U. S. Department of Justice
Office of the Inspector General

A Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks (November 2004)

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Office of the Inspector General

UNCLASSIFIED

NOTE

This report is an unclassified version of the full report that the Office of the Inspector General (OIG) completed in 2004 and provided to the Federal Bureau of Investigation (FBI), the Department of Justice, the Congress, the Central Intelligence Agency, the National Security Agency, and the National Commission on Terrorist Attacks Upon the United States. The OIG's full report is classified at the Top Secret/SCI level.

At the request of members of Congress, after issuing the full report the OIG created an unclassified version of the report. However, because the unclassified version included information about the FBI's investigation of Zacarias Moussaoui, and because of Moussaoui's trial in the United States District Court for the Eastern District of Virginia and the rules of that Court, the OIG could not release the unclassified version of the report without the Court's permission until the trial was completed.

In June 2005, the Court gave the OIG permission to release the sections of the unclassified report that did not discuss Moussaoui. Therefore, at that time the OIG released publicly a version of the unclassified report that did not contain Chapter 4 (the OIG's review of the Mousssaoui matter), as well as other references to Moussaoui throughout the report.

The Moussaoui case concluded on May 4, 2006, when the Court sentenced Moussaoui to life in prison. The OIG then prepared this document, an unclassified version of the full report that includes the information related to Moussaoui.

On June 19, 2006, the OIG is releasing this full version of the unclassified report, which includes the Moussaoui chapter and other references to Moussaoui throughout the report, as well as the other chapters that previously were released publicly.

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CHAPTER ONE
INTRODUCTION

I. Introduction

On September 11, 2001, 19 terrorists hijacked 4 commercial airplanes as part of a coordinated terrorist attack against the United States. Two of the planes crashed into the World Trade Center Towers in New York City and one hit the Pentagon near Washington, D.C. The fourth plane crashed in a field in southwestern Pennsylvania. More than 3,000 persons were killed in these terrorist attacks.

On February 14, 2002, the House of Representatives Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence began a joint inquiry to address questions related to the September 11 attacks, such as "what the Intelligence Community knew prior to September 11 about the scope and nature of any possible terrorist attacks… what was done with that information" and "how and to what degree the elements of the Intelligence Community have interacted with each other, as well as with other parts of the federal, state, and local governments, with respect to identifying, tracking, assessing, and coping with international terrorist threats."[1] This review became known as the Joint Intelligence Committee Inquiry or "the JICI review."

One of the key questions arising after the attacks was what information the Federal Bureau of Investigation (FBI) knew before September 11 that was potentially related to the terrorist attacks. On May 21, 2002, Coleen Rowley, the Chief Division Counsel in the FBI's Minneapolis Field Office,[2] wrote a 13-page letter to FBI Director Robert Mueller in which she raised concerns about how the FBI had handled certain information in its possession before the attacks. Among other things, Rowley discussed the FBI's investigation of

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[1] The U.S. "Intelligence Community" is composed of 14 agencies responsible for collecting intelligence information on behalf of the government and includes the Federal Bureau of Investigation and the Central Intelligence Agency (CIA).

[2] The CDC provides legal counsel and advice to field office management, supervisors, and agents on administrative and operational matters.

Zacarias Moussaoui, a French citizen who had been arrested in Minneapolis on August 16, 2001. The Minneapolis FBI Field Office had received a telephone call from a representative of a flight school reporting suspicions about Moussaoui, who was taking flying lessons at the school near Minneapolis. Acting on this information, FBI and Immigration and Naturalization Service (INS) agents in Minneapolis investigated Moussaoui for possible connections to terrorism and discovered that he was in violation of his immigration status. As a result, on August 16, 2001, Moussaoui was taken into custody on immigration charges.

The Minneapolis FBI became concerned that Moussaoui was training to possibly commit a terrorist act using a commercial airplane. It therefore attempted to investigate his potential links to terrorism. To pursue this investigation, the Minneapolis FBI sought a warrant to search Moussaoui's computer and other belongings. However, FBI Headquarters did not believe that a sufficient predicate existed to obtain the search warrant, either a criminal warrant or a Foreign Intelligence Surveillance Act (FISA) warrant. Moussaoui, who was in custody at the time of the September 11 attacks, later was indicted and charged as a co-conspirator in the September 11 attacks.

In her May 21, 2002, letter to the FBI Director, Rowley criticized the FBI Headquarters managers who were involved with the Moussaoui investigation prior to September 11. FBI Director Mueller subsequently referred Rowley's letter to the Inspector General and asked the Office of the Inspector General (OIG) to review the FBI's handling of the Moussaoui investigation. In addition, the Director asked the OIG to review the issues in an Electronic Communication (EC) written by an FBI Special Agent in Phoenix (known as the Phoenix EC), as well as "any other matters relating to the FBI's handling of information and/or intelligence before September 11, 2001 that might relate in some manner to the September 11, 2001 attacks."

The Phoenix EC was a memorandum sent by an agent in the FBI's Phoenix office in July 2001 to FBI Headquarters and to the FBI's New York Field Office.[3] The Phoenix EC outlined the agent's theory that there was a

[3] This document has commonly been referred to as "the Phoenix memo" or "the Phoenix EC." Throughout this report, we use the term "Phoenix EC" to refer to this document.

coordinated effort by Usama Bin Laden to send students to the United States to attend civil aviation universities and colleges for the purpose of obtaining jobs in the civil aviation industry to conduct terrorist activity. The EC also recommended that FBI Headquarters instruct field offices to obtain student identification information from civil aviation schools, request the Department of State to provide visa information about foreign students attending U.S. civil aviation schools, and seek information from other intelligence agencies that might relate to his theory. At the time of the September 11 attacks, little action had been taken in response to the Phoenix EC.

