired phrase providing that the Criminal Division could not in any other way "direct or control the conduct of" FISA surveillance or searches.

(U) The draft procedures circulated by Vatis did not engender significant controversy. (See Appendix D, Tabs 8 & 9; Vatis 7/29/99) Shapiro suggested additional language concerning FBI contacts with the Criminal Division, however, that effected a significant, and perhaps unintended, shift in the meaning of the "direction and control" limitation:

(U) Additionally, the FBI and the Criminal Division should ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of the Criminal Division directing or controlling the intelligence investigation toward law enforcement objectives.

(Appendix D, Tab 9)

(U) Note that until this point in the drafting process, the only explicit limitations on the advice that the Criminal Division could provide concerned the *use of FISA*, whereas the limitation proposed by Shapiro now focused on the *investigation as a whole*. While it may seem axiomatic that the Criminal Division should not control an intelligence investigation, when the focus shifts to prohibiting *advice* that might, even *inadvertently*, result in merely the *appearance* that the Criminal Division is directing an investigation toward law enforcement objectives, such a prohibition is considerably more problematic. Nevertheless, Shapiro's language was adopted into the final version, apparently without comment.⁹⁷ (See Appendix D, Tabs 11 & 23)

⁹⁷(U) Shapiro commented, without elaboration, that his suggestion "makes explicit a fundamental legal and policy principle that must be born in mind constantly during such consultations." (Appendix D, Tab 9) As discussed below, however, there is no legal principle requiring such self-imposed restrictions, and policy considerations favor a more active role for the Criminal Division.

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(U) On February 14, 1995, Assistant Attorney General Walter Dellinger wrote a memorandum to Vatis containing the Office of Legal Counsel's advice on the meaning of "primary purpose" and its application to the question of FBI contacts with the Criminal Division during an FCI investigation. (Appendix D, Tab 11) Dellinger concluded that

(U) because the "primary purpose" test necessarily allows that intelligence-gathering will not always be the sole purpose for a FISA search, it must be permissible for prosecutors to be involved in the searches at least to the extent of ensuring that the possible criminal case not be prejudiced. Thus, they can advise the FBI agents in charge of the investigation, at least insofar as that advice is necessary to prevent damage to the criminal case.

(Id.)

(U) Dellinger's opinion dealt with the extent to which prosecutors could be involved "in the planning and execution of *FISA searches*."⁹⁵⁸ Dellinger opined that there was "enough elasticity" in the term "primary purpose" to permit the involvement of prosecutors, but added the caveat, quoted above, "at least to the extent of ensuring that the possible criminal case is not prejudiced." (Id.) A substantially verbatim draft of this memorandum had been circulated on January 19, 1995, and had obviously influenced the thinking of Shapiro (Appendix D, Tab 5) and AAG Harris (Id., Tab 6). However, where Dellinger's caveat pertained to the permissible involvement of prosecutors in *searches*, AAG Harris and Shapiro applied the caveat to the entire *investigation*. This, moreover, is how the limitation on prosecutorial advice was ultimately cast in the Attorney General's July 19, 1995 memorandum. (Id., Tab 23)

(U) On April 12, 1995, Vatis transmitted to the Attorney General a draft of what would become, essentially without change, the Attorney General's July 19, 1995 memorandum. (Appendix D, Tab 13) While describing Dellinger's memorandum as "[t]he starting point for resolving this issue" of the role of prosecutors in FCI investigations, Vatis adopted the formulation of the problem in terms of the investigation, rather than the use of FISA:

⁹⁵⁸(U) Dellinger included in this term electronic surveillance as well as physical searches. (Appendix D, Tab 11) (*italics added*)

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(U) Based upon these principles [articulated by Dellinger], the working group agreed that, when information of significant criminal activity comes to light during an FI or FCI investigation, it is permissible – and prudent – for FBI agents to consult with criminal prosecutors for the purpose of obtaining advice on how to avoid prejudicing a potential criminal prosecution. To avoid running afoul of the “primary purpose” test, however, criminal prosecutors must refrain from taking actions that would result in either the fact or the appearance of the prosecutors’ directing or controlling the FI or FCI investigations toward law enforcement objectives.⁹⁵⁹

(Id.) Vatis explained that these procedures would “ensur[e] that intelligence-gathering remains the ‘primary purpose’ of FI and FCI investigations. (Id.)

2. (U) Interpretations of, and compliance with, the Attorney General’s July 19, 1995 memorandum

(U) Almost from the start, questions were raised concerning the interpretation and implementation of the Attorney General’s July 19, 1995 memorandum.⁹⁶⁰ (See Appendix

⁹⁵⁹(U) That this summarizes the intended purpose of the July 19, 1995 memorandum is made clear by several similar references in discussions leading up to its promulgation. As Vatis explained to the Deputy Attorney General:

(U) The purpose of the procedures is to allow criminal prosecutors to advise FBI agents on how to conduct an FI investigation without prejudicing a possible criminal prosecution, while at the same time making sure that the prosecutors do not – in appearance or reality – exert direction or control over the FI investigation.

(Appendix D, Tab 22; see also Tab 18)

⁹⁶⁰(U) The United States Attorney’s Office for the Southern District of New York complained about the effect of Part B on closely related counterintelligence and criminal investigations involving terrorist groups operating in that district. (Appendix D, Tab 27)

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D, Tabs 25 & 26) In June 1996, a memorandum was drafted for the Attorney General to issue emphasizing that contacts between intelligence and criminal agents were not prohibited. (Appendix D, Tab 28) This draft memorandum⁹⁶¹ was never issued, however. (McAdams 7/16/99) By September 1997, according to Daniel S. Seikaly, Director of the Executive Office for National Security ("EONS"), the Director of the FBI had complained to the Attorney General that, despite the July 1995 memorandum, OIPR was preventing the FBI from contacting the Criminal Division.⁹⁶² (Seikaly 4/4/00) According to a memorandum Seikaly wrote at the time, the Attorney General was "anxious" to see the problem resolved. (Appendix D, Tab 37) Deputy Attorney General Holder instructed Seikaly to convene a working group consisting of representatives from OIPR, the FBI, and the Criminal Division to address the issue. (Appendix D, Tab 37; Seikaly 4/4/00) Seikaly concluded that the Attorney General's memorandum was not being followed, indeed that both OIPR and the FBI "were ignoring the procedures out of an abundance of caution." (Appendix D, Tab 45) One suggestion was "simply to ask the Attorney General to . . . reassert the validity of the Procedures" (*id.*), but there was some sentiment that it would be inappropriate for the Attorney General to issue a memorandum that essentially said "And I really mean it this time." (Seikaly 4/4/00) In the end, the working group disbanded without any written recommendation and no significant action was taken. (*Id.*)

(U) As discussed below, despite this direct involvement of the Attorney General, the Deputy Attorney General, and the Director of the FBI, OIPR's failure to follow the Attorney General's memorandum, and the consequent exclusion of the Criminal Division from a significant role in – or even notice of – FCI investigations with the potential for criminal prosecution, remains a persistent problem. Subtle reinforcement of the July 1995 memorandum has had no effect. What is called for now is decisive, meaningful change in the relationship of OIPR, the FBI, and the Criminal Division in FCI investigations.

Eventually, a special exemption for that district was issued. (*Id.*, Tab 36)

⁹⁶¹(U) James G. McAdams, former Counsel for Intelligence Policy, told the AGRT that he fully supports the draft memorandum and may have drafted it. (McAdams 7/16/99)

⁹⁶²(U) According to Seikaly, the FBI complained that it was being "bullied by OIPR into keeping the Criminal Division out." (Seikaly 4/4/00) Seikaly explained that whenever the FBI wanted to bring in the Criminal Division, it was told by OIPR, "If you do, you will not get a FISA." (*Id.*)

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a. (U) The notification provision of the July 1995 memorandum

(U) The Attorney General's July 19, 1995 memorandum provides that when, in the course of an FCI investigation, "facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed," the FBI and, in the case of an investigation employing FISA, OIPR shall notify the Criminal Division. (Appendix D, Tab 23) It is apparent that there are disparate interpretations of this notification provision. It is equally clear that this provision is not being complied with in the manner in which it was intended to be. This, moreover, has been a recognized problem at least since 1997. (See, e.g., Appendix D, Tabs 39, 40, 44)

~~(S)~~ (U) According to Richard, the importance of Criminal Division notification is not just about providing legal advice. It is about affording the Criminal Division an opportunity to interject its prosecutive judgment about what is best for the country and to raise that with the appropriate decision-maker. (Richard 8/12/99) The Criminal Division needs to be brought in when decisions are made that may have prosecutorial consequences, according to Richard. (Id.) Richards described some of the "choke points" during an investigation when the Criminal Division should be involved: At the point where there is a formulation of a "game plan"; at the "target selection" stage; when the FBI makes judgments about how it is going to approach the allegations; and when there is discussion of the means for developing the case against the target, such as through [REDACTED] (Richard 8/12/99) At such times, the Criminal Division should have the opportunity to object, according to Richard, "or to suggest, if more forward leaning." (Id.)

(U) According to its drafter, Vatis, the notification provision of the July 1995 memorandum was intended to be a "low threshold" that is "definitely short of probable cause." (Vatis 7/29/99) Vatis anticipated that the notice requirement would be met in most FCI investigations involving FISA. (Id.) Kornblum, on the other hand, believes that the foreign counterintelligence goals of the investigation should be completed, or very nearly so, before the Criminal Division is notified. (Kornblum 7/15/99) According to Kornblum, the question he asks when the FBI suggests notifying the Criminal Division is, "Are you ready to wrap this up?" (Id.) In other words, in Kornblum's view, the FBI should not notify the Criminal Division until the FBI is prepared to end its FISA surveillance.⁶³ Obviously, it provides a strong disincentive for the FBI to notify the

⁶³(U) In 1997, Kornblum allowed that "[i]t has been OIPR's practice to wait until the case 'matures' to the point that some of the essential information relied on for the

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Criminal Division if doing so would jeopardize its ability to use FISA. And, in fact, it has, in the view of many in the FBI.

