

**CHAPTER SIX**  
**OFFICE OF THE INSPECTOR GENERAL'S ANALYSIS OF THE**  
**INVESTIGATION, ARREST, AND CONFINEMENT OF MAYFIELD**

This chapter of the report analyzes the FBI's investigation and subsequent arrest of Mayfield after the FBI Laboratory concluded that Mayfield's fingerprint was on the evidence linked to the Madrid train bombings. As described in Chapter Two, the FBI conducted electronic surveillance and physical searches during the Mayfield investigation pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1801 et seq., and, along with the Portland United States Attorney's Office (U.S. Attorney's Office), obtained a material witness arrest warrant for Mayfield. In this chapter, we examine the FBI's use of FISA to conduct electronic surveillance and physical searches. We specifically assess the impact of the Patriot Act on the FBI's use of FISA in the Mayfield case and on other aspects of the investigation of Mayfield. We also examine the role of Mayfield's religion in the investigation and the representations made by the FBI in seeking a material witness and criminal search warrants. In addition, we discuss the problems the FBI encountered in conducting the surveillance and searches. We also examine the affect of the media leaks in Mayfield's arrest. Finally, we address the conditions under which Mayfield was confined as a material witness.

**I. Analysis of the FBI's Use of FISA and the Patriot Act**

An issue that has received much public discussion in connection with the Mayfield investigation is whether the FBI used any provisions of the Patriot Act in conducting the FISA surveillance and searches.<sup>146</sup> To address this issue, in this section we summarize the pertinent Patriot Act provisions and our analysis of whether, and how, these provisions affected the surveillance and searches conducted by the FBI in the Mayfield investigation. We also discuss the impact of the Patriot Act on the FBI's use of National Security Letters (NSLs) to gather information about Mayfield. Finally, we discuss how the Patriot Act amendments affected the sharing of information gathered about Mayfield between government criminal and intelligence personnel.

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<sup>146</sup> After the terrorist attacks of September 11, 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the Patriot Act), which significantly amended some of FISA's provisions.

## **A. The Impact of the Patriot Act Amendments on the FISA Surveillance and Searches of Mayfield**

In this section, we discuss Sections 218 and 504 of the Patriot Act, the amendments to FISA that removed barriers separating criminal and intelligence investigations. We examine whether those amendments affected the government's decision to seek FISA authority to conduct covert searches and surveillance of Mayfield. We then evaluate whether, in conducting the covert surveillance and searches, the government made use of other Patriot Act provisions. Those include provisions affecting the time limits for electronic searches and surveillance, the standards for obtaining pen register and trap and trace information, authorization for "roving wiretaps" under FISA, and provisions authorizing delayed notification of the execution of criminal search warrants (sometimes referred to as "sneak and peek" searches).

### **1. Sections 218 and 504 of the Patriot Act**

#### **a. The "Primary Purpose" test and the "Wall"**

When originally enacted in 1978, FISA required a certification that "the purpose" of the requested surveillance was to gather foreign intelligence information. Although Congress anticipated that evidence of criminal conduct uncovered during FISA surveillance would be provided to criminal investigators, the statute did not specify the circumstances under which such information would be made available to them for use in a criminal investigation. As a result, in interpreting FISA, the Department of Justice (DOJ) and courts applied the "primary purpose" test. This allowed the use of FISA information in a criminal case, but only if the primary purpose of the FISA surveillance or search was to collect foreign intelligence information, rather than to conduct a criminal investigation. See *United States v. Troung Dinh Hung*, 629 F.2d 908 (4<sup>th</sup> Cir. 1980); *United States v. Johnson*, 952 F.2d 565 (1<sup>st</sup> Cir. 1991), cert. denied, 506 U.S. 816 (1992). In addition, the FISA Court could reject an application for a FISA warrant because of concerns that the government's purpose for seeking the warrant was for use in a criminal case rather than collecting foreign intelligence.<sup>147</sup>

The underlying rationale for the "primary purpose" test related to the standards of proof the government must meet in order to obtain permission to conduct surveillance. These standards are different in a FISA case than in a

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<sup>147</sup> For a description of the requirements of FISA and how they were interpreted by the Department of Justice and the courts prior to the Patriot Act, see the OIG's report entitled "Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks," (OIG's 9/11 Report) at pages 44-53.

criminal case. For example, to obtain authority for FISA surveillance of a particular telephone line, the government must show probable cause to believe that the target is an agent of a foreign power and that the target uses that telephone line to communicate. 50 U.S.C. § 1805(a)(3). In contrast, in a criminal case the government must show that there is probable cause to believe that an individual is committing, has committed, or is about to commit a particular criminal offense specified by statute and that particular communications about that offense will be obtained through the interception. 18 U.S.C. § 2511.

The interpretation and implementation by the courts and the Department of Justice of the “primary purpose” test had the effect of limiting coordination and information sharing between foreign intelligence and criminal law enforcement personnel. Because the courts evaluated the government’s purpose for using FISA partly by examining the nature and extent of coordination between intelligence and law enforcement officials, the more coordination that occurred, the more likely that courts would find that law enforcement, rather than foreign intelligence, was the primary purpose of the requested surveillance or search. Beginning in the 1980s, the Department of Justice developed procedures that limited the circumstances under which information from intelligence investigations could be shared with criminal prosecutors and criminal law enforcement personnel. As a result, a “wall” developed between Department intelligence personnel and criminal personnel that limited information sharing. In addition, while pre-Patriot Act FISA-derived information could be shared freely with foreign intelligence agencies such as the Central Intelligence Agency (CIA) and the National Security Agency (NSA), that same information could not be shared with criminal law enforcement officials without consultation and approval from senior officials in the Department of Justice. As described below, Sections 218 and 504 of the Patriot Act now allow the sharing of that information without prior approval.<sup>148</sup>

**b. How Sections 218 and 504 of the Patriot Act facilitated the removal of the “wall”**

Section 218 of the Patriot Act amended FISA to replace the phrase “the purpose” with the phrase “a significant purpose.” Accordingly, the government can now obtain a FISA warrant by showing that the collection of foreign intelligence information is a “significant purpose” of the investigation rather than the “primary purpose” as under the previous standard. In addition, Section 504 of the Patriot Act amended FISA to specify that intelligence

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<sup>148</sup> For a more extensive discussion of the development and effect of “the wall” on pre-Patriot Act information sharing, see pages 21-44 of the OIG’s 9/11 Report.

investigators conducting FISA surveillance or searches may consult with criminal investigators to coordinate efforts to investigate or protect against international terrorism.

These amendments to FISA eliminated the need for courts to compare the relative weight of foreign intelligence versus criminal law enforcement purposes, which has allowed for more coordination and sharing of information between intelligence officials and law enforcement officials and an increase in the use of FISA warrants. Before the passage of the Patriot Act, law enforcement officials had to determine whether to seek FISA authority to gather intelligence (which could make it difficult to later pursue a criminal case), or forgo the use of FISA in order to best preserve the potential for a criminal prosecution. Sections 218 and 504 eliminated the need for law enforcement officials to make a choice at the outset of a case which presents both intelligence and criminal aspects.

**c. Effects of Sections 218 and 504 on the decision to seek FISA searches and surveillance in the Mayfield case**

We attempted to determine whether these Patriot Act amendments affected the Mayfield investigation. In particular, we sought to determine whether, prior to the enactment of the Patriot Act, the government likely would have used FISA to conduct covert searches and surveillance of Mayfield. In addition, we evaluated whether the government could have obtained identical FISA authority under the more rigorous pre-Patriot Act primary purpose standard. Because of Section 218 of the Patriot Act, the government did not have to certify that intelligence gathering was “the purpose” of the investigation. Instead, the FISA application submitted in the Mayfield investigation contained a certification that a “significant purpose” of the requested surveillance and searches was to obtain foreign intelligence information.

In reviewing these issues, we interviewed witnesses from the FBI and Office of Intelligence Policy and Review (OIPR) who worked on the Mayfield matter and had both pre-Patriot Act and post-Patriot Act experience. All these witnesses stated that even in a pre-Patriot Act environment in which “the wall” was still in place, the government would have treated the Mayfield matter at the outset primarily as an intelligence case rather than a criminal case.

For example, the OIPR Attorney, who assisted in the preparation of the emergency FISA application and the subsequent written FISA application in the Mayfield case, told us that the Mayfield fingerprint match and its nexus to the Madrid bombings was an extremely “disconcerting piece of information and you would want to gather intelligence to find out what [Mayfield] was doing in the

United States, who he was talking to and what he was saying, who his contacts were.” The OIPR Attorney said that the Mayfield matter was a classic intelligence-gathering case and that a FISA warrant was the best tool for obtaining intelligence both before and after the Patriot Act.

FBI officials held the same view. Arthur Cummings, the FBI Section Chief of International Terrorism Operations Section I (ITOS I), stated that the principal objective of the Mayfield investigation initially was to gather as much information as possible to determine if Mayfield was a threat to the United States. He said that the FBI would have proceeded with a FISA application even if the Patriot Act had not been enacted. Similarly, Gary Bald, Assistant Director for the Counterterrorism Division (CTD) and now the Executive Assistant Director, said that the FBI was trying to determine who Mayfield was, whether he had any associates, and whether there would be any subsequent terrorist attacks in the United States. The Portland SSA who headed the Portland investigation stated that she believed the government would have proceeded with the FISA application and would have initiated a parallel criminal investigation separated from the intelligence investigation by “the wall.” All of the witnesses stated that the primary purpose at the outset of the Mayfield investigation was to collect foreign intelligence information and that the prospect of criminal prosecution of Mayfield was incidental.

In addition, some of the witnesses expressed doubts that the government could have obtained the electronic surveillance information they sought had it attempted to use traditional criminal investigative tools. Cummings told the OIG that he did not believe the FBI could have obtained criminal wiretap authority at the time the Mayfield FISA application was submitted, because he did not think the government “could show a criminal violation” by Mayfield. The Continental United States 4 (CONUS 4) SSA also told the OIG that he did not believe that the government had sufficient probable cause to obtain a criminal wiretap on Mayfield’s telephones because he did not think the FBI had probable cause to prove that Mayfield was using a particular telephone line in facilitation of a crime. However, the OIPR Attorney disagreed, stating that given the gravity of the Madrid bombings and the fingerprint identification of Mayfield, he believed the government could have obtained a criminal wiretap.

In addition, these witnesses pointed out that the information obtained through FISA warrants remains classified, while information obtained pursuant to a criminal wiretap must eventually be disclosed to the defendant. They stated that as a result, they believed FISA was the best tool for the government to identify and disrupt any future planned terrorist acts in the United States.

Based on our interviews and review of the evidence known to the FBI when it made the decision to seek emergency FISA authority, we believe that the government likely would have proceeded with a FISA application even before Sections 218 and 504 of the Patriot Act facilitated the removal of “the wall.”

[REDACTED]

Given the devastating impact of the Madrid train bombings and the uncertainty whether Mayfield might be part of a plan to conduct similar terrorist acts within the United States, the FBI’s need for intelligence information to help identify and disrupt any potential plot would have led the FBI to seek a FISA warrant rather than a criminal warrant. In our view, therefore, Sections 218 and 504 did not affect the government’s decision to pursue FISA search and surveillance authority in this matter. Further, we believe that the government could have met the primary purpose standard that existed before the Patriot Act.

In sum, we concluded that, while the wording of the FISA application was affected by Sections 218 and 504, those sections did not affect the government’s decision or ability to seek a FISA warrant in the Mayfield case.

However, both Section 218 and 504 of the Patriot Act drastically altered the way in which FISA-derived information was used and shared once it was obtained. We discuss the Patriot Act’s effect on information sharing in this case in Section C, below.

## **2. Section 207 of the Patriot Act**

Section 207 of the Patriot Act caused a change in the language of the FISA order but, in our view did not affect the manner in which the Mayfield investigation was conducted.