The OIG agreed to conduct a review in response to the FBI Director's request. In conducting our review, OIG investigators also learned that prior to the September 11 attacks the Intelligence Community had acquired a significant amount of intelligence about two of the hijackers – Nawaf al Hazmi and Khalid al Mihdhar.[4] Well before September 11, 2001, the Intelligence Community had discovered that Hazmi and Mihdhar had met with other al Qaeda operatives in Malaysia in January 2000. The CIA also had discovered that Mihdhar possessed a valid U.S visa and that Hazmi had traveled to the United States in January 2000. The FBI contended, however, that it was not informed of Mihdhar's U.S. visa and Hazmi's travel to the United States until August 2001, just before the September 11 attacks. At that time, the FBI had initiated an investigation to locate Mihdhar and Hazmi, but the FBI was not close to finding them at the time of the September 11 attacks. The OIG also learned that Hazmi and Mihdhar had resided in the San Diego area in 2000, where they interacted with a former subject of an FBI investigation and lived as boarders in the home of an FBI source. The OIG therefore decided to include in its review an investigation of the intelligence information available to the FBI about Hazmi and Mihdhar before September 11 and the FBI's handling of that intelligence information.

In December 2002, the JICI released its final report entitled, "Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001." One of the report's recommendations was for the Inspectors General at the Department of Justice (DOJ), CIA, Department of

[4] Mihdhar, Hazmi, and three others hijacked and crashed American Airlines Flight 77 into the Pentagon.

Defense, and Department of State to determine whether and to what extent personnel at those agencies should be held accountable for any acts or omissions with regard to the identification, prevention, and disruption of the September 11 terrorist attacks.

II. OIG investigation

The OIG's review focused on the FBI's handling of the Phoenix EC, the Moussaoui investigation, and the intelligence information about Mihdhar and Hazmi. To review these issues, the OIG assembled a team of four attorneys, three special agents, and two auditors. The team conducted 225 interviews of personnel from the DOJ, FBI, CIA, and other agencies. For example, we interviewed FBI personnel from FBI Headquarters; from FBI field offices in Minneapolis, San Diego, New York, Phoenix, and Oklahoma; and from FBI offices overseas. We also interviewed employees from the CIA, the INS, the National Security Agency (NSA), and the Federal Aviation Administration (FAA). We reviewed over 14,000 pages of documents we obtained from the FBI, the CIA, the NSA, and JICI.

Our review of the FBI's handling of the Hazmi and Mihdhar matter required us to obtain a significant amount of information from the CIA regarding its interactions with the FBI on that matter. To conduct our review, we thus had to rely on the cooperation of the CIA in providing us access to CIA witnesses and documents. We were able to obtain CIA documents and interviewed CIA witnesses, but we did not have the same access to the CIA that we had to DOJ information and employees. We also note that the CIA OIG is conducting its own inquiry of the CIA's actions with regard to the Mihdhar and Hazmi matter.

III. Organization of the OIG report

This report is organized into six chapters. Chapter One contains this introduction. Chapter Two provides general background on the issues discussed in this report. For example, it contains descriptions of key terminology, the FBI's organizational structure, the so-called "wall" that separated intelligence and criminal investigations in the FBI and the DOJ, the process for obtaining a FISA warrant, and other legal background issues related to how the FBI investigated terrorism and intelligence cases before September 11, 2001. Because the background chapter contains basic terminology and

CHAPTER FOUR
THE FBI'S INVESTIGATION OF ZACARIAS MOUSSAOUI

I. Introduction

This chapter examines the FBI's investigation of Zacarias Moussaoui. In August 2001, Moussaoui enrolled in flight training lessons at a school in Minneapolis, Minnesota. On August 15, 2001, the flight school reported its suspicions about Moussaoui to the FBI, including that he only wanted to learn how to take off and land the airplane, that he had no background in aviation, and that he had paid in cash for the course. The FBI interviewed Moussaoui's flight instructor, his roommate, and then Moussaoui. The INS and the FBI detained Moussaoui for a violation of his immigration status and seized his belongings, including a computer and personal papers.

The Minneapolis FBI opened an investigation on Moussaoui, believing that he was seeking flight training to commit a terrorist act. Over the next several weeks, the Minneapolis FBI and FBI Headquarters had many discussions – and disputes – about the investigation. Minneapolis wanted to obtain a warrant to search Moussaoui's computer and other belongings that were seized at the time of Moussaoui's arrest, either a criminal warrant or Foreign Intelligence Surveillance Act (FISA) warrant. The Minnesota FBI and FBI Headquarters differed as to whether a warrant could be obtained and what the evidence in the Moussaoui case suggested. FBI Headquarters did not believe sufficient grounds existed for a criminal warrant, and it also concluded that a FISA warrant could not be obtained because it believed Moussaoui could not be connected to a foreign power as required under FISA. The Minneapolis FBI disagreed and became increasingly frustrated with the responses and guidance it was receiving from FBI Headquarters.