(U) According to Timothy D. Berezney, Section Chief in the FBI's National Security Division ("NSD"), the FBI has only limited contact with ISS out of fear that doing so will result in the loss of FISA coverage.⁶⁴ (Berezney 8/30/99) Similarly, according to Bowman, the FBI believes that contacts with the Criminal Division can jeopardize the FBI's ability to ever get FISA coverage in an investigation where it has not yet been obtained. (Bowman 8/11/99) Deputy Assistant Director Sheila Horan described a "super hyper reluctance" on the part of OIPR to admit that the conditions requiring Criminal Division notification have been met. (Horan 7/29/99)

(U) Representatives from the Criminal Division as well believe that the FBI is discouraged from complying with the notification provisions of the July 1995 memorandum, out of fear that involving the Criminal Division will jeopardize the FBI's ability to obtain or maintain FISA coverage. (Reynolds 10/14/99) As noted above, according to Richard, FBI agents have been told that it is a "career stopper if you're wrong" about contacting the Criminal Division. (Richard 8/12/99) Dion believes that a perception has been fostered that any contact with the Criminal Division during an FCI investigation will risk the FBI's ability to seek a FISA in the future or, if one is already in place, that such contact will result in it being shut down. (Dion 8/5/99)

probable cause in the FISA is corroborated." (Appendix D, Tab 44) This practice, which was a bone of contention in 1997, provided notice to the Criminal Division at a point later than required by the July 1995 memorandum, and Kornblum's current position calls for even *later* notice.

⁶⁴(U) SC Berezney also understands that the FBI should not contact the Criminal Division without first obtaining permission from OIPR. (Berezney 8/30/99) Such permission, of course, is not required by either Part A or Part B of the July 1995 memorandum. Nevertheless, this understanding is shared by Marion "Spike" Bowman, of the FBI's National Security Law Unit ("NSLU") (Bowman 8/11/99), and by FBI General Counsel Larry J. Parkinson. (Parkinson 8/11/99) According to Deputy Director Bryant, even though it is not required by the July 1995 memorandum, the FBI would not contact anyone in the Criminal Division without *first* notifying OIPR. (Bryant 11/15/99)

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(U) OIPR has played a key role in promoting this reluctance to contact the Criminal Division. Early on, Scruggs threatened to use the rejection of FISA applications as a means to curb what he regarded as unnecessary meetings between the FBI and the Criminal Division.⁹⁵ (Appendix D, Tab 19) According to SC Berezney, when Scruggs assumed office, he "clamped down" on contacts between the FBI and the Criminal Division, and, since then, the FBI has not fought these restrictions. (Berezney 8/30/99) Kornblum's comment to agents who inquire about contacting the Criminal Division, that they should be prepared to "wrap up" the FISA surveillance, is another example. (Kornblum 7/15/99)

(U) (S/NF) Many have emphasized the problems caused by late notification of the Criminal Division. As SC Berezney pointed out, FCI investigations may take three or four years to develop, but Criminal Division attorneys may have only two weeks or less to digest all of this information and to prepare for the criminal prosecution. (Berezney 8/30/99) Dion noted that notice to the Criminal Division occasionally has been so late that it has had to make decisions over the weekend before a Monday arrest. (Dion 8/5/99) In such circumstances, the Criminal Division is deprived of the opportunity to offer timely and well considered input. (Id.) For example, according to Dion, many espionage cases are made with admissions from the targets during interviews, yet ISS is frequently not consulted prior to the initial interviews. (Id.)

(U) Because of the tradecraft training which many espionage suspects have received, there is always a risk that the subject may discover surveillance equipment or otherwise learn that he is under observation. (Dion 8/5/99) Thus, flight by the subject of an investigation is always a concern. Yet, without sufficient notification of the investigation, the Criminal Division may not be prepared to rapidly step in. (Id.)

(U) AAG Robinson considers it a "very serious problem" to have the Criminal Division involved late in an investigation.⁹⁶ (Robinson 8/13/99) By that time, according

⁹⁵(U) Scruggs told the AGRT that he is aware that the FBI is under the mistaken belief that FISA coverage will be terminated, or a FISA request denied, if ISS is contacted during an FCI investigation. Scruggs opined that this belief is instilled by FBI leaders and that it should be corrected. (Scruggs 9/9/99)

⁹⁶(U) The Attorney General, as well, recognized that there is a lack of communication between FBI investigators and prosecutors early in investigations and

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to AAG Robinson, all the opportunities to shape the prosecution have passed. (Id.) The Criminal Division is deprived of the opportunity to take certain steps or to consider whether certain actions could cause trouble later. (Id.) When notice is provided late, it sometimes causes the Criminal Division to take some actions prematurely or without complete knowledge. (Id.) The Criminal Division is being asked to "hurry up and get it done," and it does not have time to look for potential problems in the case or to consider whether there are significant Brady or Giglio issues that must be considered. (Id.)

(U) AAG Robinson believes that there should be procedures in place that provide for automatic notice to the Criminal Division.⁹⁶⁷ AAG Robinson is in favor of having the FBI letterhead memoranda ("LHMs"), which are sent to OIPR when a full FCI investigation is opened and annually thereafter, regularly sent to the Criminal Division. (Robinson 8/13/99) SC Berezney favored this idea also. (Berezney 8/30/99) Bowman saw no reason why the Criminal Division should not receive a copy of the annual LHMs. (Bowman 8/11/99) Parkinson favors regular monthly meetings with the Criminal Division in order to present updates on current significant investigations. (Parkinson 8/11/99)

(U) Scruggs opined that if there are sufficient facts to open a full FCI investigation, then there should also be sufficient facts to suggest a possible prosecution, and the Criminal Division should therefore be notified. (Scruggs 9/9/99) McAdams, on the other hand, said he would oppose regular Criminal Division notification on the ground that it would create the perception that OIPR is a "front" for the Criminal Division. (McAdams 7/16/99) According to Frances Fragos Townsend, current Counsel for Intelligence Policy, the issue is not the dissemination of information to the Criminal Division; it is whether the Criminal Division gives "direction" to the FBI. (Townsend 6/29/99)

that this is a problem that needs to be resolved. (Reno 11/30/99)

⁹⁶⁷(U) "A good place to start," according to AAG Robinson, would be to begin following the Attorney General's July 19, 1995 memorandum. (Robinson 8/13/99) Richard, also, expressed the view that the July 1995 memorandum has never been implemented in the spirit in which it was promulgated. (Richard 8/12/99)

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b. (U) The advice provision of the July 1995 memorandum

i. (U) The so-called "negative advice" limitation

(U) As noted above, the starting point for what ultimately became the Attorney General's July 19, 1995 memorandum was the memorandum from Dellinger opining that it would be permissible for prosecutors to be involved in FISA searches "at least to the extent of ensuring that the possible criminal case not be prejudiced." (Appendix D, Tab 11) According to Dellinger, prosecutors could therefore advise the FBI agents in charge of an investigation, "at least insofar as that advice is necessary to prevent damage to the criminal case." (Id.) Vatis used the term "negative advice" to describe this kind of advice. (Vatis 7/29/99) Vatis explained that it would be entirely appropriate for the Criminal Division to say to the FBI, "You might not want to do that" because of the potential effects of the contemplated action upon a future prosecution. (Id.) However, according to Vatis, it would be inappropriate for the Criminal Division to suggest affirmative steps, such as that the FBI install FISA electronic surveillance on a particular telephone line. (Id.) According to Reynolds, "it's a difference between saying 'You may want to consider *not* doing something,' versus saying 'You may want to consider *doing* something.'" (Reynolds 10/14/99) (italics added) Similarly, in Kornblum's view, the Criminal Division is involved in an FCI investigation under the July 1995 memorandum only for "defensive" purposes, that is, so as not to "screw up" a criminal case. (Kornblum 7/26/99)

(U) AAG Robinson does not believe there should be any prohibition on the Criminal Division giving advice to the FBI during an FCI investigation, whether "negative" or "positive," provided that it does not give "direction" concerning the FISA coverage. (Robinson 8/13/99) Similarly, Richard opined that, consistent with the FISA statute, the Criminal Division could give advice not only to preserve, but also to "enhance," a future prosecution. (Richard 8/12/99) Doing so, according to Richard, would not amount to "direction" of the investigation. (Id.) Parkinson, too, does not subscribe to the view that the Criminal Division can only give "negative advice." (Id.) The question, according to Parkinson, is whether there is "direction and control."⁹⁶

⁹⁶(U) This harkens back to the position of Parkinson's predecessor, Shapiro, who, as discussed above, maintained in the discussions leading up to the July 1995 memorandum that "seeking advice and guidance from the Criminal Division . . . falls far short of ceding the 'direction and control' of the investigation to the Criminal Division." (Appendix D, Tab 5)

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ii. (U) "Negative advice" and "primary purpose"

(U) According to Bowman, OIPR's view is that the "primary purpose" test must be applied by examining the purpose of the entire investigation, whereas Bowman believes that the test should be applied to the primary purpose of the FISA coverage only. (Bowman 8/11/99) Deputy Director Bryant believes that as long as the FBI can articulate that the primary purpose of the investigation is counterintelligence, FBI agents should be allowed to have contact with Criminal Division prosecutors. (Id.) AAG Robinson agrees that the "primary purpose" test should only be applied to the FISA coverage, not to the investigation as a whole. (Robinson 8/13/99) Richard, as well, believes that all that is necessary is that it be possible to articulate that the primary purpose of the FISA coverage, as opposed to the investigation, is foreign counterintelligence. (Richard 8/12/99) The question is important because it dictates the boundaries of the areas as to which the Criminal Division can give only "negative advice." In other words, if the "primary purpose" of the FISA coverage is at issue, then the "negative advice" limitation would apply only to questions concerning the FISA surveillance, whereas if the "primary purpose" of the entire investigation is to be considered, the injunction against anything but "negative advice" is much broader.

(U) There are significant practical problems in applying the "negative advice" restriction to the entire investigation. For example, can the FBI ask the Criminal Division, without sacrificing its FISA coverage, whether it has assembled enough evidence to charge an espionage suspect? According to SC Berezney, Kornblum has forbidden such questions. (Berezney 8/30/99) It apparently depends upon who is asked at OIPR, however, as McAdams believes that the Criminal Division can give input as to what evidence is needed for a criminal prosecution.⁹⁶⁹ (McAdams 7/16/99) This limitation on advice has also resulted in the Criminal Division being left out of discussions on how to approach a subject's initial interview, the handling of which may be critical to a potential prosecution.⁹⁷⁰ (Dion 8/5/99) Finally, the majority of productive conversations between

⁹⁶⁹(U) Scruggs seems to have staked a middle ground, saying that there is not a problem with the Criminal Division providing advice to the FBI, but that the Criminal Division is prohibited from working closely with the FBI due to the perception that the primary purpose of the investigation would be criminal. (Scruggs 9/9/99)

⁹⁷⁰(U) Other problems, of which the Criminal Division has complained since at least 1997, include agents being advised by OIPR that it is improper to discuss with the

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the FBI and prosecutors develop spontaneously, and these types of contacts are completely precluded by the current practice under the July 1995 memorandum. (Dion 8/5/99; see also Parkinson 8/11/99)

(U) As discussed in the legal analysis below, a policy that allows prosecutors to provide only "negative advice" concerning FISA coverage in an FCI investigation is not expressly required by the FISA statute, nor by the cases interpreting it. Nevertheless, when applied to the *FISA coverage*, such a restriction may be an appropriately cautious, prophylactic measure. When, however, this restriction is applied to the *entire FCI investigation*, as it is in the July 1995 memorandum, the Criminal Division's effectiveness is substantially, and unnecessarily, reduced. When the July 1995 memorandum adds the further restriction that even the "appearance" of Criminal Division direction in the investigation must be avoided, the Criminal Division is pushed even farther into the background. Add to this the FBI agents' understanding that the breach of this rule, should it affect the ability to obtain FISA, is a "career stopper," and the Criminal Division is not only not "at the table," it is not even in the neighborhood.