Prior to passage of the Patriot Act, the FISA Court could issue an order authorizing law enforcement agents to conduct electronic surveillance of United States persons for an initial period of 90 days, with extensions for additional 90-day periods based on renewal applications by the government. The FISA Court could also authorize physical searches of any agent of a foreign power for initial periods of 45 days, with extensions for additional 45-day periods. According to the OIPR Attorney, due to the difference in time limits, OIPR often had to seek renewal of FISA physical search authority before the expiration of electronic surveillance authority in the same case, and then file a separate application for renewal of the electronic surveillance authority.

Section 207 of the Patriot Act changed the time period for which the FISA Court could issue orders authorizing physical searches from 45 days to 90 days. This amendment streamlined the FISA process by allowing FISA applications for both electronic surveillance and physical searches to be renewed simultaneously.

The FISA order obtained in the Mayfield investigation authorized physical searches for an initial period of 90 days, so this provision did affect the time period for which FISA search authorization was granted in the Mayfield investigation. However, all FISA-authorized physical searches in the Mayfield case were completed within the 45-day limit originally imposed by FISA. Thus, although Section 207 of the Patriot Act affected the length of time during which the FBI could have conducted physical searches, it had no impact upon the time or manner in which the FBI actually used the FISA authorization.

### 3. Section 206 of the Patriot Act

Some have speculated that “roving wiretaps” were conducted in the Mayfield investigation pursuant to the Patriot Act. Section 206 of the Patriot Act amended FISA to allow the FISA Court to authorize multi-point or “roving wiretaps.” A multi-point or roving wiretap order attaches to a particular suspect rather than to a particular telephone. Thus, if the suspect switches communication providers during the period authorized by a roving wiretap order, federal investigators do not have to seek a new court order authorizing surveillance on the new telephone line. In order to authorize a multi-point or roving wiretap under Section 206, the FISA Court must find probable cause to believe that the actions of the target of the FISA application have the effect of thwarting the surveillance (e.g., frequently switching telephones). 50 U.S.C. § 1805(c)(2)(B).<sup>149</sup>

As discussed in Chapter Two, the government obtained FISA orders authorizing electronic surveillance of Mayfield   
  
  
  
 Thus, Section 206 of the Patriot Act had no impact on the Mayfield investigation.

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<sup>149</sup> Prior to the enactment of the Patriot Act, federal investigators had authority to seek roving wiretap orders in criminal investigations pursuant to 18 U.S.C. § 2511. Section 206 of the Patriot Act amended FISA to afford parallel authority in foreign intelligence investigations.

#### 4. Section 213 of the Patriot Act

Section 213 of the Patriot Act authorized delayed notification of the execution of criminal search warrants, which are sometimes referred to colloquially as “sneak and peek” searches. There has been much public discussion concerning whether Mayfield was the subject of such searches.

Criminal search warrants typically require law enforcement officials to immediately notify an individual whose home or office has been searched. However, federal courts can permit delayed notification of the execution of a criminal search warrant if immediate notification would cause the suspect to flee, destroy evidence, or otherwise compromise an ongoing investigation. *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Pangburn*, 983 F.2d 449 (2d Cir.1993).

Section 213 of the Patriot Act authorized delayed notification of the execution of criminal search warrants in cases where the government can show that notice of the search would create an “adverse result.”<sup>150</sup> By doing so, Section 213 essentially extended the availability of delayed notice criminal search warrants in any federal court in all types of cases, including terrorism investigations.

However, we found that there were no delayed-notice criminal searches conducted in the Mayfield investigation. As described in Chapter Two, the government conducted covert physical searches of Mayfield’s home and office, but the covert searches were conducted pursuant to a FISA warrant, not pursuant to criminal search warrants.

The searches conducted by the FBI of Mayfield’s office, home, and vehicles on May 6, after his arrest, were conducted pursuant to traditional criminal search warrants. Mayfield or Mayfield’s wife received immediate notification of those searches. The government did not seek or obtain authority under Section 213 of the Patriot Act to delay notification of those searches. In sum, Section 213 of the Patriot Act, which allows for delayed notification searches, had no bearing on the searches conducted in this case.<sup>151</sup>

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<sup>150</sup> According to 18 U.S.C. § 2705(a)(2), an adverse result includes, among other things, flight from prosecution, the destruction of or tampering with evidence, or the intimidation of a witness.

<sup>151</sup> On March 24, 2005, the DOJ Civil Division notified Mayfield’s counsel by letter that Mayfield’s residence had been subject to FISA-authorized physical searches. The letter also stated that Mayfield was the target of other FISA-authorized surveillance and searches, but did not offer any details regarding the additional FISA surveillance and searches.



## 5. Section 214 of the Patriot Act

As described in Chapter Two, the FBI conducted FISA-authorized electronic surveillance of Mayfield [REDACTED]. Pursuant to 50 U.S.C. § 1801, the FISA Court can authorize the government to intercept and monitor the content of, among other things, telephone communications. Prior to the Patriot Act, when the government sought authority to monitor call content under this provision of FISA, it also regularly included requests for authority to obtain what is known as “pen register” or “trap and trace” information on the calls. This allows the FBI to obtain information on the telephone numbers of the incoming and outgoing calls and related call data such as the date, time, and duration of the calls. The OIPR Attorney characterized the authority to obtain both call content and pen register/trap and trace information under Section 1801 as “full FISA” authority. Alternatively, pursuant to 50 U.S.C. § 1842, the FISA Court can authorize the government to obtain only pen register/trap and trace information and not the content of the calls.

Section 214 of the Patriot Act changed the standards under which the government can obtain FISA pen register/trap and trace authority under 50 U.S.C. § 1842. In a pre-Patriot Act FISA application seeking only pen register/trap and trace authority, the government had to show that: (1) the information sought was relevant to an ongoing foreign intelligence or international terrorism investigation, and (2) the targeted lines were being used by an agent of a foreign power. Section 214 of the Patriot Act eliminated the second requirement, thus making it easier for the government to obtain authorization solely for pen register/trap and trace information.

However, Section 214 did not affect the showing the government must make to obtain “full FISA” authority to intercept both the contents of the calls and the pen register/trap and trace information. Both before and after the Patriot Act, in order to obtain a “full FISA” the government had to show not only a probable cause nexus between the target and a foreign power, but also that the target was using or about to use the targeted device.

Our review of the Mayfield FISA application determined that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] Therefore, Section 214 of the Patriot Act had no bearing on the Mayfield investigation.

**B. The Impact of the Patriot Act Amendments on the Use of National Security Letters in the Mayfield Investigation**

The FBI issued [REDACTED] National Security Letters (NSLs) in the Mayfield case requesting [REDACTED]. Pursuant to 18 U.S.C. § 2709, 12 U.S.C. § 3414, and 15 U.S.C. § 1681, the FBI can issue NSLs in intelligence cases to obtain telephone toll and transactional records and certain financial information.

Section 505 of the Patriot Act amended the certification requirements for issuing NSLs. Prior to the Patriot Act, the FBI could issue NSLs only upon the certification of high-level officials at FBI Headquarters. The certification had to specify that there were specific and articulable facts giving reason to believe that the information sought pertained to a foreign power or agent of a foreign power. Section 505 of the Patriot Act amended these provisions in two ways. First, Special Agents in Charge (SAC) of FBI field divisions may now certify NSLs. In addition, the certification requirement has been relaxed. The SAC need only specify that the information sought is "relevant" to an authorized investigation to protect against international terrorism. Thus, there is no longer any requirement that the FBI certify that the information sought pertains to a particular target of an investigation.

The FBI issued [REDACTED] NSLs in the Mayfield investigation to obtain [REDACTED]. All of the NSLs were certified by the Portland Division SAC, who used the lower certification standard under the Patriot Act amendment.

The Portland SSA said that even though the Patriot Act made it easier to obtain NSLs, she thought the FBI would have issued most of the NSLs in this case under the pre-Patriot Act standard because: [REDACTED]

[REDACTED]<sup>152</sup> She said, however, that in order to answer whether the FBI would have issued the identical NSLs under the pre-Patriot Act standard, she would have to review the entire case file and determine whether, based on the information in the file at the time the FBI sought any particular NSL, the FBI could have constructed an argument that the particular piece of information sought – such as [REDACTED] – directly pertained to Mayfield. The Portland SSA acknowledged that as drafted, all of the NSLs sought information that could be characterized simply as being simply relevant to the investigation.

We reviewed the NSLs the FBI issued in the Mayfield investigation. It is possible that the FBI would have been able to make the requisite certification under the pre-Patriot Act standard for some of the NSLs because the information sought pertained directly to Mayfield. However, it is not clear from several other of the NSLs whether the FBI could have made the requisite certification under the old standard because those NSLs appear to seek information that was simply relevant to the investigation rather than directly pertaining to Mayfield. It would be difficult to determine now whether, at the time the FBI issued those NSLs, it had information that would have supported a certification under the old standard. However, based on our review, we believe that the FBI may not have been able to make the requisite certification under the pre-Patriot Act standard to issue some of the NSLs in the Mayfield case.

**C. Effects of Patriot Act Amendments on Information Sharing in the Mayfield Case**

Because of the Patriot Act’s dismantling of “the wall” between criminal and intelligence investigators, the FBI was able to use intelligence and criminal investigative tools simultaneously. The FBI was also able to freely share between criminal and intelligence personnel the information gathered by the use of those tools in the Mayfield investigation. As described in Chapter Two, in conducting the Mayfield investigation, the government used FISA and NSLs in addition to traditional criminal investigative tools such as grand jury subpoenas and (post-arrest) criminal search warrants. In addition, FBI agents worked closely with criminal prosecutors and law enforcement agents throughout the Mayfield investigation.

FBI and DOJ employees involved in the Mayfield investigation confirmed that Sections 218 and 504 of the Patriot Act facilitated the sharing of

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152 [REDACTED]

information between criminal and intelligence officers in the investigation. For example, the Portland SSA told us that the Patriot Act allowed “a free flow of information” between the FBI and the U.S. Attorney’s Office. She said that members of the Portland-based Joint Terrorism Task Force (JTTF) were so “embedded” in the investigation that they were privy to most of the information being discovered through the use of FISA in the Mayfield investigation.<sup>153</sup> The Portland SSA said that FBI agents freely discussed with the U.S. Attorney’s Office and JTTF members pertinent information contained in Mayfield [REDACTED] [REDACTED] monitored pursuant to the FISA order.<sup>154</sup> The CONUS 4 analyst and others who worked on this matter confirmed that the Patriot Act made it much easier to share FISA information in the Mayfield investigation with law enforcement agents.

We inquired whether, before the Patriot Act, the FBI would have disclosed all of the FISA-derived information that it provided in this case to criminal prosecutors and investigators. The Portland SSA told us that she believed the FBI would have opened concurrent criminal and intelligence investigations separated by “the wall” prior to the Patriot Act. She said that although she would have sought to pass some information over “the wall” in that circumstance, the extent of information sharing would not have been as great as occurred in this case. The Portland SSA said, for example, that if the FBI had obtained information from the FISA that was significant to the criminal investigation, she would have sought permission to pass that information over “the wall” but she could not say whether permission would have been granted.

The Portland SSA also said that the daily discussions of information with the prosecutors and the JTTF members that occurred in this case would not have occurred before the Patriot Act dismantled “the wall.” She said the prosecutors and criminal investigators would not have been embedded in the investigation and would not have been privy to all of the pertinent FISA information as they were in this case.

We concluded that the Patriot Act amendments had the effect of greatly increasing the amount of intelligence information in the Mayfield matter that was shared with criminal prosecutors and investigators.

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<sup>153</sup> The JTTF is composed of representatives from approximately 20 federal, state, and local law enforcement agencies, such as the U.S. Secret Service, the U.S. Coast Guard, and the Oregon State Police.

<sup>154</sup> The Portland SSA said, however, that due to concern over leaks, the JTTF members were instructed not to share the information with their respective agencies.

