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Office of the Deputy Attorney General
Washington, D.C. 20530

MEMORANDUM

TO: Mary Jo White
United States Attorney
Southern District of New York

Louis Freeh
Director
Federal Bureau of Investigation

Richard Scruggs
Counsel of Intelligence Policy and Review
Office of Intelligence Policy and Review

Jo Ann Harris
Assistant Attorney General
Criminal Division

FROM: Jamie S. Gorelick *JSG*
Deputy Attorney General

RE: Instructions on Separation of Certain Foreign
Counterintelligence and Criminal Investigations

The United States Attorney's Office for the Southern District of New York and the FBI have been conducting criminal investigations of certain terrorist acts, including the bombing of the World Trade Center, and potential obstruction of the indicted case of United States v. Rahman, et al. During the course of those investigations significant counterintelligence information has been developed related to the activities and plans of agents of foreign powers operating in this country and overseas, including previously unknown connections between separate terrorist groups. Although information and evidence relevant to possible future criminal prosecutions is still being

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Classified by: Deputy Counsel for Intelligence Operations,
Office of Intelligence Policy and Review, Department of
Justice
Declassify on: OADR

Declassified by James A. Baker
Counsel for Intelligence Policy
OIPR/USDOJ
Date: April 10, 2014

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sought, it has become overwhelmingly apparent that there is a compelling need to further develop and expand that foreign counterintelligence information. Consequently, the FBI has initiated a separate full field counterintelligence investigation.

Although the counterintelligence investigation may result in the incidental collection of information relevant to possible future criminal prosecutions, the primary purpose of the counterintelligence investigation will be to collect foreign counterintelligence information. Because the counterintelligence investigation will involve the use of surveillance techniques authorized under the Foreign Intelligence Surveillance Act (FISA) against targets that, in some instances, had been subject to surveillance under Title III, and because it will involve some of the same sources and targets as the criminal investigation, we believe that it is prudent to establish a set of instructions that will clearly separate the counterintelligence investigation from the more limited, but continued, criminal investigations. These procedures, which go beyond what is legally required, will prevent any risk of creating an unwarranted appearance that FISA is being used to avoid procedural safeguards which would apply in a criminal investigation.

- (1) The focus of the Foreign Counterintelligence (FCI) investigation will be on preventing future terrorist acts and obtaining foreign counterintelligence information about the individuals and groups engaging in, or preparing to engage in, terrorist activities in the United States and abroad.
- (2) The criminal investigations will focus on the indicted cases of United States v. Yousef, et al. and United States v. Rahman, et al., and the potential obstruction of the Rahman case. The criminal investigations will also focus on the conspiracy to bomb United States airlines recently uncovered in the Philippines and the bombing of a Philippine airliner.
- (3) No "pro-active" investigative efforts or technical coverages are presently contemplated in any of the ongoing criminal investigations, which primarily focus on past criminal conduct, with the exception of the obstruction investigation. If in the future, the criminal investigations develop information requiring "pro-active" efforts or technical coverages, the United States Attorneys Office (USAO) and the criminal agents will consult with the Office of Intelligence Policy and Review (OIPR), and the FCI agents before undertaking such efforts, absent exigent circumstances, in order to determine the impact, if any, on the FCI investigation.

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- (4) The [redacted] subjects, who are presently under pen register surveillance in the criminal investigation, will be investigated as FCI subjects under the FCI guidelines using all available techniques, including FISA, without any direction or control by the USAO, Southern District of New York or the Criminal Division, Department of Justice. The current pen registers will be discontinued before any FISA-authorized surveillances are initiated.
- (5) [redacted] FBI memoranda and investigative reports, including 302's from [redacted] will be prepared as follows: all information relating to the aforementioned indicted cases and investigations, including the obstruction case will be segregated into separate reports which will be provided to the USAO, OIPR, and the Criminal Division. All foreign counterintelligence information (including all foreign counterintelligence relating to future terrorist activities) will be in classified reports which will be provided to OIPR, but will not be provided either to the criminal agents, the USAO, or the Criminal Division, without Federal Bureau of Investigation Headquarters and OIPR concurrence. The FBI agent responsible for handling the [redacted] will remain involved in the on-going trial of United States v. Rahman, but will otherwise be assigned to the foreign counterintelligence investigation and report to foreign counterintelligence supervisors.
- (6) Foreign counterintelligence collected during the course of the FCI investigation will be disseminated pursuant to FBI guidelines and FISA: If, in the case of the FCI investigation, facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed, the FBI and OIPR are each independently responsible for notifying the USAO and the Criminal Division. Notice shall include the facts and circumstances developed during the FCI investigation that supplied the indication of significant federal criminal activity, whether or not such activity relates to the indicted cases or criminal investigations referred to in subparagraph (2) above. An Assistant United States Attorney (AUSA) from the Southern District of New York who has knowledge of, but no active involvement in, the on-going criminal investigations, will continue to be assigned to work with OIPR and the FCI agents to review such foreign intelligence information to ensure that evidence that might be exculpatory to any defendants currently under indictment is promptly considered for dissemination to criminal investigative personnel, the USAO, and the Criminal

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Division. This AUSA will also serve to ensure, in conjunction with the FBI and OIPR, that information which reasonably indicates that a significant federal crime has been, is being, or may be committed is appropriately disseminated to criminal investigative personnel, the USAO, and the Criminal Division pursuant to the procedures set forth above. That AUSA will continue to be "walled off" from participation in the on-going criminal investigations and cases and will continue to abide by all FISA dissemination provisions and guidelines.