In late August 2001, after FBI Headquarters concluded that it could not obtain a FISA warrant, the Minneapolis FBI began plans to deport Moussaoui to France, which had issued Moussaoui's passport. They planned to ask the French authorities to search his belongings if he was deported to France. However, the September 11 terrorist attacks occurred while the FBI was in the process of finalizing the deportation plans. On September 11, after the attacks, the FBI obtained a criminal warrant to search Moussaoui's possessions. On

December 11, 2001, Moussaoui was charged in an indictment alleging that he was a co-conspirator in the September 11 attacks. He currently is awaiting trial.

On May 21, 2002, Coleen Rowley, the Minneapolis FBI's Chief Division Counsel (CDC), sent a letter to FBI Director Mueller in which she criticized FBI Headquarters for the way it had handled the Moussaoui case. Among other things, her letter disputed the way the FBI was describing its Moussaoui investigation, and she asserted that FBI Headquarters had prevented the Minneapolis FBI from seeking a criminal search warrant. In addition, she alleged that FBI Headquarters inappropriately failed to seek a FISA warrant even though probable cause for the warrant was "clear." She also alleged that FBI Headquarters had intentionally raised "roadblocks" and "undermined" the Minneapolis FBI's "desperate" efforts to obtain a FISA warrant. She added that the Phoenix EC had not been provided to the Minneapolis FBI, and that the Minneapolis FBI's assessment of Moussaoui as a potential threat had not been shared with other intelligence and law enforcement authorities.

Upon receipt of Rowley's letter, Director Mueller referred it to the OIG and asked the OIG to conduct a review of the issues raised in the letter, the Phoenix EC, and other matters related to the FBI's handling of intelligence information that was potentially related to the September 11 attacks.

In this chapter, we describe in detail the facts regarding the FBI's investigation of Moussaoui and the interactions between the Minneapolis FBI and FBI Headquarters on the request to obtain a warrant to search Moussaoui's belongings.[92] We then provide our analysis of these actions. Our analysis discusses systemic problems that this case revealed, and it also assesses the

[92] While there are some notes and e-mails relating to the conversations that took place between FBI Headquarters and the Minneapolis FBI, and within FBI Headquarters, about the Moussaoui investigation, many conversations were not documented. Witnesses could not recall the exact content of some of the conversations, the number of conversations, whether specific topics were discussed, or the dates of conversations. The following narrative is our best reconstruction of those conversations and events, when they occurred, and what was said, based on the documentary evidence and the recollections of the participants.

performance of the FBI offices and employees who were involved in the Moussaoui investigation.

We show a timeline of the FBI's investigation of Moussaoui on the next page of the report.

II. Statement of facts related to the FBI's Moussaoui investigation

A. Moussaoui's background

Zacarias Moussaoui was born in France on May 30, 1968, and is of Moroccan descent. Prior to 2001, he lived in the United Kingdom. On February 23, 2001, he legally entered the United States in Chicago, Illinois, using a French passport. He entered under the Visa Waiver Program, which allows citizens of 27 countries, including France, to enter the United States without a visa for stays of up to 90 days.[93] Moussaoui's entry was therefore valid until May 22, 2001.

In late February 2001 Moussaoui enrolled in a beginner pilot course at the Airman Flight School in Norman, Oklahoma. He did not complete the training and stopped taking lessons there in late May 2001. However, he remained in the United States after dropping out of the course and overstayed his allowed length of stay.

On May 23, 2001, Moussaoui e-mailed the Pan Am International Flight Academy, a private aviation school based in Miami, Florida, which had several campuses around the country. On August 9, 2001, Moussaoui enrolled in a flight simulator training course at a Pan Am facility near Minneapolis, Minnesota. Pan Am's Minneapolis facility used flight simulators only, and the training there usually consisted of initial training for newly hired airline pilots or refresher training for active pilots. Moussaoui's flight simulator course was part of a comprehensive training program designed to provide instruction to licensed pilots on how to fly commercial jets.