In addition to expanding the amount of information that could be shared by intelligence officials with criminal investigators, the Patriot Act also made it easier for the FBI to share certain criminal grand jury information in the Mayfield investigation with other intelligence agencies. Section 203 of the Patriot Act amended Federal Rule of Criminal Procedure 6(e) to permit the disclosure of federal grand jury information involving intelligence information to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist that official in the performance of their duties. Prior to this amendment, the sharing of grand jury information was more strictly limited. Rule 6(e) was generally interpreted to prohibit federal prosecutors from disclosing grand jury information to intelligence and national defense officials unless those officials were themselves assisting the criminal investigation. Fed. R. Crim. P. 6(e)(3)(B); *United States v. Sells Engineering*, 463 U.S. 418 (1983).

In the Mayfield investigation, the government used numerous grand jury subpoenas to obtain relevant information about Mayfield. According to court documents filed by the Portland U.S. Attorney's Office, grand jury information relating to Mayfield was disclosed or could have been disclosed to the CIA, the National Security Council, the Department of Defense, the Department of Homeland Security, the Department of the Treasury, and the NSA. Prior to the Patriot Act, such grand jury information could not have been shared with officials in those agencies unless they were participating in the criminal investigation.

Thus, Section 203 affected the amount of information the FBI was able to share with intelligence agencies in this case. For example, we reviewed the summary case reports that the FBI shared with ██████ in this matter. Although most of the information the FBI included in those reports was FISA-derived, the FBI also included some information obtained through grand jury subpoenas.

However, both before and after the Patriot Act, the FBI could share with the intelligence community information obtained through FISA and other intelligence tools such as NSLs and *ex parte* court orders for business records.<sup>155</sup> The Portland SSA stated that, with limited exceptions, she believed that most of the grand jury information in this case could have been obtained

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<sup>155</sup> Prior to the Patriot Act, pursuant to 50 U.S.C. § 1862, the FBI could apply to the FISA Court in foreign intelligence cases for an order requiring production of business records such as common carrier travel records and hotel records. In order to obtain such an order, the FBI had to show that the records were sought for a foreign intelligence investigation and that the records pertained to an agent of a foreign power. Section 215 of the Patriot Act amended this provision, but the amendments are not relevant here because the FBI did not seek *ex parte* court orders for business records in this case.

and shared with intelligence agencies prior to the Patriot Act through use of those alternative tools. The exceptions were certain types of records that, prior to the Patriot Act, could not be obtained using NSLs or ex parte court orders.

We reviewed the grand jury subpoenas issued in this case and concluded that although the FBI likely could have obtained some of the information gained through use of those subpoenas prior to the Patriot Act through NSLs or ex parte court orders, the FBI could not have obtained all of it. Thus, Section 203 made it possible for the FBI to share more information with the intelligence community in this case than it could have prior to the Patriot Act.

**D. Minimization Requirements**

Although the Patriot Act had a significant impact on the amount of FISA information that was shared with prosecutors and other criminal law enforcement agencies, the government was under an obligation to undertake procedures to “minimize” what it collected and the manner in which it made the information available to other intelligence and law enforcement agencies. In this section, we discuss those minimization procedures.

Minimization procedures are designed to protect against the acquisition, retention, and dissemination of non-public information concerning a U.S. person which is not foreign intelligence information. Pertinent information is information which the FBI has determined has potential foreign intelligence value. The FBI must minimize non-pertinent information, which means, among other things, that it cannot enter such information into any FBI database. Each FISA application must contain proposed minimization requirements concerning the conduct of the surveillance and searches in that case. 50 U.S.C. §§ 1804(a)(5), 1823 (a)(5), 1801(h), 1821(4).

The FISA Court in this matter ordered the FBI to follow [REDACTED] electronic surveillance and physical search minimization procedures, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

Lead Case Agent 2 was responsible for ensuring that the minimization procedures were followed. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

156 [REDACTED]

157 [REDACTED]

[REDACTED]

[REDACTED]

**E.    OIG Conclusions Regarding Impact of Patriot Act Amendments on the Mayfield Investigation**

In sum, we concluded that the Patriot Act amendments discussed above did not affect the government’s decision to seek FISA authority in this case, and did not affect the scope of information the government collected pursuant to FISA surveillance and searches. However, the Patriot Act had a significant effect on the dissemination of intelligence information about Mayfield throughout the law enforcement community. The Patriot Act allowed the government to freely share with prosecutors and JTTF members intelligence information about Mayfield gathered in the FISA surveillance and searches. The Patriot Act also allowed the government to share grand jury information with the intelligence community, some of which could not have been obtained or shared prior to the Patriot Act through intelligence tools. Thus, a significant amount of information about Mayfield was shared with a wide variety of law enforcement agents and intelligence agents that could not have been shared prior to the Patriot Act.

This increased sharing of information that took place between intelligence and criminal law enforcement personnel in this case was exactly what was intended by the amendments to the Patriot Act. The Patriot Act was designed to remove barriers to the coordination of intelligence and criminal investigations. The FBI used these new tools to aggressively pursue leads



when it believed that Mayfield was linked to a terrorist attack through a fingerprint. While such actions seem appropriate given the fingerprint identification, this case also demonstrates that, as a result of the increased information sharing now allowed by Patriot Act, the consequences of a mistake like the one made in the Mayfield case have increased.

Finally, we did not find any evidence that the FBI misused any provisions of the Patriot Act in conducting the investigation of Mayfield. [REDACTED]

[REDACTED], such as Section 206 (roving wiretaps), Section 213 (delayed notification searches), Section 214 (pen registers), and Section 215 (ex parte court orders for tangible things). While in this case the FBI relied on the Patriot Act amendments that affected the standard for obtaining a FISA warrant (Section 218), the certification requirement for obtaining NSLs (Section 505), and the amendments that allowed for increased sharing of intelligence information (Sections 203, 218, and 504), given its belief that Mayfield's fingerprints were on the plastic bag containing detonators found in Madrid, we did not find evidence to conclude that the FBI abused those provisions.

## **II. Analysis of the Role of Mayfield's Religion in the Investigation**

Another important issue raised in the wake of the Mayfield investigation is whether Mayfield was "targeted" because of his religion. To examine this issue, the OIG evaluated whether Mayfield's religion improperly influenced the FBI's actions in the investigation and arrest of Mayfield.

We concluded that the FBI did not initiate its investigation of Mayfield because of his religion. As described in Chapter Four, the FBI Laboratory examiners did not know Mayfield's religion when they made the initial fingerprint identification. Similarly, when the fingerprint identification was communicated to the FBI CTD and the Portland Division, neither entity was given information about Mayfield's religion. The evidence indicates that the FBI first learned of Mayfield's religion only after the FBI had opened a field investigation of Mayfield and had initiated a "full court press" to gather all intelligence available on him. Thus, we concluded that Mayfield's religion played no role in the FBI's decision to initiate a full field investigation of him.

In addition, every witness we interviewed concerning the FBI's investigation of Mayfield told us that the fingerprint identification was the primary factor driving the course of the investigation. For example, the Portland SSA said the fingerprint was the "crucial piece of evidence." The CONUS 4 SSA concurred, stating that "everything else was secondary." The

ITOS I Assistant Section Chief said the fingerprint identification was the primary impetus for the investigation of Mayfield.

Several witnesses acknowledged, however, that Mayfield's religion was a factor in the investigation. The FBI had been informed that the SNP believed the Madrid bombings had been carried out by radical Muslims. Thus, several witnesses stated that they expected to discover in investigating the case that the suspects would be Muslim. A Portland Assistant United States Attorney called Mayfield's religion a "mildly corroborating factor." The CONUS 4 analyst said that Mayfield's religion "bolstered" the fingerprint identification, and added that it would have been "puzzling" if the FBI Laboratory Latent Print Units (LPU) had identified someone who was not Muslim. Karin Immergut, the U.S. Attorney for the District of Oregon, likewise stated in her interview that, "I think the fact that he was a Muslim convert couldn't be ignored."

However, witnesses also said that although Mayfield's religion was considered a factor, it was not an "overriding" factor and it did not affect the course of the investigation. For example, the Portland SSA told us that the goal of her squad was to find out how Mayfield's fingerprint got on the bag of detonators, and that her squad would have "followed [Mayfield] just as hard if he had been a Christian." She said the Portland Division would not have done anything differently if Mayfield was not a Muslim. Similarly, the ITOS I Assistant Section Chief told us that if the fingerprint had been matched to a "librarian in Iowa," the FBI would have conducted an investigation to see where the librarian "fit in." The CONUS 4 analyst said that if the FBI LPU had identified someone who was not Muslim, they still would have had to "run it down."

Several witnesses said Mayfield's religion was not a factor in the investigation, but that his association with suspected terrorists was. The Portland SSA said Mayfield's associations with people the FBI viewed as potential terrorists were more important than his religion. ITOS I Section Chief Cummings said that what concerned the FBI about Mayfield were his associations with other Muslims who were considered to be extremists by the FBI. Similarly, the CONUS 4 SSA told us that Mayfield's telephone contact with suspected terrorists was a factor in the investigation and that "Mayfield being a Muslim was not."<sup>158</sup>

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<sup>158</sup> The CONUS 4 SSA served as the FBI declarant on the declaration submitted in support of the [REDACTED] FISA application. [REDACTED]

For his part, Mayfield's attorneys have alleged in the civil suit that the government submitted an inflammatory, demonizing, and prejudicial affidavit in support of Mayfield's arrest that made reference to his religion or his contacts with other Muslims. Paragraphs 13 and 14 of the affidavit detail Jeffrey Leon Battle's conviction on federal terrorism charges and Mayfield's legal representation of Battle in an unrelated matter. Paragraphs 15-18 of the affidavit detail Mayfield's telephone contacts with Pete Seda, also known as Perouz Sedaghaty, then Director of the U.S. offices of the Al-Haramain Islamic Foundation (AHIF). According to the affidavit, six other AHIF offices had been designated as terrorist organizations by the U.S. Department of the Treasury. Paragraph 19 of the affidavit states that Mayfield was observed "[driving] to the Bilal mosque ... on several occasions." Paragraph 20 states that Mayfield had placed an advertisement for his law office in a publication called "Business Link Directory" and that the registered agent of the company that administered the directory had past business dealings with an individual alleged to be the personal secretary to Usama Bin Laden and had been convicted in connection with the 1998 U.S. Embassy bombings in Kenya and Tanzania.

These paragraphs were included in the affidavit not because they refer to Mayfield's religion but rather because they outline Mayfield's connections with others who were either known or suspected terrorists. As described above, the affidavit outlines Mayfield's connection with Battle, a convicted terrorist; Mayfield's telephone contacts with Sedaghaty, the director of a organization with offices designated by the U.S. government as terrorist organizations; and an advertisement placed by Mayfield in a directory administered by an individual linked in past business dealings to another individual convicted of bombing a U.S. Embassy (and a known associate of Usama Bin Laden).

With respect to paragraph 19, Immergut told us that the fact that Mayfield attended the mosque, standing alone, was not meaningful in the investigation. She said that what was important to the government was the fact that members of the Portland Seven who had pled guilty to terrorism charges had attended the Bilal mosque. She said the government wondered whether there were others in the mosque who were planning "a jihad." When asked why paragraph 19 of the affidavit did not explain the significance of Mayfield's attendance at the Bilal mosque, Immergut acknowledged that "we could have clarified why this was a more significant point." We agree that the government should have explained what it believed to be the significance of Mayfield's attendance at the mosque, rather than simply stating that he attended the mosque.

Based on all the evidence, we concluded that the FBI's field investigation of Mayfield was initiated because of and largely driven by the identification of his fingerprint on evidence associated with the train bombings, not by his

religion. We also believe that the affidavit provided information that the government believed was relevant to the investigation.