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United States Attorney's Office
Southern District of New York

Mary Jo White
United States Attorney

United States Courthouse
One St. Andrew's Plaza
New York, New York 10007



COMMERCIAL (212) 791-0056

Facsimile Transmission Cover Page

Tab A

TO: ATTORNEY GENERAL JANET RENO
MIKE Name VATIS
Division/Section

Phone Number SECURE FAX TO COMMAND CENTER
FAX Number 202 514-9207

CONFIDENTIAL U.S. ATTORNEY FACSIMILE COMMUNICATION

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FROM: MARY JO WHITE
Office of the United States Attorney, Southern District of New York

Phone: COMMERCIAL (212) 791-0056



Fax: COMMERCIAL (212) 791-9098

Date: 6-13-95 Pages 9 including cover sheet

Re: As you requested my comments. I would be happy to discuss.
MJW

INSTRUCTIONS

- IMMEDIATELY NOTIFY SENDER OF ANY DIFFICULTIES IN TRANSMISSION.
- PLEASE NOTIFY SENDER OF RECEIPT BY TELEPHONE.

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June 13, 1995

M E M O R A N D U M

TO: The Honorable Janet Reno
Attorney General

FROM: Mary Jo White *MJW*
United States Attorney for the
Southern District of New York

RE: Instructions Re FI and FCI Investigations

I believe (subject to confirmation) that Mike Vatis and Gil Childers have worked out acceptable instructions for FI and FCI investigations in the Southern District of New York.

You have also asked whether I am generally comfortable with the instructions. It is hard to be totally comfortable with instructions to the FBI prohibiting contact with the United States Attorney's Offices when such prohibitions are not legally required. These instructions leave entirely to OIPR and the Criminal Division when, if ever, to contact affected U.S. Attorneys on investigations including terrorism and espionage. While I understand the need for centralization and control, this mechanism cuts out the U.S. Attorneys until the Criminal Division decides with FBI Headquarters to open up a criminal investigation. Our experience has been that the FBI labels of an

investigation as intelligence or law enforcement can be quite arbitrary; depending upon the personnel involved and that the most effective way to combat terrorism is with as few labels and walls as possible so that wherever permissible, the right and left hands are communicating.

As a legal matter, whenever it is permissible for the Criminal Division to be in contact with the FBI, it is equally permissible for the FBI to be in touch with the U.S. Attorneys' Offices. To be sure, the tighter the controls are on such contacts (i.e., limiting them to the Criminal Division), the lower the risk of improper or FISA-vulnerable contacts. Hence, I understand not wanting to have the FBI automatically contact all affected U.S. Attorneys' Offices whenever they contact the Criminal Division. But there should be that obligation on the Criminal Division so that U.S. Attorneys are made aware of potential criminal activity in their districts at the earliest possible -- and permissible -- time. We have a few changes that we believe would accomplish this very modest compromise from the viewpoint of the U.S. Attorneys:

1. "Unless otherwise specified by the Attorney General" should be added to the first sentence. This would allow for carve-outs for specific situations in specific districts. (Mike Vatis has, I believe, agreed with this.)

2. The approval required before the FBI contacts the U.S. Attorney's Office should be limited to that of OIPR and not include the Criminal Division. That would seem to burden unduly the notification mechanism and adds little if anything to the

safeguarding of FISA. Accordingly, in paragraph A.2. the following words should be stricken from the first sentence, "the Criminal Division and." A new sentence should be inserted after the first, stating, "The FBI and OIPR each independently shall notify the Criminal Division of any such contacts."

3. In a FISA investigation, once the Criminal Division has concluded that criminal law enforcement concerns exist the affected U.S. Attorney's Office should be notified. Accordingly, in paragraph A.3. the following new sentence should be added after the first sentence. "The Criminal Division shall contact the pertinent U.S. Attorney's Office(s) as soon thereafter as possible."

4. In the last sentence of paragraph A.8. the word "should" should be replaced with the word "shall."

5. In paragraph A.9. the words "the United States Attorneys," should be added between "Criminal Division" and "OIPR."

6. In investigations where FISA and related investigative efforts have not yet been undertaken the affected U.S. Attorney's Office should be included earlier in the process. Accordingly, the following sentence should be added at the conclusion of paragraph B.1., "The Criminal Division shall contact the pertinent U.S. Attorney's Office(s), as soon thereafter as possible."