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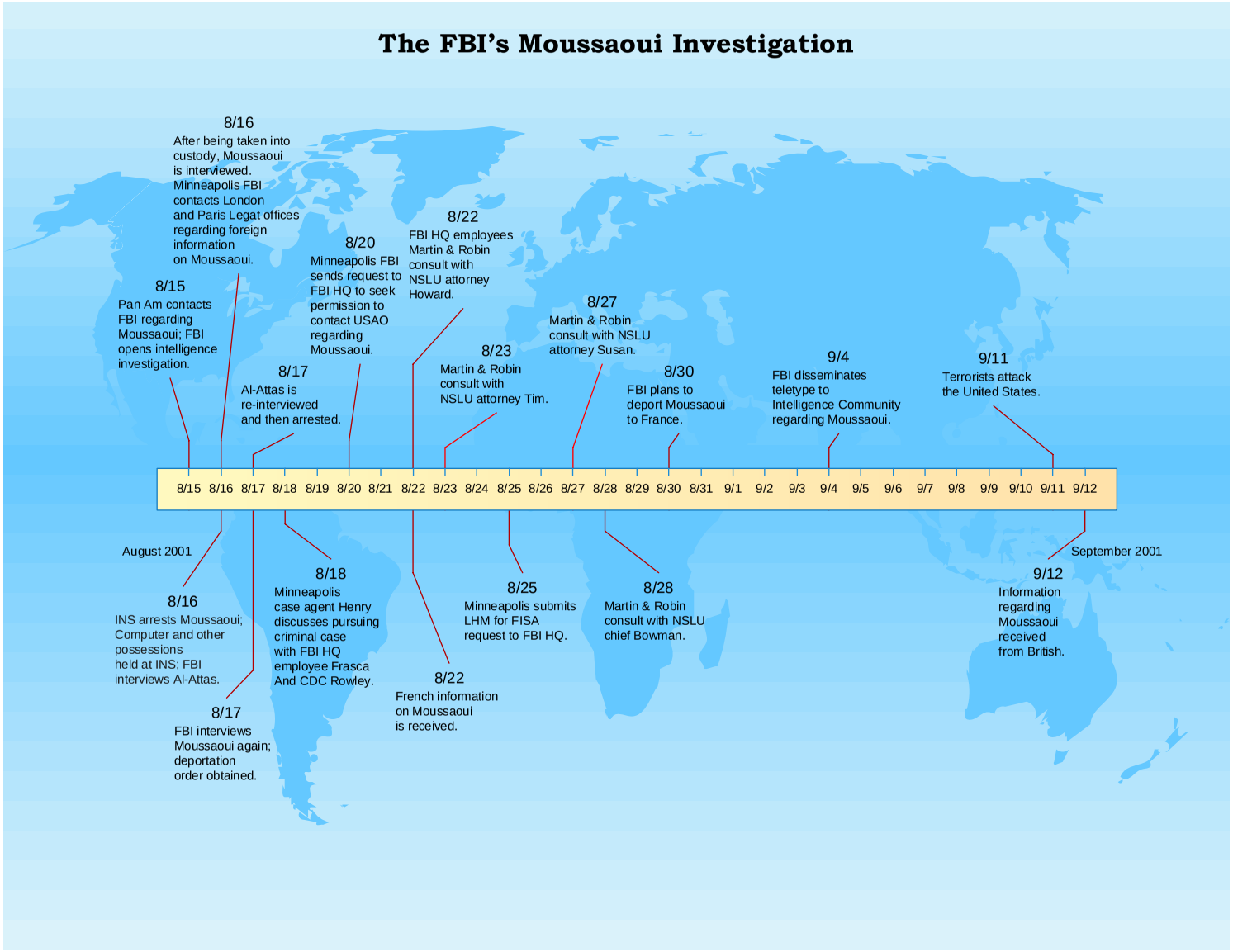
[93] For a description of the Visa Waiver Program, see the OIG report entitled "Follow-up Report on the Visa Waiver Program" (December 2001).


The FBI's Moussaoui Investigation
8/16
After being taken into custody, Moussaoui is interviewed. Minneapolis FBI contacts London and Paris Legat offices regarding foreign information on Moussaoui.
8/15
Pan Am contacts FBI regarding Moussaoui; FBI opens intelligence investigation.
8/17
Al-Attas is re-interviewed and then arrested.
8/20
Minneapolis FBI sends request to FBI HQ to seek permission to contact USAO regarding Moussaoui.
8/22
FBI HQ employees Martin & Robin consult with NSLU attorney Howard.
8/23
Martin & Robin consult with NSLU attorney Tim.
8/27
Martin & Robin consult with NSLU attorney Susan.
8/30
FBI plans to deport Moussaoui to France.
9/4
FBI disseminates teletype to Intelligence Community regarding Moussaoui.
9/11
Terrorists attack the United States.
8/15 8/16 8/17 8/18 8/19 8/20 8/21 8/22 8/23 8/24 8/25 8/26 8/27 8/28 8/29 8/30 8/31 9/1 9/2 9/3 9/4 9/5 9/6 9/7 9/8 9/9 9/10 9/11 9/12
August 2001
8/16
INS arrests Moussaoui; Computer and other possessions held at INS; FBI interviews Al-Attas.
8/17
FBI interviews Moussaoui again; deportation order obtained.
8/18
Minneapolis case agent Henry discusses pursuing criminal case with FBI HQ employee Frasca And CDC Rowley.
8/22
French information on Moussaoui is received.
8/25
Minneapolis submits LHM for FISA request to FBI HQ.
8/28
Martin & Robin consult with NSLU chief Bowman.
September 2001
9/12
Information regarding Moussaoui received from British.

III. OIG Analysis

We concluded that there were significant problems in how the FBI handled the Moussaoui case. In our view, these problems were attributable to both systemic issues in how the FBI handled intelligence and counterterrorism issues at the time, as well as to individual failings on the part of some of the individuals involved in the Moussaoui case.

A. No intentional misconduct

At the outset of our analysis, we believe it is important to state that we did not conclude that any FBI employee committed intentional misconduct, or that anyone attempted to deliberately "sabotage" the Minneapolis FBI's request for a FISA warrant, as Rowley wrote in her letter to FBI Director Mueller. For example, Rowley argued that Martin edited the initial FISA request submitted by the Minneapolis FBI and omitted information to "deliberately further undercut the FISA effort." Rowley also suggested that as part of the alleged sabotage, FBI Headquarters personnel failed to make Minneapolis aware of the Phoenix EC.

As we discuss below, we believe that Rowley's letter raised significant problems in the way the Moussaoui investigation was handled, and we criticize some of the actions of FBI employees. Her letter also alluded to broader problems that existed in how the FBI handled intelligence matters and FISA requests. But contrary to her assertions, we found no evidence, and we do not believe, that any FBI employee deliberately sabotaged the Moussaoui FISA request or committed intentional misconduct.