(U) In this way, the "primary purpose" test and the Attorney General's July 19, 1995 memorandum have been applied to cabin any affirmative advice that the Criminal Division might give in an FCI investigation, even if it is completely unrelated to the FISA coverage and, indeed, even if there is no FISA coverage at all. The problem is compounded dramatically by the unwarranted construction placed on the July 1995 memorandum by OIPR in its communications with the FBI. It is clear from interviews that the AGRT has conducted that, in any investigation where FISA is employed or even remotely hoped for (and FISA coverage is *always* hoped for), the Criminal Division is considered radioactive by both the FBI and OIPR.⁹⁷¹

Criminal Division the strengths or weaknesses of a potential prosecution or legal and tactical issues raised by an investigative plan. (Appendix D, Tab 40)

⁹⁷¹(U) This conclusion is not new. As noted above, in September 1997, the Attorney General and the Director of the FBI commissioned a working group, under the direction of Seikaly, to "improve the information flow" in FCI investigations. (Appendix D, Tab 37) From the start, a consensus was reached that in FCI investigation, with or without FISA coverage, when agents "encounter[ed] evidence of significant criminal activity," they consulted with the FBI's Office of General Counsel or with OIPR, but *not* with the Criminal Division. (*Id.*) "In many instances, OIPR reportedly advises the

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iii. (U) "Negative advice." when applied to the entire investigation, inevitably means "no advice"

(u)
(S/NF) The perception that contacts with the Criminal Division are dangerous to an ongoing FCI investigation is prevalent from the top down at the FBI, beginning with Director Freeh, who said that OIPR discourages agents from contacting the Criminal Division and acts as a "road block." (Freeh 11/11/99) According to Deputy Director Bryant, he was told during the Nicholson investigation by Kornblum that if the FBI talked to anyone in the Criminal Division, OIPR would have to take the position in court that the FBI had violated the spirit of FISA. (Bryant 11/15/99) On one occasion, according to John F. Lewis, FBI Assistant Director, Scruggs told him that OIPR would not even look at a FISA application if Scruggs discovered that the FBI had contacted the Criminal Division for advice in the investigation. (Lewis 7/6/99)

(U) Deputy Director Bryant would like to see Criminal Division attorneys involved in espionage investigations to give guidance to the investigators. (Bryant 11/15/99) Parkinson, too, said that he is a strong advocate for FBI agents having greater contact with Criminal Division attorneys. (Parkinson 8/11/99) According to DAD Horan, the Criminal Division should be brought in as soon as it appears that the case may be prosecuted. (Horan 7/29/99) This has not been done, however, because of OIPR's interpretation of "primary purpose," according to DAD Horan, and OIPR's belief that contacting the Criminal Division will taint the primary purpose of the FCI investigation. (Id.) As a result, the FBI is reluctant to contact the Criminal Division for fear that OIPR will terminate a FISA order because of the contact. (Id.) According to DAD Horan, she has been told outright by OIPR not to contact the Criminal Division, although OIPR has never told her that a FISA order would be terminated if she did. (Id.)

(U) According to SC Berezney, OIPR has warned the FBI against approaching ISS for advice relating to the prosecutorial potential of an espionage case. (Berezney 8/30/99) OIPR has told the FBI that approaching the Criminal Division without OIPR permission could result in the termination of FISA coverage. (Id.) This warning has occurred "at all levels," according to SC Berezney. (Id.) Moreover, the FBI has not fought this restriction because "you don't want to do anything that is going to mess up the FISA coverage." (Id.)

agents not to contact lawyers in the Criminal Division for advice on preserving a possible criminal prosecution." (Id.) The situation has not changed in the intervening years.

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(U) According to "Spike" Bowman, the FBI has been warned by OIPR that if agents approach the Criminal Division regarding a case and are perceived to be seeking advice, FISA coverage will be terminated. (Bowman 8/11/99) As might be imagined, therefore, there is "tension" between the FBI and OIPR when an agent seeks an opinion from the Criminal Division on the prosecutive potential of an investigation. (Id.) FBI agents are required to consult with NSLU before approaching the Criminal Division regarding how a case should be presented, and OIPR trusts NSLU to "restrain" the FBI agent who wishes to speak with the Criminal Division.⁷⁷² (Id.)

(U) Gerald Schroeder, former acting Counsel for Intelligence Policy, acknowledged that FBI agents do not consult with the Criminal Division as soon as they should, and offered that this was due to a fear that contacting the Criminal Division will somehow "screw up" the FISA process. (Schroeder 7/7/99) According to Schroeder, however, he never turned down a request from the FBI to meet with prosecutors. (Id.) McAdams was more adamant, describing as "complete hogwash" the claim that OIPR would terminate FISA coverage if the FBI contacted the Criminal Division. (McAdams 7/16/99)

(U) Nevertheless, the overarching message that the FBI has received from OIPR over the years is that contact with the Criminal Division is dangerous, either because future FISA coverage will not be approved or because existing FISA coverage will be taken down.⁷⁷³ Adding significantly to this problem is the matter of what advice the Criminal Division may give when a contact does take place. When the FBI is already concerned about jeopardizing FISA coverage by having *any* contact with the Criminal Division, the fact that its contact is likely to be unproductive, given the limitations on advice that the Criminal Division may provide, makes the whole exercise hardly worth the bother.

⁷⁷²(U) Bowman believes that the tensions with OIPR would be reduced if the FBI was allowed to contact the Criminal Division without having to obtain OIPR permission to do so. According to Bowman, the FBI could operate more effectively if FBI agents could contact the Criminal Division more frequently. (Bowman 8/11/99)

⁷⁷³(U) The situation has not changed since at least 1997, when Parkinson indicated that FBI NSD agents were "gun shy" about conversations with the Criminal Division. (Appendix D, Tab 44)

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(U) Meanwhile, the FBI's inability to obtain meaningful advice from the Criminal Division during an FCI investigation is affecting the FBI's ability to perform its job. (Berezney 8/30/99; Bowman 8/11/99) Moreover, because of these restrictions on its ability to give advice, the Criminal Division is prevented from performing *its* core function as well. *It is not the case that prosecutive judgments in an FCI investigation are not being made; they are simply not being made by the Criminal Division, the entity charged with that responsibility.* (Robinson 8/13/99; Richard 8/12/99; Dion 8/5/99) In fact, as SC Berezney observed, if FBI agents cannot approach the Criminal Division for advice, and OIPR does not render advice on investigative steps that may be taken, the agents are forced "by default" to rely upon the FBI Office of General Counsel and the NSLU on matters relating to criminal prosecution. (Berezney 8/30/99)

b. (U) Meetings with the Criminal Division

(U) There is no question that the implementation of the Attorney General's July 19, 1995 memorandum has wrought significant changes in the relationship between the FBI and the Criminal Division. Nowhere are these more palpable than in the briefings. As Stephen W. Dillard, then a Section Chief in NSD, explained in 1997:

(U) [P]rior to the adoption of the AG's Procedures, the FBI considered espionage cases to be both criminal and intelligence driven. As a result, regular contact with ISS seemed appropriate. Since adoption of the guidelines, a number of meetings held between FBI agents and ISS attorneys have resulted in OIPR attorneys indicating that certain information could not be shared, apparently to avoid the appearance that direction and control of the investigation is being exercised by the Criminal Division.

(Appendix D, Tab 44)

(U) As a consequence of the current restrictions on the advice that the Criminal Division may give to the FBI during an FCI investigation, the meetings between the FBI and the Criminal Division tend to be unproductive. Parkinson described these meetings as "surreal" and "weird." (Parkinson 8/11/99) According to Parkinson, there is not much dialog at these meetings, with an OIPR attorney present to hear the briefing and ISS acting like a "potted plant." (Id.) The discussion is not the ordinary interaction between agents

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and prosecutors.⁷⁷⁴ (Id.) According to Bowman, OIPR presence at meetings between the FBI and the Criminal Division can be "intimidating" because of concerns about jeopardizing FISA coverage by asking for advice. (Bowman 8/11/99) In fact, the FBI regards the meetings *themselves* as potentially lethal to obtaining FISA coverage in marginal cases. (Id.) SC Berezney described the ISS briefings as rather useless, because ISS is not permitted to ask questions that may be interpreted as directing an investigation. (Berezney 8/30/99)

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(U) Richard complained that [REDACTED] (Richard 8/12/99) AAG Robinson objected to OIPR acting as "referee" at these briefings. Also, OIPR wants to be present at every meeting, according to Richard, and as a result, there are substantial delays in scheduling them, a concern that AAG Robinson shared. (Richard 8/12/99; Robinson 8/13/99) According to Dion, these meetings are unusual, and when they do occur, the FBI agents are scared to ask questions of the ISS prosecutors.⁷⁷⁵ (Dion 8/5/99)

(U) According to Kornblum, on the other hand, OIPR attends the meetings between the FBI and the Criminal Division precisely *because* it should act as "referee."⁷⁷⁶ (Kornblum 7/26/99) Scruggs, however, believed that a representative of OIPR should be present at meetings between the FBI and the Criminal Division, acting in a "passive" role that would not inhibit conversation. (Scruggs 9/9/99) Still, Scruggs believed that the OIPR representative must ensure that the Criminal Division does not take over the investigation by giving proactive advice at such meetings. (Id.)