We believe the FBI would have sought covert search and surveillance authority irrespective of Mayfield's religion. Moreover, we did not find evidence suggesting that the investigation was prolonged because Mayfield is a Muslim. After the decision to seek covert surveillance and search authority, the FBI's investigation between March 20 and May 6 largely consisted of carrying out the FISA searches and seizures, conducting logical follow-up investigation, and examining the information obtained. By April 19, the government had decided that it would finish reviewing and analyzing the large volume of evidence gathered by the end of May and "if no additional evidence was found" to link Mayfield to the bombings, it would end the covert investigation and seek to interview Mayfield.

In our view, the FBI's field investigation appropriately sought information about a subject who had been positively identified by the FBI Laboratory as having left a fingerprint on a bag of detonators found in Madrid. When the FBI Laboratory continued to declare that the fingerprint was Mayfield's, we do not believe it was unreasonable for the Portland FBI agents to aggressively pursue their investigation.

### **III. The FBI's Participation in the Preparation of the Material Witness and Criminal Search Warrants**

In this section, we evaluate the accuracy of certain representations made by the FBI in the affidavits submitted in support of the material witness warrant and the criminal search warrants. Lead Case Agent 1, the original FBI affiant, Werder, and Supervisory Fingerprint Specialist Green all participated in the preparation of the affidavit submitted to the Court in support of the material witness warrant.

In conducting this assessment, the OIG recognized that the U.S. Attorney's Office and DOJ Criminal Division were involved in the review and approval of the final version of the affidavits and were ultimately responsible for determining how to satisfy the government's ongoing duty of candor.

The OIG is not analyzing whether government attorneys satisfied their duty of candor. Nor is the OIG evaluating the merits of the decision to seek a material witness warrant. The decision to seek a material witness warrant, while clearly supported by Portland Division SAC Robert Jordan, was ultimately made by Chris Wray and David Nahmias, both of the DOJ Criminal Division, with input from U.S. Attorney Karin Immergut. As mentioned earlier,

DOJ Office of Professional Responsibility (OPR) evaluated the attorneys' conduct in this case.

The FBI is responsible, however, for assuring that statements in sworn affidavits regarding information known to its agents and fingerprint examiners are factually accurate, logically supportable, and not misleading. The OIG therefore investigated the FBI's conduct with respect to this responsibility, and we address this issue in this section.

#### **A. Representations Relating to the FBI's Fingerprint Identification**

The FBI described the Laboratory's identification of Latent Fingerprint 17 (LFP 17) in paragraph seven of the affidavit signed by SA Werder and submitted in support of the material witness warrant. This language was initially drafted by the original FBI affiant and AUSA 2 in March 2004. As described in Chapter Two, there were no significant differences between the first draft of this paragraph circulated by AUSA 2 on March 26 and the final version filed with the Court on May 6. The final version states:

On March 17, 2004, the SNP provided the FBI with photographic images of latent fingerprints that were recovered from the plastic bag containing the detonators that was found in the Kangoo van, including Latent Finger Print # 17 (hereinafter LFP#17). All the fingerprints were provided to the Latent Print Unit at the FBI Laboratory in Quantico, Virginia. Senior Fingerprint Examiner Terry Green, submitted LFP#17 into the Automated Fingerprint Identification System (AFIS) for possible matches. BRANDON BIERI MAYFIELD was identified as a potential match to the unknown print. Senior Fingerprint Examiner Green then requested and received two known fingerprint cards of MAYFIELD. The first card contained the known prints of MAYFIELD's obtained in connection with a criminal arrest for burglary in Wichita, Kansas on December 22, 1984. The second fingerprint card contained the known prints of MAYFIELD obtained during his service in the United States Army. Both cards containing the known fingerprints of MAYFIELD were compared to LFP#17 received from Madrid. Senior Fingerprint Examiner Green identified in excess of 15 points of identification during his comparison and has advised the affiant that he considers the match to be a 100% identification of BRANDON BIERI MAYFIELD. The 100% identification was verified by Supervisory Fingerprint Specialist Michael Wieners, Unit Chief, Latent Print Unit, and Fingerprint Examiner John T. Massey, who is a retired FBI fingerprint examiner with over 30 years of experience on contract

with the Latent Fingerprint Section of the FBI Laboratory.  
(Emphasis added.)

The OIG found that the underlined information set forth in this paragraph was inaccurate in several respects. First, although the images of latent prints originated with the SNP, they were provided to the FBI by INTERPOL, not the SNP. Moreover, they were provided on March 13 and 14, not March 17. Also, Green and Wieners told the OIG that Green made the identification on March 16, before he requested the original fingerprint cards from the FBI's Criminal Justice Information Services Division (CJIS), based on a digital image of Mayfield's criminal print available to him at his computer.

In addition, contrary to the affidavits, Wieners did not "verify" the identification, as that term is used in the FBI Laboratory's Standard Operating Procedures (SOPs) and the SWGFAST Methodology. As detailed in Chapter Three, these documents define a verification as an "independent examination by another examiner resulting in the same conclusion." Although Wieners told the OIG that he had "no problem" with the statement that he had verified the identification, Wieners acknowledged that he did not perform a complete and independent examination at the time of the identification. He was not required to do so under the Laboratory's SOPs. The Laboratory's procedures only required verification by a single examiner, who in this case was John T. Massey.

Wieners told the OIG that he studied the print very carefully in the course of preparing for the April 21 meeting in Madrid, at which time he became as familiar with the print as he would have been had he done a complete examination in the time of the identification. However, it does not appear that the statement in the affidavits that Wieners verified the print was made with reference to this activity, since the statement first appeared in a draft of the affidavit circulated on March 26, well before Wieners had seen the April 13 Negativo Report and begun preparing for his trip to Madrid. We concluded that the statement in the affidavits that Wieners "verified" the identification was not accurate.<sup>159</sup>

The OIG concluded that these errors in the affidavits reflect a regrettable inattention to accuracy. AUSA 2 and Lead Case Agent 1 told the OIG that they read the draft language to Green at various stages in the process. Green

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<sup>159</sup> The affidavits also stated incorrectly that Green "advised the affiant" (Werder) that he considered the match to be a 100 percent identification. However, Werder told the OIG that he had not spoken to the Laboratory. This error was likely the result of the late substitution of Werder as the affiant instead of Lead Case Agent 1. Nonetheless, Werder did not catch this error.

confirmed that the original FBI affiant and possibly others read the language to him. Under this circumstance, the OIG concluded that the FBI – probably Green – should have caught and corrected these errors.<sup>160</sup>

## **B. Representations Relating to the SNP**

The FBI described its communications with the SNP regarding the Mayfield identification in paragraph eight of the Werder affidavit. This paragraph states:

In mid-April it became apparent that the preliminary findings of the Forensic Science Division of the SNP concerning the fingerprint were not consistent with those of the FBI Laboratory. As a result, a meeting was held between a representative of the FBI's Latent Fingerprint Unit and approximately ten members of the Forensic Science Division of the SNP, including representatives from both the automatic fingerprint identification section and the latent fingerprint section on April 21, 2004. Before the meeting SNP personnel indicated that their report of the examination of LP#17 was preliminary and that a final determination had not been rendered. The SNP also indicated that they had not gone into the level three characteristics (ridge edges, ridge breaks, pores, and incipient ridge events) utilized by the FBI when making their initial comparison. [REDACTED]

[REDACTED] and indicated that the Forensic Science Division intended to continue its analysis of the latent print comparison. I have been advised that the FBI lab stands by their conclusion of a 100% positive identification that [sic] LFP#17 as the fingerprint of BRANDON BIERI MAYFIELD. (Emphasis added.)

There are several issues with this paragraph, which we discuss below.

Description of the April 13 Negativo Report. The first issue is whether the FBI failed to disclose the fact that on April 13 the SNP issued a report in which it stated that it did not agree with the FBI's identification of Mayfield. As described in Chapter Two, in late April, Lead Case Agent 1 drafted a more detailed version of this paragraph that specifically identified the April 13 Negativo Report and described the FBI's uncertainty regarding whether the

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<sup>160</sup> We concluded that Green's failure to correct the errors in this paragraph of the affidavits did not constitute intentional misconduct. However, we believe that the FBI Laboratory should reiterate to its examiners the importance of ensuring the accuracy of information attributed to them in FBI affidavits. As noted in Chapter Five, Green's current position in the FBI Laboratory does not involve casework.

SNP's finding was equivalent to an "inconclusive" or an "exclusion" determination, and whether the finding was a preliminary or final determination. At the time, the Madrid Legat insisted that this information be removed from the affidavit because it had been provided to the FBI in confidence. The government then substituted the more general language that the SNP's "preliminary findings" were "not consistent" with the FBI's identification. According to contemporaneous e-mail communications between Lead Case Agent 1 and the Madrid Legat, this language was meant to address the Madrid Legat's concern while satisfying the government's obligation to be candid with the Court.

We believe that the change in the language of the affidavit describing the April 13 Negativo Report was not an intentional effort to mislead the judge about the contents of the report, but rather the product of an effort to accommodate the Madrid Legat's concerns about protecting the confidence of his sources in Spain. The OIG notes that the April 13 Negativo Report itself provides at most slightly more detail than the "not consistent" language in the affidavits. The April 13 Negativo Report states that the results of the comparison were "negativo" (negative) without further explanation, and indicates that the SNP would continue its analysis. The final affidavit's characterization of the report as "preliminary" was consistent with the statement in the report that the SNP's examination was continuing and with characterizations of the report provided orally to the FBI by the SNP. The statements in the affidavit that the SNP's findings were "not consistent" with the FBI's identification of Mayfield was an accurate characterization of the "negativo" result contained in the April 13 Negativo Report, even if it did not specifically identify the written report. The OIG concluded that the final affidavit adequately conveyed the relevant information.

Description of the April 21 Meeting. The second issue is whether the FBI accurately described the April 21 meeting in Madrid. Of particular concern is the statement that "[a]t the conclusion of the meeting it was believed that the SNP felt satisfied with the FBI Laboratory's identification of LFP#17." Lead Case Agent 1 told the OIG that he composed this language based on a memorandum the Madrid Legat drafted the day after the meeting, which stated that "at the conclusion of the meeting all of the SNP personnel seemed satisfied with the FBI's identification." This apparently led the judge to erroneously conclude that the SNP had agreed with the FBI's identification. During a hearing on May 17, Judge Jones took issue with Mayfield's attorneys for relying on reports in the newspapers that the SNP disagreed with the FBI, stating, "I have no affidavit from any Spanish authorities as to questioning the



fingerprint. The only information I have is that after consulting with the FBI, that they agreed with the 100 percent identification.”<sup>161</sup>

The OIG interviewed six witnesses who were present at the April 21 meeting in Madrid, including all three FBI representatives (Wieners, the Madrid Legat, and an ETIU SSA) and three SNP participants. The witnesses differed in their specific recollections of the SNP’s reaction to Wieners’ presentation, but all agreed on one key fact: the SNP had not determined or communicated on April 21 that it was in agreement with the FBI that Mayfield was the source of the print. Rather, the SNP agreed to conduct a reexamination of the print in light of the FBI’s presentation.