B. Probable cause was not clear

Rowley asserted in her letter that FBI Headquarters inappropriately failed to seek a FISA warrant even though probable cause for the FISA became clear when the FBI received the French information that Moussaoui had recruited someone to fight in Chechnya on behalf of the rebel forces led by Ibn Khattab. As we discuss below, in our view the standards that the FBI applied towards FISA requests before September 11 were unduly conservative, and FBI Headquarters did not fully or appropriately analyze the French information, as well as other pieces of information regarding Moussaoui, for how it could be used in the FISA process or in connection with obtaining a criminal warrant.

But according to the prevailing FBI and DOJ practices at the time, it was not clear that the French information, or other available information, was sufficient to obtain a warrant from the FISA Court. Prior to September 11, 2001, the Chechen rebels led by Khattab had not been designated by the State Department as a foreign terrorist organization. FBI managers and attorneys we interviewed told us that they believed that the Chechen rebels had not been pleaded as a foreign power before the FISA Court previously. In addition, they stated that while it may have been theoretically possible to use the Chechen rebels as a new foreign power in FISA applications to the FISA Court, FBI Headquarters was operating under the belief that OIPR would not plead a foreign power in a FISA request that had not previously been pled. In addition, several FBI witnesses stated that the intelligence at the time suggested that Khattab and the Chechen rebels were involved only in a civil war and were not interested in harming U.S. interests, and they believed this assessment would have caused OIPR not to support using the Chechen rebels as a foreign power in a FISA application. The FBI witnesses stated that even if the CIA had evidence that would have supported articulating the Chechen rebels as a foreign power for a FISA application, "building" a new foreign power for a FISA application was a process that took several months to complete, and the Moussaoui FISA warrant was needed more quickly because he was about to be deported.

The Minneapolis FBI believed that the foreign power connection was also established because Moussaoui was connected to Khattab, who was linked to Usama Bin Laden. Yet, several FBI employees we interviewed stated that while there was some association between Khattab and Bin Laden, the latest intelligence information indicated Khattab was not part of the al Qaeda organization, and that Khattab did not take direction from Bin Laden.

In an effort to examine whether probable cause was clear with regard to the Minneapolis FBI's request for a FISA warrant, we asked James Baker, the current head of OIPR, to review the documentation in the Moussaoui investigation and provide us with his assessment as to whether there was a sufficient connection between Moussaoui and a foreign power to support a

FISA warrant.[144] He opined that the case for a FISA warrant was "not a slam dunk" and that there were "no conclusively damning facts" to establish the necessary connection to a foreign power. However, he said that, while he could not say conclusively how he would have responded if he had been asked to review the Moussaoui matter in August 2001, he thought it might have been possible to argue that Moussaoui and the other individuals who had surfaced in the investigation were operating as an al Qaeda cell in the United States. Alternatively, he said that it was possible to argue that Moussaoui, Al-Attas, and the other individuals who surfaced in the investigation were their own small, unnamed foreign power, since the FISA legislative history provides that a foreign power can be a group as small as two individuals.

Baker stated that if the request for a FISA warrant had been presented to OIPR for consideration in August 2001, he would have "asked lots of questions" about it. He said that he would have been concerned about such a FISA application because the Minneapolis FBI had at first wanted to go to the U.S. Attorney's Office to seek a criminal search warrant, and he believed this would have raised questions with the FISA Court that the FBI was trying to use FISA to pursue a criminal investigation. He said that in order to obtain a FISA warrant, OIPR likely would have recommended a wall between the two investigations.

Baker's analysis confirmed our view that, contrary to Rowley's allegations, the Minneapolis FBI did not have a completely clear case for a FISA warrant in the Moussaoui case that would have been easily approved had the FBI and OIPR sought one from the FISA Court. Given the standards and prevailing practices at the time, FBI Headquarters' assessment that it could not establish Moussaoui's connection to a foreign power with OIPR or the FISA Court was not completely off base, as alleged by the Minneapolis FBI. Nor do we believe that FBI Headquarters' failure to seek a FISA warrant was a result of any intent to "sabotage" the Moussaoui case. But, as we discuss below, we

[144] As stated previously, Baker joined OIPR in October 1996 and became the Deputy Counsel in 1998. In May 2001, he was named Acting Counsel, and in January 2002 he became the Counsel. Before we showed him the documents, Baker had not previously reviewed the Moussaoui information.

believe the FBI Headquarters' handling of the Moussaoui request and other FISA requests was unduly conservative and problematic in various ways.

C. Problems in the FBI's handling of the Moussaoui investigation

The handling of the Moussaoui case highlighted that the Department's narrow interpretation of the "purpose" requirement under FISA before September 11, 2001, was a severe impediment to obtaining FISA warrants. We also question how the FBI examined the interaction between a potential criminal case and an intelligence case in the context of the Moussaoui investigation.

We believe the FBI did not carefully consider its options at the outset of the Moussaoui investigation, and it inexplicably failed to consider whether it should seek a criminal warrant once the decision was made that a FISA warrant should not be sought. Moreover, it did not adequately disseminate, within or outside the FBI, the information from the Minneapolis FBI about the potential threat posed by Moussaoui.

The Department's interpretation of FISA was conservative prior to September 11 for a variety of reasons. This conservative interpretation was exacerbated in the Moussaoui case by the fact that many of the FBI's decisions were informed only by what FBI Headquarters or NSLU attorneys sensed might be the reaction of OIPR or the FISA Court. There was no clear body of law to guide the FBI, and neither OIPR, the NSLU, nor FBI management made clear the policies and practices to guide individual FBI employees or supervisors on FISA applications. Many decisions appear to have been made based on prior feedback from OIPR, rather than clear guidance. As we discuss below, this lack of guidance resulted in frequent misunderstandings about the possibilities under FISA or the appropriate standards to guide decisions regarding intelligence and criminal investigations.