⁷⁷⁴(U) Parkinson's opinion has not changed since 1997, when he said that the meetings between the FBI and the Criminal Division "over the last two years have been stilted" and that "these sessions bear little resemblance to the give-and-take of agent-prosecutor discussions in ordinary criminal investigations." (Appendix D, Tab 42)

⁷⁷⁵(U) Deputy Director Bryant, on the other hand, believes that the Criminal Division attorneys are reluctant to work with FBI agents because *the attorneys* are afraid of Kornblum's reaction. (Bryant 11/15/99)

⁷⁷⁶(U) McAdams, however, did not believe that OIPR should act as a "hall monitor" for contacts between the Criminal Division and the FBI. (McAdams 7/16/99)

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(U) Notably, in a questionable elevation of form over substance, OIPR occasionally advises the FBI to refrain from briefing the Criminal Division on recent developments in an investigation until after OIPR files an application with the FISA Court for an order or a renewal, so that OIPR will not have to inform the court of the briefing until the next submission.⁷⁷ (Berezney 8/30/99; Parkinson 8/11/99) In a similar preoccupation with "appearances," OIPR has a written policy of discouraging agents from sharing with the Criminal Division even "highly incriminating" evidence obtained from FISA coverage until the next regularly scheduled briefing, on the grounds that immediate disclosure may "open[] the evidence to suppression." (Appendix D, Tab 43; see also Tab 44) In a variant of this practice, Kornblum believes that meetings between the Criminal Division and the FBI should not take place shortly before or after a FISA search is conducted. (Kornblum 7/26/99)

(U) Parkinson would have OIPR inform the FISA Court that the Criminal Division is regularly updated on an investigation and views such discussions as appropriate and expected.⁷⁸ (Parkinson 8/11/99) In Dion's view, regular briefings of the Criminal Division, on a "universal" basis, as opposed to on selected investigations, would be more defensible in court, since there would be a presumption that the Criminal Division would be notified in all cases involving potential espionage. (Dion 8/5/99) As discussed below, there is no legal justification not to have such briefings.

C. (U) Legal analysis

(U) As discussed below, there is no prohibition contained in FISA, nor in the cases interpreting it, upon the Criminal Division giving advice regarding an FCI investigation, as distinguished from FISA coverage employed as part of the FCI investigation. It is also clear that the Criminal Division may play *some* role in the decisions concerning the use of FISA coverage itself. Nevertheless, the degree to which it may be *actively* involved in the FISA is not sufficiently clear, based upon the current state of the decisional law, to

⁷⁷(U) As Parkinson noted in 1997, "OIPR has advised the agents about implications which would militate against contact with ISS (usually depending upon the status of a case-related FISA issue, such as a FISA renewal)." (Appendix D, Tab 42)

⁷⁸(U) Vatis, too, believed that it would be a good practice to brief the Criminal Division about ongoing FISA surveillance if evidence of criminal activity is found. (Vatis 7/29/99)

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confidently assert that the Criminal Division's involvement need not be limited in some way. For this reason, borrowing from Dellinger's memorandum, we recommend that the advice that the Criminal Division may give in an FCI investigation *specifically concerning the FISA coverage* should be limited to "that advice [which] is necessary to prevent damage to the criminal case." (See Appendix D, Tab 11) For the reasons discussed below, however, this should not in any way limit the Criminal Division's knowledge of the underlying FCI investigation, nor limit the advice and guidance that it may give in connection with other issues that are not directly related to the FISA coverage.

1. (U) The Criminal Division need not be excluded from an FCI investigation in order for the "primary purpose" of the FISA surveillance to be to obtain foreign intelligence information

a. (U) The primary purpose certification applies to the FISA coverage, not to the underlying investigation

(U) An application for a FISA order must include, among other things, a certification by the Director of the FBI⁷⁹⁹ "that the purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. § 1804(a)(7)(B).⁸⁰⁰ While this certification must be made by the Director, the application as a whole, of which the certification is a part, must be approved by the Attorney General "based upon [her] finding that it satisfies the criteria and requirements of such application as set forth in this subchapter." 50 U.S.C. § 1804(a). The legislative history of the Act states that "the Attorney General must personally be satisfied that the certification has been made pursuant to statutory requirements." S. Rep. No. 95-701, at 49 (1978), reprinted in, 1978 U.S.C.C.A.N. 3973,

⁷⁹⁹(U) The FISA statute provides that the certification must be made by "the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate." 50 U.S.C. § 1804(a)(7). Since this chapter deals with the relationship of the Criminal Division, OIPR, and the FBI, the certifying official referred to herein will be the Director of the FBI.

⁸⁰⁰(U) An application for a physical search under FISA must contain a similar certification "that the purpose of the search is to obtain foreign intelligence information." 50 U.S.C. § 1823(a)(7)(B).

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4018; H.R. Rep. No. 95-1283, pt. 1, at 73 (1978). Thus, the Director and the Attorney General both share a responsibility for ensuring that "the purpose" of the FISA coverage is to obtain foreign intelligence information.

(U) The statute, as cases interpreting it confirm, does not require that the *sole* purpose⁹¹ of the FISA coverage be to obtain foreign intelligence information, although it seems clear that obtaining foreign intelligence information cannot be merely a purpose.⁹² Instead, the cases suggest that the *primary* purpose of the FISA coverage must be to obtain foreign intelligence information. United States v. Johnson, 952 F.2d 565 (1st Cir. 1991) ("investigation of criminal activity cannot be the primary purpose of the surveillance"), cert. denied, 506 U.S. 816 (1992); United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) ("foreign intelligence information [must] be the primary objective of the surveillance"); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) ("We agree with the district court that the 'primary purpose of the surveillance, both initially and throughout, was to gather foreign intelligence information.'"), cert. denied, 486 U.S. 1010 (1988); United States v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987) (approving surveillance that "did not have as its purpose the primary objective of investigating a criminal act"), cert. denied, 485 U.S. 937 (1988); United States v. Rahman, 861 F. Supp. 247, 251 (S.D.N.Y. 1994) (characterizing the required certification to be "that the primary purpose of the surveillance was the gathering of foreign intelligence information"), aff'd, 189 F.3d 88 (2d Cir. 1999), cert. denied, 120 S. Ct. 830 (2000); United States v. Megahey, 553 F. Supp. 1180, 1189 (E.D.N.Y. 1982) (requirement that the surveillance be conducted "primarily" for foreign intelligence reasons is "clearly implicit in the FISA standards"), aff'd, 729 F.2d 1444 (2d Cir. 1983); but see United States v. Sarkissian, 841 F.2d 959, 964-65 (9th Cir. 1988) (declining to decide whether test was "purpose" or "primary purpose").

⁹¹(U) It should be noted that on occasion the legislative history refers to the "sole purpose" of the surveillance as being the gathering of foreign intelligence information. E.g., H.R. Rep. No. 95-1283, pt. 1, at 76 (1978). In other places, as discussed below, the legislative history speaks of "primary purpose," and this is the test that the courts have uniformly applied.

⁹²(U) This was the conclusion of Dellinger when the Office of Legal Counsel was asked for an opinion by Vatis prior to the meetings leading to the Attorney General's July 19, 1995 memorandum. (See Appendix D, Tab 11)

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(U) The FISA statute, by its terms, requires only that the *surveillance* or the *search* have "the purpose" – or, accepting the judicial gloss, the "primary purpose" – of "obtain[ing] foreign intelligence information." 50 U.S.C. §§ 1804(a)(7)(B) & 1823(a)(7)(B). Nowhere in the language of the statute is there a requirement that the purpose of underlying *investigation* be inquired into. In the statute's prerequisites for the Director's certification, the Attorney General's approval, and the FISA Court's order, there is no requirement that an averment or a finding be made concerning the purpose of the investigation. The purpose the *investigation* giving rise to the FISA application is simply not mentioned in the FISA statute.

(U) The legislative history of the FISA statute, moreover, suggests that Congress not only did not intend for the purpose of the investigation to be at issue, but affirmatively anticipated that the underlying investigation might well have a criminal as well as a foreign counterintelligence objective. According to the report by the Senate Select Committee on Intelligence ("SSCI"):

(U) U.S. persons may be authorized targets, and the surveillance is part of an investigative process often designed to protect against the commission of serious crimes such as espionage, sabotage, assassination, kidnapping, and terrorists acts committed by or on behalf of foreign powers. Intelligence and criminal law enforcement tend to merge in this area.

S. Rep. No. 95-701, at 10-11 (1978), reprinted in 1978 U.S.C.C.A.N. 3973, 3979.

(U) The SSCI was here making the point that foreign *counterintelligence* investigations differed from foreign *intelligence* investigations. The committee was mindful that in counterintelligence investigations, "[t]he targeting of U.S. persons and the overlap with criminal law enforcement require close attention to traditional fourth amendment principles." S. Rep. No. 95-701, at 11 (1978), reprinted in 1978 U.S.C.C.A.N. 3973, 3979. This concern, however, was addressed in the statute itself. Indeed, to do so, the drafters "adopt[ed] . . . certain safeguards which are more stringent than conventional criminal procedures." *Id.* at 11, 1978 U.S.C.C.A.N. 3980. One of these safeguards was that the statute "requires the judge to review the certification that surveillance of a U.S. person is necessary for foreign counterintelligence purposes. Because the probable cause standards are more flexible under the bill, the judge must also determine that the executive branch certification of necessity is not 'clearly erroneous.'" *Id.* The report likened the

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"clearly erroneous" standard to that applicable in administrative law, where "[t]he judge is required to review an administrative determination that, in pursuit of a particular type of investigation, surveillance is justified to acquire necessary information. The judge may request additional information in order to understand fully how and why the surveillance is expected to contribute to the investigation." *Id.* at 11, n.85, 1978 U.S.C.C.A.N. 3980.⁹³

(U) Thus, the focus of the certification, and the FISA Court's review of it, is upon the purpose of the surveillance. To the extent that the underlying investigation is considered at all, according to the SSCI, it is only to assess whether the surveillance will "contribute" to it. This in no way suggests that "the purpose" or the "primary purpose" of the investigation as a whole is at issue. On the contrary, as the passage quoted above makes clear, the surveillance may be "part of an investigative process . . . designed to protect against the commission of serious crimes" and the investigation may have both intelligence and criminal law enforcement interests that "tend to merge." S. Rep. No. 95-701, at 11, 1978 U.S.C.C.A.N. 3979.

- b. (U) While the primary purpose of FISA coverage must be to obtain foreign intelligence information, criminal law enforcement may be a secondary purpose, although, for prudential reasons, this is not where the line should be drawn for fashioning policy on the giving of advice

(U) The legislative history of FISA suggests that the surveillance may have a criminal law enforcement purpose, so long as gathering of foreign intelligence information is its primary purpose. This conclusion is supported by the SSCI's observation that "surveillance conducted under [FISA] need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate." S. Rep. No. 95-701, at 11, 1978 U.S.C.C.A.N. 3980. Implicit in this is a recognition that prosecution is one, among other, "protective measures" for which FISA coverage may be used.⁹⁴

⁹³(U) Nevertheless, as discussed below, the certification is subjected to only "minimal scrutiny" by the courts.