7. In paragraph B.3. the pertinent U.S. Attorney's Offices should be included in the notification the Criminal

Division makes to the FBI and OIPR.

8. In the last sentence of paragraph B.6. the word "should" should be replaced with the word "shall."

9. In paragraph B.8. the words "the United States Attorney" should be inserted between "Criminal Division" and "OIPR".

A marked-up copy of the instructions with these proposed changes is attached.

Thank you for your consideration.

M.J.W.

Attachment

cc: Mike Vatis



Office of the Attorney General
Washington, D. C. 20530

MEMORANDUM

TO: Assistant Attorney General, Criminal Division
Director, FBI
Counsel for Intelligence Policy

FROM: The Attorney General

SUBJECT: Procedures for Contacts Between the FBI and the
Criminal Division Concerning Foreign Intelligence and
Foreign Counterintelligence Investigations

Unless otherwise specified by the Attorney General

The procedures contained herein apply to foreign intelligence (FI) and foreign counterintelligence (FCI) investigations conducted by the FBI, including investigations related to espionage and foreign and international terrorism. The purpose of these procedures is to ensure that FI and FCI investigations are conducted lawfully, and that the Department's criminal and intelligence/counterintelligence functions are properly coordinated.

A. Contacts During an FI or FCI Investigation in Which FISA Surveillance or Searches are Being Conducted

1. If, in the course of an FI or FCI investigation utilizing electronic surveillance or physical searches under the Foreign Intelligence Surveillance Act (FISA), facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed, the FBI and OIPR each shall independently notify the Criminal Division. Notice to the Criminal Division shall include the facts and circumstances developed during the investigation that support the indication of significant federal criminal activity. The FBI shall inform OIPR when it initiates contact with the Criminal Division. After this initial notification, the Criminal Division shall notify OIPR before engaging in substantive consultations with the FBI, as discussed in paragraph 5, below.

2. The FBI shall not contact a U.S. Attorney's Office concerning such an investigation without the approval of ~~the Criminal Division and OIPR~~. In exigent circumstances, where immediate contact with a U.S. Attorney's Office is appropriate because of potential danger to life or property, FBIHQ or an FBI field office may make such notification. The Criminal Division

* The FBI and OIPR each independently shall notify the Criminal Division of any such contact

* The Criminal Division shall contact the pertinent U.S. Attorney's Office(s) as soon thereafter as possible.

and OIPR should be contacted and advised of the circumstances of the investigation and the facts surrounding the notification as soon as possible.

3. If the Criminal Division concludes that the information provided by the FBI or OIPR raises legitimate and significant criminal law enforcement concerns, it shall inform the FBI and OIPR. *Thereafter, the FBI may consult with the Criminal Division concerning the investigation to the extent described in paragraphs 5 and 6, below.

4. The FBI shall maintain a log of all contacts with the Criminal Division, noting the time and participants involved in any contact, and briefly summarizing the content of any communication.

5. The Criminal Division shall notify OIPR of, and give OIPR the opportunity to participate in, consultations between the FBI and Criminal Division concerning an FI or FCI investigation. If OIPR is unable or does not desire to participate in a particular consultation, the Criminal Division will, after the consultation takes place, orally inform OIPR of the substance of the communication in a timely fashion.

6. Consultations between the Criminal Division and the FBI shall be limited in the following manner: The FBI will apprise the Criminal Division, on a timely basis, of information developed during the FI or FCI investigation that relates to significant federal criminal activity. The Criminal Division may give guidance to the FBI aimed at preserving the option of a criminal prosecution. (For example, the Criminal Division may provide advice on the handling of sensitive human sources so that they would not be compromised in the event of an ultimate decision to pursue criminal prosecution.) The Criminal Division shall not, however, instruct the FBI on the operation, continuation, or expansion of FISA electronic surveillance or physical searches. Additionally, the FBI and Criminal Division should ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of the Criminal Division's directing or controlling the FI or FCI investigation toward law enforcement objectives.

7. In a FISA renewal application concerning such an investigation, OIPR shall apprise the Foreign Intelligence Surveillance Court (FISC) of the existence of, and basis for, contacts between the FBI and Criminal Division, in order to keep the FISC informed of the criminal justice aspects of the ongoing investigation.

8. In the event the Criminal Division concludes that circumstances exist that indicate the need to consider initiation of a criminal investigation or prosecution, it shall immediately notify OIPR. The Criminal Division and OIPR ~~should~~ shall contact the pertinent U.S. Attorney's Office as soon thereafter as possible.

9. Any disagreement among the Criminal Division, OIPR, and the FBI concerning the application of these procedures in a particular case, or concerning the propriety of initiating a criminal investigation or prosecution, shall be raised with the Deputy Attorney General.