1. Initial evaluation of the request for a FISA warrant

a. Prevailing standards

As discussed in Chapter Two, the FISA statute requires that "the purpose" of a FISA warrant be to obtain foreign intelligence information. However, courts and the Department for many years used the standard of whether the "*primary* purpose" of the FISA request was to obtain intelligence

information. Under this standard, the Department and the FBI analyzed each case to determine whether the goal of an investigation was to gather intelligence or to pursue a criminal investigation. In 1995, the Department developed written procedures, called the "1995 Procedures," designed to ensure adherence to this "primary purpose" standard. The impetus for the 1995 Procedures was OIPR's concern that the lack of procedures had permitted the FBI and the Criminal Division to work so closely together in the Ames case that the FISA Court would believe that the purpose of the FISA warrant was to gather information for the criminal case, rather than the intelligence investigation.

The Department's interpretation of the primary purpose standard, and the widespread perception within the FBI that the FISA Court and OIPR would not permit criminal investigative activity when an intelligence investigation was opened, impeded the Minneapolis FBI's ability even to consult with prosecutors to assess whether probable cause existed to obtain a criminal search warrant. After Moussaoui's arrest on immigration charges, the Minneapolis FBI wanted to search Moussaoui's belongings to determine his plans and to prevent him from committing a terrorist act. The FBI agents' objectives were broad – to deter any criminal activities, to protect national security by whatever means available, and to obtain any intelligence on Moussaoui's plans. These objectives could not be easily categorized as either criminal or intelligence.

Unfortunately, under the prevailing standards at the time, consultation and coordination with the prosecutors in the local U.S. Attorney's Office was difficult, and it did not occur in the Moussaoui case. The Minneapolis agents opened the Moussaoui case as an intelligence investigation. As a result, they could not contact the USAO for guidance and advice on the criminal investigation or the possibility of obtaining a criminal search warrant without approval from the Criminal Division and notice to OIPR. Once the FBI's intelligence case was opened, FBI Headquarters had to send a memorandum to the Criminal Division to receive permission to contact the USAO to discuss a criminal warrant.

The Minneapolis FBI initially made contact with the USAO, but then did not pursue any substantive conversations because of these prohibitions. Conversely, if the Minneapolis FBI had opened the case as a criminal investigation, or consulted with the USAO or the Criminal Division attorneys

about a criminal case, that possibly would have affected its ability to obtain a FISA warrant because of concerns about the "smell test." According to OIPR Counsel Baker, even the fact that that Minneapolis FBI had written in its 26-page EC that it wanted permission to go to the USAO would have been something that concerned him and may have affected the Moussaoui FISA request.

At the initial stages of a terrorism investigation, it is often unclear and difficult to know how to proceed. In this case, the Minneapolis agents were not able to seek advice directly from the Minneapolis USAO, which was probably in the best position to assess whether there was sufficient evidence to obtain a criminal warrant from the local court. Although Rowley assumed that the Minneapolis USAO would not have supported the request for a criminal warrant because she believed it had an unduly high standard of probable cause, this was only a guess. The Minneapolis USAO disputes her claim and stated that its normal practice was to work with the FBI to obtain a warrant. Yet, whether or not this assessment was accurate, the system resulted in uninformed decisions because it did not allow agents to consult with prosecutors at an early stage, absent permission from the Criminal Division.[145]

This problem was addressed in October 2001, when the Patriot Act changed the requirement from "the purpose" (for obtaining foreign intelligence) to "a significant purpose," and specifically permitted such consultations. As a result, direct consultations among the intelligence investigators and the criminal investigators and prosecutors can occur immediately. We agree with the statement of former Associate Deputy Attorney General David Kris, who testified before Congress on September 10, 2002:

> We need <u>all</u> of our best people, intelligence and law enforcement alike, working together to neutralize the threat. In some cases, the best protection is prosecution – like the recent

[145] In addition, as discussed in Chapter Two criminal investigations had to be segregated from intelligence investigations, and information collected in the intelligence investigation that related to the criminal investigation had to be passed "over the wall" to the agents handling the criminal investigation. We discuss some of the problems created by this system in Chapter Five.

> prosecution of Robert Hanssen for espionage. In other cases, prosecution is a bad idea, and another method – such as recruitment – is called for. Sometimes you need to use both methods. But we can't make a rational decision until everyone is allowed to sit down together and brainstorm about what to do.

(Emphasis in original.)

b. Inadequate evaluation of whether to proceed as a criminal or intelligence matter

Given the effect that consulting with the USAO had on a potential FISA application, the options in the Moussaoui case needed to be evaluated carefully before making the initial decision whether to proceed criminally or as an intelligence investigation under FISA. This was especially true because the Moussaoui case was unusual for the FBI. Ordinarily, the FBI spent months collecting intelligence information in support of a FISA request. However, in this case the FBI did not have time because Moussaoui was about to be deported.

Therefore, it was even more important for the FBI to carefully consider the evidence before it, the likely outcome of seeking a criminal warrant, including an assessment of probable cause for a criminal search warrant, and the potential for obtaining additional information that could connect Moussaoui to a foreign power under the FISA standards at the time.