⁹⁴(U) As the SSCI noted in distinguishing FI from FCI investigations, "[s]urveillance to collect positive foreign intelligence may result in the incidental acquisition of information about crimes; but that is not its objective. By contrast, foreign counterintelligence surveillance frequently *seeks* information needed to detect or

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(U) This point is made explicit in the report by the House Permanent Select Committee on Intelligence ("HPSCI"):

(U) With respect to information concerning U.S. persons, foreign intelligence information includes information necessary to protect against clandestine intelligence activities of foreign powers or their agents. Information about a spy's espionage activities obviously is within this definition, and it is most likely at the same time evidence of criminal activities. How this information may be used "to protect" against clandestine intelligence activities is not prescribed by the definition of foreign intelligence information Obviously, use of "foreign intelligence information" as evidence in a criminal trial is one way the Government can lawfully protect against clandestine intelligence activities, sabotage, and international terrorism. The bill, therefore, explicitly recognizes that *information which is evidence of crimes involving clandestine intelligence activities, sabotage, and international terrorism can be sought, retained, and used pursuant to this bill.*

H.R. Rep. No. 95-1283, pt. 1, at 49 (1978) (emphasis added).⁹⁸⁵

anticipate the commission of crimes." S. Rep. No. 95-701, at 11, n.83, 1978 U.S.C.C.A.N. 3980 (emphasis added). In discussing the provisions of 50 U.S.C. § 1806, which allow for the use at a criminal trial of evidence gathered through FISA coverage, the SSCI explained that "[a]lthough the primary purpose of electronic surveillance conducted pursuant to this chapter will not be the gathering of criminal evidence, it is contemplated that such evidence will be acquired and these subsections establish the procedural mechanisms by which such information may be used in formal proceedings." *Id.*, at 62, 1978 U.S.C.C.A.N. 4031 (emphasis added).

⁹⁸⁵(U) The HPSCI "recognize[d] full well that the surveillance under this bill are not primarily for the purpose of gathering evidence of a crime. They are to obtain foreign intelligence information, which when it concerns United States persons must be necessary to important national security concerns. Combatting the espionage and covert actions of other nations in this country is an extremely important national concern. Prosecution is one way, but only one way and not always the best way, to combat such

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(U) It could certainly be argued, therefore, that so long as the crimes involve clandestine intelligence activity, sabotage, or international terrorism, evidence of such crimes could be "sought" as a means "to protect" against them, and *that* could be a "purpose" of FISA coverage. Although the relatively small number of cases interpreting the FISA statute have not addressed this issue, there is nevertheless some support among them for such a position.

(U) In United States v. Sarkissian, 841 F.2d 959 (9th Cir. 1988), FISA surveillance was reauthorized after it was learned that the defendants were assembling a bomb and planning to use it on a Turkish consulate. On the day that the FISA order was issued, the FBI apparently used information obtained from the FISA telephone surveillance to stake out an airport, to identify the courier of the bomb-making materials and the plane he would be taking, to seize the suitcase containing the unassembled bomb, and, ultimately, to arrest the defendants. 841 F.2d at 961-62. The court rejected the defendants' contention that "the FBI's primary purpose for the surveillance had shifted from an intelligence to a criminal investigation."

(U) We refuse to draw too fine a distinction between criminal and intelligence investigations. "International terrorism," by definition, requires the investigation of activities that constitute crimes. That the government may later choose to prosecute is irrelevant. FISA contemplates prosecution based on evidence gathered through surveillance. "[S]urveillance . . . need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate." FISA is meant to take into account "[t]he differences between ordinary criminal investigations to gather evidence of specific crimes and foreign counterintelligence investigations to uncover and monitor clandestine activities" At no point was this case an ordinary criminal investigation.

841 F.2d at 965 (citations omitted, editing by the court)

activities." H.R. Rep. No. 95-1283, pt. 1, at 36.

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(U) Similarly, in United States v. Duggan, 743 F.2d 59 (2d Cir. 1984), FISA surveillance continued until the defendants were arrested and was used to acquire information that the defendants were working on behalf of the Irish Republican Army to obtain "explosives, weapons, ammunition, and remote-controlled detonation devices . . . for use in terrorist activities." Id. at 65. The court agreed with the district court that "the purpose of the surveillance . . . was to secure foreign intelligence information and was not . . . directed towards criminal investigation or the institution of a criminal prosecution." Id. at 78.

(U) [W]e emphasize that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by § 1806(b), as evidence in a criminal trial. Congress recognized that in many cases the concerns of the government with respect to foreign intelligence will overlap those with respect to law enforcement. . . . In sum, FISA authorizes surveillance for the purpose of obtaining foreign intelligence information; the information possessed about [the target of the surveillance] involved international terrorism; and the fact that domestic law enforcement concerns may also have been implicated did not eliminate the government's ability to obtain a valid FISA order.

743 F.2d at 78.

(U) In United States v. Johnson, 952 F.2d 565 (1st Cir. 1991), cert. denied, 506 U.S. 816 (1992), the court approved the use of FISA coverage that continued until the defendants were arrested. The court found "no evidence of an end-run" around the Fourth Amendment's prohibition of warrantless searches. 952 F.2d at 572. "From our review of the FISA applications, it is clear that their primary purpose . . . was to obtain foreign intelligence information, not to collect evidence for any criminal prosecution of appellants." Id. Yet, the FISA surveillance in that case continued for two months after a search warrant was obtained to open a letter sent to one of the defendants, according to an opinion by the magistrate judge that was adopted by the district court. United States v. Johnson, No. 89-221, 1990 WL 78522, at *5 (D. Mass Apr. 13, 1990). In fact, certain FISA interceptions were included in the affidavit in support of the search warrant. Id. at *6. In an opinion that the First Circuit described as "lengthy and careful," 952 F.2d at 571,

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the lower court dismissed arguments that "the purpose of the FISA surveillance was therefore to further a criminal investigation. *Id.* at *5.

(U) Gathering of foreign intelligence information and obtaining information which is evidence of a crime are not mutually exclusive activities. As was recognized in the FISA legislative history, "Intelligence and criminal law enforcement tend to merge in (the area of foreign counter-intelligence investigations)."

1990 WL 78522, at *5. The court went on to hold that the purpose of the FISA coverage was to obtain foreign intelligence information "even though the Government might reasonably anticipate that the surveillance would yield evidence of criminal activity." *Id.*⁹⁶

(U) Cases involving espionage, sabotage, and international terrorism are not "ordinary" criminal investigations. The legislative history of FISA discussed above, as well as cases such as Sarkissian, Duggan, and Johnson, suggest that in assessing the FBI's use of FISA to uncover, monitor, and "protect against" *such* crimes, courts should never draw "too fine a distinction" between criminal and intelligence investigations. In other words, one might argue, so long as the *primary* purpose of the FISA coverage is the gathering of foreign intelligence information, a secondary purpose of prosecuting such crimes is permissible. Although this no doubt would be an appropriate position to take in defending against a motion to suppress, in our view it draws the line unnecessarily close for purposes of fashioning Department policy on the advice that the Criminal Division may give, at least in the absence of more definitive rulings from the appellate courts. Nevertheless, while there may be prudential reasons to keep the Criminal Division at arm's length from the FISA coverage, it is unnecessary to keep it miles away from any line that

⁹⁶(U) In Pelton, the FISA surveillance continued after the defendant was confronted by the FBI and discussed with FBI agents whether he should consult an attorney, the possibility of a future prosecution, his potential criminal exposure for tax and drug charges, his possible sentence, and the likelihood that the agents would testify on his behalf concerning his cooperation. 835 F.2d at 1070-71. Although the FISA surveillance was not challenged specifically on this ground, the court did not appear at all troubled by it, and concluded that the primary purpose of the surveillance "throughout" was to gather foreign intelligence information. *Id.* at 1076.

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could logically be drawn using the language of the FISA statute, or to keep it wholly in the dark until the intelligence objectives have been met. No case interpreting FISA requires such a sterile separation.

c. (U) The Criminal Division may give affirmative advice and guidance concerning issues relating to the FCI investigation

(U) It is clear from the statute, from the legislative history, and from the case law that the government can anticipate that it will use evidence collected from FISA coverage in a subsequent criminal trial. *E.g., United States v. Badia*, 827 F.2d at 1464. In fact, not only may the government anticipate such use, but this is one of the ways that the government may "protect against" the clandestine intelligence activity, sabotage, and international terrorism that FISA was designed to combat. H.R. Rep. No. 95-1283, pt. 1, at 36; S. Rep. No. 95-701, at 11, 1978 U.S.C.C.A.N. 3980; *United States v. Megahey*, 553 F. Supp. at 1189 ("Congress clearly viewed arrest and criminal prosecution as one of the possible outcomes of a foreign intelligence investigation.").

(U) It cannot be the case, therefore, that Congress intended for the Criminal Division to have no role whatsoever during the accumulation of such evidence, and that it must simply await the fortuity that the evidence will fall in its lap after the intelligence objectives have been attained and after the cessation of the FISA coverage. Certainly if that were the intent of Congress, it would have been expressed in the statute or in the legislative history. Further, as noted above, Congress intended that even after conclusive evidence of a crime was established, the FISA coverage "may be extended longer where protective measures other than arrest and prosecution are more appropriate." S. Rep. No. 95-701, at 11, 1978 U.S.C.C.A.N. 3980. This of course suggests the involvement in the investigation of those responsible for criminal law enforcement, and their participation in the determination of whether prosecution or continued surveillance is the most appropriate protective measure.

~~(S)~~ (U) We are not suggesting that the Criminal Division should "take over" or "run" an FCI investigation, or even that it should suggest uses of the FISA coverage to obtain evidence for a future prosecution. For prudential reasons, the advice of the Criminal Division *with respect to FISA coverage* should be confined to ensuring that a future prosecution is not jeopardized. But the Criminal Division's role *with respect to the investigation* should not be – nor does FISA require that it be – relegated to giving only "negative advice" that is designed merely to *preserve* a prosecution. The Criminal

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Division should also be – and can be, consistent with FISA – *involved in*, and not merely passively aware of, what Richard called the “choke points” of an investigation. (Richard 8/12/99) These would include when targets of the investigation are being identified, when there is a formulation of an investigative strategy, when there is an interview of the target, when [REDACTED] when decisions are made concerning the proof necessary to establish the elements of a crime, and, of course, when there is a discussion of whether the evidence amassed is sufficient to warrant the initiation of criminal proceedings. At each of these stages, the Criminal Division should be giving what Shapiro described as “advice and guidance” (Appendix D, Tab 5), not to run the investigation, but as one of the responsible entities *legitimately* involved in an area where “intelligence and criminal law enforcement tend to merge.” S. Rep. No. 95-701, at 11, 1978 U.S.C.C.A.N 3979.