B. Contacts During an FI or FCI Investigation in Which No FISA Surveillance or Searches Are Being Conducted

1. If, in the course of an FI or FCI investigation in which FISA electronic surveillance or physical searches are not being conducted, facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed, the FBI shall notify the Criminal Division. Notice to the Criminal Division shall include the facts and circumstances developed during the investigation that support the indication of significant federal criminal activity.*

2. The FBI shall not contact a U.S. Attorney's Office concerning such an investigation without the approval of the Criminal Division, and notice to OIPR. In exigent circumstances, where immediate contact with a U.S. Attorney's Office is appropriate because of potential danger to life or property, FBIHQ or an FBI field office may make such notification. The Criminal Division and OIPR should be contacted and advised of the circumstances of the investigation and the facts surrounding the notification as soon as possible.

3. If the Criminal Division concludes that the information provided by the FBI raises legitimate and significant criminal law enforcement concerns, it shall notify the FBI and OIPR. Thereafter, the FBI may consult with the Criminal Division concerning the investigation. The pertinent U.S. Attorney

4. The Criminal Division will be responsible for orally informing OIPR of its contacts and consultations with the FBI concerning such an investigation.

5. The FBI shall maintain a log of all contacts with the Criminal Division, noting the time and participants involved in any contact, and briefly summarizing the content of any communication.

6. In the event the Criminal Division concludes that circumstances exist that indicate the need to consider initiation of a criminal investigation or prosecution, it shall immediately

* The Criminal Division shall³ contact the pertinent U.S. Attorney's Office(s) as soon thereafter as possible.

notify OMPR. The Criminal Division and OIPR ^{shall} ~~should~~ contact the pertinent U.S. Attorney's Office as soon thereafter as possible.

7. If, during an FI or FCI investigation, a FISA electronic surveillance or search is undertaken after the FBI has consulted with the Criminal Division, the procedures set forth in section A., above, shall apply.

8. Any disagreement among the Criminal Division, the United States Attorney OIPR, and the FBI concerning the application of these procedures in a particular case, or concerning the propriety of initiating a criminal investigation or prosecution, shall be raised with the Deputy Attorney General.



U. S. Department of Justice

Office of the Deputy Attorney General

Executive Office for National Security

'95 JUN 21 AIO-22

Washington, D.C. 20530

June 19, 1995

EXECUTIVE SECRETARIAT

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL *SS*

FROM: Michael Vatis *MV*
Deputy Director, Executive Office for National Security

SUBJECT: Procedures for Contacts between the FBI and the
Criminal Division Concerning Foreign Intelligence and
Foreign Counterintelligence Investigations

Following my conversations with U.S. Attorney Mary Jo White and AUSA Gil Childers of the Southern District of New York regarding Mary Jo's first set of recommended changes to the draft procedures, Mary Jo has now sent you a second memorandum (attached at Tab A) proposing additional changes (some of which repeat proposals from her first memorandum). Mary Jo's chief concern is ensuring that the draft procedures not affect the SDNY's existing terrorism cases and the existing instructions that we instituted to deal with specific overlapping FI and criminal investigations in that district. I assured Gil that these draft procedures did not affect the existing instructions, and told him that we could add language to the draft procedures to make this clear (see section 1, below). In addition, I recommend sending a separate memo to the AAG, Criminal Division; the Counsel for Intelligence Policy; the Director, FBI; and the U.S. Attorney for the Southern District of New York specifying that these draft procedures do not affect the existing instructions governing FI investigations in the SDNY. A memo to that effect is attached at Tab B.

Listed below are Mary Jo's additional proposed changes and my recommended responses. A revised draft of the procedures incorporating some of Mary Jo's changes is attached at Tab C.

1. Mary Jo suggests amending the first sentence of the procedures to allow for "carve-outs" from the procedures for specific situations in specific districts. The first sentence would read: "The procedures contained herein, **unless otherwise specified by the Attorney General**, apply to foreign intelligence (FI) and foreign counterintelligence (FCI) investigations conducted by the FBI, including investigations related to espionage and foreign and international terrorism."

I recommend making this change. As discussed above, this change, along with the memo at Tab B, would make clear that the existing instructions regarding the FI and criminal investigations in the SDNY are not affected by the draft procedures.

2. Mary Jo suggests that only OIPR's, and not Crim. Div.'s, approval should be required before the FBI contacts the pertinent U.S. Attorney's Office.

I recommend rejecting this change. The draft procedures attempt to establish a collaborative process between Crim. Div. and OIPR, and I would be reluctant to exclude Crim. Div. from this part of the decisionmaking process. Contrary to Mary Jo's suggestion, requiring Crim. Div.'s as well as OIPR's approval should not be unduly burdensome, since the FBI will already be in contact with both Crim. Div. and OIPR, and both components will have been kept apprised of the progress of the investigation.