Unfortunately, this careful or thorough analysis did not occur. After initially opening the Moussaoui matter as an intelligence investigation, the Minneapolis FBI agents requested FBI Headquarters to seek permission from the Criminal Division to approach the USAO to discuss a criminal warrant. Because of its relative inexperience in handling counterterrorism investigations, the Minneapolis FBI did not appreciate the adverse impact that seeking a criminal warrant could have on the intelligence investigation. Therefore, as an initial matter it did not fully consider the issues and outcomes in pursuing the Moussaoui case as an intelligence investigation or criminal investigation. By the same token, it did not receive sufficient guidance or assistance from FBI Headquarters, partly because of the strained relations between the Minneapolis Field Office and the RFU, which we discuss below.

Another opportunity for a thorough assessment of the case arose when the Minneapolis case agent, Henry, consulted with RFU Unit Chief Don. Don advised Henry that he did not believe that there was sufficient information to obtain a criminal search warrant and that failing to obtain a criminal search warrant would prevent the Minneapolis FBI from obtaining a FISA search warrant. Henry's recollection is that Don directly told him that he could not open a criminal case. According to Henry, Don also asserted that probable cause for a criminal search warrant was "shaky." After his conversation with Don, Henry wrote on the paperwork that had been previously prepared to open the criminal case: "Not opened per instructions of [Unit Chief Don]."

Don told the OIG, on the other hand, that he did not give such a direct instruction and that at no time did he tell Minneapolis that they could not pursue the matter criminally. He said that based on his knowledge of the case, he did not believe there was criminal predication for a criminal search warrant and that he voiced this opinion to the Minneapolis FBI about the lack of criminal predication. He said he also advised Minneapolis that if obtaining the criminal warrant failed, the FBI would not be able to pursue the FISA warrant. Don said he suggested the case agent consult with the Minneapolis CDC, Coleen Rowley, about whether she believed that probable cause for a criminal search warrant was present because he believed that it was the role of the CDC to make such assessments. According to Don, he stated, "you guys need to go back to your CDC, you need to discuss it with your CDC, and get back to me and tell me your position." As we discuss below, Henry did consult with Rowley, who said she recommended the avenue with the best chance of success, which she believed was seeking a FISA warrant instead of a criminal warrant.

While it is impossible to be certain of what exactly was said in the discussion between Don and Henry, or whether FBI Headquarters made clear it would refuse permission to seek a criminal warrant, it is clear that the decision on whether to pursue a criminal or intelligence case was made without full consultation or adequate analysis. Based on this conversation and other contacts with Martin and Don in the following days, Minneapolis believed that FBI Headquarters would not support its request to seek a criminal warrant and that a FISA request was the only viable option available. It therefore pursued that option. But no one carefully considered at an early stage whether this was likely to be a viable option under the prevailing FISA standards.

We do not believe that Don's response to Henry's initial contact was adequate. Don should have weighed the possibility of obtaining a criminal warrant with what would be gained from the intelligence investigation and the problems in obtaining a FISA warrant. While Don believed that the Minneapolis FBI lacked sufficient information to warrant pursuing a criminal investigation and that the intelligence investigation was therefore the only option available, this judgment was made too quickly and without adequate consideration of whether the evidence suggested that the FBI was likely ever going to be able to, under the prevailing view of FISA requirements at the time, sufficiently connect Moussaoui to a foreign power for a FISA warrant.

We also believe that Don should have ensured that Henry discussed the matter fully with RFU SSA Martin and an NSLU attorney, taking into consideration the potential of the criminal investigation and the potential of the FISA route, including the problems that would have to be overcome, before reaching the decision on which route to take. While it was the field office's prerogative to decide how to pursue an investigation, the role of FBI Headquarters was to ensure that these decisions were made with full information and adequate analysis from the substantive experts in FBI Headquarters. Yet, this never occurred, partly because of Headquarters' dismissal of the Minneapolis FBI's assessment of the threat posed by Moussaoui, partly because of strained relations between the RFU and the Minneapolis FBI, and partly because FBI Headquarters approached this case like other cases, where there was time to investigate further and obtain more evidence to support the FISA warrant. In this case, however, Moussaoui was going to be deported quickly, and there was little time to conduct an investigation to obtain sufficient evidence to link Moussaoui to a recognized foreign power.

From our review, early on the RFU appears to have discounted the concerns of the Minneapolis FBI about Moussaoui. Don and Martin believed that Minneapolis was overreacting and couching facts in an "inflammatory" way to get people "spun up" about someone who was only "suspected" of being a terrorist. The RFU downplayed and undersold the field office's concerns about Moussaoui, even writing "that there is no indication that either [Moussaoui or Al-Attas] had plans for nefarious activity." In response to the Minneapolis FBI's concern that it wanted "to make sure Moussaoui doesn't get control of an airplane to crash it into the [World Trade Center] or something

like that," Martin dismissed this possibility, stating "You have a guy interested in this type of aircraft. That is it." As we discuss below, we believe that the RFU did not fully consider with an open mind the evidence against Moussaoui and examine in a collaborative fashion with Minneapolis how to best pursue its investigation. Rather, it quickly and inappropriately dismissed Minneapolis' information as incomplete and its concerns as far-fetched.