(U) The issue is not one of expertise. Obviously, the Director of the FBI, a former federal judge and prosecutor, and the FBI’s General Counsel, a former federal prosecutor, have such expertise. The issue is that it is the Criminal Division that is charged with the primary responsibility for asserting the Department’s prosecutive equities. While it should not be the *only* party at the table, when such equities are at stake, it should certainly be at least one of them.⁹²⁷

(U) The Attorney General’s July 19, 1995 memorandum (Appendix D, Tab 23) blurs the distinction between the giving of advice concerning FISA coverage and the giving of advice concerning other issues arising in the investigation. In paragraph 6 of Part A, it specifically forbids the Criminal Division from “instruct[ing] the FBI on the operation, continuation, or expansion of” *FISA coverage*. But then it prohibits any advice that might give the “appearance,” even “inadvertently,” of directing the *investigation*. Yet there is nothing inherently wrong with the Criminal Division giving advice in an FCI investigation. It is only the FISA coverage that raises Fourth Amendment concerns.⁹²⁸

⁹²⁷(U) Indeed, to the extent that there is concern about the merging of intelligence functions with criminal functions, the Criminal Division, unlike the Attorney General and unlike the Director of the FBI, is *exclusively* concerned with matters relating to the enforcement of federal criminal law.

⁹²⁸(U) As the HPSCI recognized, “strict standards applicable to the most intrusive techniques of investigation may not be appropriate for other less intrusive techniques. . . . [T]he decision here with respect to electronic surveillance does not mean the same

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This is implicitly recognized in Part B of the Attorney General's memorandum, which deals with FCI investigations in which there has been no FISA coverage. It contains no limitation on the advice that the Criminal Division may give. If giving advice concerning the investigation as a whole were objectionable, there would be no reason to distinguish between investigations in which there was FISA coverage and those in which there was not.

(U) For the reasons discussed above, the July 1995 memorandum needs to be revised to allow for greater participation by the Criminal Division and to spell out explicitly the nature of advice that the Criminal Division may properly give to the FBI during an FCI investigation. A proposed revision of the July 1995 memorandum is appended to the end of this chapter.

2. (U) The test is "primary purpose," not "direction and control"

(U) For the reasons discussed above, the test for determining whether a FISA application should be authorized by OIPR, as well as the test for determining whether the Criminal Division may provide advice and guidance in an FCI investigation in which there is FISA coverage, should mirror the test applied by the courts in determining whether to grant a FISA order or in ruling upon a motion to suppress. The test in all instances should be whether the *primary purpose* of the FISA coverage is to obtain foreign intelligence information.⁹⁹ The phrase "*direction and control*," particularly insofar as it relates to the

standard must be applied to all techniques." H.R. Rep. No. 1283, pt. 1, at 37.

⁹⁹(U) The cases interpreting FISA have uniformly focused on the purpose of the surveillance, not on the underlying investigation. United States v. Badia, 827 F.2d at 1464 (the surveillance "did not have as its purpose the primary objective of investigating a criminal act"); United States v. Cavanagh, 807 F.2d 787, 790 (9th Cir. 1987) ("the purpose of the surveillance is not to ferret out criminal activity but rather to gather intelligence"); United States v. Duggan, 743 F.2d at 77 ("[t]he requirement that foreign intelligence information be the primary objective of the surveillance is plain"); United States v. Johnson, 952 F.2d at 572 ("the investigation of criminal activity cannot be the primary purpose of the surveillance"); United States v. Megahay, 553 F. Supp. at 1189-90 (E.D.N.Y. 1982) ("surveillance under FISA is appropriate only if foreign intelligence surveillance is the Government's primary purpose").

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advice that the Criminal Division may give concerning the investigation, as distinguished from the surveillance, should be jettisoned.

(U) This is not to suggest that it would be desirable or prudent for the Criminal Division to supervise or manage an FCI investigation. Rather, the "direction and control" formulation should be discarded because it improperly and unnecessarily places the focus of the inquiry upon the investigation. As demonstrated above, the focus should instead be upon the purpose of the FISA surveillance or search. Moreover, were the "direction and control" phrase applied to the FISA coverage, it would add no more clarity than the statutory test, as applied by the courts: whether the "primary purpose" of the surveillance or search is to obtain foreign intelligence information.

(U) The "direction and control" language does not find support in the statute, the legislative history, or the case law interpreting FISA. No court applying FISA has suppressed evidence on the ground that the FISA coverage was misused. None has applied a "direction and control" test in arriving at this conclusion. Indeed, no court has examined the underlying investigation in determining whether the FISA coverage was properly obtained or employed. The only decision *ever* to suppress evidence in a search undertaken for national security purposes, United States v. Humphrey, 456 F. Supp. 51 (E.D. Va. 1978), *aff'd sub nom. United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), was decided before the effective date of FISA. The Truong/Humphrey courts therefore did not construe FISA, but based their holdings solely upon Fourth Amendment principles applicable to *warrantless* searches. This pre-FISA case is the only one to have examined the underlying investigation in assessing the legality of the national security surveillance.

(U) In Truong/Humphrey, the defendants were charged with espionage based in part upon evidence obtained through surveillance consisting of a tap on Truong's telephone, a microphone in Truong's apartment, and a video camera in Humphrey's office. 456 F. Supp. at 54. Although the surveillance was approved by the Attorney General, the government never obtained, nor sought to obtain, judicial approval for the surveillance. *Id.* Finding that "no existing warrant procedure can be reconciled with the government's need to protect its security and existence," the district court held that "under traditional Fourth Amendment analysis, the United States is not required to apply for a warrant whenever the President, or the Attorney General acting at the President's designation, feels it necessary to electronically eavesdrop in his conduct of foreign affairs." *Id.* at 55. Nevertheless, according to the district court, "once prosecution is actively considered, . . .

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the Court must become involved in order to determine whether the primary focus has shifted away from foreign intelligence." Id. at 57.

(U) To make this determination, the district court applied a "primary purpose" test. 456 F. Supp. at 57-58. Initially, the court applied this test to the purpose of the surveillance:

(U) The "primary purpose" test . . . appears to balance the interests of the government in the conduct of foreign affairs and the potential defendant. It asks "was the primary purpose of this *surveillance* on this day to gather foreign intelligence information?"

Id. at 58 (emphasis added). Later in the opinion, the court restated the test, again emphasizing the purpose of the surveillance:

(U) It is unrealistic to expect, in a case like this one, that the option of prosecution is never considered. The relevant inquiry remains however: when, if at all, did the primary focus of the *surveillance* shift away from foreign intelligence gathering?

Id. (emphasis added).⁹⁹⁰ Then, however, the court shifted its own focus away from the purpose of the surveillance to the purpose of the investigation as a whole.

(U) At the outset, the court found that discussions between the FBI and the Internal Security Section of the Criminal Division of a *potential* prosecution; and the opening of a criminal file, were not dispositive. 456 F. Supp. at 58. Nor were internal Department of Justice discussions of possible prosecution which were merely "coincidental to the foreign intelligence investigation." Id. at 59. Similarly, briefings by the FBI to ISS on the status of the foreign intelligence investigation did not spoil the "primary purpose." Id. The court noted "that during his early involvement in the case [then ISS Deputy Chief John L.] Martin offered no advice as to how the tap should be conducted or as to the focus of the investigation." Id. (emphasis added). The court found that the "primary purpose"

⁹⁹⁰(U) At still another point, the court questioned whether "the primary purpose of the *surveillance* remained foreign intelligence gathering throughout the life of the surveillance. 456 F. Supp. at 58-59 (emphasis added).

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changed, however, with the preparation of a July 19, 1977 status memorandum that the court characterized as "prosecution-oriented" and a July 20, 1977 letter that showed that the Department of Justice was "trying to put together a criminal case."

(U) While it is true . . . that the Justice Department may not have had a "winnable" case until much later, this is not the test. The test is: what is the primary focus of the *investigation*? The Court concludes that by July 20, 77, the primary focus of the *investigation* was no longer foreign intelligence gathering, and therefore all evidence obtained from the telephone and microphone surveillance after July 20, 1977, as well as the fruits thereof, must be suppressed.

456 F. Supp. at 59 (emphasis added).

(U) The Fourth Circuit affirmed the district court analysis, although it too merged the concepts of the surveillance and the underlying investigation. Initially, the court appeared to focus on the purpose of the surveillance:

(U) [A]s the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted "primarily" for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination

629 F.2d at 915. Later, the court spoke of the purpose of the investigation:

(U) Although the Criminal Division of the Justice Department had been aware of the investigation from its inception, until summer the Criminal Division had not taken a central role in the investigation. On July 19 and July 20, however, several memoranda circulated between the Justice Department and the various intelligence and national security agencies indicating that the government had begun to assemble a criminal prosecution. On the facts of this case, the district court's

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finding that July 20 was the critical date when the investigation became primarily a criminal investigation was clearly correct.

Id. at 916.

(U) Several important points must be borne in mind when evaluating the holdings of the Truong/Humphrey decisions. First, Congress did not have Truong/Humphrey in mind when it drafted FISA, and the statute should in no way be viewed as a "codification" of its holding. The district court's opinion itself refers to the "proposed" statute, 456 F. Supp. at 54, and the legislation was substantially drafted long before the opinion was issued. See S. Rep. No. 95-604, pt. 1, at 3-4 1978 U.S.C.C.A.N 3905.⁹⁹¹ Second, the kind of warrantless national security surveillance conducted in Truong/Humphrey bears no resemblance to the judicially-approved surveillance conducted pursuant to FISA. As the district court noted, such surveillance was "[o]ften . . . undertaken with no probable cause." Third, as the Fourth Circuit realized, its opinion would not, and should not, govern surveillance conducted pursuant to FISA:

(U) The elaborate structure of the statute demonstrates that the political branches need great flexibility to reach the compromises and formulate the standards which will govern foreign intelligence surveillance. Thus, the Act teaches that it would be unwise for the judiciary, inexperienced in foreign intelligence, to attempt to enunciate an equally elaborate structure for core foreign intelligence surveillance under the guise of a constitutional decision. Such an attempt would be particularly ill-advised because it would not be easily subject to adjustment as the political branches gain experience in working with a warrant requirement in the foreign intelligence area.