Furthermore, requiring Crim. Div.'s approval before notification of a USAO is entirely consistent with the revision of Chap. 90 of the U.S. Attorneys' Manual, which has been approved by the DAG and the AGAC (including Mary Jo). That Chapter makes clear that the AAG, Criminal Division, shall supervise all criminal cases involving national security matters. It also provides that the AAG will notify the pertinent U.S. Attorney "as soon as possible" following the referral to Crim. of a criminal investigation regarding a national security matter. It follows that a USAO should not be notified of a national security investigation -- particularly one that has not yet developed into a criminal case -- without the approval of the AAG, Criminal Division.

3. Mary Jo suggests that once Crim. decides that "criminal law enforcement concerns exist" in a FISA investigation, the pertinent USAO should be notified.

I recommend rejecting this change. Notifying the USAO as soon as law enforcement concerns exist -- but before Crim. thinks that the investigation should "go criminal" -- is simply too early. The purpose of the procedures is to allow criminal prosecutors to advise FBI agents on how to conduct an FI investigation without prejudicing a possible criminal prosecution, while at the same time making sure that the prosecutors do not -- in appearance or reality -- exert direction or control over the FI investigation. If a USAO is brought in any time significant law enforcement concerns exist -- which could be very common in terrorism and espionage cases -- this delicate balance could be disrupted, and it could create the appearance that the FI investigation's true purpose was criminal. In addition, it may not be entirely clear at this early stage where venue lies; it therefore may not be clear which USAO(s)

should be notified.

Instead, the USAO should be brought in only after Crim. Div. decides that DoJ should consider initiating a criminal investigation or prosecution, allowing the USAO to weigh in on this decision. Paragraphs A.8 and B.6 of the draft procedures already provide for this.

4. Mary Jo suggests that the obligation to notify the pertinent USAO when Crim. Div. decides that we need to consider "going criminal" should be mandatory, rather than merely hortatory. Accordingly, she would change "should" to "shall" in paragraph A.8.

I recommend making this change. The reason "should" was used was to provide some flexibility to permit non-notification in special circumstances (e.g., where there was a concern about leaks in a particular USAO, etc.). I believe that other language in this sentence -- specifically, that Crim. Div. and OIPR will contact the pertinent USAO "as soon thereafter as possible" provide sufficient flexibility to deal with such circumstances.

5. Mary Jo would amend paragraph A.9. as follows: "Any disagreement among the Criminal Division, **United States Attorneys**, OIPR, and the FBI concerning the application of these procedures in a particular case, or concerning the propriety of initiating a criminal investigation or prosecution, shall be raised with the Deputy Attorney General."

I recommend making this change.

6. Mary Jo suggests that for FI investigations in which FISA techniques are not yet being utilized, USAOs should be included earlier in the process. Thus, she would require notice to the pertinent USAO during such investigations as soon as Crim. Div. is notified -- that is, whenever facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed.

I recommend rejecting this change. An FI investigation that goes anywhere is likely to utilize FISA techniques at some point. But if a USAO has already been brought in before the FISA techniques are initiated, it will be even more difficult to avoid the appearance that the FI investigation had a predominantly criminal purpose from the outset. As a result, the FISA court might even refuse to authorize FISA surveillance or physical searches if a USAO has already become involved in such an investigation.

7. Mary Jo suggests that in an FI investigation in which FISA techniques are not yet being used, the USAO should be notified whenever Crim. Div decides that significant law

enforcement interests exist.

I recommend rejecting this change for the reasons discussed in section 3, above.

8. Mary Jo suggests changing "should" to "shall" in paragraph B.6.

I recommend making this change for the reasons discussed in section 4, above.

9. Mary Jo suggests adding "United States Attorneys" to paragraph B.8, so that when USAs are dissatisfied with the application of the procedures in a particular case, they too can raise the issue with the DAG.

I recommend making this change for the reasons discussed in section 5, above.

* * *

RECOMMENDATION: That you sign the memoranda attached at Tabs B and C.

Attachments

cc: Merrick Garland
Paul Fishman



U.S. Department of Justice
The Deputy Attorney General

Washington, D.C. 20530

To the AG -

I have reviewed
and concur in the
Vatis/Garland
recommendations for the
reasons set forth
in the Vatis memo.

Jarin



U. S. Department of Justice

Office of the Deputy Attorney General

Executive Office for National Security

Washington, D.C. 20530

July 14, 1995

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

THROUGH: Merrick Garland *MG*
Principal Associate Deputy Attorney General

FROM: Michael Vatis *MV*

SUBJECT: Procedures for Contacts Between the FBI and the
Criminal Division Concerning Foreign Intelligence and
Foreign Counterintelligence Investigations

Attached at Tab A are Mary Jo White's latest suggested revisions to the draft procedures, as well as your own changes to her revisions. Attached at Tab B is a redlined version of revised procedures, incorporating your changes. Attached at Tab C is a clean version of the revised procedures, ready for the AG's signature. Finally, attached at Tab D is a second copy of the memo, originally sent to the AG on June 19, stating that these procedures do not affect the March 4 instructions governing specific FCI and criminal investigations. (I worked this out with Mary Jo last month.)