The Madrid Legat, who served as the translator at the meeting, told the OIG that the SNP only agreed to reexamine the print. He stated that he thought that Wieners’ presentation was very persuasive, and that most of the SNP personnel seemed impressed by it, but that the SNP examiners had not yet agreed with the FBI’s identification. The Madrid Legat further stated that he did not come away from the meeting with any particular confidence that the SNP would ultimately agree with the FBI’s conclusions. An ETIU SSA (who spoke Spanish) and Wieners (who was relying on the Madrid Legat for a translation) both told the OIG that they came away from the meeting with the expectation that the SNP would eventually agree with the FBI, but both acknowledged that the SNP had not specifically done so at the April 21 meeting. Contemporaneous documents appear to confirm that the FBI participants came away from the April 21 meeting under the impression that Wieners’ presentation had been persuasive, but they do not support the conclusion that the SNP had communicated that it was “satisfied” that the FBI’s identification of Mayfield was correct.<sup>162</sup>

The SNP witnesses we interviewed denied that the SNP expressed agreement with the FBI’s identification at the April 21 meeting. The SNP Section Chief who signed the April 13 Negativo Report stated that although the

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<sup>161</sup> In citing this statement, we are not suggesting that Judge Jones’ belief about the SNP’s position was a decisive factor in his decision to detain Mayfield. Even after learning that the SNP had identified Daoud, Judge Jones initially declined to release Mayfield. We disagree, however, with comments made by the U.S. Attorney’s Office that the judge’s statement was merely an “offhand” comment. The judge’s statement was made in response to a specific argument made in support of a motion for Mayfield’s release.

<sup>162</sup> Later, at a June 9 meeting in Madrid, the SNP representatives told the FBI what their reaction had been to Wieners’ presentation of April 21. The Portland SSA, AUSA 2, Meagher, and Wieners all made notes or memoranda of the June 9 meeting indicating that at least some of the SNP examiners confirmed that they were initially persuaded by Wieners’ April 21 presentation that Mayfield was the source of LFP 17 and that it was only later, upon further analysis, that these SNP examiners concluded it was not Mayfield’s print.

SNP participants expressed satisfaction with the detail and meticulousness of the FBI's presentation, they did not express agreement with the FBI's conclusions. He told the OIG that there was an exchange of views and that all of the participants were sticking to their own positions. He stated that the SNP told the FBI during the meeting that the identification of Mayfield was incorrect. A supervisor in the SNP Laboratory also told the OIG that the SNP told the FBI that the identification was negative from their point of view. He told the OIG that he did not recall that anyone from the SNP agreed with the FBI's identification.<sup>163</sup>

Although the recollections of the FBI witnesses varied from those of the SNP witnesses on the degree of satisfaction expressed by the SNP representatives at the meeting, all of the FBI witnesses acknowledged that the SNP had only committed to reexamine the prints and had not expressed agreement with the FBI's identification. The FBI witnesses may have been optimistic about what the SNP might ultimately decide, but they knew that decision had not been made yet.<sup>164</sup> In light of these facts, the OIG believes that

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<sup>163</sup> The recollection of the SNP witnesses was generally consistent with statements attributed to the SNP in a June 5 article in *The New York Times*. The article quoted a supervisor in the SNP Laboratory as stating, "The Spanish law enforcement officials kept pointing out discrepancies between their analysis and that of the F.B.I., but this did not sink in with the Americans." During our interview, the supervisor suggested that this quote was taken out of context, and did not reflect the gratitude that the SNP felt toward the FBI for its assistance. He stated that it was not that the FBI did not want to understand, it was just that it did not seem that the FBI representative was going to change his mind on the basis of what the SNP said. The article also quoted the supervisor as stating that the SNP "refused to validate' the F.B.I.'s conclusions and maintained the match was negative." The supervisor told the OIG that this quote was accurate. He reported that he understood that the FBI was requesting that the SNP validate or corroborate the FBI's identification, but that the SNP was adamant that it was not Mayfield's print. The SNP Section Chief said he did not recall any request from the FBI that the SNP state whether it agreed with the identification, but he did recall that the SNP told the FBI it did not agree with the identification.

The FBI participants, Wieners, the Madrid Legat, and an ETIU SSA, all disputed the descriptions of the April 21 meeting in *The New York Times* article. They said that the FBI was receptive to the issues that the SNP raised, but that Wieners had explanations for each apparent dissimilarity between LFP 17 and the Mayfield prints. They denied that the FBI ever requested that the SNP validate its findings during the April 21 meeting, and all three told the OIG that they came away from the meeting believing that the SNP would reconsider its examination.

<sup>164</sup> The U.S. Attorney's Office told the OIG that AUSA 2 had a conversation with Wieners shortly after he returned from Spain in which Wieners gave a description of the April 21 meeting that was consistent with the language used in the affidavit, that the SNP "felt satisfied" with the FBI's identification of Mayfield. However, AUSA 2's handwritten notes of her conversation with Wieners do not state that the SNP "seemed to agree" or "felt satisfied" with the FBI's conclusions, but rather that the "Spanish reserve [the] right to further examine [the print]." The April 26 telephone log notes of the Acting Unit Chief from the Laboratory describe a three-way call between Wieners, the Acting Unit Chief, and AUSA 2. According to these notes, Wieners "stated he was optimistic that they [the SNP] were going to review the evidence (continued)

the FBI should not have made the statement in the affidavits that “[a]t the conclusion of the meeting it was believed that the SNP felt satisfied with the FBI Laboratory’s identification of LFP#17.” That statement suggested to the judge that the SNP had expressed more agreement with the FBI than in fact was the case. Taken together with the statement later in the same sentence that the SNP “intended to continue its analysis,” the language was ambiguous and subject to misinterpretation by the judge.

Within days after the affidavits were filed and Mayfield was arrested, the FBI and the U.S. Attorney’s Office learned facts that were inconsistent with the statement in the affidavit that the SNP “felt satisfied” with the FBI’s identification of Mayfield. On May 7 (the day after the affidavit was filed and Mayfield was arrested), the Madrid Legat reported in an email to an ETIU SSA and the ITOS I Assistant Section Chief that an SNP official told him that there was still “disagreement” within the SNP regarding the fingerprint identification. This disagreement was also described in the CTS Attorney’s May 7 e-mail to the U.S. Attorney’s Office. On May 12, the SNP asked the FBI to provide additional inked fingerprints for Mayfield, stating that such prints were “essential” to completing its analysis, and the U.S. Attorney’s Office was made aware of this communication. In our view, the May 7 e-mails and the May 12 letter made it clear that the SNP had not yet completed its review or reached agreement with the FBI, and these communications underscore the ambiguous nature of the affidavit language assessing the SNP’s position.<sup>165</sup>

We attempted to assess responsibility for the inclusion of this ambiguous language in the affidavits. As noted above, the description of the April 21 meeting in the affidavits was drafted by Lead Case Agent 1, who relied on the Madrid Legat’s April 22 memorandum stating that “all of the SNP personnel seemed satisfied with the FBI’s identification.” Further, Lead Case Agent 1 circulated the draft affidavit to the Madrid Legat for his review before it was presented to the judge.

During his OIG interview, the Madrid Legat revised his April 22 assessment that the SNP “seemed satisfied” with the identification. He

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again, and they might publish a follow-up report.” Again, this description falls short of stating that the SNP agreed or felt satisfied with the FBI’s conclusions. Wieners told the OIG that he would not have made the statement in the affidavit that the SNP “felt satisfied,” because he thought some SNP examiners agreed and some did not.

<sup>165</sup> On May 14, 2004, the CTS Attorney sent an e-mail to three AUSAs in Portland stating, among other things, “Re the never ending saga on the fingerprint report – [The Madrid Legat] said still no movement. He agreed with your assessment that the Spanish have probably determined that their initial report is wrong and they have requested an additional copy of the prints in order to save face.” We do not believe that this speculative interpretation of the May 12 request from the SNP provided sufficient basis for the government to maintain, in light of other information, that the SNP “felt satisfied” with the FBI’s identification of Mayfield.

emphasized that while Wieners had been persuasive, and the SNP responded positively to his presentation, they did not explicitly agree with the FBI's conclusion and committed only to conducting a reexamination of the prints. Given the Madrid Legat's characterization of the meeting in his OIG interview, we believe that he should have told Lead Case Agent 1 not to state that the SNP "felt satisfied" with the identification when the Madrid Legat saw the draft language on April 29, before the affidavit was filed. The Madrid Legat told us that he would have preferred that the affidavit were phrased differently on this point. We found no evidence, however, that he conveyed that concern to anyone else at the time. Having participated in the April 21 meeting and served as translator for it, the Madrid Legat was in the best position to correct the characterization at the time, but we found no evidence that he made any effort to clarify or correct the affidavit on this point. Instead, at that time the Madrid Legat was focusing his attention on a different issue: whether the FBI should disclose the April 13 Negativo Report in the affidavit.<sup>166</sup>

We also believe that the participants involved in drafting the affidavits should have recognized the ambiguous nature of this language and should have consulted directly with the Madrid Legat to seek less ambiguous language. Failing that, we believe it would have been better practice to omit this ambiguous language from the affidavit.<sup>167</sup>

We also note that the U.S. Attorney's Office was involved in preparation of the affidavit language and was responsible for decisions regarding what

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<sup>166</sup> The Madrid Legat is retired from the FBI, so the issue of whether the FBI should take any action with respect to his conduct is moot.

<sup>167</sup> We concluded that the failure of Lead Case Agent 1 and Werder to recognize the ambiguous nature of this language did not constitute intentional misconduct. However, we believe that the FBI should remind its agents about the importance of ensuring that information provided in FBI affidavits is accurate and unambiguous.

Furthermore, in a letter to the OIG dated December 13 (Appendix L), U.S. Attorney Immergut stated: "[T]here should be no dispute but that Portland personnel did 'consult directly' with the Legat. We employed best practices by quoting the official report of the primary witness and then circulating the description of the meeting to that witness in order to ensure accuracy." As noted above, we do not dispute that the Portland personnel based their draft affidavit on the Legat's April 22 memorandum, quoted from that draft, and also sent the draft affidavit to the Madrid Legat on April 29 for his review. Our point is that even without prompting from the Legat, a better practice for the persons involved in drafting the language of the affidavit would have been to recognize that the statement that "it was believed that the SNP felt satisfied with the FBI Laboratory's identification" was potentially ambiguous. Alternatives included asking the Legat more specifically what the SNP said or leaving the characterizations of the SNP's "feelings" out of the affidavit altogether.

information was disclosed to the Court. DOJ OPR assessed the conduct of the U.S. Attorney's Office attorneys with respect to these matters.<sup>168</sup>

The OIG concluded that the statement about the agreement of the SNP should not have been included in the affidavits. It predictably had the effect of persuading the judge that more had taken place at the April 21 meeting than was in fact the case. In the affidavits, the FBI should have stated objective facts that were known by the participants: that the SNP's initial comparison yielded a "negative" result, that the SNP representatives agreed on April 22 to take another look at the prints, and that the FBI Laboratory stood by its identification of Mayfield.<sup>169</sup>

#### Disclosures to the FISA Court.

[REDACTED]

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<sup>168</sup> U.S. Attorney Immergut emphasized to the OIG the fact that the "Portland investigators did not have direct access to the evidence and were not able to communicate directly with the Spanish." We believe that Portland's lack of contact with the SNP counseled particular caution in stating a belief in the affidavit that the SNP "felt satisfied" with the identification of Mayfield. A better practice would have been to seek clarification from the Madrid Legat regarding the basis for his April 22 assessment of the SNP's satisfaction. The Madrid Legat might have provided the same clarification that he later provided to the OIG, to the effect that the SNP did *not* explicitly agree with the FBI's conclusion and committed only to conducting a reexamination of the prints. However, we recognize and agree with U.S. Attorney Immergut that the Madrid Legat did not offer such a clarification when he was asked to review the draft affidavit.

<sup>169</sup> U.S. Attorney Immergut's letter of December 13 (Appendix L) stated that our report "fails to account for the fact that on May 4, Portland FBI SAC Jordan and I (along with several members of our respective staffs) spoke directly with the Madrid Legat by teleconference. The Legat told us that *the SNP were about to issue a final report concurring with the FBI fingerprint identification*. This teleconference was specifically convened to consider whether Portland should recommend that a warrant be sought to detain Mr. Mayfield as a material witness." (Emphasis in original.) In interviews with the OIG, however, the Madrid Legat and SAC Jordan both said they had no recollection of the Legat making such a prediction. When the OIG asked the Madrid Legat whether at that time he had any idea of whether the SNP was going to agree with the FBI, the Madrid Legat said "absolutely not."