However, it is also important to note that another potential opportunity for a thorough evaluation of both the criminal and intelligence investigations arose when Henry consulted with Rowley, the Minneapolis CDC. When Henry approached Rowley at Don's suggestion to discuss whether Minneapolis should seek a criminal warrant or a FISA warrant, Rowley correctly advised Henry about the existence of the smell test and the adverse effect that seeking a criminal warrant could have on the intelligence investigation. Her advice – that Henry instead seek a FISA warrant – was based on her concerns that the USAO would not approve a request for a criminal warrant because she believed it used a standard higher than probable cause. Rowley told the OIG that she gave the advice that she believed would optimize the Minneapolis FBI's chances of being able to search Moussaoui's belongings. She did not, however, adequately assess or discuss with Henry whether a FISA warrant would even be feasible in this case, given the need to connect Moussaoui to a foreign power.

Rowley acknowledged to the OIG that her experience and knowledge of FISA were not extensive.[146] We believe that she should have recognized the need for a more thorough examination of the potential of both the criminal and

[146] When we questioned Rowley about the basis for her belief that probable cause for a FISA warrant was "clear" when the information from the French was received, her responses indicated that she did not fully understand the statutory requirements of FISA. She believed that sufficient information existed to obtain a FISA warrant because she believed the French information indicated that there was probable cause to believe that Moussaoui was engaged in terrorist activities. Rowley failed to consider whether there was probable cause to believe that Moussaoui was an agent acting for or on behalf of a foreign power. She further stated her belief that the foreign power connection could be made to Bin Laden because Moussaoui shared similar philosophy and goals with Bin Laden and was linked to Khattab, who also held radical Islamic beliefs. These statements revealed a lack of a full understanding of agency principles under the existing FISA requirements.

intelligence options, including the likelihood of obtaining a FISA warrant within a matter of several days, and at a minimum consulted with an NSLU attorney.

2. Failure to reconsider criminal warrant

We found it even more troubling that after the FBI Headquarters conclusion – based upon NSLU advice – that Moussaoui did not have a sufficient connection to a recognized foreign power for a FISA warrant, no one reconsidered whether to try to obtain a criminal warrant. As far as we could determine, neither FBI Headquarters nor the Minneapolis FBI initiated any discussion about pursuing the criminal warrant after NSLU Unit Chief Bowman opined that a FISA warrant was not feasible. After the FISA warrant was ruled out, the "smell test" was no longer a consideration. The FBI could have consulted with the Minnesota USAO at that point to determine whether it believed there was sufficient probable cause to obtain a criminal search warrant. If the Minnesota USAO agreed, one could have been sought. If the USAO disagreed, this consultation would have had no impact on a FISA warrant, since one was no longer being sought.

We asked Don, Henry, Rowley, Gary, and Martin why a criminal warrant was not considered after the FISA route was exhausted. Don, Henry, and Rowley told the OIG that they did not know why this was not done. Don said that looking back on the matter now, he wished it had been discussed. Gary told the OIG that he did not seek to pursue it again because he believed FBI Headquarters was not willing to support obtaining the requisite permission to approach the USAO. Martin told the OIG that because Minneapolis believed that there was sufficient evidence to support obtaining a criminal warrant, it was up to the field office to initiate pursuit of the criminal warrant.

We found it puzzling, and troubling, that no one discussed pursuing this option. It also showed that the FBI never fully evaluated the potential of the criminal investigation versus the FISA investigation. Instead, the FBI pursued the case as an either/or proposition, without evaluating the potential of each approach.

We also do not agree with Martin that it was Minneapolis' responsibility alone to consider this option. In our view, his position reflects the breakdown in communication between Headquarters and the field, and also shows a

troubling lack of initiative and acceptance of responsibility by FBI Headquarters. While we cannot say whether a request for a criminal warrant would have been successful, it should have been reconsidered.

3. Conservatism with respect to FISA

The handling of the Moussaoui case also highlighted the conservatism of the Department and the FBI at the time with regard to the use of FISA. At the time of the Moussaoui investigation there was a widespread perception in the FBI that OIPR was excessively restrictive in its approach to obtaining FISAs. The perception was that OIPR would not plead "new" foreign powers – foreign powers that had not previously been pled to the FISA Court – and that OIPR required more support to go forward than the probable cause that what was required by the FISA statute. This perception caused the FBI to be less aggressive in pursuit of FISA warrants that did not fit the standard pattern.

This perception was discussed in the May 2000 report of the Attorney General's Review Team (AGRT) that was established to review the FBI and the Department's handling of the Wen Ho Lee FCI investigations and FISA application. The report stated that in interviews with FBI personnel, "a consistent theme that has emerged has been the FBI's substantial frustration with what it perceives to be OIPR's general lack of aggressiveness in the handling of FISA applications." The AGRT concluded that OIPR was too conservative in its handling of the Lee FISA application and three factors suggested that the FBI's general complaint of undue conservatism had merit. First, the AGRT found that OIPR had never had a FISA application turned down by the FISA Court and that "this record suggests the use of 'PC+' [probable cause plus], an insistence on a bit more than the law requires." Second, the AGRT asserted that while some disputes between agents and lawyers were to be expected, the fact that the complaints about OIPR came from all levels within the FBI as well as the frequency and the intensity of the complaints suggested that this concern was not arising out of the normal tension between agents and lawyers. Third, the AGRT stated that OIPR applied too conservative an approach to the Lee application, which suggested it did so across the board because of the significance of and attention received within OIPR by the Lee application.

We heard similar complaints from FBI Headquarters managers and NSLU attorneys that OIPR was too conservative. FBI employees made two