Per Merrick's request, I have discussed Mary Jo's proposed revisions with Jim Reynolds. Jim still believes that Mary Jo's changes would require involvement of USAOs too early in the process -- before CRM decides that we should initiate a criminal investigation. This would raise all the problems detailed in my earlier memoranda to you and the AG -- in short, if these cases are not carefully monitored and coordinated by Main Justice and FBIHQ, we run the risk of prejudicing potential criminal prosecutions down the road.

Jim notes that CRM in fact is likely to consult early on with some USAOs, including the Southern District of New York, which are experienced with FI and FCI matters and understand the legal and practical difficulties in coordinating intelligence and criminal investigations. But we simply cannot write into the procedures that we will treat some USAOs differently from others. Jim agrees that your proposed changes to Mary Jo's language would afford CRM the necessary flexibility to decide when it is appropriate to consult with a particular USAO.

I RECOMMEND THAT THE AG SIGN THE MEMOS AT TABS C AND D.

United States Attorney's Office
Southern District of New York

Mary Jo White
United States Attorney

United States Courthouse
One St. Andrew's Plaza
New York, New York 10007



COMMERCIAL (212) 791-0056

Facsimile Transmission Cover Page

TO:

ATTORNEY GENERAL JANET RENO

Name

Division/Section

Phone Number

202 514-0468

FAX Number

CONFIDENTIAL U.S. ATTORNEY FACSIMILE COMMUNICATION

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FROM:

M. J. White

Office of the United States Attorney, Southern District of New York

Phone: **COMMERCIAL** (212) 791-0056



Fax: **COMMERCIAL** (212) 791-9098

Date: _____ Pages _____ including cover sheet

Re: 3 Suggested Changes. I am available to discuss.

I changed "as soon thereafter as possible" to "as soon

practicable." -- More discretion for Perm. Div.

INSTRUCTIONS

20fw

IMMEDIATELY NOTIFY SENDER OF ANY DIFFICULTIES IN TRANSMISSION.

PLEASE NOTIFY SENDER OF RECEIPT BY TELEPHONE.



Office of the Attorney General
Washington, D. C. 20530

TABC

514-0468

MEMORANDUM

TO: Assistant Attorney General, Criminal Division
Director, FBI
Counsel for Intelligence Policy
The United States Attorneys

FROM: The Attorney General

SUBJECT: Procedures for Contacts Between the FBI and the
Criminal Division Concerning Foreign Intelligence and
Foreign Counterintelligence Investigations

①

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

A. Contacts During an FI or FCI Investigation in Which FISA Surveillance or Searches are Being Conducted

1. If, in the course of an FI or FCI investigation utilizing electronic surveillance or physical searches under the Foreign Intelligence Surveillance Act (FISA), facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed, the FBI and OIPR each shall independently notify the Criminal Division. Notice to the Criminal Division shall include the facts and circumstances developed during the investigation that support the indication of significant federal criminal activity. The FBI shall inform OIPR when it initiates contact with the Criminal Division. After this initial notification, the Criminal Division shall notify OIPR before engaging in substantive consultations with the FBI, as discussed in paragraph 5, below.

2. The FBI shall not contact a U.S. Attorney's Office concerning such an investigation without the approval of the Criminal Division and OIPR. In exigent circumstances, where immediate contact with a U.S. Attorney's Office is appropriate because of potential danger to life or property, FBIHQ or an FBI

may, in appropriate circumstances,
The Criminal Division ~~will~~ *shall* contact
Department U.S. Attorney's Office(s) *as soon as possible.*

②

field office may make such notification. The Criminal Division and OIPR should be contacted and advised of the circumstances of the investigation and the facts surrounding the notification as soon as possible.

for the purpose of evaluating the information

3. ~~When~~ the Criminal Division concludes that the information provided by the FBI or OIPR raises legitimate and significant criminal law enforcement concerns, it shall inform the FBI and OIPR. Thereafter, the FBI may consult with the Criminal Division concerning the investigation to the extent described in paragraphs 5 and 6, below.

4. The FBI shall maintain a log of all contacts with the Criminal Division, noting the time and participants involved in any contact, and briefly summarizing the content of any communication.

5. The Criminal Division shall notify OIPR of, and give OIPR the opportunity to participate in, consultations between the FBI and Criminal Division concerning an FI or FCI investigation. If OIPR is unable or does not desire to participate in a particular consultation, the Criminal Division will, after the consultation takes place, orally inform OIPR of the substance of the communication in a timely fashion.

6. Consultations between the Criminal Division and the FBI shall be limited in the following manner: The FBI will apprise the Criminal Division, on a timely basis, of information developed during the FI or FCI investigation that relates to significant federal criminal activity. The Criminal Division may give guidance to the FBI aimed at preserving the option of a criminal prosecution. (For example, the Criminal Division may provide advice on the handling of sensitive human sources so that they would not be compromised in the event of an ultimate decision to pursue criminal prosecution.) The Criminal Division shall not, however, instruct the FBI on the operation, continuation, or expansion of FISA electronic surveillance or physical searches. Additionally, the FBI and Criminal Division should ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of the Criminal Division's directing or controlling the FI or FCI investigation toward law enforcement objectives.