[REDACTED]

[REDACTED]

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[REDACTED]

Whether the FBI failed to disclose that the SNP disagreed with the identification. The fourth issue is whether the FBI knew prior to May 19 that the SNP had completed its reexamination of LFP 17 and had again reached the conclusion that it disagreed with the identification of Mayfield. If so, the FBI failed to convey that information (which would have contradicted the description in the affidavit of the SNP's perceived position) to the U.S. Attorney's Office for disclosure to the judge. As noted in Chapter Three, the former Director of the SNP Laboratory told the OIG that the SNP had completed its reexamination of the prints and reached its determination that Mayfield was

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<sup>170</sup> DOJ OPR examined the actions of the OIPR attorney on this issue as part of OPR's investigation of the conduct of DOJ attorneys in the Mayfield case.

not the source of LFP 17 before May 12. He told the OIG that he recalled that he communicated that result to the Madrid Legat at the time.

We reviewed all contemporaneous written communications provided by the FBI regarding the identification of LFP 17 during the period between April 22 (the date of the first meeting in Madrid) and May 19 (the date the SNP informed the FBI of the identification of Daoud). We found no contemporaneous written record suggesting that the SNP had informed the Madrid Legat or anyone else at the FBI before May 19 that the SNP Laboratory had excluded Mayfield as the source of LFP 17. On several occasions between April 22 and May 19, the Madrid Legat made reports to the FBI CTD and the Portland Division describing his conversations with officials of the SNP. Some of these reports set forth the results of repeated inquiries the Madrid Legat made to the SNP regarding the status of their reexamination of LFP 17. In none of these communications did the Madrid Legat ever indicate that the SNP had told him it had excluded Mayfield. For example, on May 7 the Madrid Legat wrote, "Regarding the fingerprint report, it is still undecided as of today. Some of their people agree with our finding, there is still a few who don't, according to [the Deputy Director], they hope to resolve this tomorrow morning when the Director General returns." On May 12, the Madrid Legat wrote, "As of yesterday afternoon, the SNP Laboratory still had not finalized their report . . . ." A major purpose of the Madrid Legat's reports was to let the FBI and the U.S. Attorney's Office know about the status of the SNP Laboratory's reexamination, and we would have expected the Madrid Legat to tell them immediately if he learned anything as dramatic as that the SNP had excluded Mayfield. We found no compelling reason for the Madrid Legat to conceal this important fact from his superiors or from the U.S. Attorney's Office, had he known about it.

As noted above, on May 12, the SNP sent an official letter to the FBI requesting new inked prints for Mayfield that the SNP said it considered "essential" to completing its analysis, and requesting a DNA sample for Mayfield. The Madrid Legat told us that he inferred from this letter that the SNP still considered Mayfield as a potential source of the print. As previously noted, this letter indicated that the SNP had not yet completed its reexamination or reached a conclusion about LFP 17. We agree, however, that it was reasonable for the FBI to infer from the May 12 letter that the SNP had not yet excluded Mayfield. In particular, the May 12 letter's emphasis on the insufficiency of detail in the "upper portion" of the known prints, and their request for rolled prints that included the upper area, strongly suggested that the SNP wanted to determine whether the details in the upper portion of LFP 17 could be matched to a part of Mayfield's known prints that had not previously been recorded. The SNP was likely investigating the FBI's explanation that the dissimilarity in the upper left was attributable to a double touch by Mayfield.

Taking all of the evidence into account, we found that although there was sufficient evidence to conclude that the FBI knew by May 7 that there were *disagreements* within the SNP regarding the identification of LFP 17, there was insufficient evidence to conclude that the FBI learned prior to May 19 that the SNP Laboratory had definitively determined that Mayfield was not the source of LFP 17.

### **C. Representations Relating to Mayfield's Travel and Risk of Flight**

Another issue raised by the affidavit filed in support of the material witness warrant relates to the existence of false travel documents concerning Mayfield. Paragraphs 21 and 23 of the affidavit indicate that, at the time the affidavit was filed, no documents for travel outside the United States had been found in Mayfield's name. Paragraph 23 states that "it is believed that MAYFIELD may have traveled under a false or fictitious name, with false or fictitious documents. It is also believed that if MAYFIELD did not travel to Spain utilizing false identification documents that he associated with someone that played a role in the [Madrid bombings]." Paragraph 23 also states that "law enforcement has been unable to substantiate any other reasonable explanation for MAYFIELD'S fingerprint to be located on a bag of detonators in a van in Madrid Spain."

However, paragraph 24 of the affidavit states "that based upon the **likelihood** of false travel documents in existence, and the serious nature of the potential charges, Mayfield may attempt to flee the country if served with a subpoena to appear before the federal grand jury." (Emphasis added) Thus, paragraph 24 goes beyond the representation of paragraph 23 that Mayfield may have traveled to Spain under false pretenses to represent that there was "likelihood of false travel documents in existence." We believe the latter amounts to an unfounded inference regarding the "likely" existence of false travel documents. The only factual underpinning for this inference was the existence of a fingerprint believed to be Mayfield's on the plastic bag. There were other possible explanations for this fact other than Mayfield using false travel documents to go to Madrid. Indeed, one of the theories the government was exploring to explain how Mayfield's fingerprint got on the bag of detonators was that Mayfield had touched the bag in the United States (which meant that he did not travel to Spain with false travel documents) and that someone else took the bag to Spain.

When questioned about this language, the Portland SSA said she interpreted it to mean that there was a likelihood of false travel documents



because they had not been able to review all of the documents in the residence during the FISA search.<sup>171</sup> We were not persuaded by this explanation because the language referring to “the likelihood of false travel documents in existence” was drafted in late March, weeks before the FISA searches of the Mayfield residence were conducted. [REDACTED]

[REDACTED] Given the other potential ways that Mayfield’s fingerprint could be on a bag found in Madrid, we found that there was no logical support for the FBI’s assertion that false travel documents were “likely” in existence. Indeed, David Nahmias told us that the representation concerning the “likelihood of false travel documents in existence” may have been a “bit stronger” than the evidence of which he was aware.

In light of the above, we concluded that it would have been preferable for the FBI agents who participated in the drafting and review of paragraph 24 to use the term “possibility” regarding the existence of false travel documents.<sup>172</sup> The DOJ OPR reviewed the actions of DOJ attorneys in the drafting and review of paragraph 24 of the affidavit

#### **IV. The FBI’s Effort To Obtain a Final Fingerprint Report from the SNP Laboratory**

As noted in Chapter Two, on May 4 the FBI CTD transmitted a formal Letterhead Memorandum (LHM) to the Legat in Madrid for dissemination to the Spanish government. The LHM described the media inquiry from the Los Angeles Times that changed the FBI’s investigative plan for Mayfield. The LHM stated:

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<sup>171</sup> We did not interview the original FBI affiant in connection with this issue because he was detailed to Iraq when we conducted our interviews of the FBI agents in Portland, Oregon. Lead Case Agent 1 said that he did not recall who drafted paragraph 24, and that he did not recall having any discussions concerning this paragraph. He agreed that the content of paragraph 24 is accurate.

<sup>172</sup> U.S. Attorney Immergut’s letter of December 13 (Appendix L) and the FBI’s response to this report (Appendix K) noted that the affidavit stated that the government believed that Mayfield may have traveled under a false name with false or fictitious documents, or if he did not travel to Spain using false identification documents, he associated with someone that played a role in the bombing. While these statements may be true, the next paragraph of the affidavit explicitly states that there is a “likelihood of false travel documents in existence.” We believe that this claim of the *likelihood* of false travel documents was an unsupported inference. As set forth above, we believe the term “possibility” more accurately reflected the evidence of which the government was aware concerning the potential existence of false travel documents at the time the affidavit was filed.

[B]ecause Mayfield's name and/or FBI investigation of Mayfield appears likely to become public in the very near future, our plans to investigate Mayfield have been significantly advanced. To effectively interview Mayfield, we need the authority to detain him; currently, we cannot obtain such authority from our courts without an official Spanish report identifying Latent Print # 17 . . . as Mayfield's. We would greatly appreciate a final forensic report from your service as soon as possible, in an unclassified format for use in U.S. judicial proceedings.

The LHM was drafted by the CONUS 4 analyst. She stated that the LHM was reviewed by one of her supervisors, but she could not recall whom. She transmitted the LHM to the Madrid Legat. He said he did not recall the memorandum specifically but told the OIG he had no reason to believe that he did not receive it or deliver it to the Spanish government as requested.

The CONUS 4 analyst told us that she wrote the LHM based on her understanding that the issuance of a final report by the SNP would solve several problems facing the U.S. Attorney's Office and the FBI in preparing affidavits in support of the material witness warrant and search warrants. She stated that she understood that the Madrid Legat was concerned that detailed information about the April 13 Negativo Report could not be provided in the affidavit because the report was not official and had been provided in confidence. Moreover, the CONUS 4 analyst said that she believed a new report would help resolve the fact that the SNP's initial report disagreed with the FBI's identification of Mayfield. She said that it was the expectation of the FBI, based on the April 21 meeting, that the final SNP Report would agree with the identification of Mayfield. She said the FBI wanted to get an unclassified revised SNP report agreeing with the FBI Laboratory in time to include it in the affidavit because it would resolve the issues arising from the April 13 Negativo Report.

However, the language in the LHM was potentially misleading. There was no requirement under the material witness statute or any other authority that the SNP issue a report identifying Mayfield before he could be detained. Indeed, no such report was ever issued and Mayfield was detained without it.

The CONUS 4 analyst stated that nobody told her that obtaining a final report from the SNP identifying Mayfield as the source of LFP 17 was a prerequisite to detaining Mayfield. She described the language in the LHM as sloppy and stated that it reflected her expectation, based on descriptions of the April 21 meeting provided to her from others in the FBI, that the SNP was going to agree with the FBI. She stated that the language she used was intended to encourage the SNP to accelerate the process of finalizing and releasing the

report, not to pressure the SNP Laboratory to agree with the FBI's identification of Mayfield.

We found that the CONUS 4 analyst's explanation of her expectations regarding what conclusions the SNP Laboratory was likely to reach to be supported by the documents we reviewed. Several contemporaneous documents show that the favorable descriptions of the April 21 meeting provided by the Madrid Legat and Wieners gave the impression to others in the FBI that the SNP was likely to eventually agree with the FBI Laboratory regarding the identification of LFP 17. In particular, the Madrid Legat's April 22 memorandum describing the meeting contributed to this perception.

Although the CONUS 4 analyst understandably formed her expectations regarding the likely outcome of the SNP fingerprint examination on information that was provided by others, this does not excuse the inclusion of a potentially misleading assessment of the requirements of an American court in an LHM intended for dissemination to the SNP. Regardless of her understanding of whether the SNP was likely to agree with the FBI Laboratory, she had no basis for stating that Mayfield could not be detained without a final report from the SNP Laboratory. Moreover, a misstatement of this nature could create the unintended perception that the FBI was pressuring the SNP to issue a favorable report by suggesting that otherwise a potential terrorist could not be detained.

## **V. Problems in the Execution of the Surveillance and Searches**

The OIG's investigation also reviewed several problems in connection with the FBI's execution of the surveillance and searches in this investigation. In this section of the report, we discuss those problems and analyze what impact they had upon the Mayfield investigation.

### **A. Problems in the Execution of FISA Surveillance**

The Portland SSA said that the FBI inadvertently began monitoring [REDACTED] pursuant to the FISA warrant 30 minutes before the FISA emergency authorization was officially obtained. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In addition, FBI documents indicate that the FBI inadvertently recorded [REDACTED] on Mayfield [REDACTED] shortly after FISA coverage was initiated.

[REDACTED]

In our judgment, both of these errors were inadvertent and did not materially affect the case.