⁹⁹¹(U) The Truong/Humphrey decision was mentioned by the SSCI in the 1994 legislative history for the amendment of FISA that added authority for physical searches. S. Rep. No. 103-296 (1994) WL 320917 (cited in H.R. Conf. Rep. No. 103-753, at 56 (1994), reprinted in 1994 U.S.C.C.A.N. 2751, 2764). It does not suggest, however, that pre-FISA decision set forth the appropriate test to govern FISA searches or surveillances. On the contrary, the legislation retains the same focus on the "purpose" of the search, not the investigation, in 50 U.S.C. § 1823(a)(7)(B), and the SSCI incorporated by reference all of the legislative history dating prior to the Truong/Humphrey decision. Id.

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629 F.2d at 914 n.4. Finally, while the Fourth Circuit's Truong/Humphrey decision may be regarded as a "constitutional minimum," it is a minimum applicable to *warrantless* national security searches which often may be conducted in the absence of probable cause. In stark contrast, FISA requires a certification by the Director of the FBI as to the purpose and, in the case of a United States person, the necessity of the surveillance; it specifies the approval required of the Attorney General, which represents an additional certification as to purpose and necessity; it requires a judicial warrant upon a finding of probable cause and a determination that the certification is not clearly erroneous in the case of a United States person; it requires judicially-approved minimization procedures; it requires periodic renewals, where the same showings must again be made to the judicial officer; together with a host of other safeguards, including reports to and oversight by Congress.⁹⁹² There is simply no justifiable reason to apply the standard used in Truong/Humphrey – which involved the reasonableness of warrantless, unsupervised surveillances – to determine the lawfulness of surveillance that is conducted with all of the attendant procedural safeguards mandated by FISA, some of which are "more stringent than conventional criminal procedures." S. Rep. No. 95-701, at 11, 1978 U.S.C.C.A.N. 3980.

(U) And yet, that is precisely what OIPR has done in applying the Attorney General's July 19, 1995 memorandum, by effectively excluding the Criminal Division from any meaningful role during FCI investigations. Indeed, OIPR's strictures are more severe than those of Truong/Humphrey, which at least permitted the Criminal Division to be informed at the inception of the investigation, to provide an "initial prosecutive evaluation," and to receive briefings concerning the status of the investigation as it progressed. 456 F. Supp. at 59. In its application of a nebulous "direction and control" standard to the investigation as a whole, coupled with the injunction against even the "appearance" of such direction and control, OIPR has effectively crippled the Criminal Division's ability to carry out what ought to be one of its core functions, which is to provide affirmative advice and guidance at critical junctures during FCI investigations, which even the Truong/Humphrey court recognized are "almost all . . . in part criminal investigations." 629 F.2d at 915.

⁹⁹²(U) By enacting FISA, Congress sought to bring the President's use of surveillance for purposes of national security under the control of the legislature; FISA constitutes a "significant abridgement of an Executive prerogative theretofore assumed to exist." United States v. Andonian, 735 F. Supp. 1469, 1472-73 (C.D. Cal. 1990).

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(U) Thus, the focus should not be on whether the Criminal Division exercises any "direction and control" over the investigation. Moreover, by now this term is so freighted with the practice of excluding the Criminal Division that it should be discarded altogether. It adds nothing to answering the truly significant question, which is whether the primary purpose of the FISA search or surveillance is the gathering of foreign intelligence information.

3. (U) There is no reason for an unduly apprehensive application of the "primary purpose" standard

(U) The FISA Court shall enter an order approving the FISA application if it finds, among other things, that "the application which has been filed contains all statements and certifications required [including that concerning the "purpose" of the surveillance] . . . and, if the target is a United States person, the certification or certifications are not clearly erroneous." 50 U.S.C. § 1805(a)(5).⁹⁹³ The certification as to the purpose of the surveillance is given great deference. "Once this certification is made . . . , it is, under FISA, subjected to only minimal scrutiny by the courts." United States v. Duggan, 743 F.2d at 77.

(U) The FISA Judge, in reviewing the application, is not to second-guess the executive branch official's certification that the objective of the surveillance is foreign intelligence information. Further, Congress intended that, when a person affected by a FISA surveillance challenges the FISA Court's order, a reviewing court is to have no greater authority to second-guess the executive branch's certification than has the FISA Judge.

Id. (footnote omitted).⁹⁹⁴ Accord: United States v. Badia, 827 F.2d at 1463. See also United States v. Pelton, 835 F.2d at 1075 ("Where, as here, the statutory application was

⁹⁹³(U) The provision relating to FISA searches is identical in all essential respects. 50 U.S.C. § 1824(a)(5).

⁹⁹⁴(U) The court may, however, require the applicant to provide additional information to enable the court to make this determination. 50 U.S.C. § 1804(d).

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properly made and earlier approved by a FISA judge, it carries a strong presumption of veracity and regularity in a reviewing court.”).

(U) Moreover, according to the Second Circuit in Duggan, “to be entitled to a hearing as to the validity of those presentations, the person challenging the FISA surveillance would be required to make ‘a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included’ in the application and that the allegedly false statement was ‘necessary’ to the FISA Judge’s approval of the application.” 743 F.2d at 77 n.6 (quoting Franks v. Delaware, 438 U.S. 154, 155-56 (1978)).

(U) As discussed above, both the Director and the Attorney General share the responsibility for ensuring that the primary purpose of FISA searches and surveillances is to obtain foreign intelligence information. This, as Congress recognized, is an important aspect of the FISA scheme for ensuring that such activities comport with Fourth Amendment principles. All components within the Department, therefore, – including the FBI, OIPR, and the Criminal Division – have an interest in ensuring that the Director’s certification as to the purpose of FISA coverage is entirely accurate. As discussed above, however, “[o]nce this certification is made . . . , it is, under FISA, subjected to only minimal scrutiny by the courts.” Duggan, 743 F.2d at 77. A standard that condemns advice given by the Criminal Division that might, even inadvertently, result in the “appearance” that the Criminal Division is “directing or controlling” the *investigation* is simply overkill. It is unnecessary and it has damaged the relationship between the FBI and the Criminal Division. Indeed, as discussed elsewhere,⁹⁹⁵ it may have been responsible for causing very real damage to the country’s “supreme national interest”⁹⁹⁶ as a consequence of its effect upon the investigation of Wen Ho Lee.

⁹⁹⁵(U) See Chapters 9 and 19.

⁹⁹⁶(U) This is how Stephen Younger, Associate Laboratory Director at Los Alamos National Laboratory (“LANL”), described the importance of the nuclear weapons design codes that Lee had downloaded from LANL’s secure computer system onto portable tapes that remain unaccounted for. (Detention Hearing 12/13/99 Tr. 38)

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D. (U) Recommendations

1. (U) The AGRT's interim recommendations

(U) On October 19, 1999, the AGRT delivered to the Attorney General three interim recommendations for remedying the notification problems discussed above. (Appendix D, Tab 54) These interim recommendations were implemented in part by a memorandum approved by the Attorney General on January 21, 2000. The interim recommendations were as follows:⁹⁹⁷

(U)
(S) Recommendation Number One: The procedures in the Attorney General's July 19, 1995 memorandum, relating to notification of the Criminal Division in certain FCI investigations, must be strictly followed.

(U) Recommendation Number One is superceded by our recommendation, as suggested below, that the Attorney General's July 19, 1995 memorandum be re-written. This possibility was referenced in the AGRT's October 19, 1999 letter to the Attorney General. (Appendix D, Tab 54)

(U)
(S) Recommendation Number Two: FBI letterhead memoranda ("LHMs") concerning full FCI investigations of United States persons should be *automatically* sent to the Criminal Division.

(U)
(S) In an important first step, the January 2000 memorandum requires that the Criminal Division be provided copies of the LHMs in full FCI investigations falling within AG Guidelines III(C)(1)(b) ("a person, group or organization . . . engaged in activities that violate the espionage statutes"). (Appendix D, Tab 1) Now that the AGRT has issued its final recommendations, this Recommendation Number Two should be implemented in full, for the reasons given in the AGRT's October 19, 1999 letter to the Attorney General.

⁹⁹⁷(U) The rationale for the interim recommendations, which can be found in the AGRT's October 19, 1999 letter to the Attorney General (Appendix D, Tab 54) will not be repeated here.

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(8) Recommendation Number Three: The FBI should provide regularly scheduled briefings to the Criminal Division concerning those FCI investigations that may involve potential criminal prosecution.

(U) The January 2000 memorandum provides for a multi-step process for providing briefings to the Criminal Division. First, during regular monthly meetings of a "core group" (consisting of the Assistant Director for the FBI's National Security Division, the Assistant Director of the FBI's Terrorism Division, the Principal Associate Deputy Attorney General ("PADAG"), and the Counsel for Intelligence Policy), the Assistant Attorney General for the Criminal Division ("AAG") and the AAG's Chief of Staff will be briefed by the Assistant Directors on matters satisfying the notification requirement of the July 1995 memorandum. Second, the AAG may brief the Chiefs of ISS and TVCS, and the Deputy Assistant Attorneys General responsible for those sections, on the information the AAG received at the monthly briefing. Third, the Chiefs of ISS and TVCS may request additional information from the Assistant Directors, which shall be provided unless the "core group" agrees otherwise. An OIPR representative is to be present at resulting meetings and is to receive a copy of an written briefing. Fourth, the Chiefs of ISS and TVCS may brief the AAG on the information they receive from the Assistant Directors. The Chiefs of ISS and TVCS may take no other action. Finally, after this process, if the AAG believes that the Criminal Division should receive additional information or should take some affirmative action (such as consulting a United States Attorney's Office, issuing a grand jury subpoena, or seeking a Title III order), the AAG must first "consult with" the "core group."

(U) While these briefings, too, constitute an important first step, we mention here certain shortcomings in the procedure that we recommend be addressed. First, the procedure is unnecessarily restrictive. The Chiefs of TVCS and ISS ought to be included in the initial briefings to make that exercise both more efficient and more effective. Second, for the reasons discussed above, OIPR need not be present at the follow-up briefings of the Chiefs of ISS and TVCS, particularly in light of our recommendation concerning the affirmative advice that the Criminal Division may provide. The Criminal Division is perfectly capable of following the limitations on advice (whether those recommended here or those contained in the July 1995 memorandum), without OIPR's intervention, and is equally capable of maintaining a log of the contact. Finally, it does not seem appropriate to require the AAG to "consult with" - which, in practical effect, means

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to obtain the approval of - the PADAG, the Counsel for Intelligence Policy, and the FBI, before the AAG may take any affirmative action in a matter involving a potential criminal prosecution.⁹⁹⁹

2. (U) Additional recommendations

(U) Additional recommendations, supported by the preceding legal analysis, are set forth below. These and the interim recommendations are reflected in a proposed revision of the Attorney General's July 19, 1995 memorandum that is appended to the end of this chapter.