7. In a FISA renewal application concerning such an investigation, OIPR shall apprise the Foreign Intelligence Surveillance Court (FISC) of the existence of, and basis for, contacts between the FBI and Criminal Division, in order to keep the FISC informed of the criminal justice aspects of the ongoing investigation.

~~The Criminal Division shall contact the pertinent United States Attorney's Office as soon thereafter as possible~~ (3)

8. In the event the Criminal Division concludes that circumstances exist that indicate the need to consider initiation of a criminal investigation or prosecution, it shall immediately notify OIPR. The Criminal Division and OIPR shall contact the pertinent U.S. Attorney's Office as soon thereafter as possible.

9. Any disagreement among the Criminal Division, United States Attorneys, OIPR, and the FBI concerning the application of these procedures in a particular case, or concerning the propriety of initiating a criminal investigation or prosecution, shall be raised with the Deputy Attorney General.

B. Contacts During an FI or FCI Investigation in Which No FISA Surveillance or Searches Are Being Conducted

1. If, in the course of an FI or FCI investigation in which FISA electronic surveillance or physical searches are not being conducted, facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed, the FBI shall notify the Criminal Division. Notice to the Criminal Division shall include the facts and circumstances developed during the investigation that support the indication of significant federal criminal activity. ✓

2. The FBI shall not contact a U.S. Attorney's Office concerning such an investigation without the approval of the Criminal Division, and notice to OIPR. In exigent circumstances, where immediate contact with a U.S. Attorney's Office is appropriate because of potential danger to life or property, FBIHQ or an FBI field office may make such notification. The Criminal Division and OIPR should be contacted and advised of the circumstances of the investigation and the facts surrounding the notification as soon as possible. ✓

3. If the Criminal Division concludes that the information provided by the FBI raises legitimate and significant criminal law enforcement concerns, it shall notify the FBI and OIPR. Thereafter, the FBI may consult with the Criminal Division concerning the investigation.

4. The Criminal Division will be responsible for orally informing OIPR of its contacts and consultations with the FBI concerning such an investigation.

5. The FBI shall maintain a log of all contacts with the Criminal Division, noting the time and participants involved in any contact, and briefly summarizing the content of any communication.

6. In the event the Criminal Division concludes that circumstances exist that indicate the need to consider initiation of a criminal investigation or prosecution, it shall immediately

notify OIPR. The Criminal Division and OIPR shall contact the pertinent U.S. Attorney's Office as soon thereafter as possible.

7. If, during an FI or FCI investigation, a FISA electronic surveillance or search is undertaken after the FBI has consulted with the Criminal Division, the procedures set forth in section A., above, shall apply.

8. Any disagreement among the Criminal Division, United States Attorneys, OIPR, and the FBI concerning the application of these procedures in a particular case, or concerning the propriety of initiating a criminal investigation or prosecution, shall be raised with the Deputy Attorney General.



Office of the Attorney General
Washington, D. C. 20530

July 19, 1995

MEMORANDUM

TO: Assistant Attorney General, Criminal Division
United States Attorney, Southern District of New York
Director, FBI
Counsel for Intelligence Policy

FROM: The Attorney General *J. Edgar Hoover*

SUBJECT: Effect of Procedures Governing FBI-Criminal Division
Contacts During FI/FCI Investigations on Specific
Instructions Concerning Separation of Certain FCI and
Criminal Investigations

The memorandum issued by me today regarding procedures for contacts between the FBI and the Criminal Division concerning foreign intelligence and foreign counterintelligence investigations does not affect the specific instructions, contained in a memorandum from the Deputy Attorney General issued March 4, 1995, governing the separation of certain foreign counterintelligence and criminal investigations. Those instructions remain in effect.



Office of the Attorney General
Washington, D. C. 20530

July 19, 1995

MEMORANDUM

TO: Assistant Attorney General, Criminal Division
Director, FBI
Counsel for Intelligence Policy
The United States Attorneys

FROM: The Attorney General

SUBJECT: Procedures for Contacts Between the FBI and the
Criminal Division Concerning Foreign Intelligence and
Foreign Counterintelligence Investigations

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

A. Contacts During an FI or FCI Investigation in Which FISA Surveillance or Searches are Being Conducted

1. If, in the course of an FI or FCI investigation utilizing electronic surveillance or physical searches under the Foreign Intelligence Surveillance Act (FISA), facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed, the FBI and OIPR each shall independently notify the Criminal Division. Notice to the Criminal Division shall include the facts and circumstances developed during the investigation that support the indication of significant federal criminal activity. The FBI shall inform OIPR when it initiates contact with the Criminal Division. After this initial notification, the Criminal Division shall notify OIPR before engaging in substantive consultations with the FBI, as discussed in paragraph 5, below.

