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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 *[Signature]*
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, 2004

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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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