[REDACTED]

**B. Problems with the FBI's Searches of the Residence**

We also reviewed [REDACTED] during the searches which led the Mayfields to become suspicious that someone had searched their home. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This dissuaded the FBI from conducting additional covert searches of the residence.

We interviewed the two Computer Analysis Response Team examiners who participated in the [REDACTED] FISA search of the residence.<sup>173</sup> They told us that during the search, they found [REDACTED] computers in the home. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] We believe that this was not an unreasonable decision under the circumstances.

A second problem with the search was avoidable, however. As discussed in more detail in Chapter Two, the Mayfields became suspicious [REDACTED]

[REDACTED]

[REDACTED] As a result, although the FBI wanted to conduct another covert search of the home, it could not do so because of the Mayfields' suspicions that they were under surveillance.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>173</sup> These were the same Computer Analysis Response Team examiners who participated in the [REDACTED] FISA search of Mayfield's office.

[REDACTED]

The actions of the technical agents [REDACTED]

had a negative impact on the Mayfield investigation. Had Mayfield been a terrorist, the FBI's failure [REDACTED] could have had serious national security implications.

We also examined how the FBI conducted the May 6 search of the residence. In press accounts regarding that search, Mona Mayfield was quoted as claiming that the house looked like it had been "robbed" because every room had been "ransacked," closets emptied, and drawers overturned. In examining this issue, we interviewed agents who were present at the search of the residence and reviewed photographs that were taken by the FBI both before and after the search. The agents who were present during the search denied Mona Mayfield's allegations and said the house was left in "good condition" at the conclusion of the search.

In examining the FBI's photographs of the house, we found that some items, such as papers, were displaced from cabinets and cabinet drawers as a result of the search, and that other items, such as boxes in what appears be the attic of the Mayfield home, were left in disarray. However, the photographs do not support Mona Mayfield's allegations that the FBI left the Mayfield residence looking like it had been robbed, or ransacked or that the closets had been emptied and the drawers overturned.

**VI. The Role of Media Leaks in the Arrest of Mayfield**

As described in Chapter Two, the investigative plan that the FBI adopted in mid-April called for the FBI to finish the intelligence gathering and analytical work concerning Mayfield near the end of May. The FBI then planned to approach Mayfield in early June and attempt to interview but not necessarily arrest him.

The FBI first became aware on May 4 that its fingerprint identification of Mayfield may have been leaked to the media when a reporter from the Paris bureau of the Los Angeles Times called the Madrid Legat to ask about an American whose fingerprint was linked to the Madrid bombings. On May 5, the FBI learned that the Spanish magazine, El Tiempo, had called the U.S. Embassy in Spain to ask about an American suspect in the bombings. This

information caused the FBI, in conjunction with the DOJ Criminal Division and the U.S. Attorney's Office, to decide to execute the material witness and criminal search warrants on May 6.

One of the issues we examined is whether anyone in the FBI or DOJ caused the leaks in order to justify the immediate arrest of Mayfield. We asked all the witnesses we interviewed about their knowledge of the source of the leaks.<sup>174</sup> Each witness denied being the source of the leaks and also denied knowing who the source was. Several witnesses in the FBI and DOJ told us that they were surprised and upset by the leaks, and said that the leaks forced them to approach and arrest Mayfield ahead of schedule.

[REDACTED] Most of that speculation centered on either the SNP or those associated with the Spanish court system, primarily because the May 4 and May 5 press inquiries came from Spain or were directed to the FBI Legat in Spain. We found insufficient evidence to conclude that anyone in either the FBI or DOJ caused or contributed to the leaks in order to facilitate the arrest of Mayfield. We were unable to determine the source of the leak, however, partly because the universe of individuals with knowledge of the Mayfield investigation at the time of the leaks was large. We estimated that at least 50 to 100 people in the United States and Spain were aware of the Mayfield fingerprint identification and subsequent investigation before Mayfield was approached and arrested.

## **VII. Conditions of Confinement**

During the first court hearing after Mayfield was arrested as a material witness, Mayfield requested that he be released to home detention. The court denied this request, and Mayfield was incarcerated at the Multnomah County Detention Center (MCDC), a facility that is primarily used to temporarily house criminal defendants awaiting trials, as well as some prisoners convicted of crimes who are serving relatively short sentences, or who have upcoming court appearances. According to a local newspaper report, when Mayfield was released he questioned the appropriateness of his incarceration in light of his status as a material witness rather than a criminal defendant.<sup>175</sup> The OIG sought to interview Mayfield regarding a variety of issues, including his

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<sup>174</sup> We also asked many witnesses about their knowledge of the source of the post-arrest leaks that resulted in the imposition of a gag order as discussed in Chapter Two. Every witness we asked denied leaking any information or documents to the media and denied knowing anyone who did.

<sup>175</sup> The Oregonian, June 26, 2004.

perception of the conditions of his confinement, but Mayfield declined to be interviewed.

In this section of the report, the OIG examines whether Mayfield's detention at the MCDC was consistent with the requirements of the material witness statute. We also address other allegations made by Mayfield regarding his conditions of confinement, as well as the disclosure of Mayfield's alias to the media by the MCDC.

#### **A. Whether Mayfield's Detention was in Compliance with the Material Witness Statute**

The material witness statute provides that "if it is shown that it may become impracticable to secure the presence of the [material witness] by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of Section 3142 of this title." 18 U.S.C. § 3144. Thus, under the material witness statute, if the judicial officer orders an arrest, the witness must be treated in accordance with Section 3142, which generally addresses the release or detention of a defendant pending trial. In other words, Congress did not create a separate set of detention procedures or requirements uniquely applicable to material witnesses. Instead, Congress permitted judges to apply the detention procedures and requirements that are generally applicable to criminal defendants to material witnesses, even though material witnesses have not been charged with any crime.

One of the detention procedures that is applicable to a criminal defendant awaiting trial – and thus is also applicable to a material witness under detention – is the segregation requirement of Section 3142(i)(2). This section states that if detention is ordered, the judicial officer "shall" direct that the criminal defendant (or material witness) be confined in a corrections facility, and kept "separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U.S.C. § 3142(i)(2). Thus, if detention is ordered, the statute requires that the material witness (like a criminal defendant) be placed in a corrections facility, segregated from convicted criminals "to the extent practicable."

In this case, the judge declined a request by Mayfield's attorneys that he be released on special conditions, stating that because of the "gravity of the matter, there is no way I can ensure the appearance . . . of this material witness at this time." Once the judge ordered Mayfield's detention pursuant to the material witness statute, the United States Marshals Service (USMS) treated Mayfield like a criminal defendant and confined him in a corrections facility. The material witness statute did not require the USMS or the MCDC to treat Mayfield differently from criminal defendants.



According to the Chief Deputy U.S. Marshal for Portland, Mayfield was assigned to the MCDC because this was the contract facility normally used by the USMS to house all federal prisoners awaiting court appearances. The Deputy Chief U.S. Marshal stated that there was no discussion about housing Mayfield at any other facility.

As noted above, Section 3142(i)(2) requires that criminal defendants awaiting trial be segregated from criminals serving sentences and awaiting appeals "to the extent practicable." This requirement is applicable to many federal prisoners confined in the MCDC, which is the contract facility normally used by the USMS to house federal prisoners awaiting trial. According to the Chief Deputy U.S. Marshal and the Chief Deputy for the Multnomah County Sheriff's Office Corrections Division, the segregation requirement is normally satisfied by the general practice of housing inmates serving sentences or awaiting appeal at a different facility. However, some prisoners serving sentences are housed at MCDC, including federal prisoners who are housed temporarily at MCDC in order to be available for upcoming court dates, and state and county prisoners serving sentences of less than 12 months. The Chief Deputy U.S. Marshal and the Chief Deputy for the Multnomah County Sheriff's Office Corrections Division both stated that generally it is not considered "practicable" to keep pre-trial criminal defendants and material witnesses segregated from those state and federal prisoners housed in the MCDC who are serving sentences or awaiting appeals, and such prisoners are housed together in the general prison population.

In this case, however, the USMS attempted to take additional steps to keep Mayfield separate from other prisoners. On the date of Mayfield's arrest, a Portland AUSA sent a memorandum to the USMS stating that Mayfield was being detained as a material witness, not a criminal defendant. The USMS Operations Supervisor noted on AUSA 2's memorandum that the "subject should be kept separate from all individuals for his own safety" and faxed the memorandum to the MCDC's classification unit. However, the MCDC deputy on duty at the classification station when Mayfield was booked told the OIG that he did not receive any instructions regarding keeping Mayfield separate from other inmates for his safety. He told the OIG that he initially assigned Mayfield to a cell in the general prison population.

Before Mayfield was sent to the cell in the general population, however, the deputy recognized him from internet news reports and became concerned that other prisoners would also recognize him. The deputy told us he then assigned Mayfield to the administrative segregation unit. This unit, which housed a small number of prisoners considered to be high-profile or dangerous, was the most restrictive area of the MCDC. Mayfield, like other prisoners in this unit, was kept in a 22-hour lockdown status, with a 2-hour recreation period during which he was allowed to go to a small day room, either

by himself or accompanied by one other inmate. This recreation period was voluntary and inmates could instead opt to remain in their cells.

According to the MCDC Captain, the MCDC performs weekly assessments of prisoners held in the administrative segregation unit to determine whether inmates held there can be reassigned to a less restrictive unit. The Captain told us that as the result of this assessment, on May 12 the MCDC determined that Mayfield was not dangerous and could be transferred. The Captain told us that Mayfield was quiet, well-behaved and cooperative. Therefore, six days after entering the MCDC, Mayfield was moved to the less restrictive protective custody unit. In that unit, Mayfield had a separate cell and was permitted (but not required) to commingle with as many as seven other prisoners in a common area for several hours per guard shift.

We concluded that the treatment of Mayfield, including his segregation from the general population, did not violate any provisions of the material witness statute. Indeed, because Mayfield was assigned to the administrative protection unit and later the protective custody unit, Mayfield was kept separate from prisoners serving sentences to a greater degree than is usually provided to pre-trial defendants who are also subject to the segregation requirements of 18 U.S.C. § 3142.

However, we also found that the MCDC did not ensure that instructions from the USMS regarding the treatment of the prisoner were followed. As a result, Mayfield was initially going to be placed in the general prison population. He was only placed in a separate cell as a result of the deputy's recognition of Mayfield from a photograph on the internet. We believe that the MCDC should review its procedures to ensure that a more reliable system for communicating instructions regarding special handling of particular prisoners exists and that such instructions reach the appropriate personnel in the MCDC.

#### **B.    OIG Review of Other Allegations Regarding Mayfield's Confinement**

Because of Mayfield's decision not to speak to the OIG, we did not receive directly from him allegations regarding his treatment while confined. However, we reviewed statements that Mayfield or his friends or relatives made to the media regarding his confinement. The statements relating to conditions of his confinement, and our analysis of them, follow.

Mayfield stated that a prison guard told him that he should watch his back.<sup>176</sup> The MCDC Captain told us it was likely that several deputies would have said this to Mayfield. He said that this is commonly said by the deputy at the classification desk and by other deputies to first-time inmates and that it is meant as a helpful warning. He added that he could understand how Mayfield could perceive this as threatening, but that it was not meant to be.

Mayfield stated that he was kept in the jail's mental ward. He worried for his safety, especially after seeing an inmate in a nearby cell injure his own ear by jabbing it with a pencil.<sup>177</sup> As described earlier, Mayfield was housed in the administrative segregation and protective custody units in the MCDC, not in the MCDC's mental ward. Mayfield may have made this statement because inmates who have less acute mental problems are also housed in the protective custody unit where Mayfield was housed. According to the MCDC Captain, the MCDC has a large population of such inmates. The MCDC houses inmates with acute mental problems separately from the general prison population in a special housing unit, while those with lesser mental problems are housed in the protective custody unit where Mayfield was located.