2. The FBI shall not contact a U.S. Attorney's Office concerning such an investigation without the approval of the Criminal Division and OIPR. In exigent circumstances, where immediate contact with a U.S. Attorney's Office is appropriate

because of potential danger to life or property, FBIHQ or an FBI field office may make such notification. The Criminal Division and OIPR should be contacted and advised of the circumstances of the investigation and the facts surrounding the notification as soon as possible.

3. If the Criminal Division concludes that the information provided by the FBI or OIPR raises legitimate and significant criminal law enforcement concerns, it shall inform the FBI and OIPR. The Criminal Division may, in appropriate circumstances, contact the pertinent U.S. Attorney's Office for the purpose of evaluating the information. Thereafter, the FBI may consult with the Criminal Division concerning the investigation to the extent described in paragraphs 5 and 6, below.

4. The FBI shall maintain a log of all contacts with the Criminal Division, noting the time and participants involved in any contact, and briefly summarizing the content of any communication.

5. The Criminal Division shall notify OIPR of, and give OIPR the opportunity to participate in, consultations between the FBI and Criminal Division concerning an FI or FCI investigation. If OIPR is unable or does not desire to participate in a particular consultation, the Criminal Division will, after the consultation takes place, orally inform OIPR of the substance of the communication in a timely fashion.

6. Consultations between the Criminal Division and the FBI shall be limited in the following manner: The FBI will apprise the Criminal Division, on a timely basis, of information developed during the FI or FCI investigation that relates to significant federal criminal activity. The Criminal Division may give guidance to the FBI aimed at preserving the option of a criminal prosecution. (For example, the Criminal Division may provide advice on the handling of sensitive human sources so that they would not be compromised in the event of an ultimate decision to pursue criminal prosecution.) The Criminal Division shall not, however, instruct the FBI on the operation, continuation, or expansion of FISA electronic surveillance or physical searches. Additionally, the FBI and Criminal Division should ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of the Criminal Division's directing or controlling the FI or FCI investigation toward law enforcement objectives.

7. In a FISA renewal application concerning such an investigation, OIPR shall apprise the Foreign Intelligence Surveillance Court (FISC) of the existence of, and basis for, any contacts among the FBI, the Criminal Division, and a U.S.

Attorney's Office, in order to keep the FISC informed of the criminal justice aspects of the ongoing investigation.

8. In the event the Criminal Division concludes that circumstances exist that indicate the need to consider initiation of a criminal investigation or prosecution, it shall immediately notify OIPR. The Criminal Division and OIPR shall contact the pertinent U.S. Attorney's Office as soon thereafter as possible.

9. Any disagreement among the Criminal Division, United States Attorneys, OIPR, and the FBI concerning the application of these procedures in a particular case, or concerning the propriety of initiating a criminal investigation or prosecution, shall be raised with the Deputy Attorney General.

B. Contacts During an FI or FCI Investigation in Which No FISA Surveillance or Searches Are Being Conducted

1. If, in the course of an FI or FCI investigation in which FISA electronic surveillance or physical searches are not being conducted, facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed, the FBI shall notify the Criminal Division. Notice to the Criminal Division shall include the facts and circumstances developed during the investigation that support the indication of significant federal criminal activity. The Criminal Division may, in appropriate circumstances, contact the pertinent U.S. Attorney's Office for the purpose of evaluating the information.

2. The FBI shall not contact a U.S. Attorney's Office concerning such an investigation without the approval of the Criminal Division, and notice to OIPR. In exigent circumstances, where immediate contact with a U.S. Attorney's Office is appropriate because of potential danger to life or property, FBIHQ or an FBI field office may make such notification. The Criminal Division and OIPR should be contacted and advised of the circumstances of the investigation and the facts surrounding the notification as soon as possible.

3. If the Criminal Division concludes that the information provided by the FBI raises legitimate and significant criminal law enforcement concerns, it shall notify the FBI and OIPR. Thereafter, the FBI may consult with the Criminal Division concerning the investigation.

4. The Criminal Division will be responsible for orally informing OIPR of its contacts and consultations with the FBI concerning such an investigation.

5. The FBI shall maintain a log of all contacts with the Criminal Division, noting the time and participants involved in

any contact, and briefly summarizing the content of any communication.

6. In the event the Criminal Division concludes that circumstances exist that indicate the need to consider initiation of a criminal investigation or prosecution, it shall immediately notify OIPR. The Criminal Division and OIPR shall contact the pertinent U.S. Attorney's Office as soon thereafter as possible.

7. If, during an FI or FCI investigation, a FISA electronic surveillance or search is undertaken after the FBI has consulted with the Criminal Division, the procedures set forth in section A., above, shall apply.

8. Any disagreement among the Criminal Division, United States Attorneys, OIPR, and the FBI concerning the application of these procedures in a particular case, or concerning the propriety of initiating a criminal investigation or prosecution, shall be raised with the Deputy Attorney General.