(U) Recommendation Number Four: During the course of an FCI investigation in which there is a potential for criminal prosecution,⁹⁹⁹ the Criminal Division should be provided the opportunity to give advice to the FBI with respect to issues that are not directly related to any existing or planned FISA search or surveillance.

(U) This advice should not be limited to the "negative advice" that has been discussed above. In other words, the advice may be not merely to "preserve" a potential criminal prosecution, but also to "enhance" it. The Attorney General should affirmatively state that such advice is *expected*. This advice could occur during the regular briefings of the Criminal Division on the status of an FCI investigation, or it may occur more informally. The Criminal Division should maintain a log of all contacts it has with the FBI concerning an investigation, whether or not FISA coverage is being employed. The FBI should inform OIPR in its LHM requesting FISA coverage or renewal that it has had prior contact with the Criminal Division. OIPR should then be given access to the Criminal Division logs for the purpose of providing to the FISA Court, when a FISA order or renewal is sought, a brief description of the contacts between the Criminal Division and the FBI.

⁹⁹⁹(U) The AAG is, after all, appointed by the President with the advice and consent of the Senate.

⁹⁹⁹(U) This is meant to refer to an FCI investigation in which "facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed," thus triggering an obligation to notify the Criminal Division.

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(U) Recommendation Number Five: It is unnecessary for OIPR to receive *prior* notice of any contact between the Criminal Division and the FBI.

(U) OIPR's role should not be to authorize, forbid, prevent, temper, or otherwise "referee" contacts between the Criminal Division and the FBI, including any advice the Criminal Division may provide. The practice of requiring prior notice to OIPR, even though not required by the July 1995 memorandum, has served to stifle communications between the Criminal Division and the FBI. OIPR's role in informing the FISA Court of contacts between the Criminal Division and the FBI can be fully realized by reviewing the Criminal Division's logs of such contacts. To require that OIPR be present at such meetings between the FBI and the Criminal Division suggests that they are incapable of following the Attorney General's limitations on advice regarding FISA coverage (as recommended herein) or that the Criminal Division attorneys are unwilling or unable to accurately record the contact with the FBI. There is no requirement that OIPR have first-hand knowledge of what transpires at the meetings in order to report them to the FISA Court.

(U) Recommendation Number Six: The Criminal Division should not provide advice directly related to an existing or planned FISA search or surveillance, except for the purpose of preventing damage to a potential criminal prosecution.

(U) For the reasons discussed above, this is a precautionary measure, to ensure that the FISA Court, and any reviewing court, will find that the Director's certification as to the purpose of the FISA search or surveillance is not clearly erroneous (in the case of a United States person). We anticipate that occasions when the Criminal Division would provide *any* advice directly relating to the FISA coverage would be exceptionally rare, and it is difficult to anticipate the circumstances under which such an occasion might arise. Nevertheless, we believed that the policy should have sufficient flexibility to allow for the Criminal Division to provide advice in those rare instances when it is necessary to prevent damage to a potential prosecution.

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(U) Recommendation Number Seven: OIPR should include, with each application for a FISA order or renewal in connection with an FCI investigation, a statement that the Criminal Division may provide advice concerning the underlying investigation.

(U) Each FISA application should contain a statement that spells out the Department's policy with respect to the advice that the Criminal Division may give concerning the underlying investigation. Accordingly, in addition to reporting to the FISA Court the nature of any contacts the FBI and the Criminal Division have already had, the application should state that the Criminal Division may provide further advice relating to the investigation. The application should affirmatively state that the advice may be for the purposes of preserving or enhancing a potential criminal prosecution. It should also state that, out of an abundance of caution, the Criminal Division will not provide advice directly relating to the FISA coverage, except for the purpose of preventing damage to a potential prosecution. The application should also contain a brief description of the contacts that have already taken place between the Criminal Division and the FBI.

(U) Such a statement in the FISA application will serve at least two functions. First, it will make clear to all – the FBI, the Criminal Division, OIPR, and the FISA Court – that the Department regards Criminal Division advice concerning the underlying investigation to be entirely appropriate. Second, it will help to insulate the giving of such advice from attack in a motion to suppress, given the usual deference that is accorded the FISA Court's approval of an application.

(U) Recommendation Number Eight: The Attorney General should affirmatively state that, except with her express approval, no request from the FBI for a FISA application should be denied, nor any FISA coverage withdrawn, on the basis of any contact the FBI has had with, or advice the FBI has received from, the Criminal Division.

(U) The institutional trepidation that has worked its way into the warp and woof of the FBI's dealings with the Criminal Division in FCI investigations calls for an institutional response. This recommendation is intended to allay any FBI concern that, notwithstanding what may be contained in written procedures, OIPR retains the power to withhold FISA coverage to impose its will upon the relationship between the FBI and the Criminal Division. Such concern would not be unfounded, given the manner in which the Attorney General's July 19, 1995 memorandum has historically been ignored by OIPR,

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and given the FBI's own non-compliance with the memorandum out of a fear of doing "anything that is going to mess up the FISA coverage." (Berezney 8/30/99) Rejecting a FISA application in an FCI investigation on this ground is a dramatic step, one that could potentially affect our national security. A decision of this kind should be made only with the Attorney General's express approval.

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E. (U) Proposed revisions to the Attorney General's July 19, 1995 memorandum

(U) The procedures contained herein, unless otherwise specified by the Attorney General, apply to foreign counterintelligence ("FCI") investigations conducted by the FBI, including investigations relating to clandestine intelligence activity, espionage, sabotage, or international terrorism. The purpose of these procedures is to ensure that FCI investigations are conducted lawfully, and that the Department's criminal and counterintelligence functions are properly coordinated.

1. (U) If, in the course of an FCI investigation, facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed, the FBI shall notify the Criminal Division. If OIPR is aware of such facts or circumstances, it shall independently notify the Criminal Division. Notice to the Criminal Division shall include the facts and circumstances developed during the investigation that support the indication of significant federal criminal activity.
2. (U) The FBI shall not contact a United States Attorney's Office concerning an FCI investigation without the approval of the Criminal Division and notice to OIPR. In exigent circumstances, where immediate contact with a United States Attorney's Office is appropriate because of potential danger to life or property, FBI Headquarters or an FBI field office may make such notification. The Criminal Division and OIPR should be contacted and advised of the circumstances of the investigation and the facts surrounding the notification as soon as possible.
3. (U) If the Criminal Division concludes that the information provided by the FBI or OIPR raises legitimate and significant criminal law enforcement concerns, it shall inform the FBI and OIPR. The Criminal Division may, if it deems it appropriate, contact the pertinent United States Attorney's Office for the purpose of evaluating the information.
4. (U) (S) Upon the initiation of a full FCI investigation of a United States person, the initial letterhead memorandum ("LHM") required by the Attorney General's Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations ("AG Guidelines"), ¶ IX(C), and each annual LHM thereafter, shall be provided to the Criminal Division at or

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before the time it is provided to OIPR. Each such LHM shall contain a statement indicating that it has already been, or is then being, provided to the Criminal Division. The Criminal Division shall strictly limit access to the LHMs and shall coordinate access issues with the FBI.

5. (U) The FBI shall provide regularly scheduled briefings, which shall occur at least monthly, to the Criminal Division concerning FCI investigations as follows: (a) based upon the LHMs provided to the Criminal Division pursuant to paragraph 4, above, the Criminal Division should identify the full FCI investigations about which it requires information in addition to that contained in the LHMs; (b) the FBI should brief the Criminal Division on significant developments in full FCI investigation that enhance or diminish the likelihood of criminal prosecution; and (c) the FBI should brief the Criminal Division on matters under investigation that contain a reasonable indication of significant federal criminal activity which, for whatever reason, have not been disclosed to the Criminal Division pursuant to paragraph 4, above.
6. (U) During the briefings provided for in paragraph 5, above, or informally at other times, the FBI may request, and the Criminal Division may provide, advice concerning issues arising during the investigation that are not directly related to any existing or planned FISA search or surveillance. Such advice may be intended not only to preserve, but also to enhance, a potential criminal prosecution. Such advice may relate to, but need not be limited to, the following areas: the identification of targets of the investigation; the formulation of an investigative strategy; the use of investigative techniques other than a FISA search or surveillance; the interview of a target of the investigation or of others; representations made during interviews that may affect a subsequent prosecution; actions taken in an investigation that may affect a subsequent prosecution; the planning and execution of an undercover operation; whether particular conduct constitutes a crime; the proof necessary to establish the elements of a crime; and whether the evidence amassed by the investigation is sufficient to warrant the initiation of criminal proceedings. Advice of this kind is expected and appropriate.
7. (U) Notwithstanding paragraph 6, above, the Criminal Division shall not instruct the FBI on the operation, continuation, or expansion of any FISA

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search or surveillance, except for the purpose of preventing damage to a potential criminal prosecution.

8. (U) With respect to each FCI investigation in which the Criminal Division is contacted by the FBI, regardless of whether FISA searches or surveillance have yet been employed, the Criminal Division shall maintain a separate log of all contacts with the FBI concerning the investigation, noting the date of the contact, the participants involved in the contact, and briefly summarizing the content of any communication. The log shall be retained by the Criminal Division. In investigations involving FISA searches or surveillance, the Criminal Division shall make available to OIPR a copy of the log for the particular investigation.
9. (U) Whenever the FBI seeks authorization for a FISA order or renewal, it shall inform OIPR if there has been prior contact with the Criminal Division. If so, OIPR shall obtain from the Criminal Division its log for the particular investigation. OIPR shall use such logs to inform the FISA Court of any such contacts.
10. (U) In addition to specific information concerning prior contacts between the FBI and the Criminal Division, each application for a FISA order or renewal shall contain a general statement that the Criminal Division may give advice concerning the underlying investigation; that the advice may be for the purposes of preserving or enhancing a potential criminal prosecution; and that, out of an abundance of caution, the Criminal Division will not provide advice directly relating to the FISA coverage, except for the purpose of preventing damage to a potential prosecution.
11. (U) In the event the Criminal Division concludes that circumstances exist that indicate the need to consider initiation of a criminal investigation or prosecution, it shall notify the FBI and OIPR. The Criminal Division shall contact the pertinent United States Attorney's Office as soon thereafter as possible.
12. (U) Any disagreement among the Criminal Division, United States Attorneys, OIPR, or the FBI concerning the application of these procedures

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in a particular case, or concerning the propriety of initiating a criminal investigation or prosecution, shall be raised with the Deputy Attorney General.

13. (U) No request from the FBI for a FISA application shall be denied, nor any FISA coverage withdrawn, on the basis of any contact the FBI has had with, or advice the FBI has received from, the Criminal Division, except with the express approval of the Attorney General.

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