Mayfield stated that he feared for his safety when inmates began to recognize him on the nightly news.<sup>178</sup> As noted above, the MCDC took steps to protect Mayfield from retaliation by other inmates. Mayfield was housed alone in a cell in restricted parts of the detention center the entire time he was in the MCDC. During his first week of confinement, like all prisoners housed in the administrative segregation unit, Mayfield was allowed out of his cell for two hours a day, and that was under escort by a guard. During his second week of confinement, he was allowed to commingle with others in the protective custody unit in a small common area, with a guard present, but was not required to do so.

Mayfield stated that he was handcuffed, forced to wear leg irons, and routinely strip searched.<sup>179</sup> According to USMS officials, Mayfield was handcuffed and shackled when he was transported by the USMS to and from court. He was also handcuffed when he was transferred between cells. Mayfield was strip searched for contraband after "contact" visits with his attorneys. Mayfield was also strip searched when he was first booked by the MCDC and each time he returned from court. USMS and MCDC witnesses told the OIG that these procedures are standard for all prisoners. For example, the

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<sup>176</sup> CBSNews.com, May 25, 2004.

<sup>177</sup> CBSNews.com, May 25, 2004; The Oregonian, June 26, 2004.

<sup>178</sup> Associated Press, May 25, 2004.

<sup>179</sup> Los Angeles Times, May 29, 2004.

USMS Policies and Procedures Manual states, “[p]risoners will be fully restrained when transported by the USMS. Full restraints consist of handcuffs, waist chains, and leg irons.”

Mayfield made a televised statement on the steps of the courthouse immediately after he was released in which he described his detention as a “harrowing ordeal,” but he thanked jail officials for providing him with a copy of the Koran and a prayer rug. On May 27, 2004, he stated in an MSNBC interview, “Hey, there’s a lot of people I need to thank. And the professionals and the guards at the Multnomah County Detention center, which I thought, for the most part were professional.” In addition, we note that while Mayfield has filed a lawsuit against the FBI, in the lawsuit he did not allege that he was mistreated by either the USMS or the MCDC.

In summary, we did not find evidence that Mayfield was mistreated either while in the custody of the USMS or at the MCDC, or that the conditions of confinement violated the material witness statute. The treatment of Mayfield also was consistent with the normal practices of the USMS and the MCDC.

### **C. Problems with Mayfield’s Alias**

As detailed in Chapter Two, at the time of Mayfield’s arrest the U.S. Attorney’s Office sent a memorandum to the USMS explaining that Mayfield was a material witness. Consequently, his arrest was governed by the Federal Rule of Criminal Procedure 6(e) and could not be publicly disclosed. The memorandum further instructed the USMS and the jail not to release any information regarding Mayfield’s custody status, including his photographs.

The USMS Operations Supervisor discussed these conditions with the Captain of the MCDC. As a result, the USMS and the MCDC agreed that Mayfield would be booked under the alias “Randy Taylor” in order to protect the secrecy of his detention pursuant to the Federal Rules of Criminal Procedure. However, we found two problems in the implementation of the decision to assign an alias to Mayfield, both of which resulted from the failure of the MCDC to communicate this decision to all appropriate personnel.

First, the failure to communicate the decision led to inappropriate confrontations between an MCDC deputy and Mayfield. As described in Chapter Two, the decision regarding assigning an alias to Mayfield was not communicated to the MCDC deputy who was staffing the classification station. The deputy stated that when he did a database search for prior arrest records for “Randy Taylor,” he found several from Florida under this alias. He then interrogated Mayfield and confronted Mayfield about his alleged failure to disclose these arrests. According to the deputy, Mayfield denied the arrests

but did not reveal his true identity. The deputy later recognized Mayfield from an internet news report, and chastised Mayfield for lying to him. According to the deputy, Mayfield responded that he had been instructed not to reveal his identity. We found that these confrontations were unnecessary and avoidable. Had the deputy been given accurate information and instructions about Mayfield he would have not interrogated him, or confronted him for his use of the alias.

Second, and more significantly, the failure of the MCDC to communicate the alias to appropriate staff led to the disclosure of Mayfield's alias to the media. On May 7, 2004, one day after Mayfield was booked into the MCDC, an article appeared in The Oregonian newspaper stating "It was unclear why Mayfield was booked into the Justice Center jail under the false name of Randy Taylor on Thursday evening." The OIG determined that the disclosure of Mayfield's alias to the press occurred because of MCDC management's failure to inform its Public Information Officer (PIO) of the circumstances of Mayfield's arrest and to direct the PIO to refer requests for information to the USMS.

According to the PIO, he began receiving calls from the media at around noon on May 6, the day that Mayfield was arrested. These callers did not specifically ask about Mayfield, but made general inquiries as to whether the MCDC had taken any high-profile prisoners into custody. The PIO responded "no." The PIO stated that throughout the afternoon he continued to receive calls from the media specifically asking whether Mayfield was in custody. The PIO stated that he was surprised at how much information the media seemed to have about Mayfield. The PIO then checked with the booking desk about Mayfield and was told that no one was booked under Mayfield's name.

The PIO told us that around 5 p.m., after continuing to be barraged with calls, he contacted the MCDC control center and asked whether the U.S. Marshals had transported any prisoners to the MCDC. He was told that the U.S. Marshals had brought over a Randy Taylor. The PIO stated that he therefore told subsequent callers that the only person the U.S. Marshals had transported was Randy Taylor and advised them to contact the USMS to find out if this was "the guy they were looking for."<sup>180</sup> We could not determine whether anyone in the USMS confirmed to the reporters whether Taylor was Mayfield or whether Mayfield had been booked at the MCDC. The Captain of the MCDC told us that he believed that the information about Randy Taylor provided by the PIO was the basis of the report in The Oregonian revealing the alias under which Mayfield was booked.

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<sup>180</sup> According to the USMS, other persons were transported and booked with Mayfield.

The PIO told the OIG that when he later informed the MCDC Captain of the calls, he was told that Randy Taylor was Mayfield's alias and that the MCDC was not supposed to disclose anything about "Randy Taylor" to the press. During our interview with the Captain, he confirmed the PIO's description of events and took responsibility for "dropping the ball" by not informing the PIO who Randy Taylor was or instructing the PIO not to disclose anything about him.

The PIO told us that despite the public disclosure of Mayfield's alias, he believes that the media could have discerned that Mayfield had been booked at the MCDC on its own. He explained that booking records are considered to be public information and that the MCDC routinely provides the media with a daily register of bookings. He stated that there were limited bookings that day and the media could have used the process of elimination to figure out which name was Mayfield's alias. If so, use of an alias is an inadequate means of complying with Rule 6(e), and the USMS and MCDC should work together to devise a more effective mechanism to preserve grand jury secrecy.

The Chief Deputy U.S. Marshal also told us that he was upset about the disclosure and, after determining that it did not originate from within the USMS, convened a meeting with Multnomah County Sheriff's Office (MCSO) officials to discuss how to contain the information and the need to prevent future occurrences of inappropriate disclosures of confidential information in similar cases. As a result of this meeting, the MCSO provided written guidance to the PIOs in their facilities requiring them not to respond to public and media inquiries regarding federal prisoners, but instead to direct these callers to the USMS. Furthermore, the USMS agreed that, in addition to its current practice of providing written notification to detention facility management regarding a federal prisoner being detained as a material witness, it would concurrently provide written notification to the MCDC Chief Deputy for Corrections and to MCDC Counsel.

In short, we found a communications problem in the MCDC that resulted in two inappropriate and readily avoidable incidents: the confrontations between a deputy and Mayfield about his alias and the disclosure of Mayfield's alias to the media. The USMS and the MCDC must assure that appropriate personnel in the correction facility are made aware of the special status of a material witness, both to protect grand jury secrecy and to prevent unnecessary intimidation of material witnesses.

## **VIII. Summary**

The OIG concluded that the government's decision to seek FISA authorization in the Mayfield case was not influenced by the Patriot Act

amendments to the FISA statute. In addition, the Patriot Act amendments did not affect the scope of information the government collected about Mayfield pursuant to the FISA surveillance and searches. We also found that contrary to public speculation, the FBI did not use certain provisions of the Patriot Act in the Mayfield case, such as those relating to delayed notification searches [REDACTED]. Moreover, the evidence indicated that even prior to the Patriot Act, the FBI likely would have sought and been able to obtain FISA authorization for the searches and surveillance of Mayfield that it conducted.

The Patriot Act did permit sharing of a significant amount of information about Mayfield with a wider variety of law enforcement agents and intelligence agents than prior to the Patriot Act. By dismantling the wall between intelligence and criminal investigations, the Patriot Act allowed the government to freely share intelligence information about Mayfield gathered in the FISA surveillance and searches with prosecutors and other criminal law enforcement officials. The Patriot Act also allowed the government to share grand jury information with the intelligence community that could not previously have been shared. In addition, the Patriot Act affected the amount of information the government collected through use of NSLs in the Mayfield investigation by relaxing the certification requirements for issuing NSLs.

In sum, we did not find any evidence that the FBI misused any provisions of the Patriot Act in conducting its investigation of Mayfield. However, the increased information sharing allowed by the Patriot Act amplified the consequences of the FBI's fingerprint misidentification in the Mayfield case.

We also examined whether Mayfield's religion improperly influenced the FBI's actions in the investigation and arrest of Mayfield. We concluded that the FBI's field investigation of Mayfield was initiated on the basis of the fingerprint identification of Mayfield, and that initially FBI examiners were unaware of his religion. Several witnesses acknowledged, however, that at a later point Mayfield's religion was a factor in the investigation, although they said it was not an overriding factor and did not affect the course of the investigation.

In our view, the FBI's field investigation appropriately sought information about a subject who had been positively – although erroneously – identified by the FBI Laboratory as having left his fingerprint on the bag of detonators found in Madrid. We did not find that the FBI employees who supervised and conducted the field investigation of Mayfield used his religion to improperly influence the course of the investigation.

In addition, we analyzed the accuracy of affidavits submitted by the FBI in support of the material witness and criminal search warrants. We found

several inaccuracies in these affidavits relating to the FBI Laboratory's identification of LFP 17, which we concluded reflected a regrettable inattention to detail. We also found that the affidavits contained an ambiguous description of the April 21 meeting between the FBI and the SNP in Madrid. This description apparently led to the judge to believe that the SNP had agreed with the FBI's identification, when in fact the SNP had only agreed to conduct a new examination of LFP 17. In addition, the material witness warrant affidavit contained an unfounded inference concerning the likelihood of false travel documents regarding Mayfield.

We also determined that the FBI sent a LHM to the SNP that inaccurately stated that Mayfield could not be detained unless the SNP Laboratory issued an unclassified report identifying him as the source of LFP 17.

With regard to the media leaks concerning the FBI's investigation of Mayfield, the FBI learned in early May 2004 that the Los Angeles Times and other media outlets had inquired about an American suspect in the Madrid bombings. This information caused the FBI, in conjunction with DOJ Criminal Division and the Portland U.S. Attorney's Office, to seek a material witness warrant and criminal search warrants. This media leak altered the FBI's investigative plan, which had called for approaching Mayfield in June for a voluntary interview after completing additional investigation. Through our investigation, we found insufficient evidence to conclude that anyone in either the FBI or DOJ caused or contributed to the leaks in order to facilitate Mayfield's arrest. We did not find sufficient evidence to determine who leaked this information about Mayfield to the media.

Finally, with regard to Mayfield's conditions of confinement, we found that Mayfield's treatment did not violate the material witness statute. We also did not find evidence to conclude that he was mistreated during his detention. His treatment was consistent with the normal practices of the USMS and the MCDC. However, we did find that the MCDC failed to convey important information about Mayfield to appropriate prison personnel, including the instruction to keep him separated from other prisoners for his own safety and the fact that he had been booked under an alias to protect grand jury secrecy. This resulted in an inadvertent disclosure to the press of Mayfield's alias and an unnecessary confrontation of Mayfield by the MCDC's classification deputy.